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(Winnipeg Centre)
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COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

PEOPLE CORPORATION, plaintiff, -and-	Cameron Rempel Counsel for the plaintiff
STEVEN MANSBRIDGE, HUB INTERNATIONAL LIMITED, and HUB INTERNATIONAL MANITOBA LTD., defendants.	Kosta L. Vartsakis Counsel for the defendant Steven Mansbridge Jeffrey A. Baigrie Counsel for the defendants Hub International Limited and Hub International Manitoba Ltd.
	REASONS FOR JUDGMENT: JUNE 5, 2023

MASTER BERTHAUDIN

[1] This decision relates to a motion by the plaintiff seeking an order under King's Bench Rule 30 to perform a "limited forensic examination" of the home desktop computer of the defendant Steven Mansbridge (Mansbridge), on the basis that the metadata sought by the plaintiff falls within the definition of

"document" under that Rule. The motion is opposed by Mansbridge and his co-defendants HUB International Limited and HUB International Manitoba (together, HUB).

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BACKGROUND

[2] At its core, this litigation is about allegations that Mansbridge misused the plaintiff's confidential information when he departed employment with the plaintiff and began employment with HUB. The plaintiff unsuccessfully sought injunctive relief against Mansbridge in this Court (2021 MBQB 170), and its appeal of that decision was dismissed by the Manitoba Court of Appeal (2022 MBCA 37).

[3] Rather than replicate the facts here, I will rely on the statement of facts set out by Harris J. in his decision at 2021 MBQB 170, paragraphs 2 to 12:

> **2** People is an independent national provider of individual employee group benefits (*i.e.*, healthcare benefits, life and disability insurance, etc.), group retirement, wellness, and human resource products, solutions and services. It employs approximately 1,100 people serving organizations across Canada.
>
> **3** Mansbridge was hired in 2012 as a benefits consultant by Healthsource Plus Inc., one of the businesses within People's partner group, at which time he signed an employment agreement ("Employment Agreement" or "Agreement"). The Agreement was amended in October 2020 in relation to compensation only. Some time after the signing of the Agreement, Healthsource Plus Inc. merged with People. Throughout his employment with Healthsource Plus Inc. and People, Mansbridge has been a benefits consultant, becoming a Senior Consultant/Partner in or around August 2020.
>
> **4** Mansbridge's job required him to provide consulting services to People's clients regarding their benefits and retirement plans as well as selling other services offered by People. Of People's revenue of $210.8 million in 2020, Mansbridge accounted for just over $1.8 million. By early 2021, Mansbridge was responsible for managing and servicing

approximately 100 clients, primarily in Manitoba, with a few in Saskatchewan and Ontario.

5 On February 4, 2021, Mansbridge sent a letter to Kimberly Siddall ("Siddall"), Vice-President, Enterprise Consulting, Western Region for People by which he resigned from his employment effective April 5, 2021. People waived the notice period and Mansbridge's relationship with People ended effective February 4, 2021.

6 Subsequently, Mansbridge was hired by HUB as the Vice-President and Senior Group Benefits Consultant commencing April 5, 2021.

7 Mansbridge was one of three full-time benefits consultants in Winnipeg. To his customers, he was the face and voice of People. Customer development was important to People as it had a business development group whose job it was to identify potential customers so that the benefits consultants could then focus on making sales. Customers rarely left People.

8 After Mansbridge's departure, People learned that in late 2019 Mansbridge forwarded to his personal e-mail from People's database:

> (a) an Excel spreadsheet listing each client he served through People, along with a brief description of the services provided and revenue associated with each client;
> (b) two spreadsheets listing every lead generated by the business development team in 2017 and 2018-2020. These lists represent potential clients of People; and
> (c) approximately 15 documents developed by People which would be used by it in the course of a consulting relationship.

9 Mansbridge deposed that he sent these documents for various reasons unrelated to his move from People to HUB, or any other company. He has sworn that since he started working with HUB, he has not opened the e-mails and that he has not made any use of them since joining HUB. When he left People, Mansbridge confirmed in writing that he was aware of his obligations to People and that he intended to honour the same.

10 Mansbridge says that he has accepted the work of some clients of People who have advised that they wanted to continue to work with him, but that he has not actively diverted People's clients away to HUB, nor has he solicited People's clients or used confidential information of People. He admits that he contacted former clients to advise them as to his move. Nine of approximately 100 clients have moved to HUB following Mansbridge's departure.

