SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-17-047488-088

DATE: April 10, 2012

BY: THE HONOURABLE DAVID R. COLLIER, J.S.C.

KENNETH GILMAN, KEVIN REYNOLDS, DAVID MOSKOWSKI, TROY SQUIRES and JIM PETRUCELLI

Plaintiffs

v.

FIELDTURF TARKETT INC.

Defendant

JUDGMENT

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[1] The plaintiffs are former employees of the defendant Fieldturf Tarkett Inc. In 2008 and 2009, they were dismissed by their employer or resigned from the company. Consequently, they were not paid bonuses that were available to the company's key employees at the end of 2008. The plaintiffs claim that they are entitled to receive these bonuses.

[2] Fieldturf Tarkett argues that the bonus payments were discretionary and that the company did not abuse its discretion when it decided not to pay bonuses to the plaintiffs.

THE FACTS

[3] Fieldturf Tarkett is a manufacturer and installer of indoor and outdoor sporting surfaces, most notably the product known as "artificial turf" used for football and soccer fields.

[4] Fieldturf Tarkett was founded as Fieldturf Inc. in 1995. In its early years, Fieldturf struggled. However, in 2001, several groups invested in the company, and it grew and became profitable.

[5] John Gilman was a co-founder and the CEO of Fieldturf. He was the driving force behind the company's success. By 2007, Fieldturf dominated the North American market for artificial sports fields with annual sales of almost $400 million. Although the company had more than a hundred employees in North America and Europe, John Gilman was involved in every aspect of the business. He was respected by his employees, who looked up to him as the "head coach" of a successful corporate team.

[6] The five plaintiffs were part of John Gilman's inner circle and contributed to Fieldturf's success. In 2007, David Moskowski was the company's chief financial officer. John Gilman's son, Kenny, was responsible for manufacturing operations and field installations, as was Kevin Reynolds. Jim Petrucelli and Troy Squires were key sales representatives in the United States. Each of the plaintiffs reported directly to John Gilman.

[7] In 2004, John Gilman decided to establish an employee stock option plan to reward and motivate his key employees. This plan became impractical, however, when Fieldturf entered into a joint venture agreement with a French flooring company, Tarkett S.A.S., in August 2004.[1] Under the agreement, Fieldturf's shareholders sold 10% of their shares to Tarkett and granted it an option to purchase additional shares.

[8] Nevertheless, in keeping with John Gilman's wishes, the joint venture agreement provided an incentive for Fieldturf's key employees. The agreement provided that in the event Fieldturf's earnings in 2005 exceeded US $8 million, Tarkett would make an additional capital contribution to the company according to a formula based on the company's excess earnings. These extra funds would be distributed by John Gilman, at his discretion, to key employees of Fieldturf to reward them for their contribution to the company.

[1] Exhibit P-37.

[9] In September 2005, Fieldturf and Tarkett replaced the joint venture agreement with a share purchase agreement.[2] Under this new agreement, Tarkett purchased an additional 62% of Fieldturf's shares and became the majority shareholder of the newly named Fieldturf Tarkett Inc. The agreement provided that Tarkett would purchase the remaining 28% of the shares in early 2009, after the company's 2008 financial results were known.

[10] The agreement P-1 continued the incentive program for key employees. Tarkett agreed to contribute to a special bonus fund when it purchased Fieldturf's shares in 2005 and 2009. In order to calculate how much would be paid into the fund on each occasion, the parties agreed that Tarkett's additional capital contribution under the joint venture agreement would be converted into a number of notional shares of the company. When Tarkett purchased additional shares it would contribute an amount to the bonus fund that was equal to the value of these notional or "phantom shares" at that time. In this manner, Fieldturf Tarkett's key employees would receive phantom share bonuses in 2005 and 2009 that were commensurate with the company's prevailing share value.

[11] The agreement P-1 stipulated that John Gilman would decide which key employees would receive phantom share bonus payments in 2005 and 2009 and how much each would be paid.

[12] In September 2005, Tarkett made an initial payment of US $1 million to the phantom share bonus account. John Gilman distributed this sum to 23 Fieldturf Tarkett employees. The five plaintiffs were the largest beneficiaries of Gilman's largesse, collectively receiving almost 60% of the total amount.

