

GasTOPS Ltd. (plaintiff/respondent/appellant by way of cross-appeal) v. Bradley Forsyth, Douglas Brouse, Jeffrey Cass, Robert Vandenberg, and MxI Technologies Ltd. a.k.a. 1197543 Ontario Limited (defendants/appellants/respondents by way of cross-appeal)
(C51170; 2012 ONCA 134)

Indexed As: GasTOPS Ltd. v. Forsyth et al.

Ontario Court of Appeal
Goudge, Juriansz and Rouleau, J.J.A.
March 1, 2012.

Summary:

GasTOPS Ltd. was incorporated in 1979 and engaged in the design, development and application of computer software products that assessed machinery conditions for maintenance purposes for operators of gas turbine engines. Up until October 1996, the personal defendants were all employees of GasTOPS. These four were considered the designers of the core programs within the family of GasTOPS' technology products. The personal defendants resigned from GasTOPS and incorporated the corporate defendant (MxI Technologies Ltd.). GasTOPS sued.

The Ontario Superior Court, in a decision reported at [2009] O.T.C. Uned. M66, allowed the action. The court found the personal defendants liable to GasTOPS for breach of fiduciary duty, breach of confidence and breach of their contract of employment. The court found MxI liable for breach of confidence. The court awarded damages against the personal defendants equivalent to the profits earned by MxI from military contracts in its first 10 years of operation, and ordered MxI to disgorge those profits. All defendants were ordered to pay this amount jointly and severally quantified at \$12,306,495. The court also awarded pre-judgment interest of \$3,039,944 together with costs on a full indemnity basis of \$4,252,920.24. The defendants appealed, raising a narrow set of issues. The only issue of liability they contested was the finding that the defendants Cass and Vandenberg owed a fiduciary duty to GasTOPS. The principal issue argued by the defendants was the trial judge's use of 10 years as the timeframe for the assessment of damages and for the disgorgement of MxI's profits. They also contested the inclusion of certain amounts in calculating the quantum and the finding of joint and several liability. Finally, they appealed the scale on which costs were awarded. GasTOPS cross-appealed the use of 10 years to limit its relief. It argued that MxI should be permanently enjoined from using the information taken in breach of confidence or should be required to disgorge its profits in perpetuity.

The Ontario Court of Appeal dismissed the appeal and the cross-appeal.

Equity - Topic 3606

Fiduciary or confidential relationships - General principles - What constitutes a fiduciary relationship - GasTOPS Ltd. was incorporated in 1979 and engaged in the design, development and application of computer software products that assessed machinery conditions for maintenance purposes for operators of gas turbine engines - Up until October 1996, the personal defendants were all employees of GasTOPS - These four were considered the designers of the core programs within the family of GasTOPS'

technology products - The personal defendants resigned from GasTOPS and incorporated the corporate defendant (MxI Technologies Ltd.) - The trial judge found the personal defendants liable to GasTOPS for breach of fiduciary duty, breach of confidence and breach of their contract of employment and MxI liable for breach of confidence - The defendants appealed, challenging the trial judge's finding that the personal defendants Cass and Vandenberg were fiduciaries who owed a fiduciary duty to GasTOPS - The Ontario Court of Appeal dismissed the appeal - The finding that Cass and Vandenberg owed a fiduciary duty was one that had to be given significant deference - The trial judge found that Cass and Vandenberg were fiduciaries after a detailed review of their roles at GasTOPS - Along with the other two personal defendants "[t]hey were responsible for developing a significant commercial component of GasTOPS' business, and achieved that through the use of sensitive technological information that they helped develop and which was at the very core of GasTOPS' corporate identity" - They worked with little if any supervision but with a high degree of responsibility - They had integral knowledge of and involvement with the design, development and future of GasTOPS' family of products - In this respect, Cass and Vandenberg were crucial to its direction and guidance - The trial judge specifically concluded that all four personal defendants were part of GasTOPS' senior management - The defendants had not established that the trial judge made any palpable and overriding error in making these findings of fact - See paragraphs 79 to 84.