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> **11** Siddall deposed that one former client advised her that Mansbridge "had been soliciting his former People clients to join him at HUB". The client was not identified to Mansbridge nor has the client sworn an affidavit. The value of this unsupported double hearsay on a very critical issue is dubious. While other clients left People to follow Mansbridge, there is no evidence that Mansbridge solicited their business. In fact, it appears from the evidence of Siddall that these clients made decisions to follow Mansbridge because of the relationship each had with Mansbridge, and not because he solicited them. Siddall states that she has a "strong belief" that Mansbridge has been soliciting clients.
>
> **12** I accept Mansbridge's evidence which, considering my concerns about Siddall's evidence, effectively stands uncontroverted.

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[4] It should be noted that the documents forwarded by Mansbridge in 2019 were sent to his Gmail account. The documents were not saved to his home computer hard drive. It is accepted that his Gmail account and the forwarded documents could have been accessed by him (and may still be) from virtually any computer, smartphone or tablet with an internet connection. Despite that, however, the plaintiff has limited its request on this motion to Mansbridge's home desktop computer. Mansbridge says that he has not accessed or made any use of the documents since before his departure from employment with the plaintiff.

ORDER SOUGHT

[5] The specific terms of the order sought by the plaintiff are as follows:

> (i) Mansbridge shall, within 10 days of the date of the Order, deliver the Computer to KPMG LLP offices, along with any BitLocker Keys or other information necessary to access the Computer's hard drive;
>
> (ii) Forensic Services professionals from KPMG LLP shall create an image of the Computer's hard drive and conduct a Timeline Event Analysis on its contents, focused exclusively on identifying and summarizing any available metadata or other information that is relevant to the subsequent access, use and treatment of the

files Mansbridge sent by email from People Corp.'s internal server to his personal Gmail account in the late 2019 (the Confidential Documents, defined below);

(iii) KPMG LLP shall deliver a formal report to People Corp.'s counsel, Adair Goldblatt Bieber LLP, containing the results of the Timeline Event Analysis, which report shall be listed as one of the People Corp.'s documents in this proceeding;

(iv) KPMG LLP shall not disclose any information obtained from the Computer's hard drive to any person or entity except as provided for in this Order;

(v) KPMG LLP shall return the Computer to an address of Mansbridge's choosing, or make it available for pickup, as soon as reasonably possible after making a copy of the Computer's hard drive, and shall delete the copy upon receiving notice from Adair Goldblatt Bieber LLP that this proceeding has been finally discontinued, dismissed, decided or otherwise resolve; and

(vi) People Corp. shall bear the cost of all steps taken by KPMG LLP pursuant to the terms of this Order.

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PLAINTIFF'S POSITION

[6] The basic position of the plaintiff is that it has alleged in this action that Mansbridge breached the confidentiality clause in his contract and his common law duties of confidentiality, and needs to know whether he accessed or downloaded the documents at issue. The plaintiff relies upon King's Bench Rule 30.01(1) (a) and 30.04(5), both of which are set out below:

> **Document**
> **30.01(1)** In rules 30.02 to 30.11,
> (a) **"document"** includes a sound recording, videotape, film, photograph, chart, graph, map, plan, survey, book of account and information recorded or stored by means of any device;
>
> **Court may order production**
> **30.04(5)** The court may at any time order production for inspection of relevant documents that are not privileged and that are in the possession, control or power of a party.

[7] The plaintiff suggests that there should be no dispute that a "document" includes metadata, given the reference in the definition to "information recorded or stored by means of any device."

[8] The plaintiff filed an affidavit of Owen Key, Director, Risk Consulting, Cybersecurity, at KMPG Ltd., sworn November 3, 2022, to explain the process that would be undertaken by KMPG if the order was granted. In so doing, Mr. Key said the following regarding metadata:

> 9. Metadata is "data that provides information about other data", but not the content of the data. For example, the text of a message or the image itself, the date that a file was created, or the dates that a file was copied or deleted.

[9] Mr. Key describes the analysis to be undertaken as follows:

> 6. A timeline analysis contains but is not limited to the visualization over a time period of computer data such as user logins, copying of files, exfiltration (emailing, printing etc.) of files, and subsequent deletions of files. These types of findings can be set out in a brief written report provided to counsel and contain the supporting facts as per each action detailed in the timeline.