[13] In 2007, the minority Fieldturf Tarkett shareholders agreed to sell 50% of their remaining shares (14%) to Tarkett, two years ahead of the date set out in the agreement P-1. A second share purchase agreement[3] was concluded that essentially reproduced the bonus provisions contained in the previous agreement.

[14] Given Fieldturf Tarkett's increased profitability, Tarkett paid a higher price for the company's shares in 2007 and contributed US $ 1,435,547 to the phantom share bonus fund.

[15] Once again, John Gilman exercised his discretion in distributing the phantom share bonuses. In March 2007, he distributed US $1,305,000 to 31 key Fieldturf Tarkett employees. The five plaintiffs again received the lion's share of the payment, or about 66% of the total amount distributed.

[16] In July 2007, John Gilman died unexpectedly. His untimely departure threw the future of Fieldturf Tarkett into doubt and precipitated important changes at the company.

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[2] Exhibit P-1.
[3] Exhibit P-2.

[17] With John Gilman gone, Tarkett decided to hire a group of professional managers to run Fieldturf Tarkett. In the year following Gilman's death, Tarkett hired a new CEO, Joe Fields, and several senior managers, and established a more decentralized reporting structure at the company.

[18] In July 2008, the minority Fieldturf Tarkett shareholders (including John Gilman's estate) agreed to sell the remaining 14% of their shares to Tarkett, ahead of the 2009 deadline. The minority shareholders had little remaining interest in the business and Tarkett needed a free hand to set the company on a new track.

[19] Tarkett paid $5,200 per share to acquire the remaining Fieldturf Tarkett shares. Based on this price, Tarkett made a final contribution of US $2,177,175 to the phantom share bonus fund.

[20] Tarkett's final share purchase occurred as it was pursuing management changes at Fieldturf Tarkett. With the arrival of new senior managers at the company, four of the five plaintiffs no longer figured in Tarkett's future plans. In September 2008, Joe Fields dismissed thirteen employees without cause, including the plaintiffs Moszkowski, Gilman, Reynolds and Petrucelli.

[21] Troy Squires was offered a new position at the company, but on different terms. In January 2009, he refused these new terms and resigned from the company.

[22] None of the plaintiffs received a final phantom share bonus payment before leaving the company.

[23] In February 2009, Fieldturf Tarkett paid out approximately half (US $ 1,120,000) of the final phantom share bonuses to all 73 of Fieldturf Tarkett's salaried employees. The defendant was prudent, however, and did not distribute all the monies. It withheld the sum of US $ 1,057,175 in anticipation of a possible lawsuit by the plaintiffs. [4]

THE PARTIES' POSITIONS

[24] The plaintiffs argue that in 2008 they had a reasonable expectation they would receive phantom share bonus payments similar to those paid to them on two prior occasions. Based on this expectation, the plaintiffs claim bonuses in the following amounts:

David Moszkowski	$ US 500,750
Kenny Gilman	$ US 315,690
Kevin Reynolds	$ US 315, 690

[4] Exhibit D-49.

Jim Petrucelli	$ US 152,402
Troy Squires	$ US 152,402

[25] Fieldturf Tarkett argues that the plaintiffs have no right to a bonus, which was payable at the discretion of the company's CEO. The defendant argues that once the decision was made to terminate the plaintiffs' employment, Joe Fields reasonably exercised his discretion in refusing to pay bonuses to them.

[26] Fieldturf Tarkett adds that under the share purchase agreement P-2, the plaintiffs had to be employees of the company on December 31, 2008 in order to qualify for a bonus payment. Since the plaintiffs Mozskowski, Gilman, Reynolds and Petrucelli were terminated in September 2008, they did not qualify. Although Troy Squires was an employee on December 31, 2008, Fieldturf Tarkett argues that he resigned shortly thereafter to work for a competitor, in breach of his employment agreement.

[27] The plaintiffs reply that since Fieldturf Tarkett dismissed them, the defendant company cannot invoke the condition that they be employed on December 31, 2008 to qualify for a bonus.[5] For his part, Troy Squires denies that he breached his employment agreement by resigning in January 2009.