Equity - Topic 3648

Fiduciary or confidential relationships - Breach of fiduciary relationship - By employee - Solicitation of business - [See **Equity - Topic 3606**].

Equity - Topic 3654

Fiduciary or confidential relationships - Breach of fiduciary relationship - Remedies - [See all **Equity - Topic 3655**].

Equity - Topic 3655

Fiduciary or confidential relationships - Breach of fiduciary relationship - Damages - GasTOPS Ltd. was incorporated in 1979 and engaged in the design, development and application of computer software products that assessed machinery conditions for maintenance purposes for operators of gas turbine engines - Up until October 1996, the personal defendants were all employees of GasTOPS - These four were considered the designers of the core programs within the family of GasTOPS' technology products - The personal defendants resigned from GasTOPS and incorporated the corporate defendant (MxI Technologies Ltd.) - The trial judge found the personal defendants liable to GasTOPS for breach of fiduciary duty, breach of confidence and breach of their contract of employment and MxI liable for breach of confidence - The court awarded damages against the personal defendants equivalent to the profits earned by MxI from military contracts in its first 10 years of operation, and ordered MxI to disgorge those profits (\$12,306,495) - The defendants appealed, challenging the trial judge's use of 10 years as the timeframe for the assessment of damages and for the disgorgement of MxI's profits - The defendants submitted that the remedy was not "measured and proportional", but was used by the trial judge as a vehicle to "punish them" - The Ontario Court of Appeal

dismissed the appeal - There was no basis for suggesting that the trial judge chose 10 years in order to punish the defendants - He explained in detail why he selected 10 years and his reasons had nothing to do with an attempt to punish the defendants - The allegation that it resulted in a remedy that was not "measured and proportional" was entirely fact-dependent - Whether a remedy was balanced and proportional depended entirely on the facts of the case - The trial judge's conclusion was that on the facts the damages for breach of the fiduciary duty imposed on the four personal defendants and the duty of confidence imposed on all of the defendants lasted ten years - That conclusion deserved deference - It could not be said to be unreasonable - See paragraphs 48 to 50.

Equity - Topic 3655

Fiduciary or confidential relationships - Breach of fiduciary relationship - Damages - GasTOPS Ltd. was incorporated in 1979 and engaged in the design, development and application of computer software products that assessed machinery conditions for maintenance purposes for operators of gas turbine engines - Up until October 1996, the personal defendants were all employees of GasTOPS - These four were considered the designers of the core programs within the family of GasTOPS' technology products - The personal defendants resigned from GasTOPS and incorporated the corporate defendant (MxI Technologies Ltd.) - The trial judge found the personal defendants liable to GasTOPS for breach of fiduciary duty, breach of confidence and breach of their contract of employment and MxI liable for breach of confidence - The court awarded damages against the personal defendants equivalent to the profits earned by MxI from military contracts in its first 10 years of operation, and ordered MxI to disgorge those profits (\$12,306,495) - The defendants appealed, challenging the trial judge's use of 10 years as the timeframe for the assessment of damages and for the disgorgement of MxI's profits - The defendants submitted that the 10 year accounting period was well in excess of the temporal limits set by the case law, whether for breach of fiduciary duty, or for breach of confidence, or for failure to give notice - The Ontario Court of Appeal dismissed the appeal - The trial judge did not assess the accounting period required for each cause of action separately - He decided upon the accounting period as an integral part of the remedy for the harm caused by the combined effect of all these breaches - Even if each cause of action were viewed separately, however, the defendants' argument could not be sustained - See paragraphs 51 to 62.