[10] While the defendants have not yet provided affidavits of documents and examinations for discovery have not yet taken place, the plaintiff points to the words "at any time" in rule 30.04(5) to suggest that those milestones are not required to be met for such an order to be granted. The plaintiff further relies on ***574201 Alberta Ltd. v. Ground Level Transport Inc. et al***, 2017 MBQB 70, for support for this proposition.

[11] The plaintiff suggests that this is not a fishing expedition, but a focused, proportional request and the evidence obtained by way of the inspection will be key to the court's consideration of the issues in dispute in this litigation.

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DEFENDANTS' POSITION

[12] While Mansbridge and HUB are separately represented in this litigation, their positions on this motion are essentially the same, so will be referred to together in this section.

[13] The defendants raise numerous grounds upon which to oppose the order sought by the plaintiff. They do not, however, dispute that the metadata sought by the plaintiff constitutes a "document" for the purposes of King's Bench Rule 30.

[14] The first argument of the defendants is that the underlying legal foundation for the motion no longer exists given the conclusion reached by Harris J. on the dismissal of the plaintiff's injunction motion, which conclusion was upheld when the Manitoba Court of Appeal dismissed the plaintiff's appeal. As to the confidentiality clause, Harris J. stated the following in his decision at paragraphs 28 and 29:

> **28** The clause is also ambiguous. There is no limit placed on what is included in confidential information, includes vague terms such as process, development, idea, know-how, activities and similar materials and information. It concludes by declaring that all of the foregoing is illustrative and other confidential information may exist at the time of entering into, or arise subsequent to, the execution of the agreement.
>
> **29** As the clause is both ambiguous and overly broad, it is unreasonable and unenforceable.

[15] On the issue of the confidentiality clause, the Manitoba Court of Appeal stated the following at paragraphs 44 to 46 of its decision:

> **44** We have left the discussion of the confidentiality clause to this stage given the particular facts of this case. The only major issue as to the confidentiality clause that was raised by People was the transfer by

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> Mansbridge to himself of various pieces of information over a number of months before he left People. He had retained that information although he denied that he made any use of it. It had not been returned, according to his counsel on appeal, because of the uncertainty of the litigation. At the end of the appeal, we imposed a condition to the dismissal that the material be returned, unused, to People or that it be destroyed in a manner acceptable to People. Counsel for Mansbridge undertook to do so.
>
> **45** There is no evidence that, other than that information, Mansbridge had in his possession any other confidential information or that he was using confidential information to which he was not entitled. On appeal, People raised not only the contractual obligations of confidentiality, but also the common law ability of an employer to seek to maintain the confidentiality of its proprietary information.
>
> **46** A discussion on a confidentiality clause raises concerns which are different than non-competition and non-solicitation clauses. There are a number of cases which raise the possibility that a lower standard, namely, a substantial issue or serious question to be tried, should be used in assessing whether an interlocutory injunction should be granted for a potential breach of a confidentiality clause. In our view, this is not the case to decide that issue as it is not raised by the facts of this case and it is unlikely that it will be given the order made by this Court at the end of this appeal. For that reason, we find it unnecessary to deal with the confidentiality clause on this appeal.

[16] The defendants suggest that the combination of these two decisions are conclusory as it relates to enforcement of the confidentiality clause, such that there is no legal foundation for the plaintiff to now seek further disclosure relating to Mansbridge's use of the allegedly confidential documents. In essence, the defendants argue that the court is now precluded from ordering disclosure with respect to a confidentiality clause determined by the Court of King's Bench and the Court of Appeal to be unenforceable.

[17] With respect to the plaintiff's allegation that the metadata is also relevant in relation to the alleged breach of the common law duty of confidentiality, the defendants argue further that the documents contained in Mansbridge's Gmail

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account are not confidential. They rely upon ***Imperial Sheet Metal Ltd. et al. v. Landry and Gray Metal Products Inc.***, 2007 NBCA 51, for the proposition that the documents at issue are not confidential. The New Brunswick Court of Appeal stated the following in that decision at paragraph 42:

> **42** In summary, I cannot accept that knowledge of a customer's needs and preferences, let alone the names of contact persons, qualifies as confidential information. I state this as a general proposition. I accept that the classification of information as confidential may vary from business to business or in a particular context: e.g. bidding contracts. However, in the world of sales, the broad definition being argued for is unacceptable.