ISSUES TO BE DETERMINED

[28] Did the dismissal of four plaintiffs prior to December 31, 2008 disqualify them from receiving a final phantom share bonus payment?

[29] Did Troy Squires' resignation in January 2009 justify the defendant's refusal to pay him a final phantom share bonus?

[30] If the plaintiffs were eligible to receive phantom share bonuses in 2009, did Fieldturf Tarkett's CEO reasonably exercise his discretion in deciding not to pay bonuses to them?

[31] If the plaintiffs are entitled to receive phantom share bonuses, what is the appropriate amount?

ANALYSIS

(i) The dismissal of four plaintiffs prior to December 31, 2008

[32] According to section 7.2 of the share purchase agreement P-2, only key employees who were employed with the Target Group on December 31, 2008 qualified for a bonus. Tarkett Group includes the defendant and its related companies.

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[5] Art. 1503 C.C.Q.

[33] Sections 7.1 and 7.2 of the agreement set out the conditions applying to the 2007 and 2009 phantom share bonus payments:

> 7.1 The Purchaser hereby deposits the amount of $U.S. 1,435,547 into a bank account designated by the Corporation. Such amount is paid by the Purchaser in accordance with Section 3.6 of the Joint Venture Agreement and Section 7.2 of the Share Purchase Agreement as partial payment of its obligations thereunder, and is to be considered as a contribution to capital by the Purchaser and shall be distributed prior to December 31, 2007, by John Gilman as CEO of the Corporation, to those key employees of the Tarkett Group as he in his sole discretion shall determine (but who are not currently shareholders of the Corporation) provided such employees are then employed by the Tarkett Group, and any appropriate federal, state or provincial tax deductions will be made by the Corporation prior to the distribution of such amounts to any key employee. The list of such key employees and the amounts that they have received shall be provided to the Board of Directors of the Corporation no later than February 1, 2008.
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> 7.2 In addition, on the Second Closing Date, the Purchaser will cause the Corporation to pay to certain key employees identified by John Gilman as CEO of the Corporation (who are not also shareholders of the Corporation) and in the amounts that he so determines, provided such employees remain employed with the Tarkett Group on December 31, 2008, an aggregate amount determined as if such employees owned 375.375 Common Shares, and as if such shares were being sold to the Purchaser on the Second Closing Date for the same price per share being paid to the Remaining Shareholders as determined in accordance with the Share Purchase Agreement. All the appropriate federal, state or provincial tax deductions will be made by the Corporation prior to the distribution of such amounts to any key employee. The list of such key employees and the percentage that they may be entitled to receive from this bonus pool shall be provided to the Board of Directors of the Corporation no later than February 1, 2008.

[34] The plaintiffs Mozskowski, Gilman, Reynolds and Petrucelli were terminated in September 2008 and were consequently not employed by the Tarkett Group on December 31, 2008.

[35] Nevertheless, Mozskowski, Gilman and Reynolds each signed a settlement agreement with the defendant that provided for an indemnity payment in lieu of a notice of termination.[6] The payments were equal to notices of twelve, seven and nine months respectively. Although Petrucelli did not sign a settlement agreement, he was entitled to a similar notice of termination.[7]

[36] The law in Québec is settled that an employee who is terminated without cause is entitled to receive all of the benefits that accrue during the notice period, including bonuses.[8] Since the plaintiffs' entitlement to receive a phantom share bonus vested on December 31, 2008, i.e. during their respective notice periods, the plaintiffs Mozskowski, Gilman, Reynolds and Petrucelli are eligible to receive bonuses notwithstanding their dismissal in September 2008.

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[6] Exhibits P-14, D-14 and D-15.
[7] Art. 2091 C.C.Q.
[8] *Aksich* c. *Canadian Pacific Railway*, 2006 QCCA 931, paras. 37 and 49.

(ii) Troy Squires' resignation

[37] The defendant argues that Troy Squires breached his employment contract when he left the company in January 2009 to work for a competitor. The defendant produced an alleged employment agreement between Squires and Fieldturf USA Inc. as exhibit D-8. While it appears that both parties signed the document on September 29, 2008, the evidence leads to the conclusion that the parties never came to an agreement regarding the terms of Troy Squires' employment.