Equity - Topic 3655

Fiduciary or confidential relationships - Breach of fiduciary relationship - Damages - GasTOPS Ltd. was incorporated in 1979 and engaged in the design, development and application of computer software products that assessed machinery conditions for maintenance purposes for operators of gas turbine engines - Up until October 1996, the personal defendants were all employees of GasTOPS - These four were considered the designers of the core programs within the family of GasTOPS' technology products - The personal defendants resigned from GasTOPS and incorporated the corporate defendant (MxI Technologies Ltd.) - The trial judge found the personal defendants liable to GasTOPS for breach of fiduciary duty, breach of confidence and breach of their contract of employment and MxI liable for breach of confidence - The court awarded damages against the personal defendants equivalent to the profits earned by MxI from military

contracts in its first 10 years of operation, and ordered MxI to disgorge those profits (\$12,306,495) - The defendants appealed, challenging the trial judge's use of 10 years as the timeframe for the assessment of damages and for the disgorgement of MxI's profits - The defendants submitted that the trial judge made adverse credibility findings against them based on their late disclosure of certain productions - They argued that these late disclosures were no more noteworthy than similar deficiencies by GasTOPS, but were nonetheless influential in the determination of the accounting period - The Ontario Court of Appeal dismissed the appeal - The trial judge's main concern was not just the lateness of the defendants' productions, but what those productions disclosed about the misleading evidence the defendants had already given - The same could not be said of GasTOPS - The trial judge had ample basis for his credibility findings - It was also clear that the defendants could point to nothing linking those findings to the determination of the accounting period - The credibility findings were nothing more than the trial judge doing his job - See paragraphs 64 to 66.

Equity - Topic 3655

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Equity - Topic 3655

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designers of the core programs within the family of GasTOPS' technology products - The personal defendants resigned from GasTOPS and incorporated the corporate defendant (MxI Technologies Ltd.) - The trial judge found the personal defendants liable to GasTOPS for breach of fiduciary duty, breach of confidence and breach of their contract of employment and MxI liable for breach of confidence - The court awarded damages against the personal defendants equivalent to the profits earned by MxI from military contracts in its first 10 years of operation, and ordered MxI to disgorge those profits (\$12,306,495) - The defendants appealed, challenging the trial judge's use of 10 years as the timeframe for the assessment of damages and for the disgorgement of MxI's profits - The defendants submitted that the trial judge had to have decided that GasTOPS, not the Crown owned the software it designed under contract with the Crown, that he erred in doing so without analysis and without the Crown being a party, and that this conclusion was nonetheless important in deciding the accounting period - The Ontario Court of Appeal dismissed the appeal - The trial judge made no finding of ownership of the misappropriated information, nor did he base the accounting period on it - GasTOPS was not required to show ownership, but only that it held the information in confidence - Moreover, the trial judge, in deciding upon a 10 year accounting period, placed greater reliance on the defendants' misappropriation of GasTOPS' proprietary data model than on the misappropriation of the software design - See paragraphs 69 and 70.

Equity - Topic 3655

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Equity - Topic 3655

Fiduciary or confidential relationships - Breach of fiduciary relationship - Damages - GasTOPS Ltd. was incorporated in 1979 and engaged in the design, development and application of computer software products that assessed machinery conditions for maintenance purposes for operators of gas turbine engines - Up until October 1996, the

personal defendants were all employees of GasTOPS - These four were considered the designers of the core programs within the family of GasTOPS' technology products - The personal defendants resigned from GasTOPS and incorporated the corporate defendant (MxI Technologies Ltd.) - The trial judge found the personal defendants liable to GasTOPS for breach of fiduciary duty, breach of confidence and breach of their contract of employment and MxI liable for breach of confidence - The court awarded damages against the personal defendants equivalent to the profits earned by MxI from military contracts in its first 10 years of operation, and ordered MxI to disgorge those profits (\$12,306,495) - The defendants appealed, challenging the trial judge's use of 10 years as the timeframe for the assessment of damages and for the disgorgement of MxI's profits - The defendants submitted that the trial judge's finding that the accounting period should be 10 years was undermined because so much of his reasons for judgment were lifted verbatim and without attribution from GasTOPS' written submissions - The Ontario Court of Appeal dismissed the appeal - It was true that lengthy passages were taken from GasTOPS' written argument - That did not dictate the conclusion that the trial judge's reasoning was not his own - There was nothing here that permitted such a conclusion - See paragraphs 73 and 74.

Equity - Topic 3655

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fiduciary duty and their duty of confidence, and therefore they were properly included in the damage calculation - See paragraphs 76 to 78.

