2019 CarswellNat 1707
Canada Adjudication (Canada Labour Code Part III)

Taylor and Avmax Aircraft Leasing Inc., Re

2019 CarswellNat 1707

IN THE MATTER OF A COMPLAINT OF UNJUST DISMISSAL, PURSUANT TO DIVISION XIV - PART III OF THE CANADA LABOUR CODE, R.S.C. 1985, c. L-2, as amended

GREGORY TAYLOR (Complainant) and AVMAX AIRCRAFT LEASING INC. (Respondent)

Cheryl Yingst Bartel Adjud.

Heard: November 19, 2018; November 21, 2018; January 30, 2019; February 1, 2019
Judgment: May 10, 2019
Docket: None given.

Counsel: Complainant, for himself
April Kosten, Sarah Sobieraj, for Respondent

***Cheryl Yingst Bartel Adjud.*:**

I — INTRODUCTION

1. Background

1 The Complainant, Gregory Taylor maintains that on September 24, 2014 he was unjustly dismissed from his position as Technical Asset Manager for Avmax Aircraft Leasing Inc. ("AALI"). At the time of his dismissal, the Complainant was also carrying out obligations from his role as Director of Sales and Marketing for Avmax Aircraft Services Inc. ("AASI"). Both companies are part of the Avmax group of corporations. While Avmax Aircraft Services Inc. was not named in this Complaint, it was represented by counsel at this hearing and it was established Mr. Taylor was also employed by — and terminated from — Avmax Aircraft Services Inc. in September of 2014.

2 The Respondent employer (referred to as the "Employer", "Avmax", "AALI" or "AASI") maintains that the dismissal of Mr. Taylor was just. It urged he breached duties owed to it, including breach of the duty to keep its information confidential, breach of trust and breach of his duty to avoid a conflict of interest while employed. It urged these obligations stemmed from the Complainant's employment contract, but also from the common law, and were communicated in its policies. It alleged the dismissal was just, as the Complainant shared confidential information belonging to the Employer with officials of the Mexican military in September of 2014, in breach of these obligations. The confidential information related to a project for a missionized aircraft — known internally — and referred to in this award — as "Peregrine" or the "Peregrine Project".

3 This dispute has a protracted history. The Complaint was originally filed on October 1, 2014. A preliminary objection was brought by the Employer that Mr. Taylor was a manager and so not subject to sections 240 to 246 of the *Canada Labour Code* (the "Unjust Dismissal" provisions). This was argued in January of 2016 before a different adjudicator, who issued a decision in late November 2017. That decision held Mr. Taylor was not a manager and the dispute could continue under the Unjust Dismissal provisions. That preliminary hearing and Award is referred to as the "2017 Hearing" and the "2017 Award" in this decision. After issuing the 2017 Award, the Adjudicator resigned from the file and I was appointed as Adjudicator in May of 2018. Both Mr. Taylor and Gary Thuna, who testified on Mr. Taylor's behalf, have concurrent litigation ongoing in the Court of Queen's Bench for wrongful dismissal against the Employer, stemming from the same set of facts.

4 This matter was heard over four days, with 125 exhibits filed. All evidence received in the 2017 Hearing were entered as evidence at this hearing, by agreement between the parties. Some evidence entered during this hearing had issues of weight attached. Two witnesses testified on behalf of the Employer, Mr. Allan Young and Mr. Don Parkin. Three witnesses testified on behalf of the Complainant: Mr. Mark O'Hearn, Mr. Gary Thuna and Mr. John Binder. While all evidence — both documentary and oral — was carefully considered in formulating this Award, not all evidence will be fully summarized, given its extent. Rather, this Award will focus on the evidence found relevant to the analysis undertaken and the conclusions reached.

II — FACTS

A. Background

5 This dispute involves the breadth of obligations owed by an employee to an employer — whether contractually, at common law, and/or as a result of employer policies — regarding confidentiality and conflict of interest. It also raises the issue of what qualifies as confidential information.

6 It was not disputed by any of the witnesses that in the airline industry generally, there is considerable concern for the protection of confidential information, including information relating to product development and protection of customer base. It was also not disputed that the same individuals may move between various companies involved in this industry within the city of Calgary and in that context, it is a "small" industry in this city. Various examples of non-disclosure agreements were presented in evidence, both from Avmax, and from Mr. Taylor's consulting company, Flight Management Systems ("FMS"), which was in existence prior to Mr. Taylor's employment with Avmax. While more will be said later in this decision regarding FMS, it is described as a "Digital Moving Map manufacturing [sic] and Consulting Firm" on Mr. Taylor's LinkedIn profile (Ex. 117). The "Moving Map" was described as software that Mr. Taylor developed which enables an aircraft to locate and stay "locked on" to a GPS coordinate on the ground (such as a house) while that aircraft is moving in the air.

7 As noted in the documentary evidence received in this hearing, the organization of the Avmax group of companies is complicated. The Chief Operating Officer, John Binder, testified he would need an organizational chart in order to give evidence of how the group of companies is organized. In 2008, Mr. Taylor was hired by Western Avionics, a predecessor company to the Employer. He was promoted to Director of Sales and Marketing for AASI in 2011, and to Director of Special Programs with AASI effective October 3, 2011. In November of 2013 he was shifted to AALI, in the position of Technical Asset Manager, although the evidence was, he carried out the role of Director of Sales and Marketing for AASI as well, until his termination from both roles in September of 2014. This dispute also raises the alleged impact of a Confidentiality and Non-Solicitation Agreement ("CNS Agreement"; Ex 3-33), which Mr. Taylor executed when hired as Director of Special Programs for AASI in 2011.

B. Evidence of Allen Young

8 Mr. Young is currently the Vice-President, Operations (Canada) for the Employer, which is a senior management position, reporting to the Chief Operating Officer. He described AASI as a full-service maintenance provider for aircraft, which would include everything from heavy maintenance, parts and components

("spares"), overhaul, repair, engineering and certification. The emphasis of the company was on repair, overhaul and modification of aircraft. It is primarily a project-based corporation, which projects are built around company requirements and specifications. AALI is a leasing company, which leases and manages aircraft. It is primarily focused on the regional market (up to 70 seat category). It provides aircraft and related support to customers around the globe, with a head office is in Calgary. The Avmax companies also have operations in Vancouver, Great Falls, Montana, Jacksonville, Florida, Nairobi, Chad and at one time had operations in Montreal and Hilton Head, South Carolina. The company has customers globally on every continent. Together, AASI and AALI have approximately 450 to 550 employees.

9 Mr. Taylor was initially hired to assist with new product development and sales. Mr. Young was familiar with Mr. Taylor and had worked with him after his initial hire in June 2008.

10 When Mr. Taylor moved into the role of Director of Sales and Marketing, he was responsible for business development, including finding customers, working with customers in programs and projects and bringing work into the company. Effective October 3, 2011, less than four months later, Mr. Taylor was offered a full-time position with AASI as Director of Special Programs. In that role, Mr. Taylor's job related to business development and was similar to his job as Director of Sales and Marketing: building a book of work and customers and working with those customers. He was also focused on some special, high profile programs which Avmax was working including the Albatross Project and the Peregrine Project. He enjoyed a high degree of autonomy, with communication from the executive from an oversight point of view. It was Mr. Young's evidence that — as part of Mr. Taylor's offer of employment as Director of Special Programs — Mr. Taylor executed a CNS Agreement on October 12, 2011 (Ex. 3-33). Mr. Young was one of the signatories to that agreement, on behalf of AASI. It was his evidence that Mr. Taylor was required to enter into the CNS Agreement because his new role would expose him to confidential and sensitive information, not only from Avmax but from vendors and clients, and he needed to understand and be aware that confidentiality was crucial to Avmax' s business.

11 Mr. Young was taken through the Agreement in his testimony. While the preamble focuses on maintaining confidentiality after termination, the agreement notes in section 2 that the "confidentiality obligations" of the Employee continue "for the duration of employment, and forever thereafter" (Ex 3-33; s. 2.1). The intent of Article 2 as noted in section 2.4 is that the "Company retains exclusive ownership and all other rights to what it asserts is Confidential Information".

"Confidential Information" is defined, in part, to mean "confidential or proprietary information, technology, material or other property of any kind, including "any product, any related information, including designs, whether patentable or not, that comes out of Product Development", as well as "actual or contemplated business plans...marketing data and plans, instructional or informational material, promotional materials....", and "[a]ny other information, the disclosure of which could adversely affect the Company, or its competitive position". In section 2.2 the parties agree that Mr. Taylor occupies a "position of trust and confidence" and that he agrees that all Confidential Information "is confidential, is the exclusive property of the Company, and is subject to protection (s. 2.2(a)) and that "disclosure of the Confidential Information would be highly detrimental to the Company and would severely damage the Company's economic interests (s. 2.2(b)) and agrees to "hold in strictest confidence, take all necessary precautions against unauthorized disclosure of, and not to use or disclose any of the Confidential Information" (s. 2.2(c)). (Ex. 3-33, s. 2.1(a), (b) and (c)). Section 2.3 requires Mr. Taylor to return all Confidential Information to the Employer on termination. There are also non-solicitation provisions.

12 Mr. Young testified Mr. Taylor was also a member of the Strategic Implementation Team ("SIT") of the Employer, composed of thirteen Directors of the various business units within AASI. The SIT was part of the decision-making process within the corporation.

13 Mr. Young addressed in his evidence the Employee Policy Manual of "Avmax and Western Avionics", last revised in January 2008 (Ex. 3-35) (the "Employee Manual"). He explained the Employee Manual described company policies for employees and applied to all employees of both AALI and AASI. It was his evidence this version of the Employee Manual was in force in September of 2014, when Mr. Taylor was terminated. He testified that when employees were hired and signed an employment letter, they would be given an opportunity to read the document and ensure they understood it before they started working. Employees could access the Employee Manual by either hard copy, or online. He further testified that Mr. Taylor would have occasion to refer to the Employee Manual in his various roles with the Employer, and through discussions with senior management regarding policy changes and improvements to the Employee Manual. Mr. Young attention was drawn to page 22, section 13.0, titled "Conflicts of Interest" and section 13.1 and 13.2 titled "Confidentiality" and "Outside Employment" respectively.

14 Section 13.0 of the Employee Manual is one full page and will not be reproduced in full. Suffice it to say that it prohibits "actual or perceived" conflicts

of interest and indicates the Policy is intended to give general direction and be a "guideline": employees can "seek further clarification on issues related to the subject of acceptable standards of operation" should there be a need to do so. It states:

> An actual or potential conflict of interest occurs when an employee is in a position to influence a decision that may result in a personal gain for that employee or for a relative as a result of The Company's business dealings...If an employee has any influence on transactions involving purchases, contracts, or leases, it is imperative that he/she discloses to an officer of the organization, as soon as possible, the existence of any actual or potential conflict of interest so that safeguards can be established to protect all parties.

15 With respect to Confidentiality, Section 13.1 states:

> The materials, products, designs, plans, ideas and data are the property of The Company and are not to be given to an outside firm or individual except through normal channels and with appropriate authorization. Any improper transfer of material or disclosure of information, even though it is not apparent that an employee has personally gained by such action, constitutes unacceptable conduct. Any employee who participates in such a practice will be subject to disciplinary action, including termination and or possible legal action. In situations where the nature of an employee's work will expose them to extremely sensitive information, such employees may be required to sign a confidentiality agreement.

16 With respect to Outside Employment, section 13.2 reads — in part:

> Employees may hold outside jobs as long as they meet the performance standards of their job with the Avmax and/or Western [sic].... Outside employment performed for any organization operating or maintaining "regional" aircraft or that otherwise constitutes a conflict of interest (Section 13.0) is prohibited. Employees may not receive income or material gain from individuals outside the organization. In addition, any employee whose outside employment involves the use of an Aircraft Maintenance Engineer License will be required to sign a Waiver in the form supplied by the Director of Quality before proceeding with such employment.

17 The Employee Manual provides for "Disciplinary Action" in Section 15.0. It sets out progressive disciplinary steps for "minor infractions", which are defined, and notes that "major infractions" — including conflict of interest — are more serious and subject to a "more severe penalty, including suspension and possibly dismissal for cause". With respect to discipline, Mr. Young testified there are

incidents where the progressive discipline stages of verbal warning, written warning and suspension are not followed, as noted in the manual, such as sexual harassment and conflict of interest. According to Mr. Young's evidence, an employee must notify the Employer of any potential conflict of interest. With respect to Outside Employment, Mr. Young's interpretation is that outside employment relating in any manner to flying an aircraft or doing maintenance work would be prohibited. He indicated this was important to the Employer as it has a wide scope of services and wants to ensure that all employees are working for the Employer's interests, and not for their own personal interest. He testified the primary core of Avmax' s business involves regional aircraft — the repair, overhaul and maintenance of that aircraft — and Avmax intends to protect that. While Mr. Young's evidence was that he was aware Mr. Taylor engaged in outside employment, he understood that employment only related to supporting the helicopter industry for law enforcement. Mr. Taylor had disclosed this at the time of his hiring and was given permission to continue with that work while he was employed at Avmax, as it was not seen to be a conflict through direct competition with Avmax's business interests. To Mr. Young's knowledge, Mr. Taylor had not come forward with any other business opportunities that could be a conflict.

18 Mr. Young gave evidence that Mr. Taylor had a fair bit of interface with the executive team while employed as the programs he was working on were "high profile", with a great deal of interest right from the top senior executives down, including Mr. John Binder as CEO, as well as the Chief Operating Officer and Chief Financial Officer, Mr. Young and other executive vice-presidents. Mr. Young testified there was a great deal of conversations around these programs, as they were considered important for Avmax, with a great deal of potential. One of these projects was the Peregrine Project. Mr. Young testified that this project was an aircraft that was being developed to offer surveillance, with a focus on marine patrol. It would be equipped with very sophisticated radar equipment and infrared cameras, with integration of various systems, to be used for maritime and potentially land patrol. It was felt by the executives at Avmax that there was a market for this type of aircraft for governments and large corporations. Mr. Young gave evidence that Avmax began to work on Peregrine around 2010. The idea was originally brought to the table by Marty Craig, a sales and marketing employee of Avmax, based in Hilton Head, South Carolina. At the time work on Peregrine began, there were at least three other companies who were looking at this type of surveillance aircraft, as well as the U.S. military, who would all be competitors of Avmax. According to Mr. Young, Avmax felt that they could develop a sound product at a price point that would be well-received by the market. It was Mr. Young's testimony that, due to Avmax's capabilities, it would be able to do the engineering and other aspects of the work in-house, as it had a great deal

of capability within the group to bring the project forward at a competitive price. Mr. Young also testified that Avmax initially considered two different aircraft platforms for the Peregrine Project. It was not disputed by the parties that one aircraft platform was settled upon to develop and market, which will not be identified in this decision.