[38] The agreement D-8 bears a number of handwritten notations, many of which are in Squires' handwriting. Some of the notations, which add terms to the agreement or strike out words, are not in Squires' handwriting and were presumably made by a representative of Fieldturf Tarkett.

[39] Troy Squires testified that in September 2008, Joe Fields gave him a proposed employment agreement to look over. Squires took the typed agreement home and made a number of handwritten changes to the document before signing and returning it to Fields in Montreal. After a telephone discussion with Fields, Squires thought the changes would be included in the agreement. However, Squires received a different agreement back from the defendant that failed to incorporate many of his changes and that added new terms. This new draft was not accepted by Squires.

[40] According to Troy Squire's evidence, exhibit D-8 is the original draft agreement that was never agreed to by the parties.

[41] Squires' testimony that the parties did not reach an agreement respecting the terms of his employment in 2008 was not contradicted by the defendant. Moreover, Squires' evidence that there was no agreement is corroborated by his email exchange with Fieldturf Tarkett's US sales manager, Marty Olinger, in January 2009.[9] It is also noteworthy that although the agreement D-8 provided for a signing bonus, Squires never received one.

[42] Since no written employment agreement was concluded between Troy Squires and the defendant in 2008, the Court concludes that Squires did not breach any obligation to the defendant when he went to work for a competitor in January 2009.

[43] Moreover, Squires' resignation was justified. The draft agreement D-8 drastically changed his former terms of employment. Squires' remuneration was reduced by US $ 100,000 a year. Squires had to report to a new boss, which he considered a demotion. Squires was also required to move his family from Texas to Georgia by February 1, 2009, despite the fact that the sub-prime mortgage crisis in the US made it virtually impossible for Squires to sell his home without incurring a significant loss. As of January 2009, Squires had not yet come to terms with Fieldturf Tarkett regarding his housing allowance and relocation costs.

[9] Exhibit D-47.

[44] For the foregoing reasons, the Court concludes that Troy Squires' resignation did not justify the defendant's refusal to pay him a phantom share bonus in 2009.

(iii) The plaintiffs' entitlement to a phantom share bonus payment

[45] In Québec law, an employee is not entitled to claim a bonus if the payment is discretionary and depends entirely upon the employer. Nevertheless, evidence that a bonus was regularly paid to an employee in the past may rebut the argument that its attribution was discretionary.[10]

[46] When a bonus was continuously paid to an employee in the past, it may be considered an integral part of his or her remuneration and cannot be withheld by the employer.[11]

[47] An employee is entitled to receive a bonus owed during a notice period when the employee has a reasonable expectation, based on past practice, that it will be paid. This is the case even when an employer has discretion to pay bonuses, but has systematically exercised that discretion in favour of an employee:[12]

> Les bonis pourront être ajoutés aux dommages accordés suite à un congédiement s'il était raisonnable d'anticiper leur paiement durant la période de préavis ou durant le reste du terme. Pour être raisonnablement anticipés, ces bonis devront avoir été payés régulièrement dans le passé et le montant devra en être prévisible. Pour déterminer ce montant, les tribunaux s'en remettent au contrat ou à la pratique passée. (…)
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> (…) Lorsque l'octroi d'un boni est discrétionnaire, l'employé ne réussira pas, dans la plupart des cas, à démontrer son droit au montant d'argent recherché. Cependant, lorsque l'employeur possède cette discrétion, à savoir si le boni sera accordé ou non, mais que cette discrétion fut systématiquement exercée en faveur de l'employé dans le passé, le boni sera considéré comme partie intégrante de la rémunération de ce dernier.
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> (references omitted)

[48] The law in Québec concerning the payment of bonuses is similar to that in other Canadian provinces. According to Howard A. Levitt, bonuses that have been regularly paid in the past form an integral part of an employee's wages.[13]

> If bonuses are reasonably anticipated by the employee, and have been provided both regularly and in fairly predictable amounts such that they are reasonably considered to be an integral part of the wage structure, they become part of the contract of employment.