Equity - Topic 3655

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Injunctions - Topic 751

Granting an injunction - Bars - Availability of other remedies - GasTOPS Ltd. was incorporated in 1979 and engaged in the design, development and application of computer software products that assessed machinery conditions for maintenance purposes for operators of gas turbine engines - Up until October 1996, the personal defendants were all employees of GasTOPS - These four were considered the designers of the core programs within the family of GasTOPS' technology products - The personal defendants resigned from GasTOPS and incorporated the corporate defendant (MxI Technologies Ltd.) - The trial judge found the personal defendants liable to GasTOPS for breach of fiduciary duty, breach of confidence and breach of their contract of employment and MxI liable for breach of confidence - The court awarded damages against the personal defendants equivalent to the profits earned by MxI from military contracts in its first 10 years of operation, and ordered MxI to disgorge those profits (\$12,306,495) - GasTOPS cross-appealed the use of 10 years to limit its relief - It argued that MxI should be permanently enjoined from using the information taken in breach of confidence or should be required to disgorge its profits in perpetuity - The Ontario Court of Appeal dismissed the cross-appeal - The trial judge declined to grant permanent injunctive relief on two bases - First, he held that a permanent injunction was inappropriate given the length of time that had passed between October 1996, when MxI began, and the trial judgment in

September 2009 - Second, he found that the profits he ordered to be disgorged and the damages he ordered together provided GasTOPS with adequate redress - GasTOPS' request for permanent disgorgement of profits had to also be rejected - It essentially would be a monetized version of a permanent injunction and faced the same objections - See paragraphs 91 to 94.

Master and Servant - Topic 343

Fiduciary duty - When owed - [See **Equity - Topic 3606**].

Master and Servant - Topic 344

Fiduciary duty - Breach - [See all **Equity - Topic 3655**].

Practice - Topic 7454

Costs - Solicitor and client costs - Entitlement to - Improper, irresponsible or unconscionable conduct - GasTOPS Ltd. was incorporated in 1979 and engaged in the design, development and application of computer software products that assessed machinery conditions for maintenance purposes for operators of gas turbine engines - Up until October 1996, the personal defendants were all employees of GasTOPS - These four were considered the designers of the core programs within the family of GasTOPS' technology products - The personal defendants resigned from GasTOPS and incorporated the corporate defendant (MxI Technologies Ltd.) - The trial judge found the personal defendants liable to GasTOPS for breach of fiduciary duty, breach of confidence and breach of their contract of employment and MxI liable for breach of confidence - The court awarded damages against the personal defendants equivalent to the profits earned by MxI from military contracts in its first 10 years of operation, and ordered MxI to disgorge those profits (\$12,306,495) - All defendants were ordered to pay this amount jointly and severally - The court also awarded pre-judgment interest of \$3,039,944 together with costs on a full indemnity basis of \$4,252,920.24 - The defendants appealed the costs award - The Ontario Court of Appeal dismissed the appeal - The award of costs was an act of judicial discretion to be set aside only if the trial judge has made an error in principle or if the award was plainly wrong - Here, the trial judge had ample evidence on which to base his conclusion that the defendants intended to mislead the court - The defendants' conduct clearly warranted the scale of the costs order made at trial - See paragraphs 87 to 90.

Cases Noticed:

3464920 Canada Inc. v. Strother et al., [2007] 2 S.C.R. 177; 363 N.R. 123; 241 B.C.A.C. 108; 399 W.A.C. 108; 2007 SCC 24, reld to. [para. 45].

R. v. Regan (G.A.), [2002] 1 S.C.R. 297; 282 N.R. 1; 201 N.S.R.(2d) 63; 629 A.P.R. 63; 2002 SCC 12, reld to. [para. 47].

Cadbury Schweppes Inc. et al. v. FBI Foods Ltd. et al., [1999] 1 S.C.R. 142; 235 N.R. 30; 117 B.C.A.C. 161; 191 W.A.C. 161, reld to. [para. 56].

Seager v. Copydex Ltd. (No. 2), [1969] 1 W.L.R. 809, reld to. [para. 57].