19 Mr. Young testified that Mr. Taylor was responsible for the development of the Peregrine Project within Avmax. Mr. Taylor was the "lead" or the project manager and was described as "owning" the Project right from the concept, through working with vendors to procure equipment for the first build, working with engineering regarding the integration of systems, talking with potential customers and looking for a "launch" customer for the aircraft. Other people were resourced from other areas of Avmax to assist Mr. Taylor, and he had access to the resources in Avmax to build the plan, most of which came from the Calgary office. It would be necessary for Mr. Taylor to reach out to suppliers and customers and he did so. The equipment required was very sensitive, with strong military applications. Mr. Taylor worked with suppliers to "sell" them on the concept of Peregrine, and arranged for rental and loaner units to use in an initial build for marketing the product, including radar and infrared cameras. Some of those companies had confidentiality requirements as well, considering the sensitive nature of the equipment.

20 Mr. Young testified the documents and work-product related to Peregrine were considered to be confidential. His evidence was there were several other companies who were producing the same types of products and it was a sensitive development. Mr. Young testified that he personally had executive oversight of Peregrine, but there was a great deal of executive interest, particularly from the CEO, John Binder. Peregrine would present a very big opportunity for Avmax to move forward in special mission aircraft, and this generated a great deal of excitement among the executive. It was Mr. Young's testimony that a Business Plan was developed for the Peregrine Project by Mr. Taylor, dated June 28, 2011, which was a discussion paper outlining the Peregrine Project, provided to Mr. Young by Mr. Taylor. Mr. Young described it as a confidential document. Review of this document demonstrates an Executive Summary of the Peregrine Project, and a Market Analysis. A separate Executive Summary document was also prepared for the executive team (Ex. 3-45), which Mr. Young also received, which outlined the Tentative Approach, Method, Budget and Schedule of the Peregrine Project. A PowerPoint was also prepared as a high-level marketing document and a discussion document for Peregrine, which Mr. Young received (Ex 3-46). It outlined what the aircraft was and its capabilities. The contact person listed in the marketing documentation was Mr. Taylor. Evidence was provided by Mr. Young of several

meetings and email reports from Mr. Taylor regarding work on the Peregrine Project. It is not necessary to summarize this documentation. It makes clear that Mr. Taylor was actively working on obtaining suppliers of the sensitive equipment needed for the Peregrine Project, in a manner that could provide a cost advantage to Avmax. It is not necessary to outline the details of these arrangements in this decision.

21 Ex. 3-40 is an email from Mr. Taylor to Mr. Maydaniuk, Avmax's corporate legal counsel, copied to Mr. Young, which sets out this arrangement and lists several countries as possible purchasers of the Peregrine aircraft. This list includes Mexico, with a notation that the approval of the U.S. State Dept. would be required. Mr. Young testified that this limitation was because Mexico is a sanctioned country by the United States under their International Traffic and Arms Regulations ("ITAR"). Certain sensitive aerospace products are regulated by the United States with respect to certain countries, with the sale of those products being limited. Radar and infrared cameras would potentially fall under that regulation. While the United States administers ITAR, the regulations are applicable to all allied countries. While Mr. Young indicated Avmax does business with Mexico, the type or extent of that business was not elaborated upon in his evidence.

22 Mr. Young testified that Mr. Taylor also created and provided a draft budget for Peregrine (Ex. 3-43, 44) and a draft Statement of Work (Ex. 3-42), in August of 2011, which Mr. Young received via email (Ex. 3-41). The Statement of Work was a high level define of what the project was and the major pieces in the program to develop and build the aircraft. Mr. Taylor also had meetings with the suppliers of equipment and Mr. Young was copied with the Minutes of those meetings. Mr. Young was also aware that representatives of equipment suppliers also came to Avmax and met with Mr. Taylor for a technical review and discussion of the installation process, how the systems would be integrated, a general overview of the project and tour of Avmax's facilities. According to Mr. Young's evidence, a Project Charter for Peregrine was also completed by Mr. Taylor on October 10, 2011 (Ex. 3-49), which is the outline of the project, defining what Peregrine is in terms of equipment, why it is being built, the costs, so the executives could consider it. It was completed by Mr. Taylor as he was leading the Peregrine Program, with copies to the executive team. In the fall of 2011, Mr. Young gave evidence of emails between Mr. Taylor and the executive team, where Mr. Taylor was seeking executive approval for moving the project forward and starting physical work on the aircraft. Mr. Young gave evidence that there were emails from the CFO, discussing the financial risks of the project, and looking for more details about the cost and how the money would be spent. Mr. Taylor was indicating that Peregrine had been pushed as far as possible without

building the aircraft, but now he was looking to "switch it on" and build it. The executives were concerned whether customers could be found for Peregrine and were seeking greater security of interest before committing the significant funds to build the aircraft. In September of 2011, documentation was prepared to market the Peregrine Project to the Canadian government as part of a replacement of search and rescue aircraft (Ex. 3-48). It was also his evidence that if an employee breached the policies of Avmax regarding confidentiality and conflict of interest, it would be very difficult to trust that employee. Mr. Young gave evidence the Peregrine Project was not ultimately built due to lack of customer commitment. While all the work was maintained in the company files, the Peregrine Project was ultimately "shelved".

23 In cross-examination, Mr. Young confirmed through review of Mr. Taylor's performance assessments that Mr. Taylor had been performing his duties adequately and that Mr. Young had no issues with the performance of Mr. Taylor, nor did he ever have occasion to discipline him. Mr. Young also agreed that Mr. Taylor's job at Avmax was to explore business opportunities for Avmax and build business cases for them, and that his skill set in special mission aircraft was an asset to Avmax. When asked was proprietary about the Peregrine marketing proposal, Mr. Young's evidence was that the entire project was proprietary, with a heavy investment of time and resources committed to Peregrine by Avmax. Information was acquired, relationships were built, and all collectively was proprietary to Avmax. When pressed, Mr. Young emphasized that the charter was the project; that the effort that went into building the Project was and is Avmax's property. When asked if there was anything specific that was proprietary, Mr. Young indicated that the Project itself — the investment and effort that went into getting to the point of being "ready to cut aluminum" — all of that together made up the Peregrine Project and was a book of knowledge and effort. This was the investment made by Avmax for Avmax's purposes in the development of the Peregrine Project and was Avmax property. Mr. Young testified that he would expect an employee to respect that investment. Mr. Young confirmed that Avmax had not built any maritime patrol aircraft, and that Peregrine was never in fact built.

24 Mr. Young agreed that aviation was a small industry, in generic terms, and that a person's reputation in the industry would follow them wherever they go. He also agreed an accusation of theft of company property could affect an individual's reputation and that such a reputation would be a factor in a decision to hire someone. Mr. Young confirmed he was aware that other countries were taking on similar projects regarding maritime patrol aircraft, and he was aware that Field Aviation and Boeing were in the same field doing this type of work, and that there was a "race to the finish line". Mr. Young confirmed he was aware that Mr. Taylor

was using his connections in the airline industry to try to get suppliers to sign onto the Peregrine Project.

25 Mr. Young was also questioned regarding the intent of Section 13.2 of the Manual. His evidence was the intent was around the idea of employees working in competition with Avmax; that employees were not to work at a job that was counter to Avmax. Mr. Young emphasized the important aspect was disclosure of outside employment. He confirmed Mr. Taylor presented that what he was doing with FMS was consulting relating to his software platform for law enforcement for that product, and that Mr. Young found that acceptable. Mr. Young confirmed the Director of Sales and Marketing was also a confidential position and he was not sure why there was no signed confidentiality agreement with Mr. Taylor while in that position.

26 In Re-examination, Mr. Young confirmed there were circumstances that an employee with good performance could be terminated when they had broken trust by a significant event.

C. Evidence of Mr. Don Parkin

27 Mr. Parkin retired from Avmax in June of 2016. He is trained as an Avionics Engineering Technologist. He was a founding partner of what became Avmax, beginning work with Western Avionics in 1980. In September of 2014, Mr. Parkin was the Executive Vice-President, in charge of AALI, reporting to John Binder, as CEO. Mr. Parkin's evidence was that Avmax's customers were worldwide.

28 Mr. Parkin testified that he knew Mr. Taylor from the time of Mr. Taylor's work with the STARS Air Ambulance and Calgary Police HAWCS Airborne Division. It was Mr. Parkin that hired Mr. Taylor for Western Avionics. Mr. Taylor reported to Mr. Parkin when he became Technical Asset Manager for AALI. In his role as Technical Asset Manager, Mr. Taylor helped manage aircraft while it was in for maintenance, whether in Calgary or in the U.S. or other places. He would interface with customers, assist with the leasing of aircraft, lease returns, interfacing with various technical people on modifications. He had authority to approve a variety of work on the aircraft, worth up to a few million dollars. Mr. Parkin testified that at the time of his termination, Mr. Taylor held dual roles as a Technical Asset Manager for AALI and as a Director of Sales and Marketing for AASI.

29 Mr. Parkin was familiar with the Peregrine Project and gave a similar description of the project to that provided by Mr. Young. Mr. Parkin was involved with Peregrine, due to his involvement with the leasing company. Peregrine was

a large project, with the expenditure of millions of dollars needed to modify an aircraft in the manner which was being developed as Peregrine. Mr. Parkin confirmed that Peregrine was basically Mr. Taylor's project to run, organize and "make happen". To do so, Mr. Taylor would be involved with various departments within Avmax including engineering, avionics and sales. He was responsible for bringing the various departments together, he wrote a good business plan and was involved in marketing the idea and concept and going after customers to try to get them to "buy in" to the idea. Mr. Parkin's evidence was that Mr. Taylor was involved in the full "A to Z" development of the project, to try to get it into the market. It was the evidence of Mr. Parkin that the Peregrine Project was confidential and proprietary. From the idea, to creating it onto the engineering paperwork, how the systems would integrate, where they go, placement of work stations and the whole idea of how sensors would be integrated into what becomes the Peregrine was something Avmax was developing and putting together. Mr. Parkin gave evidence of the Proprietary Information Agreement executed between a supplier for Peregrine and Avmax (Ex. 3-51). The agreement was needed so that both parties could protect their proprietary information while determining the "fit" of the equipment for Peregrine and extracting information to see if the equipment could be integrated into the aircraft. It was his evidence such agreements are typically needed when that is the case. While they want to get the supplier onboard, Avmax does not want its competitors to find out what it is doing. The supplier also has trade secrets and wants to make sure Avmax does not take its information. Ex. 3-52 is another Proprietary Information Agreement with another supplier for Peregrine. Mr. Parkin testified that it was Mr. Taylor who lined up these suppliers and arranged for the agreements. His evidence was these were very important to Avmax, as Avmax had spent money developing and creating the idea and did not anyone to steal that idea and create it themselves.

30 With respect to why Peregrine was not completed, Mr. Parkin's evidence was that Avmax was never able to get any firm customers for the aircraft, so after a great deal of time and money was spent, and a lot of "anguish" on the part of Mr. Taylor, the executives decided it should be "shelved" until such time as a firm customer could be located. His evidence was that project was not "terminated" as that type of project is never "terminated", especially not after spending the kind of money that had gone into Peregrine. The intention was that if a customer came along, it could be dusted off and continued. Mr. Parkin's evidence was that Mr. Taylor did keep trying to find customers for Peregrine for a time after it was "shelved", but never came to Mr. Parkin with any customers.

31 Regarding what was disclosed when Mr. Taylor was hired, his understanding was that the business of Mr. Taylor involved Mr. Taylor marketing a software

product, developed for helicopters. Avmax allowed Mr. Taylor to engage in those marketing activities from time to time. For example, sometimes Mr. Taylor would need days off to attend a helicopter show and display his product and try to sell it to that market. His evidence was this outside work was approved as it involved helicopters, which are "rotary wing", while Avmax is in the "fixed wing" market. Avmax did not have any concern, as rotary wing was not its marketplace.

32 Mr. Parkin gave evidence that when Mr. Taylor requested vacation in late August of 2014, he was not told of Mr. Taylor's plans. Mr. Taylor contacted him towards the end of that vacation and requested several extra days to address issues involving his daughter and his divorce; Mr. Parkin was not entirely clear in his evidence on what the issues were for which Mr. Taylor needed extra time. He was granted that extra time. Mr. Parkin subsequently became aware that Mr. Thuna, who handled Avmax's IT department, and Mr. Taylor were in the Caribbean together, which he found odd, as Mr. Taylor was supposed to be attending to a personal matter. At some point, Mr. Parkin found out Mr. Taylor was not in fact in the Caribbean or home dealing with a personal matter, but had been in Mexico, meeting with the Mexican government and marketing Peregrine to the Mexican authorities, without anyone from Avmax knowing this was going on. It was not clear from the evidence how Mr. Parkin discovered this fact, nor what he was told had occurred between Mr. Taylor, Mr. Thuna and the Mexican authorities in Mexico, or what information was shared. Mr. Parkin waited for the two men to return from Mexico and then started an investigation into what was going on in Mexico and whether there was a conflict of interest. This concerned Mr. Parkin, as no one from Avmax knew what was going on. He met with both men separately to question them. Ex. 3-62 is a private and confidential memo dated September 23, 2014 from Mark Maydaniuk, corporate legal counsel, to Mr. Parkin and Mr. Dupuis of Avmax, which is the result of the investigation interview with Mr. Taylor which occurred on September 19, 2014. According to Mr. Parkin, he concluded after meeting with Mr. Taylor that Mr. Taylor had been marketing the Peregrine Project to the Mexican authorities. According to Mr. Parkin's evidence, Mr. Taylor felt he had not done anything wrong, as the idea was similar but not the same as Peregrine, although when pressed, Mr. Parkin testified Mr. Taylor could not articulate any differences between Peregrine and what Mr. Taylor had been marketing in Mexico. Mr. Parkin felt Mr. Taylor and Mr. Thuna had felt they had a right to take Avmax's idea, project, and program for Peregrine and go do it themselves, since Avmax was not pursuing its development. According to Avmax's Employee Manual, this is something Mr. Parkin felt that they did not have a right to do, as that information was proprietary to Avmax. Avmax had spent a very large amount of money on that project, to develop and missionize a certain aircraft platform, while Mr. Taylor was employed. Mr. Taylor could not

have developed it outside of his work for Avmax and the idea had come from an Avmax employee (Marty Craig). The experience and knowledge of putting Peregrine together belonged to Avmax.

33 Mr. Parkin testified that it had been Mr. Taylor's job to try to market Peregrine on behalf of Avmax, and get customers for Avmax, not for himself and Mr. Thuna. Mr. Parkin was very surprised Mr. Taylor felt he could take that information and try to pursue it on his own. According to Mr. Parkin's investigation, Mr. Taylor was willing to quit Avmax and go work for the Mexican authorities if they chose to pursue the project. Mr. Taylor felt he would be doing Avmax a favour, as he intended to try to arrange for the Mexican authorities to purchase the aircraft from Avmax. According to Mr. Parkin's evidence, it did not matter to Avmax that the Mexican government was not a current customer of Avmax; Avmax had been marketing to Mexico and other countries around the world and it was a potential customer of Avmax. Neither did it matter that other companies were also developing specialized missionized aircraft to compete with Avmax's offering; other companies were not developing the Peregrine. According to the evidence gathered by Mr. Parkin, Mr. Taylor had been working on this for himself for approximately a six-month period before September 2014.