[18] The second, and alternative, argument of the defendants is that the plaintiff has not established the "exceptional circumstances", required for the court to grant an order as intrusive as that which it seeks. The defendants rely on several decisions from other provinces for the position that court orders granting access to hard drives of litigants should be made only in exceptional cases. In particular, the defendants rely on ***Desgagne v. Yuen et al.***, 2006 BCSC 955, ***Innovative Health Group Inc. v. Calgary Health Region***, 2008 ABCA 219 and ***Ceballos v. Aviva Insurance Company et al***, 2021 ONSC 4695. While each of these decisions has a fact situation distinct from the present circumstances, and the requests made by the moving parties are not necessarily identical to the request here, representative of the position of the defendants is the following statement form ***Innovative Health*** at paragraph 3:

> **3** The case management judge erred in ordering production of the imaged hard drives. Although relevant and material information stored on a computer hard drive is producible, a hard drive is not ordinarily subject to production. In exceptional circumstances, a court can order production of a hard drive for examination by an expert, on appropriate terms, but

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> only where evidence establishes that a party is intentionally deleting relevant and material information or otherwise deliberately thwarting the discovery process. Even in such a case, the applying party is only entitled to relevant and material information and it is the duty of the judge to protect irrelevant, confidential and private material. In this case, exceptional circumstances did not exist.

[19] The defendants also rely on the following statement from paragraph 12 of ***Ceballos***:

> **12** The defendant Aviva also relies on the comments of Leroy J. I n *Merpaw v. Hyde*, 2015 ONSC 1053 (para. 26):
>
> > A computer hard drive contains stored data that is neither relevant nor material to a lawsuit and which contains information that is private and confidential and ought not to be produced. Relevant and material information stored on a computer hard drive is subject to production. ***Only in exceptional circumstances such as when there is convincing evidence that a party is intentionally deleting relevant and material information will the Court order production of the hard drive for examination***. [emphasis added]

[20] In reliance on these decisions, the defendants argue that exceptional circumstances are required for such order as that sought here, but no such exceptional circumstances exist.

[21] Finally, the defendants point to King's Bench Rule 31.06(1)(b) for the argument that the questions sought at the root of the plaintiff's request are solely to test the credibility of Mansbridge and are barred by the above-noted rule. The defendants point to paragraph (bb) of the grounds stated in the notice of motion, which refers to the order sought being "the only meaningful way to test his evidence on this point".

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[22] Thus, the defendants suggest that the sole purpose of the order sought is to test Mansbridge's credibility and the operation of King's Bench Rule 31.06(1)(b) requires that such questions are not appropriate at the discovery stage of proceedings.

ANALYSIS

[23] With there being no real dispute that the metadata sought by the plaintiff falls within the definition of "document" for the purposes of documentary disclosure, I will start with consideration of the relevant factors under King's Bench Rule 30.04(5).

[24] In that regard, the plaintiff relies upon the following statement from ***574201 Alberta Ltd.*** at paragraphs 38 and 39:

> **38** While the plaintiffs by cc have argued that the request to inspect was premature, and that the pleadings must be closed and affidavit of documents prepared prior to any inspection, they concede that the court has the jurisdiction pursuant to Rule 30 to order any documents be produced, at any time. The defendants by cc have urged the court to order the early production for inspection of documents expressly referred to in the pleadings, including in the counterclaim filed, as well as some documents which arguably are implicitly referred to.
>
> **39** While acknowledging the request to inspect in this case comes early in the proceedings, I nevertheless find that it is helpful to address it at this stage, particularly given the nature of the allegations raised by the plaintiffs by cc. This is not to say that I agree with the defendants by cc that such disclosure is always automatic, particularly where disclosure is being requested of documents that are not expressly referred to in the pleadings, as is the case here. Production for inspection in such circumstances is, in my view, a discretionary matter for the courts consideration and we must balance the interests of the parties, the nature of the pleadings and the role of discovery when considering such requests.

[25] Thus, the court has discretion to consider this request at any stage of the proceeding, but must balance the interests of the parties in so doing.

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[26] Further, the court must always consider King's Bench Rule 1.04(1.1), set out below, when considering the application of the rules:

> **Proportionality**
> 1.04(1.1) In applying these rules in a proceeding, the court is to make orders and give directions that are proportionate to the following:
> (a) the nature of the proceeding;
> (b) the amount that is probably at issue in the proceeding;
> (c) the complexity of the issues involved in the proceeding;
> (d) the likely expense of the proceeding to the parties.

[27] While proportionality is a principle for the court to consider on every motion before it, in my view it is especially important in such cases where the order sought is intrusive and raises privacy and confidentiality concerns.