Free Trade Medical Network Inc. v. RBC Travel Insurance Co. (2006), 215 O.A.C. 230 (C.A.), reld to. [para. 70].

Hodgkinson v. Simms et al., [1994] 3 S.C.R. 377; 171 N.R. 245; 49 B.C.A.C. 1; 80

W.A.C. 1, refd to. [para. 81].
Hamilton v. Open Window Bakery Ltd. et al. (2004), 316 N.R. 265; 184 O.A.C. 209;
2004 SCC 9, refd to. [para. 89].

Counsel:

Catherine P. Coulter, David R. Elliott and K. Scott McLean, for the appellants;
James L. Shields, John H. Yach and Thomas Finlay for the respondent.

This appeal was heard on September 19-22, 2011, by Goudge, Juriansz and Rouleau, J.J.A., of the Ontario Court of Appeal. The following judgment of the Court of Appeal was delivered by Goudge, J.A., on March 1, 2012.

Appeal dismissed.

Editor: Anick Ouellette-Levesque

Equity - Topic 3648

Fiduciary or confidential relationships - Breach of fiduciary relationship - By employee - Solicitation of business - GasTOPS Ltd. was incorporated in 1979 and engaged in the design, development and application of computer software products that assessed machinery conditions for maintenance purposes for operators of gas turbine engines - Up until October 1996, the personal defendants were all employees of GasTOPS - These four were considered the designers of the core programs within the family of GasTOPS' technology products - The personal defendants resigned from GasTOPS and incorporated the corporate defendant (MxI Technologies Ltd.) - The trial judge found the personal defendants liable to GasTOPS for breach of fiduciary duty, breach of confidence and breach of their contract of employment and MxI liable for breach of confidence - The defendants appealed, challenging the trial judge's finding that the personal defendants Cass and Vandenberg were fiduciaries who owed a fiduciary duty to GasTOPS - The Ontario Court of Appeal dismissed the appeal - The finding that Cass and Vandenberg owed a fiduciary duty was one that had to be given significant deference - The trial judge found that Cass and Vandenberg were fiduciaries after a detailed review of their roles at GasTOPS - Along with the other two personal defendants "[t]hey were responsible for developing a significant commercial component of GasTOPS' business, and achieved that through the use of sensitive technological information that they helped develop and which was at the very core of GasTOPS' corporate identity" - They worked with little if any supervision but with a high degree of responsibility - They had integral knowledge of and involvement with the design, development and future of GasTOPS' family of products - In this respect, Cass and Vandenberg were crucial to its direction and guidance - The trial judge specifically concluded that all four personal defendants were part of GasTOPS' senior management - The defendants had not established that the trial judge made any palpable and overriding error in making these findings of fact - See paragraphs 79 to 84.

Equity - Topic 3654

Fiduciary or confidential relationships - Breach of fiduciary relationship - Remedies - GasTOPS Ltd. was incorporated in 1979 and engaged in the design, development and application of computer software products that assessed machinery conditions for maintenance purposes for operators of gas turbine engines - Up until October 1996, the personal defendants were all employees of GasTOPS - These four were considered the designers of the core programs within the family of GasTOPS' technology products - The personal defendants resigned from GasTOPS and incorporated the corporate defendant (MxI Technologies Ltd.) - The trial judge found the personal defendants liable to GasTOPS for breach of fiduciary duty, breach of confidence and breach of their contract of employment and MxI liable for breach of confidence - The court awarded damages against the personal defendants equivalent to the profits earned by MxI from military contracts in its first 10 years of operation, and ordered MxI to disgorge those profits (\$12,306,495) - The defendants appealed, challenging the trial judge's use of 10 years as the timeframe for the assessment of damages and for the disgorgement of MxI's profits - The defendants submitted that the remedy was not "measured and proportional", but was used by the trial judge as a vehicle to "punish them" - The Ontario Court of Appeal dismissed the appeal - There was no basis for suggesting that the trial judge chose 10 years in order to punish the defendants - He explained in detail why he selected 10 years and his reasons had nothing to do with an attempt to punish the defendants - The allegation that it resulted in a remedy that was not "measured and proportional" was entirely fact-dependent - Whether a remedy was balanced and proportional depended entirely on the facts of the case - The trial judge's conclusion was that on the facts the damages for breach of the fiduciary duty imposed on the four personal defendants and the duty of confidence imposed on all of the defendants lasted ten years - That conclusion deserved deference - It could not be said to be unreasonable - See paragraphs 48 to 50.