34 As a result of this meeting, Mr. Parkin determined to put Mr. Taylor on suspension with pay while he continued to investigate (Ex. 3-63). His evidence was Avmax needed further time to see if what they believed was correct: that the marketing of Peregrine had occurred in Mexico, which was a severe conflict of interest using Avmax's proprietary ideas and documentation. There was no evidence of what other steps Mr. Parkin took to investigate. On September 24, 2014, Mr. Taylor was terminated. Mr. Parkin testified he was involved in the decision to terminate, which was taken in consultation with Mr. Maydaniuk and after consultation with John Binder. Important for their decision was that Mr. Taylor was unable to see how what he had done was wrong. Had he admitted he "messed up" and was intent to fix his mistake, Mr. Parkin's evidence was that outcome may have been different, as Mr. Taylor had been a good employee. However, Mr. Taylor was adamant he had done nothing wrong. Mr. Parkin testified that — to Avmax — this was an obvious conflict as Mr. Taylor was not allowed to compete with Avmax in the market of regional aircraft modification. No other disciplinary measures were considered due to the seriousness of the misconduct and the fact that Mr. Taylor did not have any measure of remorse. Mr. Parkin also testified that Mr. Taylor did not return to Avmax all confidential information in his possession, as was clear from the documentation produced by him for this hearing. Mr. Parkin testified it was important to trust employees and they felt they could not trust Mr. Taylor anymore. Had Mr. Taylor admitted his

misconduct, or shown any desire to address the issue, Mr. Parkin indicated Avmax would have given Mr. Taylor the opportunity to make it right, although he would have had "short reins" in order to rebuild trust. As Mr. Taylor believes he has done nothing wrong, Avmax could no longer trust him. Mr. Parkin gave evidence that Mr. Thuna was also terminated because he was part of the marketing effort in Mexico.

35 In cross-examination, Mr. Parkin confirmed that Mr. Taylor had been still doing work for sales, as well as his role in leasing, at the time of his change to Technical Asset Manager as it was not a clear transition. Mr. Parkin confirmed it was not uncommon in the airline industry to execute NDA's with suppliers. Mr. Parkin was questioned regarding a helicopter manufacturer which business Mr. Taylor had brought to Avmax to develop an interface for passengers to select a language on board a helicopter while touring. Mr. Parkin was unable to recall if Avmax had made any money off that venture, but acknowledged that was the goal. He was also unable to recall whether Avmax had any dealings with that helicopter manufacturer prior to Mr. Taylor's introduction. Mr. Taylor confirmed with Mr. Parkin that Mr. Parkin had performed a satisfactory performance assessment of Mr. Taylor in May of 2014 and that he had not ever disciplined Mr. Taylor.

36 Mr. Parkin was also cross-examined regarding outside business interests. He confirmed Mr. Taylor had told him about the software product for helicopters and that Mr. Taylor wanted to continue to sell and market this after employment with Avmax. He testified Avmax agreed, as they are not interested in that field and did nothing to curtail Mr. Taylor's business. Mr. Parkin confirmed he was aware that Calgary Police had a small fixed wing Cessna, but was not aware Mr. Taylor's software — a "Moving Map" system was installed in that plane. Mr. Parkin's evidence was that all of the Avmax companies used the same Employee Manual (apart from the U.S.). He agreed Mr. Taylor had good business experience that Avmax had recognized when it hired him. Mr. Parkin was taken to statements in the proposal to the Canadian government (Ex. 3-48) stating that Avmax was "committed to building" Peregrine and asked if that were true. Mr. Parkin's evidence was that if they had a customer signed up — such as Public Works — the company did have the funds to build Peregrine.

37 As with Mr. Young, Mr. Parkin was questioned as to what in the Peregrine marketing proposal was proprietary to Avmax and what made it different. Mr. Parkin testified that it was the equipment chosen; and how it would be integrated that may be better for the operator and what was developed around the equipment integration. He testified Avmax was trying to come up with something special for the market; the selection of sensors and software and the integration of the

equipment onto a particular aircraft. It was the evidence of Mr. Parkin that the selection of aircraft was very important, as Avmax saw different applications and opportunities for a certain aircraft type as a missionized aircraft. While the equipment might be otherwise available, how it is put together, and how it is integrated is different than other maritime patrol aircraft in the market; the equipment was being brought together in a unique way and Avmax felt no one else in the market had done this. According to Mr. Parkin, how that equipment was integrated on a certain airframe to make Peregrine was unique and special in the industry. Certain types of equipment were chosen because of the capabilities and how Avmax felt it could integrate that equipment into a mission aircraft. Mr. Parkin emphasized that what Mr. Taylor knew regarding the aircraft and the integration of the equipment was developed by him while he was an Avmax employee; it is the entire Project that is proprietary, not the individual pieces.

38 When Mr. Taylor asked Mr. Parkin where the line would be if Mr. Taylor was asked to work on another aircraft, Mr. Parkin answered by saying "that's easy: you as an employee are not allowed to perform work on anything to do with another fixed wing aircraft". With respect to marketing to Mexico, it was a conflict of interest because Mr. Taylor was marketing modification of a fixed wing aircraft, which was Avmax's business. Had he brought the Mexican officials to Avmax and said they wanted to do something like Peregrine — whether on the same or different platform, Avmax could have done that. Mr. Parkin testified that Avmax has created two maritime patrol aircraft. When asked how he knew that Mr. Taylor was in Mexico selling Peregrine, Mr. Parkin did not directly answer the question, other than stating it was from Mr. Taylor's own admission. Mr. Parkin indicated he asked Mr. Taylor for the marketing materials he used with the Mexican officials, and Mr. Taylor did not give them to him. When asked if it would be a conflict if the Mexican authorities were interested in the same sensor suite but a different aircraft, Mr. Parkin stated it would be. Mr. Parkin did admit Mr. Taylor was open and forthright in talking to him about the activities in Mexico, when he asked. Mr. Parkin agreed that Avmax was unhappy that Mr. Thuna was not in Calgary for the launch of a new software program the company was using internally. He also agreed that the aviation industry in Calgary is quite small, with people moving around to different companies in Calgary and that a person's reputation follows him. He agreed accusations of theft could affect that reputation. He also agreed he would not be likely to hire someone accused of theft.

39 In re-direct examination, Mr. Parkin confirmed that it was Mr. Taylor's involvement with a customer for a fixed wing aircraft that created the conflict, as that is Avmax's market. When someone like Mr. Taylor is hired, with experience in the industry, it was the expectation of Avmax that he would be bringing

customers and suppliers to Avmax, for the benefit of Avmax. With respect to the investigation, it was Mr. Parkin's testimony that he felt Mr. Taylor's intention was to try to have the Mexican authorities buy the aircraft from Avmax, if they decided to proceed, and he would then would quit Avmax and in his mind be absolved of all conflict. Mr. Parkin disagreed that would absolve Mr. Taylor of any conflict. He also recalled Mr. Taylor indicating he would profit personally.

D. Evidence of Mark O'Hearn

40 Mr. O'Hearn gave evidence on behalf of Mr. Taylor. He is an Avionics Technologist, with 22 years' experience. He has also been a naval combat information operator. He is currently employed at Avmax in Technical Sales Business Development. His exact position was not in evidence. His role involves taking technology and regulations and putting solutions together and bringing them to market. He and Mr. Taylor have been acquaintances for several years, in various capacities in the airline industry, apart from with Avmax. Mr. Taylor was a customer initially of Mr. O'Hearn, although it was not made clear what company Mr. O'Hearn was working for at the time. Mr. O'Hearn hired Mr. Taylor in 1997 to work with the Calgary Police service and STARS Air Ambulance. There were other working relationships between the two men, which were not clearly articulated in the evidence.

41 Mr. O'Hearn gave evidence he does pre-or application engineering — good to "block level" but not down to "systems level" — which he described as "architecture". He gave evidence there are different ways to integrate similar equipment, such as the integration of sensors; the police integrate differently from others; there are "mission stations", although Avmax never designed mission stations, nor does it create "hard-core" special mission systems integration, such as wiring diagrams, software protocols, or mission platforms where employees sit. With respect to integrating infrared camera systems, it was Mr. O'Hearn's evidence that Avmax had secured one that could "read a nickel from someone on a speed boat when flying at 30,000 feet". Mr. O'Hearn testified there are only three or four suppliers for radar in the market; the same is true for high-end camera equipment for aircraft. He also indicated that all aircraft integration missions are different.

42 Mr. O'Hearn hired Mr. Taylor into Western Avionics in 2008. At that time, Mr. O'Hearn's role was Manger, Business Development & Sales (Ex. 1-1). It was Mr. O'Hearn's evidence that he was aware of Mr. Taylor's personal business interests with FMS at the time Mr. Taylor was hired into Avmax. He was clear in his evidence that he did not feel those business interests created any type of conflict. With respect to what those business interests were, his evidence was he did speak

specifically to Mr. Parkin about the business of Mr. Taylor because Avmax wanted to hire someone who had knowledge of product development and bringing that to market, not just retrofitting. Mr. Taylor had that knowledge from his software development of the "Moving Map". Like many companies, Avmax believes in letting the designers come in and do the selling. At the time Mr. Taylor was hired, Avmax was trying to bring ARTIS to market. ARTIS is an acronym for Aircraft Real-Time Information Systems. Avmax has also designed and developed PICO Cube, which is a communication box. It was because of Mr. Taylor's experience in product development with FMS and bringing that product to market (the "Moving Map" software, as discussed in Mr. Taylor's evidence) that Mr. O'Hearn hired him for Avmax. He testified that at times when Mr. Taylor worked for Avmax, he would go to trade shows to promote his products for FMS and he could do work for Avmax, and vice versa. In Mr. O'Hearn's words, it was a "good marriage".

43 Mr. O'Hearn credits Mr. Taylor with securing the Northrup Grummon program. Regarding the idea for Peregrine, Mr. O'Hearn testified that a potential customer had approached Marty Craig in the U.S. (Hilton Head) about surveillance aircraft. Mr. Craig brought forward the concept that became Peregrine, to meet the demand. The concept of Peregrine was put together as a response to the needs for maritime security, using a unique aircraft platform which Avmax felt could meet the identified needs well. Ultimately the "pin was pulled" on that, in Mr. O'Hearn's words, and the Hilton Head office was shut down. It was Mr. O'Hearn's evidence that ISR (Inspection, Surveillance and Reconnaissance) aircraft are not new; the concept of missionizing aircraft has been around a long time.

44 Mr. O'Hearn gave evidence he was aware of several marketing proposals that Mr. Taylor had been involved in developing for Avmax. Mr. O'Hearn confirmed that after Mr. Taylor had moved to his position in AALI, Avmax was no longer in the special missions market. By that time, Hilton Head had shut down, Mr. Craig's entire crew was laid off and the program to get Peregrine up and running had been shut down. It was his opinion that Mr. Taylor had been an asset to Avmax.

45 When asked to consider what set Peregrine apart from its peer group, Mr. O'Hearn was not able to think of anything that set it apart. When asked to consider what was proprietary about the Peregrine proposal, it was Mr. O'Hearn's evidence that if there was only one thing, it would be the choice of aircraft which Avmax was pursuing. Mr. O'Hearn testified the competition is very stiff as there are only so many variables you can have. The choice of aircraft is one of them. Mr. O'Hearn also gave evidence that aircraft may have different radar and mission consoles, but there are only so many different things you can do to create missionized aircraft.

46 In cross-examination, Mr. O'Hearn agreed it was not appropriate for an employee to compete with Avmax while employed. He also agreed that the other companies he mentioned as creating ISR aircraft (Field and Boeing) would be competitors to Avmax, although Avmax had also collaborated with such companies. Mr. O'Hearn gave evidence he was doing some work towards building Peregrine. He believed it was shelved as a corporate choice, rather than because no customers existed for it. Mr. O'Hearn agreed that all marketing proposals that Mr. Taylor would have created as an employee of Avmax would have been done for Avmax's benefit.

E. Evidence of John Binder

47 John Binder was also called by Mr. Taylor to give evidence. He is the current President and CEO of Avmax. He believes five or six companies are included in Avmax's group of companies, although he is not entirely sure of the structure. Mr. Binder's evidence was he started with leasing three aircraft and is currently leasing 150 aircraft at the time of this hearing. With respect to the Employee Manual (Ex. 3-35), Mr. Binder gave evidence he has never read it. Mr. Binder did not know whether a copy existed that had been signed by Mr. Taylor. His evidence was he did not get involved in Mr. Taylor's case and could not confirm whether progressive discipline was applied to him. With respect to outside interests, Mr. Binder gave evidence that — in general — Avmax does not condone the idea of outside employment.

48 Mr. Binder was not able to give any evidence regarding Mr. Taylor's scope of authority for Peregrine, although he confirmed Mr. Taylor could not bind Avmax financially without executive management team approval. He was not aware of whether Avmax had any involvement with the Mexican government in 2014, but he was able to confirm Avmax was not leasing any aircraft to anyone in Mexico in 2014, nor did it have any contracts with the Mexican military in 2014. Mr. Binder testified he had bought 26 of one certain aircraft from Air Canada in 2011 and recalls telling Mr. Taylor that he needed to find a "home" for those aircraft.

49 With respect to Peregrine, Mr. Binder gave evidence that it was "money" that interested him in the proposal. When shown Ex. 3-57 (aircraft interior layout diagrams), Mr. Binder indicated he would consider those drawings to be proprietary to Avmax. With respect to the Statement of Work at Ex. 3-42, Mr. Binder testified that such a Statement was required when modifying an aircraft. It was Mr. Binder's evidence that Avmax had the financial resources to build a Peregrine aircraft, with either the expertise — or the ability to find the expertise

needed — to complete the job. He testified Peregrine was not built because Avmax had not been able to sell one. Mr. Binder did not specifically recall stopping Peregrine. When asked whether Avmax was out of the special missions market when Hilton Head was shut down and Mr. Taylor was moved to leasing, Mr. Binder's evidence was that Peregrine had been an expensive venture, and that nothing had ever come of it. It was Mr. Binder's evidence that Avmax was always in the special missions' business and that "shelving" a project was different than "killing" a project.

50 In cross-examination, Mr. Binder confirmed he was aware an Employee Manual was in place, even though he had not read it personally. He also confirmed that a great deal of money was invested in developing Peregrine and that it was never terminated but only "shelved". If a customer was found for Peregrine, it would be pursued. In re-examination, Mr. Binder noted there were two competitors to Peregrine in Canada, but there would be others globally.

