Court of King's Bench of Alberta

Citation: Great North Equipment Inc v Penney, 2024 ABKB 533

Date: 20240906
Docket: 2301 08144
Registry: Calgary

Between:

Great North Equipment Inc., and 1185641 BC Ltd.

Plaintiffs/Applicants

- and -

Bradley Penney, Neil MacDonald, Dustin Monilaws, Paloma Pressure Control LLC., Paloma PC Holdings LLC., Indeed Oilfield Supply LLC., and Indeed Alberta Corp.

Defendants

- and –

Bradley Penney, Neil MacDonald, Dustin Monilaws, Paloma Pressure Control LLC., Paloma PC Holdings LLC., and Paloma Pressure Control Canada Ltd.

Respondents

Reasons for Judgment
of the
Honourable Justice Michael J. Lema

I. Introduction

[1] Should a no-solicitation, no-competition, no-use-of-confidential-information interim injunction be extended for another year and to additional parties?

[2] The applicants assert fiduciary status for three (now former) employees, contractual restrictive covenants for two of them, misuse of confidential information, and post-injunction breaches by all three of them, in support of the proposed extension. Plus conspiracy behaviour by them and the Paloma entities in support of extending the injunction to the latter.

[3] The former employees dispute fiduciary status and the existence of contractual covenants (or that any such covenants continue to operate), deny the existence of confidential information or (if any) that any of them misused it, and deny breaching the current injunction. Per them, no extension is warranted. The Paloma entities dispute the conspiracy allegations and that the injunction should extend to them for any reason.

[4] As explained below, I find no existing contractual commitments, no justification for an extended fiduciary period, no material evidence of continuing-to-be-confidential information, and no material evidence of off-side conduct by Paloma.

[5] Accordingly, the existing injunction is set aside, and the application for a sealing order is dismissed.

II. Background

[6] The background is partly outlined in ***Great North Equipment Inc v Penney***, 2024 ABKB 391, where Feasby J. decided a questioning-and-undertakings point.

[7] In a nutshell, Messrs. Penney, Macdonald, and Monilaws left GNE in June 2023, shortly thereafter doing work for and then becoming employed by one of the Paloma entities, in the same (oilfield equipment) market.

[8] In response to GNE's application shortly after for an interim injunction barring them from competing with, soliciting customers from, and using confidential information of, GNE, all three consented to a ten-month interim injunction barring these activities. Yamauchi J. granted the consented-to injunction on August 1, 2023.

[9] The injunction was extended from June 17, 2023 to July 20, 2024 (Sidnell J. order) and from the latter date to August 31, 2024 (Mah J. order), largely to allow for questioning, undertakings, and related work.

[10] I heard the injunction-extension application on August 14, 2024 and reserved judgment. I also extended the interim injunction through to the release of this decision (at minimum).

[11] This judgment outlines my reasoning for dismissing the extension application and also a related application for a sealing order.

III. Analysis

A. "Serious issue to be tried" or "strong *prima facie* case"

[12] On the first prong of the test for an injunction (the other two being irreparable harm and balance of convenience), GNE asserts the appropriate gauge is the less onerous "serious issue to be tried" (GNE brief, paras 59-62). The individual respondents urge the more onerous "strong *prima facie* case" (their brief, paras 56-60).

[13] In this case, as will be seen below, it does not matter which standard applies: GNE fails on both.

[14] I turn next to the issues raised by GNE to gauge whether they constitute (at minimum) "serious issues to be tried", starting with an alleged breach of restrictive covenants in a shareholders' agreement.

B. Shareholders' agreement (binding effect)

1. Shareholders agreement (key provisions)

[15] GNE anchors part of its argument on restrictive covenants contained in a certain shareholders' agreement (SA).

[16] Neither Penney nor MacDonald signed the original SA.

[17] GNE argues that they later became parties to the SA (via downstream agreements, discussed below) and thus bound by those covenants.

[18] Here are the key SA covenants:

> Non-Competition and Non-Solicitation by Shareholder
>
> a) Each member of the Non-IGP Group [including Penney and MacDonald in the circumstances here] covenants and agrees that **so long as it … holds any Shares and for twenty-four (24) months thereafter**, such Person shall **not**, directly or indirectly … **participate in any business** … in the Restricted Territory **which engages or which proposes to engage in the Business** …
>
> b) Each member of the Non-IGP Group covenants and agrees that **so long as it … holds any Shares and for twenty-four (24) months thereafter,** such Person shall not, indirectly or directly, (i) **accept any business relating to the Business from any customer of the Company** …, (ii) **solicit**, cause in any part or knowingly encourage **any customer of the Company … to divert, adversely alter or cease doing business in whole or in part with the Company** with respect to the Business or (iii) acquire or attempt to acquire any business which the Company … [has] identified as a potential acquisition target …, or take any action to induce or attempt to induce any Acquisition Target to consummate any acquisition, investment or other similar transaction with any person or entity other than the Company ….
>
> c) Each member of the Non-IGP Group covenants and agrees that **so long as it … holds any Shares and for twenty-four (24) months thereafter**, such Person shall **not**, directly or indirectly, **employ or contract with, offer employment to, solicit the employment or service of, or procure or assist any Person to employ or contract with, offer employment to, solicitor the employment or service of, or otherwise entice away from the employment or service of the Company** … (i) any Person who is employed by the Company … or any Person whose consulting services are retained by the Company …, or (ii) any Person who was employed, or whose consulting services were retained by, … the Company … ; provided that, solely the non-solicitation restriction of this Section 25(c)