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[10] Georges Audet et al. *Le congédiement en droit québécois en matière de contrat individual de travail*, 3e éd. vol. 1, Cowansville, Éditions Yvon Blais, 1991, para. 6.1.23.
[11] *Ibid.,* para. 6.1.24.
[12] A. Edward Aust, *Le contrat d'emploi*, Cowansville, Éditions Yvon Blais, 1988, pp. 176, 177.
[13] Howard A. Levitt, *The Law of Dismissal in Canada*, 3rd ed., Toronto, Canada Law Book, 2011, § 9:10.40.1; see also: David Harris, *Wrongful Dismissal*, vol. 2, Toronto, Carswell, 1989, § 4.21; Ellen E. Mole, *Wrongful Dismissal Practice Manual*, 2nd ed., LexisNexis, 2006, § 9.103.

> (…)
>
> (…) If, on the balance of the probabilities, the plaintiff but for his or her dismissal would have received the bonus, the court will award such bonus. If the plaintiff can demonstrate that he or she would have received the bonus during the notice period, then the bonus will form part of the damages.
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> (references omitted)

[49] The evidence in the present case leads to the conclusion that the phantom share bonus payments had become an integral part of the plaintiffs' wages by the end of 2008.

[50] First, the bonuses had been consistently paid to the plaintiffs in 2005 and 2007. On both occasions, the proportionate share of the bonuses paid to the plaintiffs was similar.

[51] Second, the very nature of the phantom share program led the plaintiffs to have a reasonable expectation that they would receive a final bonus payment at the end of 2008.

[52] A phantom share program is intended to motivate a company's employees and secure their loyalty by giving them an interest in the company's financial performance. In this respect, a phantom share program is similar to a stock option plan, except that it does not give the employee a proprietary interest in the company.[14]

[53] The benefits of the phantom share program at Fieldturf Tarkett were explained to the plaintiffs by John Gilman. This was to be expected, since it was an incentive program. Each of the plaintiffs knew that if the company's share value increased as Tarkett acquired the company, larger bonuses would be available to reward key employees.

[54] Fieldturf Tarkett's phantom share program was clearly directed at the plaintiffs. In a July 2008 memorandum, Fieldturf Tarkett's chief financial officer, Michel Levasseur, explained to Joe Fields that, "Tarkett wanted to secure the services of these people [Moszkowski, Gilman and Reynolds] and this special payout amount was set-up to motivate them to continue at least until year 2008".[15]

[55] The purpose of the bonus program was also confirmed by Fieldturf Tarkett's shareholder and legal counsel, Robert Raiche, who negotiated the share purchase agreements with Tarkett. Raich testified that the phantom share program was designed to encourage key employees to stay with the company and "maximize results during the buy-out period".

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[14] A. Edward Aust et al., *Executives & Managers*, Butterworths Canada, 2002, § 7.52.
[15] Exhibit P-32.

[56] John Gilman encouraged the plaintiffs' efforts by giving them handwritten notes with the bonus payments in 2005 and 2007. One example is a note given by John Gilman to his son Kenny in 2007, which stated, "More to come. I expect more and more from you".[16] At trial, the defendant objected to this note as inadmissible hearsay. The Court does not agree. The note is admissible to establish Kenny Gilman's reasonable expectation of receiving a further bonus in 2009. Furthermore, the author of the note could not testify, and its contents, written before any expectation of litigation, are reliable and corroborated by other evidence.

[57] The plaintiffs' reasonable expectation of receiving a third phantom share bonus payment is also reflected in the language used by the defendant to describe the program. In a memorandum from Robert Raich to David Moszkowski, written shortly after John Gilman's death, Raich referred to the phantom shares that were "still held by the employees".[17] The notion of "holding shares" is consistent with an employee's expectation of receiving a future benefit.

[58] Furthermore, a number of witnesses at trial referred to the bonus payments in 2005, 2007 and 2009 as "tranches". The minutes of the Fieldturf Tarkett board of directors meeting held on January 30, 2008 stated that, "the last tranche of the special equity bonuses would be paid in 2009, when the 2008 results were known". A tranche is a portion of something. The use of the word by Fieldturf Tarkett's board indicates that the defendant viewed the three bonus payments as forming separate parts of a total remuneration package.

[59] While John Gilman and his successor as CEO enjoyed discretion in attributing phantom share bonuses, the bonus payments were not entirely discretionary. Bonuses had to be paid whenever Tarkett purchased shares, subject to the company's financial performance. The amount of the bonuses was based on a formula and was not discretionary. Finally, the bonuses had to be paid to "key employees" of the company.