F. Evidence of Gary Thuna

51 Mr. Thuna has a bachelor's degree in Computer and Electrical Engineering. He has also earned his commercial pilot's license and class 4 flight instructor's license. Mr. Thuna gave evidence he began working for Western Avionics in 2003 as a Product Development Manager. He was promoted to Information Systems Manager in 2011, which was his title at the time of his termination in 2014, and reported to Don Parkin. In September of 2014, Mr. Thuna was the Manager of Information Systems at Avmax. He did not execute a non-disclosure agreement with Avmax as at the time of his hiring, as he asked that the confidentiality agreement be mutual, as he had previously been working on aerospace aviation projects. As Avmax did not want to get lawyers involved, he was told just to not take information out or bring any in. He "shook on it" with Vince Scott who hired him at Avmax, and it was based on trust. While working at Avmax, Mr. Thuna developed a "Communicube", which is similar to a flight data recorder, but stores much more information. As an engineer, Mr. Thuna described integration as the "glue" that takes disparate systems and turns them into more cohesive and useful systems to increase the value of the system, which was why he was at Avmax; He had those skills and had already been using them on previous projects. At the time he left, no one else at Avmax had that skillset, which was fundamental for integration.

52 Mr. Thuna was familiar with the Special Missions Peregrine Project PowerPoint (Ex. 3-46). Mr. Thuna was never asked for his input on systems integration for Peregrine. He had been part of a team that did some special missions

modifications for the Northrop Grumman project. It was Mr. Thuna's evidence that Ex. 3-57 were not engineering drawings. They had no date, no revision control, no governing authority, and no certification. In Mr. Thuna's opinion, the drawings could just as easily relate to the deck of a boat as to an aircraft. On page 4-7, Mr. Thuna's evidence was he recognized the generic work station renderings, as they were rendered from marketing brochures pulled from the internet. He is aware of this because Keith Rock works for Mr. Thuna, and the drawings were completed by Mr. Rock; the originals are on Mr. Thuna's servers and any intellectual property in these drawings belongs to Mr. Rock. Mr. Thuna testified that, in aviation, any work that is going to be done on an aircraft — regardless of whether it be home-built aircraft or the largest jumbo jet — must be traceable and documented. Ex. 3-79 is an example of attaching a loud speaker to an aircraft, which is as simple a modification as can be made. Even to do this type of simple modification, an analysis would need to be done to ensure the performance of the aircraft is not affected; every aspect of safety and operations would need to be considered and official certification would have to be obtained. Regulations exist to govern every aspect of modifications to aircraft, even issues that can be easily done, such as tire changes. Mr. Thuna went through all of the various aspects of this type of modification and noted that the part that has been omitted from the package is the proprietary part of the document — being the methods used to achieve the results of the report, which is the most important part of the entire package. Ex. 3-57 on the other hand could — in Mr. Thuna's opinion — have been drawn yesterday by a child using it for flight simulation.

53 Mr. Thuna gave evidence that he first met Mr. Taylor when Mr. Taylor came to Avmax when he was first hired. His understanding was that Mr. Taylor was going to assist with the marketing of the Communicube and other marketing and sales activities for Avmax at large. Mark O'Hearn introduced Mr. Taylor as the owner of FMS, which corporation was familiar to Mr. Thuna from information he had seen in aviation trade journals and magazines. He was aware of what FMS did. Mr. Thuna did not have any involvement in Peregrine or attend any meetings about Peregrine. Mr. Thuna testified he knew Mr. Maricio Salum as he had been working with him on a modification project, prior to joining Avmax. He also provided expertise when needed on several small projects for Mr. Salum. With respect to the meetings which occurred in Mexico in 2014 with Mr. Taylor, Mr. Thuna was present for all of them. He testified there was two formal meetings and one informal meeting. The purpose of the meeting was mission equipment capabilities. One meeting took place with a General from the Mexican military. He was not aware of where the meetings took place, as they were chaperoned and driven for approximately 90 minutes to a concrete bunker.

54 It was Mr. Thuna's testimony that what was being sold at the meeting was Mr. Salum's capability to manage, run, and bring together the necessary resources to create a special missions platform. Mr. Thuna only can say he "believes" this because much of the conversation was in Spanish. Mr. Taylor was there to provide information on what is and isn't possible and what systems were available for the various needs that may be brought up. The first meeting started with about 10 or 11 people. He recalls Mr. Taylor utilized a PowerPoint presentation, which he had previously reviewed and made comments and notes about and helped Mr. Taylor to embed a video inside the PowerPoint (Ex. 3-80). As for other materials presented at the meeting, Mr. Thuna indicated there were data sheets and information sheets on various subsystems and components, information on different airframes and various options that were being discussed. For airframes, there was information on the Dash 8, CRJ's, ERJ's, Helicopters and C130's and perhaps a few more. There was considerable interest in the ground penetrating radar, as one of the interests was use of missionized aircraft for drug interdiction and border control missions. The capacity of the ground penetrating radar was of interest. FLEIR (forward looking infrared) was also discussed. There was a slide in the PowerPoint that had logos from several different systems/vendors and Mr. Thuna recalls that Avmax was included in that slide. That was the only mention of Avmax in the entire meeting. Other suppliers were Honeywell, Condor, L3, and ISL.

55 In cross-examination, Mr. Thuna agreed he was not part of any management or executive level discussions regarding Peregrine while he was an employee of Avmax, nor involved in the preparation of any Peregrine documentation. He was not part of SIT. He testified that he had conversations with Mr. Salum over the last 15 years relating to special missions integration and that Mr. Taylor had been involved in some of those conversations prior to the meetings in 2014. The 2014 meetings occurred over the space of approximately one week. He did not have a copy of the PowerPoint provided to the Mexican authorities. He confirmed he was terminated by Avmax, for cause on September 24, 2014, and that he filed a Complaint under the Unjust Dismissal provisions, but it was determined he was a manager, and he could not proceed under those provisions. He also confirmed in 2016 he filed a Statement of Claim against Avmax alleging wrongful dismissal.

G. Evidence of Gregory Taylor

56 Mr. Taylor gave evidence on his own behalf. He is an Aircraft Maintenance Engineer, trained at SAIT. He has both rotary-wing and fixed-wing certifications. He has lived and worked around Calgary his entire career. He is a single parent to one daughter, who is currently in university in Calgary. He

has been modifying aircraft for his entire career, including emergency medical transportation conversions for STARS Air Ambulance. He helped to start the HAWCS helicopter program for the Calgary Police Service. He is currently employed as a Quality Assurance Manager for Regent Aircraft Services. In that job, he is a liaison with Transport Canada and writes maintenance policy manuals, among other tasks.

57 Mr. Taylor managed several projects for Avmax during his tenure. Mr. Taylor gave evidence there are two primary sensors in a surveillance aircraft: the radar and an infrared sensor-referred to as EOIR (electrico-optical infrared) or FLIR (forward-looking infrared). The rest of the equipment would be data transfer — satellites, radios, which move voice and/or data. There are also systems to provide power. It was his evidence all of the surveillance aircraft are very similar; they may use different radio equipment, but the two main sensors have been used since the 1950's. He gave evidence regarding how the aircraft platform preferred for Peregrine began, but testified the cabin shape remains the same. Mr. Taylor went through documentation for the specifications of various equipment available, for both terrestrial and marine tracking. His evidence was he pulled this information from the Internet and took it to Mexico with him (Exs. 89, 90, 91, 92, 93). The video embedded in the PowerPoint was an MX20 video from the internet (Ex. 80).

58 He testified that when he went to Mexico, he took various printouts for equipment with him as it nis ecessary to first understand the mission, before selecting the correct equipment, and he was unsure what would be required. The last item that is chosen is the aircraft platform to use for the equipment, which has to be able to handle the capacity — in terms of size and power capability. Mr. Taylor also provided evidence on the various aircraft being built by competitors of Avmax, including another company using the same aircraft platform as that used by Avmax (Exs. 94, 95), which information was taken from various websites. He noted that all aircraft had the same two sensors. He gave evidence that the drawings used for the workstations for Peregrine were made by Keith Rock, and were available from a website. While Avmax tried to trademark the name "Peregrine", it was unable to do so. Mr. Taylor gave evidence of various emails between himself and Mr. Craig, to get a sense of the market and what was available. Mr. Craig was trying to market to the U.S. military.

59 Regarding what was understood about his outside employment at the time of hire, Mr. Taylor testified that the website of FMS clearly shows the Moving Map system — which he was selling around the world — as well as his capabilities in project management and maritime patrol aircraft. The same video that was

embedded in the PowerPoint presentation given in Mexico is embedded into the FMS website (Ex. 103).

60 According to Mr. Taylor, the first meeting in Mexico was with a General from the military and they discussed the capabilities of the equipment. He explained that he was invited along as a "subject matter expert" regarding equipment and Mr. Thuna was there because he was the one who knew Mr. Salum, and had that contact. Mr. Taylor explained he was pretty excited, as initially he felt that there was only a 3% chance of success, but after meeting with the Mexican authorities, those chances of success to build a missionized aircraft had increased in his mind to 50%, as they he felt the individuals had good contacts to get something built. He denied sharing Peregrine with the Mexican authorities, when asked by Mr. Parkin about that on his return from Mexico. He maintained this was not Peregrine, but was a different aircraft with a different mission. It also had the potential to be a very large sale of aircraft for Avmax; around $250 million potentially, as Mr. Taylor promoted the ability of Avmax to provide aircraft to the Mexican authorities for the project, if it went ahead.

61 He admitted he told Mr. Parkin that if the project happened, he would be resigning. This was because right before he left, Mr. Salum had approached him privately and had asked him if he would be interested in joining Mr. Salum's company and running the project. He told Mr. Salum that if the project came together, they could talk again, but it did give him something to think about on the flight home. With his daughter in Calgary, he was not sure he would be interested, as it would require a move for assembly in Mexico. However, there was very little capability left at Avmax by that time for special missions work and there was little future for his skillset at Avmax. Avmax had by that time gotten out of the special missions business, closed the Hilton Head office and let go Mr. Craig and his crew. Mr. Taylor had been shifted to AALI by that point, to help with leasing.

62 It was Mr. Taylor's testimony that he had been very committed to the Peregrine Project, and to getting it built. He put a considerable amount of effort towards the Project. By the time Peregrine was "shelved", Mr. Taylor had quite a bit of "skin in the game", and gone to quite a few people he knew from contacts made in his career, in order to arrange for equipment arrangements. He was aware that money was very tight at that point for Avmax and so he tried to develop the Project to require a reduced investment in order to build it and market by taking that build to various airshows, like Farnborough, to market it.

63 When Mr. Taylor came back from Mexico, he was called into Mr. Parkin's office and asked what he had been doing in Mexico. He was forthright with Mr.

Parkin that he was providing information to the Mexican authorities through Mr. Salum regarding what they might need for mission equipment, and what type of aircraft might work for that missionized aircraft. He explained he had gone to Mexico as an equipment consultant for surveillance aircraft, and was quite excited about the opportunity. He also saw this as a huge opportunity for Avmax, as Mr. Salum was trying to sell aircraft to the Mexican military. Originally, he thought they would be interested in maritime patrol, but when he arrived, he realized they were more interested in terrestrial surveillance. He further explained to Mr. Parkin that they had been talking to a General in the Mexican military about maritime patrol, what equipment there was, what the missions would be. His testimony was that the aircraft chosen for Peregrine was on his mind because of the number of aircraft which Avmax owned of that particular aircraft, so he recommended that as a platform.

64 Mr. Taylor described the difference between Peregrine and other similar aircraft as the price point at which Avmax would be able to build it, compared to other offerings, which was significantly different. Mr. Taylor described the market potential for such a product as "very large". It was why he was excited about the opportunity in Mexico, as it would allow Avmax to sell its airplanes. Mr. Taylor testified he recommended the same aircraft platform to the Mexican authorities as Avmax had intended to use for Peregrine. There would also be a service opportunity for Avmax to supply upgraded engines, and maintenance for each aircraft. It was Mr. Taylor's evidence that he saw this as a great business opportunity for Avmax. Mr. Taylor also noted that he brought to the attention of executives at Avmax that Field and Boeing were bringing to market a "demonstrator Maritime Surveillance Aircraft" which "Looks like Peregrine and has the same equipment on board that we proposed for Peregrine in 2011" and that the market was expected for 150 to 200 aircraft (Ex. 110). In that email exchange, Mr. Campbell noted that Field/Boeing were just about ready to "fly the prototype" and that it was "not exactly the same as Peregrine" as it used new aircraft and had a different "mission suite" (Ex. 110).

65 Mr. Taylor's evidence was that he knew the requirements of confidentiality and had made sure non-disclosure agreements were signed with suppliers for Peregrine "before we started talking very deep", as evidence by an email exchange with Don Parkin (Ex. 107). Mr. Parkin had directed him to get a "mutual NDA" signed before the site visit from the suppliers that had been arranged for early 2012. He had also worked on the HAWCS aircraft and security for the G8 summit in Canada, for which he installed special equipment and had confidentiality obligations. He has been involved with confidential information for most of his career and offered into evidence NDA's executed by FMS with various parties

to demonstrate that familiarity. He also noted that the data needed for his Moving Map system was subject to rules on how it was distributed (Geographic Information Systems data) (Ex. 111). Mr. Taylor also brought into evidence several commendations received for his previous work, as a demonstration of his character. These included a handwritten letter from former police chief Christine Silverberg thanking Mr. Taylor and other officers of the Calgary Police Service for being leaders in the industry, after hosting officers from the Montreal Police Air Patrol Section officers, who had come to view the HAWCS helicopter (Ex. 112). Calgary had the first municipal police helicopter in the country and was a leader in that area.

66 Mr. Taylor testified he developed the Moving Map software in response to a need he identified while he was with the Calgary Police HAWCS. Officers were using paper maps when they were trying to find a house or street. He built the Moving Map for HAWCS and then marketed it around the globe. It was developed to not only locate an address, but to control search light and flare cameras on target no matter what the aircraft does in the air.

67 Mr. Taylor provided FMS invoices for his time at Avmax and noted that South Africa — a client of FMS — had a "fixed wing" division as well as a rotary wing division. His software license was sold for the fixed wing and not just the rotary wing aircraft. As far as he could find, these are all the invoices from FMS, during his time at Avmax. STARS as well operated fixed wing aircraft. Mr. Taylor testified that when he was approached by Mr. O'Hearn to work for Avmax, one of the stipulations he had was that he had FMS, which was starting to get going, and that he could not work for Avmax if he could not keep going with FMS. He disclosed to Mr. O'Hearn what FMS was and what it was doing. Mr. O'Hearn knew Mr. Taylor personally, from when he had worked for Calgary Police and STARS, as Western Avionics did the completion for the HAWCS One. He had negotiated with Mr. Parkin for turning the helicopter into a missionized aircraft, as Western Avionics did the radio install. Mr. Taylor's evidence was that Mr. Parkin knew about his work with FMS and was fine with it and did not put any conditions on his work through FMS. Mr. Taylor worked on FMS business discreetly and after hours. Occasionally he would attend trade shows in the helicopter industry, which Mr. Parkin was aware of and gave him time off to attend.