[28] The plaintiff attempts to distinguish the cases relied upon by the defendants on the basis they involve a party seeking to have the opposing party's hard drive turned over for review. The hard drive is referred to in those cases as essentially being a storage cabinet of the party which stores all kinds of information, including that which is irrelevant to the litigation and subject to privacy concerns. The plaintiff's answer to that is that the order sought in this case is finely focused such that the expert, KPMG LLP, will be seeking metadata only in relation to the few documents at issue in this litigation. For that reason, the plaintiff suggests that the court is not required to limit the production to a case involving "exceptional circumstances", as suggested by the defendants.

[29] While I accept that there are some factual differences in the decisions relied upon by the defendants, the underlying concept remains the same. That is, Mansbridge would be required under the order sought to turn over his computer to an expert retained by the plaintiff for an image to be taken of its

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hard drive and inspection of its contents to seek metadata relating to the documents at issue. This is no less intrusive than the situation described in decisions relied upon by the defendants and for which the various courts suggest that exceptional circumstances are required for such an order to be granted.

[30] The decisions relied upon by the defendants require that there be, for example, "... evidence that a party is intentionally deleting relevant and material information will the Court order production of the hard drive for examination." (***Ceballos***, paragraph 12).

[31] There is no such evidence in this case; the intended use of the metadata is to "test the evidence" of Mansbridge that he did not make any use of the documents at issue. Thus far, there is no such evidence that Mansbridge misused the documents at all, nor is there an allegation that he has been deleting relevant material.

[32] Underlying this discussion is the other position of the defendants that there is no legal foundation for this order to be made, given the decision by Harris J. that the confidentiality clause is unreasonable and unenforceable, which decision was not overturned by the Court of Appeal. They contend this to be a conclusory determination of the enforceability of the confidentiality clause in the agreement such that it can no longer be relied upon by the plaintiff. On the other hand, the plaintiff argues that a decision on an interim motion is not a final disposition at all, and it remains open for the trial judge in this case to reach a different conclusion on enforceability of the confidentiality clause. The plaintiff

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also relies upon the common-law duty of confidentiality in addition to the contractual duty.

[33] In my view, while the comments by Harris J. on the injunction motion in relation to the confidentiality clause may very well be a strong signal that it will be found unenforceable at trial, I do not believe this to be the final disposition. For this I rely on the words of Schulman J. in ***Winnipeg Child and Family Services (Northwest Area) v. D.F.G.***, [1996] M.J. No. 386 (Man QB), at paragraph 27:

> **27** ... On the motion for the interim mandatory injunction, my function is to appraise the Agency's case, but it is not to make findings of fact or a final disposition of the issue raised in the statement of claim. The final findings will be made by the judge who hears the trial of the action.

[34] While I would interpret the decisions by Harris J. and the Court of Appeal to be a sign to the plaintiff of the strength of its confidentiality clause, I do not believe there is yet a final determination on enforceability.

[35] As it relates to the common law duty of confidentiality, the defendants suggest that the documents at issue are not confidential, relying on the ***Imperial Sheet Metal Ltd.*** decision.

[36] The defendants' arguments on the enforceability of the contractual confidentiality clause and the lack of confidentiality in these documents in relation to the common law duty of confidentiality, are arguments that the case of the plaintiff is weak and is a factor for consideration when determining if there are exceptional circumstances for such an intrusive order to be made.

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[37] As indicated earlier, the order being sought here is a discretionary one. When I consider all of the factors which assist in arriving at the conclusion on exceptional circumstances, they do not convince me that the plaintiff has established exceptional circumstances justifying the granting of this order. Those factors are:

- The judicial assessment of the plaintiff's confidentiality clause thus far suggests it is unenforceable;
- The order sought is intrusive and raises privacy and confidentiality concerns;
- There is no evidence that Mansbridge misused the confidential documents – in fact, Harris J. accepted Mansbridge's evidence, saying it effectively stood uncontroverted, considering his concern about the evidence of the plaintiff's representative;
- There is no evidence that Mansbridge is intentionally deleting relevant or material information;
- The information sought is to be used simply to "test the evidence" that Mansbridge has already given.

[38] On the basis of all the considerations set out herein, and at this early stage of the proceeding, I am not convinced that the exceptional order sought should be granted. I am, therefore, dismissing the plaintiff's motion.

[39] Should the parties be unable to agree on cost consequences of this decision, an appointment may be made for brief submissions.

S. D. Berthaudin
Master

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