[60] There is no doubt that the five plaintiffs were key employees of the company. They were recognized as such by John Gilman. The plaintiffs were described as key employees by Robert Raich when he wrote to the new French shareholder in March 2006.[18] Michel Levasseur referred to the plaintiffs as "top managers" who had "contributed to the tremendous growth" of the company.[19]

[61] While it is true that John Gilman paid bonuses to different employees in 2005 and 2007, on both occasions he paid similar, large bonuses to the plaintiffs. Gilman's past practice defined what the reasonable exercise of the CEO's discretion had become by the end of 2008.[20]

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[16] Exhibit P-4.
[17] Exhibit P-15.
[18] Exhibit P-3.
[19] Exhibit P-32.
[20] Art. 1426 C.C.Q.

[62] Since the intention of the phantom share program was to motivate the plaintiffs and secure their loyalty until at least 2008, it was not a reasonable exercise of the defendant's discretion to refuse a final bonus payment to the plaintiffs.

[63] At least one Canadian court has held that a stock option plan creates a unilateral contract that binds the employer once it is accepted by the employee through his continuing employment.[21] In the present case, the phantom share program was an agreement between Tarkett and the defendant made for the benefit of key employees. Once the plaintiffs had accepted the stipulation in their favour by continuing to work at the defendant company, they were entitled to claim the phantom share bonus.[22]

(iv) The amount of the bonuses owed to the plaintiffs

[64] The plaintiffs could expect that they would receive phantom share bonuses at the end of 2008 that were proportionately equal to those they had received in 2007.[23] The 2007 percentages and the resulting bonus amounts (in US dollars) are set out at paragraphs 51 and 52 of the plaintiffs' particularized amended motion to institute proceedings dated March 26, 2009.

[65] It is necessary to convert the bonuses into Canadian dollars. The plaintiffs have asked that the bonuses for Gilman and Reynold be converted to Canadian dollars as of December 29, 2008, and that those for Moszkowski, Petrucelli and Squires be converted as of February 23, 2009.[24] Since these dates correspond to the period when the bonuses were payable, they are justified.[25]

FOR THESE REASONS, THE COURT:

GRANTS the present action;

ORDERS the defendant to pay to the plaintiff Kenneth Gilman the sum of $381,959.49 with interest at the legal rate, plus the additional indemnity provided by article 1619 C.C.Q. from the date of service of the action;

ORDERS the defendant to pay to the plaintiff Kevin Reynolds, the sum of $381,959.49 with interest at the legal rate, plus the additional indemnity provided by article 1619 C.C.Q. from the date of service of the action;

ORDERS the defendant to pay to the plaintiff David Moskowski the sum of $639,557.90 with interest at the legal rate, plus the additional indemnity provided by article 1619

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[21] *Maier* v. *E. & B. Exploration Ltd.* [1986] 4 W.W.R. 275 (Alta. C.A.), cited in *Executives & Managers*, *supra*, § 7.53.
[22] Arts. 1444, 1446 C.C.Q.
[23] Note 12 *supra.*
[24] Particularized amended motion to institute proceedings, paras. 56, 56.1 and 56.2; exhibits P-10 and P-19.
[25] *Les Équipements Stosik inc.* v. *Hock Seng Lee Heavy Industries*, 2007 QCCA 1531, para. 11.

C.C.Q. from the date of service of the action;

ORDERS the defendant to pay to the plaintiff Troy Squires the sum of $194,647.83 with interest at the legal rate, plus the additional indemnity provided by article 1619 C.C.Q. from the date of service of the action;

ORDERS the defendant to pay to the plaintiff Jim Petrucelli the sum of $194,647.83 with interest at the legal rate, plus the additional indemnity provided by article 1619 C.C.Q. from the date of service of the action.

THE WHOLE with costs.

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DAVID R. COLLIER, J.S.C.

Mtre. Zavie Levine
Levine Frishman Lancry
Attorneys for Plaintiffs

Mtre. Karl Delwaide
Fasken Martineau DuMoulin LLP
Attorneys for Defendant

Date of hearing: January 16, 17, 18, 19, 20, 23, 24, 2012