68 In cross-examination, Mr. Taylor confirmed that Western Avionics was now a division of Avmax and that he agreed to the terms under which he was hired. His position was one of sales initially, finding new customers for Avmax. He explained that when he was officially hired to work in the leasing department in 2013, he stayed in the same office as he was also asked to carry on with the Director of Sales and Marketing position, with the idea that he would assist whoever replaced him

and help them in the initial stages. He stopped reporting to Mr. Young and began reporting to Mr. Parkin. He agreed that Avmax has customers worldwide.

69 Mr. Taylor also agreed he had obligations to keep information confidential. He disagreed that he couldn't do business while he was an active employee as he had been doing business with FMS and was actively looking for business for FMS. Mr. Taylor admitted it was his signature on the CNS Agreement at Ex. 3-33, that he was asked to sign it as part of accepting the role of Director of Special Programs and that the agreement does speak to what is confidential information. Mr. Taylor was taken through the various descriptions of Confidential Information within the CNS Agreement. He also acknowledged he held a position of trust within Avmax. While Mr. Taylor acknowledged the CNS Agreement required him to turn over any property of the company on termination, but stated that he always kept a personal "soft copy" of anything he authored, in case questions came up about it later. It was his evidence he still kept this information "confidential". He further acknowledged he did not have permission to keep this information, but it was something he just did.

70 It was Mr. Taylor's evidence that he did not only disclose to Mr. Parkin that he was consulting with the Moving Map, but also in both fixed wing and helicopters. While Mr. Parkin may have only understood he worked in helicopters, that was not Mr. Taylor's understanding. He did not agree that the scope of his business through FMS changed during his time employed at Avmax. His evidence was there was no discussion that he would be limited only to helicopters and that he was licensed in both fixed wing and rotary wing.

71 Mr. Taylor agreed that the marketing proposal was proprietary to Avmax, although it was his evidence it was not a "project" but just a "proposal"; a name for missionizing a fixed wing aircraft using a particular platform, which he felt was a "really good idea". He noted that the CFO of Avmax felt that if he did not have a customer or letter of intent, Peregrine was not worth funding. He pursued customers for Peregrine while still working at Avmax, after the decision was made to "shelve" the project (in Avmax's words), as even after Avmax had decided not to go ahead, as he thought that if he could find a customer, he could get approval to build it. He disagreed that he told Mr. Parkin any details of why he needed a few extra days of vacation in August of 2014 and believes Mr. Parkin was confused with another holiday period he took to Houston, when he needed extra time to deal with a personal issue involving his divorce and his daughter. In my view, nothing turns on this discrepancy in the facts.

72 Mr. Taylor's evidence was that he was not in Mexico to "market" anything, but only as a technical adviser to discuss equipment the Mexican military was considering for missionized aircraft modification. He believed he would be consulting about the equipment they may need, once he understood the mission, then would be involved in getting the equipment to do the best job, and finally the aircraft. While the Mexican military was interested in fixed wing, Mr. Taylor testified they also talked helicopters as well. Mr. Taylor described Mr. Salum as a "bit of a dreamer", and so what he said about the opportunity he took with a "grain of salt". Mr. Taylor noted he changed his mind about the chances of the project happening after speaking to Mr. Salum, as he realized Mr. Salum was talking to the right people and had the right contacts. However, there is a long "lead time" in aviation sales, and many contacts do not go anywhere fast.

73 Since he did not divulge anything belonging to Avmax in Mexico, Mr. Taylor did not consider that he had a conflict of interest. There were only two radar companies in the market, and he took information on both to Mexico. While they are the same two companies he was considering for Peregrine, they are the only two possibilities in the market. While he did tell Mr. Parkin that there were similarities to Peregrine in what the Mexicans were considering, he also noted there was differences. Both were the same aircraft, and both were surveillance aircraft, but one was maritime, and one was terrestrial, so they had different equipment. He said they were similar, in that the same aircraft was being proposed as a platform. He did not feel he was doing anything wrong, because Mexico was not a customer of Avmax. He acknowledged that had he found customers for Peregrine, while employed at Avmax, it could have started up again. Mr. Taylor gave evidence he did not raise the Mexican opportunity with Avmax because he did not consider it Avmax's business. It was Mr. Salum's project, and Mr. Salum's potential sale and had nothing to do with Avmax. He was asked if it would be a "Greg" project and he said it would if he went to work for Mr. Salum's company. If he had stayed at Avmax, it would still be a "Greg" project, as he was the only one left with any type of skill set to make this happen. With respect to the PowerPoint, Mr. Taylor gave evidence that while he was asked for it, he did not provide it, as he was then fired. With respect to the expectation of his own benefit in going to Mexico, Mr. Taylor gave evidence that he hoped something might come of it, but he was not sure that would be the case. Mr. Salum did want him on board to run the project and build the airplanes, and his goal was to support Mr. Salum.

74 There was considerable evidence provided at the hearing regarding Mr. Taylor's mitigation, employment since leaving Avmax, and financial information. In view of my finding, it is not necessary to outline this information.

III — ARGUMENT

A. Argument of the Respondent Employer

75 The Employer relied on the following authorities: *Faryna v. Chorny*, 1951 CarswellBC 133; *van Woerkens v. Marriott Hotels of Canada Ltd*. 2009 CarswellBC 195, *Lane v. Formula Powell L.P.*, 2011 CarswellNat 1410; *RSB Logistic Inc. v. Boyle*, 1999 CarswellNat 3546; *Mison v. Bank of Nova Scotia*, 1994 CarswellOnt 989; *Re Skelton and Skelton Truck Lines Ltd.* 1999 CarswellNat 6443; *Re Cowichan Tribes and Charlie* 2007 CarswellNat 7009; *Re Rogers Broadcasting Ltd. and Laratta* 2013 CarswellNat 157; *Lokane v. Bank of Montreal*, 2012 CarswellNat 1136; *Re White Bear Education Complex Inc. and Bigstone* 2009 CarswellNat 6908; *Pilisiko v. Frog Lake Education Board*, 1997 CarswellNat 5087; *P.C.L. Construction Management Inc. v. Holmes*, 1994 ABCA 358 (Alta. CA); *Re Desrosiers et Speedy Transport Group Inc.* 2014 CarswellNat 3258. Mr. Taylor did not offer any case authority in support of his arguments.

76 The Employer noted the Complainant managed multi-million-dollar projects for the Employer, one of which was Peregrine, which was started in 2011. He drafted the Statement of Work and was the external face of Peregrine for Avmax. The evidence of Mr. Parkin and Mr. Young was that Peregrine was never "terminated" at Avmax, but was "shelved" and would resume if customers were found for the project. It urged he breached his duty to hold the Employer's information confidential, and also breached a duty of fidelity owed to Avmax. The Employer noted Mr. Taylor dealt with external parties such as suppliers and customers and was involved in marketing to — and in locating — potential customers while employed by Avmax. He executed a Confidentiality and Non-Solicitation Agreement with AASI in 2011 (Ex. 3-33). It also urged the Complainant was subject to the Employee Manual of the Employer (Ex. 3-35), which directed employees to avoid conflict of interest and keep the information of the Employer confidential. The Employer urged the Complainant's successive promotions within Avmax placed him in a position of trust, and that he breached that trust by privately meeting with individuals from Mexico and promoting the Peregrine Project to them, which had been developed and pursued while he was employed at Avmax

77 The Employer urged it was unaware that the Complainant's trip to Mexico was anything other than a vacation. When the Employer learned that the Mexico trip was not just a vacation, it properly investigated Mr. Taylor and gave him the opportunity to admit his wrongdoing, which he did not do. He was not able

to demonstrate how what he was discussing with the Mexican individuals was different than the Peregrine Project. The Complainant placed himself in a conflict of interest, breached duties of confidentiality and fidelity and breached trust with the Employer. He used confidential information of the Employer for his own benefit, refusing to take responsibility for his dishonesty when investigated. His termination was therefore for "just cause".

78 The Employer urged that credibility is an issue in this case, regarding what was disclosed by Mr. Taylor about the business of FMS when he was first hired in 2008. Mr. Parkin's testimony was that Mr. Taylor disclosed his FMS business as helicopter software, which was not the business Avmax was in or pursuing, so there was no concern. Mr. Taylor's evidence was that Mr. Parkin knew — or should have known from a simple perusal of the FMS website — that FMS was also involved in fixed wing aircraft, and that his experience was in missionizing such aircraft. The Employer urged that Mr. Parkin's evidence should be preferred, as it would be inconceivable that an Employer would hire an employee if it knew that employee intended to compete with it in the same business in which it operated, being fixed wing aircraft, and in particular missionizing such aircraft. It urged that Mr. Parkin is no longer an employee of Avmax and has no vested interest in the outcome of this dispute and so his evidence should be preferred in this conflict. The Employer also noted that Mr. Thuna *does* have a vested interest in this litigation, as he has also been dismissed by the Employer and has commenced litigation for wrongful dismissal in the Court of Queen's Bench arising from these same facts, which Court action is ongoing.

79 The Employer argued that it does not matter if the Peregrine Project was not finalized, or if the information was not in a proprietary form. According to the Employer, Mr. Taylor was in a conflict of interest when he consulted on any fixed wing aircraft business while employed by Avmax. He admitted that he would personally benefit from the business and could not provide any particulars of how the aircraft he was discussing with the Mexican authorities was any different from the Peregrine Project.

B. Argument of the Complainant

80 For this part, Mr. Taylor argued that he has been accused of "theft", but has never been told what it was he has "stolen". He argued these allegations have impacted his ability to work in the city of Calgary, as people in the airline industry depend on integrity, since everyone has secrets they are trying to protect. He is 60 years old, with a 47-year career in the aviation industry and urged he would never jeopardize his career over something so risky as that alleged by the Employer. While

he was asking for reinstatement at the beginning of his case, he now is less inclined to again work for a company who would go to these lengths to accuse him of theft.

81 Mr. Taylor first argued that Peregrine was never an "aircraft level" project; there was never any specialized missions interior developed, as is clear from the evidence of Mr. Thuna and the documents themselves; There was no engineering completed on Peregrine; and certain of the drawings which Avmax argued are proprietary are actually drawings completed by Keith Rock, one of Mr. Thuna's employees; There was no systems integration completed for Peregrine; There was nothing proprietary in the equipment, as it was the same equipment used by all surveillance aircraft. He urged the concept of using that type of equipment is not unique to Avmax. He also argued there is no property in the name "Peregrine", as evidenced by the inability to trade-mark that name (Ex. 3-99). Mr. Taylor argued he is very familiar with confidential information and non-disclosure agreements, due to his extensive experience in this industry, and the use of such contracts with FMS. He urged that what made Peregrine unique was the price, as it contemplated the use of aircraft at a much different price point. Mr. Taylor argued Peregrine was only ever a marketing proposal that was never funded, as noted by the evidence of Mr. Young, Mr. Parkin and Mr. Binder. It was shelved, along with many other proposals. He also argued there was no evidence that thousands of dollars were spent by Avmax on Peregrine, and that the only monies expended were his salary while employed. While Avmax represented to the Government of Canada that it was committed to developing the project (Ex. 3-48), this was not in fact true, which speaks to credibility. He noted that several key people in Avmax were unaware of what was happening with the proposal, which also supports that it was only ever a marketing proposal.

82 Mr. Taylor further argued that Avmax holds no proprietary or confidential information relating to Peregrine other than the original marketing proposal which Mr. Taylor developed for it. He noted he was heavily invested in Peregrine, and had used many of his own contacts in the airline industry to loan equipment in order to get the prototype built. He noted his ability to accomplish this spoke to his own reputation in the airline industry. He testified Avmax had confidence in his ability, providing to him the "lead" for this project. In his view, therefore he considered it a "Greg" project; no one else in Avmax had the skills to build the aircraft.

83 Secondly, there was nothing "proprietary" that was ever disclosed by him in Mexico. He notes that himself, Mr. Thuna and Mr. Salum all agree that he was there as a technical adviser. It was his position Avmax does not have proprietary rights to the concept of terrestrial missionized aircraft, which is what the Mexican authorities were interested in. He argued Mr. Parkin had no evidence Mr. Taylor

had presented Peregrine, since his "source" was Mr. Taylor himself, who denied this. Mr. Taylor maintained that he was not promoting Peregrine in Mexico, was not "selling" anything, and was only an advisor to determine what equipment may be needed. Mr. Parkin also admitted that Avmax was no longer in the "special missions" market.

84 Mr. Taylor argued the evidence of Mr. Medanyiuk from the investigative interview is hearsay and should be given no weight, as it conflicts with the transcript which he produced from the recording of that interview, in paragraphs 12 and 14; and the transcript is more reliable. He urged he did not indicate he would be making a profit, rather this was an assumption from Mr. Parkin. He noted that in the investigative meeting, he repeatedly indicated that Peregrine was not discussed in Mexico. He also argued this was not a true "investigation", as the decision to discipline him by dismissal had been made before the meeting began. He further does not agree that he is required to return any documentation to Avmax, as he no longer works for Avmax. Mr. Taylor also argued that he believes Mr. Thuna is the real target of the termination, and that he was "collateral damage" to that intent.

85 Mr. Taylor urged that the invoices from FMS all indicate that he was actively working for FMS while he was employed at Avmax, and that some of the governments to which he was selling his software also had "fixed-wing" aircraft. He urged he has been actively involved in law enforcement activities since 1993. He argued Mr. Parkin understood and condoned what he was doing with FMS and that Mr. Parkin acknowledged that STARS did have a "fixed wing" division. He urged that Avmax was either aware — or should have been aware — of FMS's broad activities. If Mr. Parkin was not aware of what he was doing, all he had to do was visit Mr. Taylor's website, which mentioned both his fixed-wing and rotor-wing experience, knowledge and modification capabilities, which predated his employment with Avmax.

86 It was Mr. Taylor's position that he was honest and upfront in the investigation when asked about his activities in Mexico, and that he did not disclose any proprietary information in Mexico at any time. He maintains that he did not tell Avmax about the Mexico trip as it was not Avmax's business to know about it. He argued the information which he presented in Mexico was taken from the Internet and available to anyone, and that his knowledge of how to integrate systems in an aircraft pre-dated his employment with Avmax in any case. He also argued that the Mexican government are "end-users" and not "competition" to Avmax. He urged that Avmax has suffered no loss as a result of his actions, and Avmax could have been the recipient of benefits from his actions, if the Mexican authorities had chosen to purchase equipment from Avmax. He further urged that

had he proposed any other aircraft platform other than the one that had been chosen for Peregrine, the Employer's actions against him would likely not have been taken, yet he was making that promotion as he was aware of Avmax's stock of that particular aircraft. He "didn't take responsibility" as Avmax has urged, because he sincerely believed that he had done nothing wrong.

87 Mr. Taylor also urged that it was not reasonable for Avmax to suggest that he could no longer work on any missionized aircraft, or surveillance aircraft just because he had developed Peregrine for Avmax. He noted that his whole career has been in developing surveillance aircraft. He argued Avmax's actions against him have decimated his retirement plans and put his career on hold. He has suffered a significant drop in income.