> shall not apply to any non-targeted, general solicitations for employment …. [SA, s. 24]

2. Joinder agreements

[19] Here is the complete text of the downstream "Joinder Agreement" by which (per GNE) MacDonald became at party to the SA and subject to its obligations (Penney's was materially identical):

> JOINDER TO THE SHAREHOLDERS AGREEMENT
>
> This Joinder (this "Agreement") is made as of the date written below [October 21, 2022 for MacDonald; [date] for Penney] by the undersigned (the "Joining Party") in favour of and for the benefit of [118 BC Ltd] and the other parties to the Shareholders Agreement, dated as of December 17, 2018 (as may be amended, the "Shareholders Agreement"). Capitalized terms used but not defined herein shall have the meanings given such terms in the Shareholders Agreement.
>
> The Joining Party hereby acknowledges, agrees and confirms that, **by his or her execution of this Joinder, the Joining Party will be deemed to be a party to the Shareholders Agreement and shall have all of the obligations under the Shareholders Agreement as a Shareholder and a member of the Non-IGP Group as if he or she had executed the Shareholders Agreement.** T he Joining Party hereby ratifies, as of the date hereof, and **agrees to be bound by, all of the terms, provisions and conditions contained in the Shareholders Agreement.** Without limiting the generality of the foregoing, the Joining Party acknowledges that the provisions of Section 7 of the Shareholders Agreement shall apply regardless of when the Joining Party acquire Shares (as defined in the Shareholders Agreement).
>
> The Joining Party acknowledges that all expectations and future projections contained in any presentation or other materials provided to the Joining Party are estimates and for illustrative purposes only. No guarantee can be given that future projections can or will be attained.
>
> IN WITNESS WHEREOF, the undersigned has executed this Joinder as of the date written below.
>
> [October 21, 2022 for MacDonald; [date] for Penney] [emphasis added]

3. Options to purchase shares

[20] Backdrops to both JAs are options to purchase (OTP) shares in 118 given to both Penney and MacDonald. Here is the material text of MacDonald's OTP:

> THIS OPTION IS ISSUED AS OF SEPTEMBER 16, 2022 PURSUANT TO THE SHARE OPTION PLAN ADOPTED DECEMBER 17, 2018 BY THE BOARD OF DIRECTOR OF THE ISSUER (THE "PLAN"), AS AMENDED ON SEPTEMBER 28, 2021, AND THIS OPTION IS SUBJECT TO THE TERMS SET FOR IN THE PLAN.
>
> This certifies that **[MacDonald] ("Participant") is entitled, upon the due exercise hereof, to purchase up to 25 Class B Shares (the "Option Shares"),**

> **of [118] (the "Company") at a price (the "Exercise Price") of $1,000 per Option Share**. This option (this "Option") is issued pursuant to the Share Option Plan adopted December 17, 2018 by the Company's Board of Directors (the "Plan"), as amended on September 28, 2021, and is subject in its entirety to the terms and conditions of the Plan, as amended from time to time, all of which are hereby incorporated in the terms of this Option. …
>
> To the extent permitted by the Plan, the Participant may exercise all or any portion of the Option by executing and delivering to the Company an Exercise Notice … together with full payment of the Aggregate Exercise Price for all Option Shares being so purchased ….
>
> …
>
> **Prior to the exercise of this Option as permitted by the Plan, the Participant shall not, with respect to the Option Shares issuable upon the due exercise hereof, be entitled to any of the rights of a shareholder of the Company including, without limitation, the right as a shareholder to (i) vote on or consent to any proposed action of the Company, (ii) receive dividends or other distribution made to shareholders, (iii) receive notice of or attend any meetings of shareholders of the Company or (iv) receive notice of any other proceedings of the Company.** [emphasis added]
>
> [signatures of 118 representative and MacDonald]

4. Positions

[21] GNE argues that, having signed joinder agreements, Penney and MacDonald became parties to and bound by the shareholder agreement, including its restrictive covenants (s. 24).

[22] Penney and MacDonald dispute becoming parties to the SA or, at least, being bound by the covenants.

[23] Both emphasize not receiving a copy of the SA from 118, not being told about the restrictive covenants (or any other SA provision) and being led to believe by 118 representatives that the JAs were purely mechanical i.e. a means of facilitating the acquisition of shares pursuant to the OTPs.

[24] According to them, in the absence of those and any other reasonable steps by 118 to make them aware of the SA's terms (or at least the restrictive covenants), 118/GNE cannot enforce the covenants against them.

[25] I find in favour of Penney and MacDonald, as explained further below.

5. MacDonald never a shareholder

[26] First, I find a threshold obstacle to MacDonald being bound by the covenants, namely, him having not exercised his OTP and not otherwise having become a 118 shareholder.