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action separately - He decided upon the accounting period as an integral part of the remedy for the harm caused by the combined effect of all these breaches - Even if each cause of action were viewed separately, however, the defendants' argument could not be sustained - See paragraphs 51 to 62.

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the timeframe for the assessment of damages and for the disgorgement of MxI's profits - The defendants submitted that the trial judge failed to consider or give any weight to evidence from witness Turner, an employee of GasTOPS - The Ontario Court of Appeal dismissed the appeal - The defendants made extensive reference to Turner's evidence in their written argument, which the trial judge made clear he reviewed in detail - He was free to review that evidence in his reasons or not - Moreover, that evidence was of little help in accurately describing the state of GasTOPS' programs in October 1996, because it was based not on Turner's recollection but in large measure on the reconstruction of incomplete design documentation - There was good reason for the trial judge not to put weight on it - See paragraphs 67 and 68.

Equity - Topic 3654

Fiduciary or confidential relationships - Breach of fiduciary relationship - Remedies - GasTOPS Ltd. was incorporated in 1979 and engaged in the design, development and application of computer software products that assessed machinery conditions for maintenance purposes for operators of gas turbine engines - Up until October 1996, the personal defendants were all employees of GasTOPS - These four were considered the designers of the core programs within the family of GasTOPS' technology products - The personal defendants resigned from GasTOPS and incorporated the corporate defendant (MxI Technologies Ltd.) - The trial judge found the personal defendants liable to GasTOPS for breach of fiduciary duty, breach of confidence and breach of their contract of employment and MxI liable for breach of confidence - The court awarded damages against the personal defendants equivalent to the profits earned by MxI from military contracts in its first 10 years of operation, and ordered MxI to disgorge those profits (\$12,306,495) - The defendants appealed, challenging the trial judge's use of 10 years as the timeframe for the assessment of damages and for the disgorgement of MxI's profits - The defendants submitted that the trial judge had to have decided that GasTOPS not the Crown owned the software it designed under contract with the Crown, that he erred in doing so without analysis and without the Crown being a party, and that this conclusion was nonetheless important in deciding the accounting period - The Ontario Court of Appeal dismissed the appeal - The trial judge made no finding of ownership of the misappropriated information, nor did he base the accounting period on it - GasTOPS was not required to show ownership, but only that it held the information in confidence - Moreover, the trial judge, in deciding upon a 10 year accounting period, placed greater reliance on the defendants' misappropriation of GasTOPS' proprietary data model than on the misappropriation of the software design - See paragraphs 69 and 70.

Equity - Topic 3654

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GasTOPS for breach of fiduciary duty, breach of confidence and breach of their contract of employment and MxI liable for breach of confidence - The court awarded damages against the personal defendants equivalent to the profits earned by MxI from military contracts in its first 10 years of operation, and ordered MxI to disgorge those profits (\$12,306,495) - The defendants appealed, challenging the trial judge's use of 10 years as the timeframe for the assessment of damages and for the disgorgement of MxI's profits - The defendants submitted that the trial judge erred in not treating the efforts of the parties after October 1996 to reach a cooperation agreement as a factor mitigating the length of the accounting period - The Ontario Court of Appeal dismissed the appeal - The trial judge found that the cooperation agreement was never concluded - It had no legal effect and required no further attention by the trial judge - See paragraphs 71 and 72.