C. Reply Argument of the Employer

88 With respect to certain of Mr. Taylor's assertion of damages, the Employer argued there was no evidence of any damage to his reputation or the selling of his home. It urged the decision in *Re Desrosiers et Speedy Transport Group Inc*, *infra*. dictates that the damages must be an "immediate and direct consequence of the dismissal" to be compensable: para. 53. Mr. Taylor has not provided any clear proof that he has suffered this damage. He has been able to find consulting work in the airline industry and is currently employed. The Employer also noted that it took no issue that Mr. Taylor was a good employee prior to the events in the fall of 2014, but that even good employees can be found guilty of theft: *Re Rogers Broadcasting Ltd. and Laretta*, *infra*. It also argued there was no "pre-judgment" of Mr. Taylor's termination. Mr. Parkin's evidence was that termination would not have been the option chosen had Mr. Taylor shown remorse and realized his wrongdoing at that time. There was no evidence this decision was made prior to that investigation. While the Employer acknowledged that every employee comes to his or her employment with knowledge, the issue in this case is the serious conflict of interest which occurred in this case when Mr. Taylor chose to consult on fixed wing aircraft modification work *while* he was employed with Avmax. The Employer strongly disagreed that it had any "ulterior motive" in pursuing Mr. Taylor through this process.

IV — ANALYSIS AND DECISION

A. The Legal Framework

1) The Concept of "Just Cause"

89 There is no definition in the *Canada Labour Code* of a "just" dismissal. In a review of the Unjust Dismissal provisions in *Canadian Imperial Bank of Commerce v. Boisvert*, *supra*, (leave to appeal to S.C.C. denied), Justice Marceau of the Federal Court of Appeal stated:

> Only a right of "just" dismissal now exists, and this certainly means dismissal based on an objective, real and substantial cause, independent of caprice, convenience or purely personal disputes, entailing action taken exclusively to ensure the effective operation of the business (at para. 39, concurring judgment)

90 *Port Arthurs Shipbuilding Co. v. Arthurs*, 1967 CanLII 30 (Ont. C.A.), rev'd on other grounds 1968 CanLII 29 (S.C.C.) is a frequently cited decision for what constitutes "just cause":

> ...If an employee has been guilty of serious misconduct, habitual neglect of duty, incompetence, or conduct incompatible with his duties, or prejudicial to the employer's business, or if he has been guilty of willful disobedience to the employer's orders in a matter of substance, the law recognizes the employer's right summarily to dismiss the delinquent employee (at p. 9)

91 The law further requires that the discipline decision be contextual and proportional, whatever the nature of the misconduct: *McKinley v. B.C. Tel*, 2001 SCC 38 (CanLII.). While that case dealt with dishonesty, the test has been found to apply to other forms of misconduct: for example, the British Columbia Court of Appeal in *Brazeau v. I.B.E.W.*, 2004 BCCA 645 (CanLII) applied the test to allegations of sexual harassment and discrimination.

92 The Court in *McKinley* stated:

> In light of the foregoing analysis, I am of the view that whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More specifically, the test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. Once could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer (at para. 46)

93 The Court found it is the nature and context of that conduct that had to be considered in determining if "just cause" for dismissal exists, or if some other discipline is warranted "...the question to be addressed is whether, in the circumstances, the behavior was such that the employment relationship could no longer viably subsist" (at para. 29). The Court also noted that the principle of proportionality underlies this approach. That principle requires that an "effective balance must be struck between the severity of an employee's misconduct and the sanction imposed" (at para. 53). The Court stated:

> Based on the foregoing considerations, I favour an analytical framework that examines each case on its own particular facts and circumstances, and considers the nature and seriousness of the dishonesty in order to assess whether it is reconcilable with sustaining the employment relationship. Such an approach mitigates the possibility that an employee will be unduly punished by the strict application of an unequivocal rule that equates all forms of dishonest behavior with just cause for dismissal. At the same time, it would properly emphasize that dishonesty going to the core of the employment relationship carries the potential to warrant dismissal for just cause (at para. 57)

94 The particular "business culture" is also important in applying a contextual approach and determining the seriousness of the misconduct: *Varsity Plymouth Chrysler (1994) Ltd. v. Pomerleau*, 2002 ABQB 512 (CanLII).

2) The Duty of Fidelity

95 As recognized by the Alberta Court of Queen's Bench in *CRC-Evans Canada Ltd. v. Pettifer*, 1997 CanLII 494, fundamental to every contract of employment is an implied duty of fidelity. This duty has been broadly described as the requirement for an employee to serve his employer "honestly and faithfully". What this means practically has been developed in various case authorities and commented upon by various authors. The duty of fidelity was described by the Court in *CRC-Evans Canada Ltd.* as a "flexible concept" that is recognized to be "paramount to the basic relationship" (at para. 45). The duty requires an employee to act in the best interests of his employer and to not follow a course of action that "harms or places at risk the interests of the employer" (at para. 45); to not to compete with the employer's business: *Imperial Sheet Metal Ltd. v. Landry*, 2007 NBCA 51 (CanLII) and to maintain the employer's information in confidence. These principles are summarized in R. A. Brait, "Confidentiality in the Employment Relationship" (1990) 5 I.P.J. 187 at 188 and R. Brait and B. Pollock,

"Confidentiality, Intellectual Property and Competitive Risk in the Employment Relationship", *The Canadian Bar Review*, [2004] vol. 83, p. 585 at 587, 2004 CanlII Docs 94. The duty of fidelity — which includes a duty of non-competition — does not require that theft of information has occurred before it is breached.

96 The Federal Court of Appeal considered the issue of what is a conflict of interest in the context of the Unjust Dismissal provisions in *Canadian Imperial Bank of Commerce v. Boisvert*, [1986] 2 F.C. 431 (C.A.); leave to appeal to S.C.C. refused, (1986) 72 N.R. 367. In that case, it was urged that an employee of a bank had placed herself in a conflict of interest position by living with a known criminal, who subsequently robbed two banks. The Adjudicator had disagreed, holding that the employee had not done any wrongful action personally. The Court allowed the Appeal and sent the matter back to the Adjudicator. Discussing the concept of "conflict of interest", Justice Marceau (concurring with the majority in the result but not that the matter should be remitted back to the adjudicator) stated:

> I think it better to reserve the concept of a conflict of interests for a situation in which an employee engages in *activities which are external and parallel to those he performs as part of his job, and which conflict or compete with the latter*. I think one can speak of the loss by the employee of a characteristic or attribute which might reasonably be regarded as necessary for carrying out the employment, *resulting in a loss of confidence by the employer such that ordinary employer-employee relations could not continue* (at para. 40, emphasis added)

97 The Court sent the matter back to the adjudicator "on the basis that, by placing herself in a situation of incompatibility with the interests of her employer, the respondent had provided just cause for her dismissal without notice" (at para. 30).

98 In *Downham v. Lennox (County)*, 2005 CanLII 45197 (ON SC), the Ontario Supreme Court noted: "A conflict of interest arises where an employee has a personal "interest sufficiently connected with his professional duties that there is a reasonable apprehension that the personal interest may influence the actual exercise of the professional responsibilities" (at para. 189), citing *Cox v. College of Optometrists (Ontario)*, 1988 CanLII 4750 (On SC); leave to appeal denied (1988) Admin. L.R. xliv (C.A.).

3) The Analytical Framework to be Applied

99 In the recent seminal decision of *Wilson v. Atomic Energy of Canada Limited*, 2016 SCC 29, the Supreme Court found that the intent of Parliament in enacting the Unjust Dismissal provisions was to "conceptually align the protections from unjust

dismissals for non-unionized federal employees with those available to unionized employees" (at para. 46). This confirms that the concept of "unjust" dismissal is flavored with the law developed by labour arbitrators around the concept of "just cause". Even prior to this decision, adjudicators had applied the framework in *Wm. Scott & Company Ltd.* BCLRB No. 46/76 ("*Wm. Scott*") to discharge decisions, developed by labour arbitrators, which the Federal Court had found reasonable: *Kelowna Flightcraft Air Charter Ltd. v. Kmet*, 1998 CanLII 8108at para. 19. The *Wm. Scott* framework poses three questions (at p. 8):

> 1. Has the employee given just and reasonable cause for some form of discipline?
>
> 2. If so, was the employer's decision to dismiss the employee an excessive response in all the circumstances of the case? and
>
> 3. If so, what alternative measure should be substituted as just and equitable?

100 *Wm. Scott* provides non-exhaustive sub-factors to aid the assessment of whether discharge is an excessive response.

101 The Employer bears the onus to establish that the conduct of the employee warranted discipline and that termination was a just response. In order to answer the first question outlined in the *Wm. Scott* framework and determine if there was some cause for discipline, it is necessary to examine the duties Mr. Taylor is alleged to have owed his Employer, and whether those duties were breached, including the argument that Mr. Taylor was provided permission to continue with his consulting work when hired.

B. What Duties did Mr. Taylor Owe to his Employer?

102 In this case, Mr. Taylor is alleged to have breached the duty to avoid a conflict of interest and breach of confidential information, which is a breach of not only in the implied duty of fidelity, but also in Employee Manual and Mr. Taylor's contractual obligations in the CNS Agreement.

103 The implied duty of fidelity was noted previously in this decision. Several of the common law principles relating to the implied duty of fidelity have also been incorporated by Avmax in its Employee Manual (Ex. 3-35), including the duty to keep the employer's information confidential, and to avoid any conflicts of interest. The Manual notes that employees are not to compete with the Employer in outside employment "for any organization operating or maintaining "regional"

aircraft or that otherwise constitutes a conflict of interest (section 13.0 and 13.2). The Employee Manual outlines that any "materials, products, *designs, plans, ideas and data*" are the property of Avmax and are not to be given to outside individuals (emphasis added). It also notes that, even if an employee has not financially gained from the disclosure, the conduct is unacceptable, and the employee could be subject to discipline, including termination (section 13.1).

104 The duty to keep information confidential is not only incorporated in the Employee Manual, but also exists in the CNS Agreement which Mr. Taylor executed as part of his role as Director of Special Missions in October of 2011 (Ex. 3-33), which role was during the currency of the development of Peregrine. What the parties agreed to as "Confidential Information" is set out in Article 2 of that Agreement and includes "actual or contemplated business plans...marketing data and plans....instructional or informational material, promotional materials...any product and related information, including designs, whether patentable or not that comes out of Product Development..." and "any other information, the disclosure of which could adversely affect the Company, or its competitive position" (emphasis added). While Mr. Taylor was not carrying out that role at the time of his termination, Article 2 states that the duty to keep the Employer's information confidential survives termination of that employment. While Mr. Taylor urged that Avmax has not been harmed by his actions, this Agreement stipulates that any disclosure of confidential information has been agreed by the parties to be "highly detrimental" to Avmax: Article 2.2(a).

1) Was Mr. Taylor in a "Conflict of Interest" with Avmax?

105 Ex 3-104 is a transcript that was entered into evidence of this investigative interview conducted by Mr. Parkin. It states, in part:

> Mr. Parkin...So you view the inception of the Peregrine idea as yours?
>
> Mr. Taylor: "Yeah"
>
> Mr. Parkin: Any you were pushing it as yours even while you were employed at Avmax.
>
> Mr. Taylor: Well yeah....it was a concept...a concept that I thought had legs and so I wanted Avmax to do it. So I did all the groundwork, I did all the digging, I did all the talking to suppliers trying to, you know, using my contacts through helicopters to get these guys to give me, using my personal reputation to get people to give me equipment, so that we could do it on the cheap essentially at Avmax, and that got blown back in my face. But I didn't take

that as a negative, I mean it was a business decision, I get that, life goes on, so you know, yeah, *I thought we can do something with it, somewhere else*

(emphasis added).

106 I find that Mr. Taylor was heavily invested in Peregrine; he had considerable "skin in the game" as he described it. He was very disappointed that Avmax was not intending to develop Peregrine and he had been intent on trying to find customers for the project on behalf of Avmax, even after it was "shelved" by Avmax. I also find as a fact that, since Avmax had decided it was not going to develop the concept, Mr. Taylor was intent to try to do so on his own and felt that there was no conflict with him doing so: the Hilton Head office had been shut down, and Marty Craig, who had the missionizing experience was no longer an employee of Avmax by August of 2014. He himself had been shunted to leasing, so in his mind Avmax no longer had any intention of pursuing special mission aircraft.

107 Mr. Taylor had a duty not to compete with his employer, or engage in activities which were "external and parallel" to those he performed for Avmax. I find that Mr. Taylor placed himself in a conflict of interest situation by traveling to Mexico to discuss a fixed-wing missionized aircraft with the Mexican authorities — a potential customer of Avmax — while still employed by Avmax. This intention is evident from the emphasized portion of the transcript of the investigative interview, reproduced above. I find this action was external and parallel to the job duties which he had performed at Avmax, and in conflict with his duties and obligations to Avmax. In my view, it is not material to this determination that Avmax had "shelved" the project, as the undisputed evidence was that Avmax had the capability to develop the aircraft, had a customer been found (such as Mexico), and that Mexico was on the list of countries which Avmax intended to market its missionized aircraft to (Ex. 3-40).

108 Mr. Taylor has argued Mexico is an "end user" and not a competitor However, Mr. Salum — to whom Mr. Taylor was consulting — was trying to "sell" the concept of developing missionized aircraft to the Mexican authorities. If Mr. Taylor identified Mexico as a potential customer of a fixed-wing missionized aircraft product, whether the same or similar to Peregrine or not, his duty was not to consult to a potential rival competitor (Mr. Salum) to develop that project — even at the early stages — but to bring that opportunity to Avmax. To consult with Mr. Salum to build a missionized fixed wing aircraft while he was employed with Avmax was to place himself in a conflict of interest with the interests of Avmax. This obligation was not impacted because Avmax had decided not to pursue the Peregrine project. The evidence was that Avmax was a project-based company

which built to customer specifications. As Mr. Binder indicated, if a potential customer was brought to Avmax and it didn't have people to do certain types of work, or didn't have certain types of equipment, it would seek out those people and that equipment. At the very least, while he was employed by Avmax, Mr. Taylor's duty was to bring the opportunity to build a missionized aircraft for Mexico to Avmax, rather than consult with — or pursue — that opportunity for his own personal gain, with the option to buy aircraft from Avmax.

109 It was also alleged that not only did Mr. Taylor place himself in a conflict of interest by his Mexico trip, but he also breached his obligation not to share confidential information of Avmax with the Mexican authorities. This raises questions of what is considered "confidential information" and whether such information was in fact disclosed.

2). Did Mr. Taylor Disclose Confidential Information of Avmax?

a/ Was the Information Relating to Peregrine Confidential?

110 The first question to be resolved in this determination is whether the information relating to Peregrine was in fact "confidential". Mr. Taylor spent time at the hearing trying to determine from the witnesses what they considered "proprietary" about Peregrine. A significant aspect of Mr. Taylor's defence is that there was nothing "proprietary" about Peregrine as it was just a "concept" or "proposal"; it was just an "idea" that had not yet been developed, integrated or engineered and nothing was patented or trademarked. He emphasized it had not been patented and had not been developed past a "high level" marketing stage. Mr. Thuna gave evidence that Peregrine had not been reduced to engineering drawings, and that systems for Peregrine had not yet been integrated. His evidence was he felt there was no "property" in a Proposal. His position was that such a "high level" idea or concept did not constitute confidential information. Mr. Taylor's second defence to the Employer's allegations is that none of the information he shared in Mexico was proprietary but was simply promotional material available about equipment, taken from websites.

111 The CNS Agreement was entered into in 2011, when Mr. Taylor was Director of Special Programs. At the time of his termination, he did not hold that role. Even so, the contract indicated that even plans, marketing data and ideas were considered by the parties to be "confidential". His obligation to Avmax was to continue to keep that information confidential.

112 However, even if that CNS Agreement did not exist, the common law recognizes there are four main elements that identify information as confidential:

a. The value to the owner in keeping it secret, including the amount of effort or money expended in obtaining and developing the information and the fact the information has acquired commercial value: *International Corona Resources Ltd. v. Lac Minerals Ltd.* (1987) 62 O.R. (2d) 1; affirmed 1989 CanLII 34 (SCC)

b. The information is relatively secret and not common knowledge. The owner of the information must "limit the dissemination of it or at least not encourage or permit widespread publication: *Lansing Linde Ltd. v. Kerr*, [1999] 1 All E.R. 418 (C.A.); The usages or practices of a particular industry can guide a determination of accessibility: *Thomas Marshall (Exports) Ltd. v. Guinle*, [1978] 3 W.L.R. 116 (Ch.D.);

c. Reasonable measures were "put in place to protect the information"; it has not been widely disseminated: *R.I. Crain Limited v. Ashton Press Manufacturing Company Limited*, [1949] O.R. 303 (S.C.; aff'd [p1950] 1 D.L.R. 601 (Ont. CA); as noted in and

d. The information is "original, identifiable and concrete": *Cradle Pictures (Canada) v. Penner* (1977) 34 C.P.R. (2d) 34 at 47.

As summarized in R. Brait and B. Pollock, "Confidentiality, Intellectual Property and Competitive Risk in the Employment Relationship", *The Canadian Bar Review*, [2004] vol. 83, p. 585 at 587, 2004 CanlII Docs 94.

113 In my view, these pre-conditions have been met in this case.

114 The evidence was Avmax spent a considerable amount of time and resources developing the Peregrine Project and was marketing that information as it believed it had something unique, original and of commercial value in Peregrine. Mr. Taylor argued the only resources were his salary. However, he disregards his salary as a considerable investment and I disagree with that assessment. Further, Mr. Taylor had determined that no other aviation company could develop a certain aircraft in the manner Avmax was proposing, which attributes he felt would make it commercially viable and profitable for Avmax. Mr. Binder gave evidence that it was a "race to the finish line" regarding this aircraft. Most telling in this regard is that — when the information surrounding Peregrine was marketed to the Government of Canada in 2011 as a replacement for Fixed Wing Search and Rescue Aircraft (Ex. 3-48) — the documentation was clearly marked and protected as "confidential" on each page. Mr. Taylor authored that document. Whatever stage Peregrine was at in 2011, Mr. Taylor clearly felt it was confidential.

115 As noted by the evidence given at this hearing, the choice of platform was an important aspect of developing a unique product. That there was an importance in this industry to keeping even the aircraft chosen as confidential, at least at early stages, is also demonstrated by Ex. 3-95 "India's Mid-Tier Maritime Patrol Aircraft Competitions", which is an article which goes through several aircrafts and their "rumoured" aircraft platforms. While there were only limited suppliers of equipment in the industry, the choice of which equipment best suited which type of aircraft, and how that equipment would interact, was also something which was developed and protected as confidential when Avmax brought on suppliers, and when it marketed Peregrine to the Government of Canada.

116 That Mr. Taylor, Avmax and Mr. Craig — who originally presented the concept — all believed Peregrine was unique and not common knowledge was evident in an email sent from Marty Craig to Mr. Taylor discussing the economy of building an aircraft. Mr. Craig suggested that a "computer model" be considered, which would involve much less expense than an actual build. In that email, Mr. Craig stated: "As it stands right now, we are selling a concept that we want the customer to "imagine" ....With computer models we can trade mark it and sent [sic] it to customers by e-mail under PIAs or NDA." This reference is to Proprietary Information Agreement (PIA) and Non-Disclosure Agreements (NDA). As indicated in this email, Mr. Craig clearly thought the concept or idea of Peregrine — as it existed in October of 2011 — was confidential and worth protecting and was being "sold" by Avmax to potential customers.

117 That Mr. Taylor thought so as well is demonstrated by a more detailed review of the proposal made to the Government of Canada (Ex. 3-48), already mentioned. This document was authored by Mr. Taylor in pursuit of customers for Peregrine, dated September 16, 2011. Each page has the following notation on the bottom "*Company Confidential — Not intended for general distribution*". Section 2 outlines what Peregrine is, including the benefits of the aircraft chosen for the Peregrine Project, with the "latest, state of the art mission equipment installed", listing that equipment and its capabilities. This Proposal notes the significant benefits to the choices being made by Avmax for the equipment and the advantages of the aircraft, (which will not be further detailed, to protect this information). Section 2.1 contains a detailed description of the equipment to be placed on the Peregrine, including ARTIS, which is noted as being an "Avmax proprietary data collection and distribution system". Section 3 is titled "Potential Partners and Business Arrangements". In this section it outlines that Peregrine is a "unique" solution to an ISR requirement and will be equipped with various Avmax proprietary systems.

118 The key section of this proposal for the purpose of this dispute is section 6.2 entitled "Risks". This is a section outlining risks to the Canadian government and risks to Avmax. Under "Potential risks to Avmax" is the following:

Corporate espionage

-*Loss of program concept to competition.*

119 If a "smoking gun" were necessary to establish that the *concept* underlying Peregrine — as it had been developed to 2011 — was in fact understood by Mr. Taylor to be confidential information, and treated as such by Avmax (regardless of whether it was ultimately developed), Ex. 3-48 is that weapon. This concern with corporate espionage is consistent with the evidence that there was a "race to the finish line" to bring a product like Peregrine to the market, and further supports that Peregrine was "unique" in the marketplace, and was not "common knowledge".

120 Mr. Taylor has argued that there were only a few suppliers available in the market for this equipment, so the equipment on Peregrine could not be considered as confidential. I find I cannot agree. First, had this been the case, there would be no need to indicate on Ex. 3-48 that the information developed for Peregrine was "confidential", or a concern that the concept could be lost to the competition. Second, the evidence discloses that part of Mr. Taylor's job even at the early stages was to research and make conscious choices regarding what equipment should be included on Peregrine, and how that equipment would operate and integrate with the other choices made, including with Avmax's proprietary ARTIS system. Third, Mr. Taylor was aware that the *choice of aircraft* was an important component of the concept of Peregrine: a product could be created that had an attractive price point for the market, in view of Avmax's own inventory of aircraft, and whose specifications and capabilities would give it a market edge. Mr. Thuna acknowledged this choice was the "one thing" that could possibly make Peregrine unique in the market.

121 Finally, Avmax put in place measures to protect its confidential information. The Employee Manual made clear to Mr. Taylor that *concepts, ideas, marketing information, plans*, data, products and designs were considered confidential information by Avmax. It prohibited employees entering into a conflict of interest situation, prohibited outside employment in the fixed wing market while employed by Avmax, and retained the ability to approve all outside employment. It took these measures rather than relying solely on the implied duty of fidelity, and duty not to compete, which existed at common law. NDA's and PIA's were entered with suppliers even when discussions of Peregrine were at an

early stage. The evidence was this was to protect the confidential information of both parties. When the proposal was marketed to the Government of Canada (Ex. 3-48), each page was marked as "confidential". If there was nothing unique about Peregrine at the early stage of its development, such contracts and protection would not be necessary.

122 In summary, while I recognize that Mr. Taylor's belief that the information relating to Peregrine was at a "high level" stage or just a "concept" and so was not confidential, that belief was incorrect. Information does not need to be "proprietary", fully developed, engineered or subject to a trademark to be caught within "confidential information", which is then subject to an employee's duty of fidelity. While this is true at common law, the CNS Agreement executed by Mr. Taylor was also specific in this regard. That agreement included "high level" *ideas, plans* and information as confidential, *whether or not* integrated, developed or reduced to engineered drawings.

b/ Did Mr. Taylor Disclose any Confidential Information?

123 Mr. Taylor maintained that he did not share with the Mexican authorities any confidential information about Peregrine. He argued Mr. Parkin had no information of what was shared in Mexico, other than what Mr. Taylor said, and Mr. Taylor had denied sharing Peregrine information. Mr. Taylor did admit he showed the Mexican authorities a PowerPoint that he was not able to produce at this hearing as the laptop it was on had been corrupted two years earlier (so in 2017). The Employer was therefore unable to compare that PowerPoint with Ex. 3-46, which was a "high level" marketing PowerPoint created by Mr. Taylor to market the Peregrine Project. Mr. Thuna was not able to say what information was in the PowerPoint Mr. Taylor presented, and neither was Mr. Taylor, even though both were at the meetings, and even though Mr. Taylor put together the PowerPoint presentation. Mr. Taylor was asked for a copy of the PowerPoint in September of 2014 in the investigative interview, three years before it became corrupted. He was therefore aware in September of 2014, shortly after returning from Mexico, that the PowerPoint was an important piece of information to the Employer. While he agreed to provide it initially, he ultimately did not do so. If the PowerPoint exonerated Mr. Taylor, it is curious that he would not have taken steps to protect that information, back it up off his laptop and produce it at this hearing, as was the case with several other documents relating to Peregrine.

124 However, even without the PowerPoint, the evidence has established that Mr. Taylor was marketing to Mr. Salum the same aircraft that had been chosen for Peregrine for a missionized aircraft and the equipment that would be

suitable for that aircraft. This was clear not only from Mr. Taylor's evidence, but from the Affidavit of Maricio Salum which was entered into evidence by Mr. Taylor. Mr. Salum indicates in this Affidavit that Mr. Taylor was present in Mexico to suggest "custom mission configurations appropriate to the needs of my clients" and also that "Mr. Taylor *referred to the relative merits of different aircrafts as the base platform* and suggested that [the aircraft used for Peregrine] could support the desired equipment and better meet the mission's overall objectives and requirements". Mr. Taylor knew the relative merits of different equipment for a fixed wing missionized aircraft capable of maritime or terrestrial patrol, as he had just spent considerable time as an employee of Avmax over the last few years assessing and determining the merits of various aircraft and equipment and choosing which would best support a marketable missionized fixed-wing aircraft in the current marketplace. At the very least, this conclusion was established through the work that Mr. Taylor had been performing for Avmax, was shared with a potential competitor to Avmax (Mr. Salum), and marketed to a potential customer of Avmax (Mexico).

125 After considering all the documentary and oral evidence tabled, I have determined that what Mr. Taylor did in sharing information with the Mexican authorities was to take the concept or idea of Peregrine, which was confidential information — and which included the concept of converting a *particular aircraft* into a missionized aircraft with a certain "mission suite" — and presented that concept or idea to the Mexican authorities as one option for them to consider. Mr. Salum's evidence was that Mr. Taylor promoted the same aircraft to him that was chosen for Peregrine, and Mr. Taylor gave evidence that he promoted much of the same equipment. Mr. Thuna's evidence confirmed what the documentary evidence also established with respect to the uniqueness of the particular airframe choice. It was Mr. Taylor's admitted intention that — if the Mexican authorities decided to proceed — there was a possibility he would quit and work full-time for Mr. Salum and try to broker the purchase of the same aircraft from Avmax that Avmax had intended to use for Peregrine, providing the same market advantage that had been discussed by Avmax as fitting a need in the marketplace (as he was aware Avmax had this particular airframe to sell as a used aircraft). There was no intention to bring the opportunity to Avmax for it to pursue. The issue of the impact of any restrictive covenants on Mr. Taylor's plan to quit and work for Mr. Salum is not before me. For the purposes of this decision, Mr. Taylor has admitted that this was not an opportunity he was pursuing for Avmax.

126 I find at the very minimum that Mr. Taylor met with Mexican authorities in August of 2014, that he promoted a version of the Peregrine Project to those authorities, and at least promoted the *concept* and idea of creating a missionized

aircraft similar to Peregrine, using the same aircraft, and with the same or similar system capabilities or "mission suite", which was unique to the product being developed by Avmax. I find that the information which Mr. Taylor shared to the Mexican authorities was confidential information of Avmax — both at common law and by contract — which was shared with a potential customer of Avmax to promote a potential gain to Mr. Taylor personally, should the project proceed. I find that his actions breached his common law and contractual obligations to keep this information in confidence.

127 Mr. Taylor has urged that it is not reasonable to prevent him from competing in the fixed wing missionized aircraft industry, as he has been working in that industry his entire career. However, this is not a case determining the breadth of a restrictive covenant, or whether Mr. Taylor can compete after his employment with Avmax is finished, or which knowledge is innate to him and which is confidential to Avmax. The issue in this case involves two issues which arose *during* Mr. Taylor's employment with Avmax: first, did Mr. Taylor place himself in a conflict of interest by consulting on missionizing fixed wing aircraft *while employed* by Avmax? And secondly, did he share Avmax's confidential information while doing so. While I have found both issues to be established, even if Mr. Taylor had not shared confidential information of Avmax in Mexico, the fact that he chose to consult on missionizing fixed wing aircraft while being employed by Avmax would have breached his duty to avoid a conflict of interest with Avmax while employed, and would give cause for discipline.

128 As Mr. Taylor has argued he disclosed his business interests generally to Avmax upon hire, the next question is whether Avmax was aware of — or condoned — Mr. Taylor's consulting work with the Mexican authorities.

C. Did Mr. Taylor Disclose his Outside Employment Interests to Avmax

129 Mr. Taylor has argued that he disclosed his consulting work through FMS at the time of his hire and that Avmax approved that work. The Employer has argued that the restriction on Mr. Taylor's conduct was broad: he was not to consult on any fixed-wing aircraft, as noted in the Employee Manual. I pause to note here that just because a restriction appears in an employee manual or policy, it does not necessarily follow that it can be legally imposed. In this case, however, the obligation not to pursue outside employment in the fixed wing market is consistent with the common law obligation to avoid competing with Avmax as employer, or placing oneself in a conflict of interest position against the best interests of Avmax, as previously noted.

130 The Employer argued that in 2008, it was aware of Mr. Taylor's work to market and sell his "Moving Map" software in the rotary-wing market, and that it approved this outside employment, through FMS, in that market. This approval was given because Avmax did not work in the rotary-wing market. Mr. Taylor argued the Employer knew — or should have known — that he did broad consulting work and aircraft modification work in the fixed-wing market through the corporate vehicle of FMS when it hired him, which they could have determined from reviewing the website of FMS and seeing what was advertised, if there was any question of what FMS did.