Equity - Topic 3654

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Equity - Topic 3654

Fiduciary or confidential relationships - Breach of fiduciary relationship - Remedies - GasTOPS Ltd. was incorporated in 1979 and engaged in the design, development and application of computer software products that assessed machinery conditions for maintenance purposes for operators of gas turbine engines - Up until October 1996, the personal defendants were all employees of GasTOPS - These four were considered the designers of the core programs within the family of GasTOPS' technology products - The personal defendants resigned from GasTOPS and incorporated the corporate defendant (MxI Technologies Ltd.) - The trial judge found the personal defendants liable to GasTOPS for breach of fiduciary duty, breach of confidence and breach of their contract of employment and MxI liable for breach of confidence - The court awarded damages

against the personal defendants equivalent to the profits earned by MxI from military contracts in its first 10 years of operation, and ordered MxI to disgorge those profits (\$12,306,495) - The defendants appealed, challenging the inclusion of certain amounts in calculating the quantum - The defendant submitted that the trial judge erred by including profits from the Canadian Air Force (the CAF) over the entire 10 years since GasTOPS continued to do considerable business with the CAF over that period of time - They said the same about the inclusion of profits from the U.S. Navy, because many of the profits came from opportunities that were not "ripe" in the fall of 1996 - Finally they said that the trial judge wrongly included a number of accounts with entities with which GasTOPS never had any dealings - The Ontario Court of Appeal dismissed the appeal - The trial judge's task in fixing damages was to assess the profits made by the defendants from military contracts - His task was properly unaffected by whatever continuing business GasTOPS was able to preserve, or by the fact that some of the opportunities that the defendants realized on were not "ripe" in the fall of 1996, but matured only later in the 10 year accounting period, or by the fact that some of these opportunities were with entities with which GasTOPS had not had contact - They were all profits that the defendants made from military contracts over the accounting period, as a result of the breach of their fiduciary duty and their duty of confidence, and therefore they were properly included in the damage calculation - See paragraphs 76 to 78.

Equity - Topic 3654

Fiduciary or confidential relationships - Breach of fiduciary relationship - Remedies - GasTOPS Ltd. was incorporated in 1979 and engaged in the design, development and application of computer software products that assessed machinery conditions for maintenance purposes for operators of gas turbine engines - Up until October 1996, the personal defendants were all employees of GasTOPS - These four were considered the designers of the core programs within the family of GasTOPS' technology products - The personal defendants resigned from GasTOPS and incorporated the corporate defendant (MxI Technologies Ltd.) - The trial judge found the personal defendants liable to GasTOPS for breach of fiduciary duty, breach of confidence and breach of their contract of employment and MxI liable for breach of confidence - The court awarded damages against the personal defendants equivalent to the profits earned by MxI from military contracts in its first 10 years of operation, and ordered MxI to disgorge those profits (\$12,306,495) - All defendants were ordered to pay this amount jointly and severally - The defendants appealed, contesting the finding that all defendants were jointly and severally liable to GasTOPS for the quantum ordered - The Ontario Court of Appeal dismissed the appeal - The defendants together engaged in a joint enterprise that inflicted significant harm on GasTOPS in breach of their legal obligations - The quantum was ordered as remedy for the harm caused by them collectively - In all the circumstances, including the absence of evidence about the relative shareholding of the personal defendants in MxI, the trial judge's imposition of joint and several liability for the damage caused by a joint enterprise was within his discretion in fashioning an appropriate remedy - See paragraphs 85 and 86.

Master and Servant - Topic 343

Fiduciary duty - When owed - GasTOPS Ltd. was incorporated in 1979 and engaged in