131 Upon listening to the oral evidence, and reviewing the documentary evidence tabled before me, I am satisfied that Mr. Taylor and Mr. Parkin had a very cursory discussion regarding FMS at the time of Mr. Taylor's hire. While I am satisfied that there was disclosure of work done through FMS to Avmax, to the extent it was discussed I find that both Mr. Taylor and Avmax understood that disclosure to be that Mr. Taylor would be pursuing work in the helicopter industry marketing his "Moving Map" software. I am not satisfied that there were any further discussions at that time between the parties, or any other understanding that broader outside consulting work was approved. The outside employment disclosure was not reduced to writing and I was frankly left with the impression that neither Mr. O'Hearn, Mr. Parkin or Mr. Taylor gave the issue further thought. According to Mr. O'Hearn, it was the work Mr. Taylor had done developing the "Moving Map" software and bringing it to market that brought him to the attention of Avmax, which needed this expertise for certain products it was developing at that time. I am further satisfied that Avmax had no reason to believe Mr. Taylor would be undertaking — nor did Mr. Taylor disclose any intention to undertake — any other consulting work through FMS, whether in fixed-wing, rotary-wing or otherwise. With respect to Mr. Taylor's argument that Avmax "should have known" of his broad consulting interests from a review of his website, the obligation was for Mr. Taylor to disclose; not for Avmax to discover. Therefore, I do not agree with Mr. Taylor that Avmax knew — or should have known — the breadth of his business interests in fixed-wing aircraft consulting and modification from a review of his qualifications and consulting work on his website. I do not impute knowledge to the Employer that the work of FMS could at some point include Mr. Taylor consulting on missionizing aircraft, on the basis that he had done that type of work in the past with STARS Air Ambulance and the Calgary Police, and held both fixed and rotary wing certifications.

132 While FMS as a corporation may be broad enough to do other work — and its website may or may not have advertised that breadth — the issue is not

what work *could* have been done through the vehicle of FMS by Mr. Taylor — or had been done in the past — but what work he *disclosed* to Avmax as his outside employment interests when he signed his employment contract — or subsequently — and what outside work Avmax then approved. I find Mr. Taylor was aware of his obligation to disclose any outside employment to Avmax, that he did so with marketing the "Moving Map" software and that he did not disclose any further consulting work to Avmax after his date of hire. I find that he did not disclose that he was meeting with Mexican officials regarding missionizing aircraft for possible use by the Mexican government in the fall of 2014. In my view, the evidence tabled before me supports this conclusion for the following reasons.

133 First, I agree with Avmax that any agreement to allow Mr. Taylor to consult on missionizing fixed wing aircraft while he was employed and paid by Avmax to do the same type of work would be inconsistent with Mr. Taylor's obligations to Avmax, potentially damaging to Avmax's business interests and would need clear evidence in support — especially in this industry — which evidence was lacking in this case. Rather, I find the evidence that does exist discloses that Avmax was intent on protecting its confidential information, including when it presented its proposal to the Government of Canada (Ex. 3-48), and in procuring Proprietary Information Agreements and Non-Disclosure Agreements with suppliers, even at the early stages of Peregrine. Allowing Mr. Taylor to broadly consult with potential competitors or potential customers of Avmax in the special mission field for missionizing fixed-wing aircraft, while he was employed at Avmax, would be inconsistent with — and defeat — these efforts. This is consistent with the Employee Manual, which states that outside employment in the fixed-wing industry was prohibited.

134 Secondly, the actions of the parties after Mr. Taylor's hire are consistent with an initial understanding that Mr. Taylor was marketing his "Moving Map" software in the helicopter industry: Mr. Taylor was given time off by Avmax to market his Moving Map at helicopter shows and there was no evidence he was given any time off to pursue other business opportunities while employed at Avmax. Nor was there any evidence from Mr. Taylor that he pursued any other broad business interests before 2014. Mr. Taylor produced FMS invoices from the time period when he was employed with Avmax. All the invoices he produced relate to the "Moving Map" software — licensing, supporting products, etc. No invoice was produced for any other consulting work performed, whether fixed-wing or rotary-wing, or any aircraft modification work — missionizing or otherwise — during his employment with Avmax, and I find that no such work was undertaken or disclosed prior to his meeting with Mexican authorities in 2014.

135 In summary, if Mr. Taylor wanted to engage in any consulting work for other entities on missionizing fixed-wing aircraft while employed at Avmax, such employment was required to be disclosed and could only be undertaken if approved by Avmax. Mr. Taylor's consultation with the Mexican authorities was neither disclosed nor approved. I have found Mr. Taylor was guilty of misconduct, both for placing himself in a conflict of interest to potentially compete with his Employer, as well as breaching his duty to keep his Employer's information confidential. I find his Employer did not approve his outside interests. I further find discipline for that behavior was warranted. The next question is whether the discipline of termination was an excessive response.

D. The Second Wm. Scott Question: Was Termination an Excessive Response?

1) The Wm. Scott Factors

136 As previously noted, various sub-factors are listed in *Wm. Scott* to aid in a determination of the second question: whether the discipline imposed by the Employer was excessive. In noting these factors, it is important to emphasize that while they provide a framework, they are not an exhaustive list of all factors which are relevant. As noted by Chair Weiler, the "point of the overall inquiry" is to recognize that conduct cannot be considered in the abstract, and that there is no "automatic" discharge for certain types of conduct, no matter how serious or significant (at p. 8). I will first address the misconduct within the framework of the *Wm. Scott* sub-factors and then more broadly.

(i) "How serious is the immediate offence of the employee which precipitated the discharge (for example, the contrast between theft and absenteeism)"?

137 In my view, the misconduct of Mr. Taylor is significant and serious. The Employer has characterized this conduct as "theft" and "dishonesty". It urged Mr. Taylor was in a position of trust, that he breached that trust and that his misconduct was serious and significant for an individual in such a position. I agree with the Employer that Mr. Taylor was in a position of trust, with a high degree of autonomy. I further agree that misconduct of placing oneself in conflict with an employer and in sharing confidential information is conduct which goes to the fundamental obligations owed by an employee to an employer and impacts the confidence which an employer has in the viability of the continuing relationship. For the purposes of this decision, I do not need to determine whether Mr. Taylor's conduct is characterized as dishonesty — which carries with it a deceitful element — or theft. Whether it can be characterized as such or not, I find his conduct significantly interfered with his obligation to carry out his duties

faithfully, competed with the interests of his Employer and was fundamentally and directly inconsistent with Avmax's best interests and with his employment obligations.

(ii) "Was the employee's conduct premeditated, or repetitive; or instead, was it a momentary and emotional aberration, perhaps provoked by someone else?"

138 In this case, Mr. Taylor's trip to Mexico was not a momentary event but was pre-meditated and planned. The evidence was that he and Mr. Thuna had been talking to Mr. Salum and planning the trip for the six months before the fall of 2014. He prepared materials to present in Mexico for the missionizing of aircraft, including a PowerPoint slide show that he was not able to produce. On this point, neither Mr. Taylor nor Mr. Thuna were able to give evidence on what was included in the PowerPoint slide show, even though both men were present when it was presented, and both had some part in its creation. Mr. Taylor was made aware in September of 2014 that the Employer wanted to see the PowerPoint he had used, to determine if it was the same as Ex. 3-46, which was the PowerPoint developed to market Peregrine. While Mr. Taylor was initially prepared to provide that information to the Employer when first asked in his investigative interview in 2014, he later decided not to do so, even though the provision of the PowerPoint would have exonerated Mr. Taylor and demonstrated he had not been using Peregrine marketing material in Mexico, if it was dissimilar to Ex. 3-46.

(iii) "Does the employee have a record of long service with the employer in which he proved an able worker and enjoyed a relatively free disciplinary history?"

139 Mr. Taylor had been employed by one of the Avmax companies for approximately six years at the time of the incidents of 2014. While a six-year employment history is not considered "long service", Mr. Taylor was recognized as a good employee, a "team player" and enjoyed a discipline-free history.

(iv) "Has the employer attempted earlier and more moderate forms of corrective discipline of this employee which did not prove successful in solving the problem?"

140 No other attempts at corrective discipline were attempted. Mr. Taylor urged he should have been subject to progressive discipline, rather than terminated. He noted he had strong performance assessments prior to this point, and had not been subject to any discipline. In response to this argument, the Employer noted that Mr. Taylor failed to admit his wrongdoing, even when directly asked about his actions in Mexico, and had no accountability for his actions. Given the serious nature of the conduct, in such circumstances termination was a measured and warranted

disciplinary response rather than progressive discipline: *Re Rogers Broadcasting Ltd. and Laratta*. It therefore urged that dismissal was warranted.

141 If the misconduct goes to the root of the contractual obligations, it has been recognized that progressive discipline measures may not be appropriate, as the relationship may be too fractured to provide the employee a second chance under a progressive measure. In the investigative meeting, when confronted with Avmax's views of his actions, Mr. Taylor maintained that he had done nothing wrong and in fact felt his actions may have been "good" for Avmax and brought business to it, as a result of helping someone else develop the concept of missionizing a particular aircraft, which Avmax had decided not to pursue, with aircraft it had earmarked for its own project. Mr. Taylor had determined that — since Peregrine was not yet an engineered aircraft, but only a "concept" or "idea", he could pursue it elsewhere. While this does show a lack of self-awareness into the seriousness of his conduct, in my view, it is not Mr. Taylor's lack of self-awareness that is striking from the investigative interview. Rather, it was his inability to rebut that what he was marketing to Mexico was any different than Peregrine. Mr. Taylor had admitted that he was trying to see if he could develop what he had worked on for Avmax elsewhere, as noted in the transcript.... "so, you know, yeah, *I thought we can do something with it, somewhere else*". It is also significant that this was pursued by Mr. Taylor even though he was alive to the risk of corporate espionage for the concept of Peregrine, as noted in the Proposal which he authored: Ex. 3-48.

142 Misconduct that is "fundamentally or directly inconsistent with the employee's obligations to his or her employer" or that goes to the "root of the contract" ground dismissal without progressive measures of discipline. So long as the response is a proportional one in all the circumstances, it can be defended. Given the importance of confidential information to Avmax, the risk to it in maintaining a continuing relationship with Mr. Taylor by imposing another form of discipline which would maintain his employment was significant. A revelation of disloyalty to the interests of Avmax is at odds with the continuation of that relationship.

(vi) "Is the discharge of this employee in accord with the consistent policies of the employer or does it appear to single out this person for arbitrary and harsh treatment?"

143 The Employer had outlined in its Employee Manual that it would consider certain infractions, including conflict of interest, as "major" infractions, for which progressive discipline would not necessarily be followed. I pause to note that even in situations where an Employer has set out in an employee manual that

a certain action will result in a certain discipline response such as termination, that determination is subject to review to determine if it is proportional to the wrong which occurred. Discipline must be a measured — rather than an automatic — response, even in serious cases. The Employee Manual alerted employees that the infractions that would be considered "major" and subject to immediate termination without following the progressive discipline model (bearing in mind the requirement to consider proportionality for each disciplinary response) were sexual harassment and conflict of interest, although that list is not exhaustive. The Manual also clearly sets out that all outside employment must be approved, and that outside employment in the fixed-wing industry while employed by Avmax was prohibited. The evidence was that both individuals who took part in the meetings in Mexico were terminated upon their return. Mr. Taylor was not subject to discriminatory discipline. In this case, the discipline imposed was consistent with the policies of the Employer as set out in the Employee Manual. I also note the CNS Agreement was also clear that Mr. Taylor's had a continuing obligation to keep information confidential from his role as Director of Special Programs (which was during the currency of Peregrine).

2) Was discharge an excessive response considering all the circumstances?

144 While I understand that Mr. Taylor believed he did nothing wrong, I have found his misconduct pitted his personal interests against those of his Employer, was disloyal to its interests and included the use of his Employer's concept, information and ideas, which were confidential information of Avmax. In Mr. Taylor's words, the opportunity was "not Avmax's business". His obligation was to raise the business opportunity with Avmax, rather than pursue it on his own while still employed. I find that approval for his actions would not have been forthcoming from Avmax, as outside employment in the fixed-wing industry was prohibited in the Employee Manual, and Mr. Taylor was consulting for the potential development of fixed-wing aircraft, even if rotary-wing aircraft was also discussed. I find his duty of fidelity prevented him from pursuing this type of opportunity outside of his employment with Avmax.

145 Discharge is described in *Wm. Scott* as a "heavy penalty" (at p. 8). In that decision, Chair Weiler stated:

> It is the [responsibility of the decision-maker] to probe beneath the surface of the immediate events and reach a broad judgment about whether this employee, especially one with a significant investment of service with that employer, should actually lose his job for the offence in question (at p. 8)

I wish to emphasize that as the decision-maker in this case, I do not take this responsibility lightly.

146 I am cognizant that this was not a case where an employee was clearly seeking to poach an *existing* customer away from his employer, as in *Lane v. Formula Powell L.P., RSB Logistics Inc. v. Boyle* or *Re Skelton and Skelton Truck Lines Ltd.* Likewise, this is not a case where an employee agreed to close a competing business when hired and instead diverted business from his employer, as in *Mison v. Bank of Nova Scotia*, also cited by the Employer. I find Mr. Taylor was aware of his obligations but made his own assumptions on when those obligations would apply, and whether the information was "confidential", based on whether Avmax intended to currently pursue Peregrine and on the fact that Mexico was not a current customer of Avmax. I was left of the impression Mr. Taylor was a very hard-working individual, dedicated to pursuing Peregrine as a viable option for missionized aircraft, and excited to find an opportunity to pursue an idea to which he had committed considerable effort.

147 That said, considering all the factors as outlined in *Wm. Scott* and the circumstances of this case, I agree with the Employer that the ability to trust an employee in an industry permeated by confidentiality concerns is fundamental to the continuation of an employment relationship in that industry, especially where that individual had been given a significant degree of autonomy. In applying a contextual and proportional approach to assessing the discipline imposed, I have had consideration to the *Wm. Scott* factors as outlined, the industry in which Mr. Taylor worked, the significance of the misconduct in this particular industry, Mr. Taylor's knowledge of this aspect of the industry — including Avmax's concerns surrounding corporate espionage — and his senior role as "lead" for Peregrine. I find that Mr. Taylor's actions were deeply problematic for the viability of any continuing relationship and fractured that relationship such that a second chance through a progressive measure was not appropriate. I uphold the Employer's decision that Mr. Taylor's termination was for "just cause".

148 Given this finding, it is not necessary to consider the evidence or argument regarding mitigation of damages.

The Complaint is hereby dismissed.

I wish to express my appreciation to Mr. Taylor and to Counsel and Co-Counsel for the Employer for the efficient presentation of this case and for their thoughtful Arguments.