the design, development and application of computer software products that assessed machinery conditions for maintenance purposes for operators of gas turbine engines - Up until October 1996, the personal defendants were all employees of GasTOPS - These four were considered the designers of the core programs within the family of GasTOPS' technology products - The personal defendants resigned from GasTOPS and incorporated the corporate defendant (MxI Technologies Ltd.) - The trial judge found the personal defendants liable to GasTOPS for breach of fiduciary duty, breach of confidence and breach of their contract of employment and MxI liable for breach of confidence - The defendants appealed, challenging the trial judge's finding that the personal defendants Cass and Vandenberg were fiduciaries who owed a fiduciary duty to GasTOPS - The Ontario Court of Appeal dismissed the appeal - The finding that Cass and Vandenberg owed a fiduciary duty was one that had to be given significant deference - The trial judge found that Cass and Vandenberg were fiduciaries after a detailed review of their roles at GasTOPS - Along with the other two personal defendants "[t]hey were responsible for developing a significant commercial component of GasTOPS' business, and achieved that through the use of sensitive technological information that they helped develop and which was at the very core of GasTOPS' corporate identity" - They worked with little if any supervision but with a high degree of responsibility - They had integral knowledge of and involvement with the design, development and future of GasTOPS' family of products - In this respect, Cass and Vandenberg were crucial to its direction and guidance - The trial judge specifically concluded that all four personal defendants were part of GasTOPS' senior management - The defendants had not established that the trial judge made any palpable and overriding error in making these findings of fact - See paragraphs 79 to 84.

Master and Servant - Topic 344

Fiduciary duty - Breach - GasTOPS Ltd. was incorporated in 1979 and engaged in the design, development and application of computer software products that assessed machinery conditions for maintenance purposes for operators of gas turbine engines - Up until October 1996, the personal defendants were all employees of GasTOPS - These four were considered the designers of the core programs within the family of GasTOPS' technology products - The personal defendants resigned from GasTOPS and incorporated the corporate defendant (MxI Technologies Ltd.) - The trial judge found the personal defendants liable to GasTOPS for breach of fiduciary duty, breach of confidence and breach of their contract of employment and MxI liable for breach of confidence - The court awarded damages against the personal defendants equivalent to the profits earned by MxI from military contracts in its first 10 years of operation, and ordered MxI to disgorge those profits (\$12,306,495) - The defendants appealed, challenging the trial judge's use of 10 years as the timeframe for the assessment of damages and for the disgorgement of MxI's profits - The defendants submitted that the remedy was not "measured and proportional", but was used by the trial judge as a vehicle to "punish them" - The Ontario Court of Appeal dismissed the appeal - There was no basis for suggesting that the trial judge chose 10 years in order to punish the defendants - He explained in detail why he selected 10 years and his reasons had nothing to do with an attempt to punish the defendants - The allegation that it resulted in a remedy that was not "measured and proportional" was entirely fact-dependent - Whether a remedy was

balanced and proportional depended entirely on the facts of the case - The trial judge's conclusion was that on the facts the damages for breach of the fiduciary duty imposed on the four personal defendants and the duty of confidence imposed on all of the defendants lasted ten years - That conclusion deserved deference - It could not be said to be unreasonable - See paragraphs 48 to 50.

Master and Servant - Topic 344

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Master and Servant - Topic 344

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similar deficiencies by GasTOPS, but were nonetheless influential in the determination of the accounting period - The Ontario Court of Appeal dismissed the appeal - The trial judge's main concern was not just the lateness of the defendants' productions, but what those productions disclosed about the misleading evidence the defendants had already given - The same could not be said of GasTOPS - The trial judge had ample basis for his credibility findings - It was also clear that the defendants could point to nothing linking those findings to the determination of the accounting period - The credibility findings were nothing more than the trial judge doing his job - See paragraphs 64 to 66.

Master and Servant - Topic 344

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Master and Servant - Topic 344

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judge's use of 10 years as the timeframe for the assessment of damages and for the disgorgement of MxI's profits - The defendants submitted that the trial judge had to have decided that GasTOPS not the Crown owned the software it designed under contract with the Crown, that he erred in doing so without analysis and without the Crown being a party, and that this conclusion was nonetheless important in deciding the accounting period - The Ontario Court of Appeal dismissed the appeal - The trial judge made no finding of ownership of the misappropriated information, nor did he base the accounting period on it - GasTOPS was not required to show ownership, but only that it held the information in confidence - Moreover, the trial judge, in deciding upon a 10 year accounting period, placed greater reliance on the defendants' misappropriation of GasTOPS' proprietary data model than on the misappropriation of the software design - See paragraphs 69 and 70.

Master and Servant - Topic 344

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Master and Servant - Topic 344

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Master and Servant - Topic 344

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Master and Servant - Topic 344

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