[27] Recall this key wording from s. 24: "so long as it … holds any Shares and for twenty-four (24) months thereafter, such Person shall not …."

[28] Via this provision, the restrictions only apply to persons who held shares at any point.

[29] Via the word "thereafter", the extension portion (24 months) kicks in (as applicable) after the person in question ceases to hold shares.

[30] With MacDonald never holding any shares, he did not become subject to the restrictive covenants.

[31] The focus SA-wise narrows to Penney.

6. No consideration for taking on SA obligations

[32] I see another obstacle for GNE here, namely, it did not provide any consideration for Penney (or MacDonald) agreeing to take on the SA's burdens, including the covenants:

- the JA does not reference any consideration provided by GNE;
- the JA was not executed under seal in lieu of GNE providing consideration: ***Travelers Insurance Co of Canada v LCL Builds Corp***, 2018 ONSC 1805 (para 27);
- the JA refers to the joining party "[having] all of the **obligations** under the [SA]" and "[being] **bound** by all of the terms, provisions and conditions contained in the [SA], saying nothing about the joiner acquiring any rights, benefits, privileges or other advantages under the SA;
- the one SA provision expressly cited as applying to a joining party (s. 7) is a "burden" provision i.e. the joiner's exposure to certain share-repurchase rights in favour of others;
- the JA itself does not provide any right, benefit, privilege, or advantage to the joining party;
- given the pre-existence of the OTPs, it appears the only function of the JAs was to subject the joiners to the SA's burdens i.e. with the OTPs appearing to be freestanding and sufficient platforms for MacDonald and Penney to acquire shares. Despite being characterized by 118's/GNE's representatives as "facilitative" for share purchases, the JAs did not in fact include anything so facilitative, instead only adding, or attempting to add, burdens to the joining parties. Recall the closing paragraph of the OTP: "**Prior to the exercise of this Option** …, the Participant shall not … be entitled to any of the rights of a shareholder of the Company …." The converse is that, on the exercise of the Option, the exerciser obtains the rights to vote, receive dividends, and so on i.e. by its own terms, the OTP was a sufficient gateway to acquiring shares and the associated rights;
- the OTPs did not refer to the JAs in any way, let alone stipulating that their exercise was somehow contingent on or otherwise linked to the JAs; and
- 118/GNE did not point to any statute filling the consideration gap, as the *Insurance Act* does in some circumstances:

> Any person insured by but not named in a contract to which section 559 or 560 applies may recover indemnity in the same manner and to the same extent as if named in the

> contract and for that purpose is **deemed to be a party to the contract and to have given consideration for the contract**. [s. 563] [same provision in para 557(2)(b) and s 590].

[33] On the need for consideration to anchor an employee's agreement to a non-solicitation covenant after the start of employment, see ***National Bank Financial Inc v Canaccord Genuity Corp***, 2018 BCSC 857 (Weatherill J.) (paras 62-71).

[34] See also ***Rejdak v Fight Network Inc***, 2008 CanLII 37909 (ONSC) (Herman J.) at paras 56-60 and ***Tossonian v Cynphany Diamonds Inc***, 2014 ONSC 7484 (Mew J.) at paras 63 and 64.

[35] David J. Doorey in *The Law of Work* (2024 -- 3rd ed. -- Emond – Toronto) states:

> … amendments to an employment contract are only enforceable if there has been mutual consideration [citing ***Rejdak***].

[36] That is what GNE/118 attempted to do i.e. make a fundamental change to the employment contracts of Penney and MacDonald, here under the guise of setting up a share-option plan.

[37] Without consideration being provided by GNE/118, the identified SA obligations are not enforceable.

7. No reasonable (or any) notice of SA restrictive covenants

[38] If consideration was provided or if no consideration was necessary to make the covenants enforceable, I accept Penney's and MacDonald's argument (noted above) about insufficient notice of the covenants.

[39] Both Penney and MacDonald gave evidence that GNE/118 did not provide a copy of the SA to them or otherwise notify them of its terms, let alone the restrictive covenants.

[40] Per Penney (in questioning on August 6, 2024):

> Q: … were you aware at [the time share options were being discussed] that there was a shareholder agreement involving both shareholders and option holders?
>
> A: I was not. There was – I've gone through that paperwork multiple times – [t]here was **never any kind of shareholder agreement presented to us** in the whole patent purchase.
>
> Q: But did you at some point sign a joinder agreement with respect to the shareholder agreement, right?
>
> A: Did I sign a joinder agreement? Yes.
>
> Q: And **you were aware that there were restrictive covenants in that shareholder agreement before you resigned your employment, right?**
>
> **A: That is not true**. [Later] … at the end of the day, there was **never any kind of shareholder agreement that was presented to us that had any kind of restrictive covenants. I mean I had never seen it. I had never – anything**. I

mean I sat through the Steele questioning. She admitted it too. She had never seen the shareholders agreement. [from pp 147-148] [emphasis added]

[41] Per MacDonald (in questioning on July 30, 2024):

Q: Do you remember receiving an option agreement and a joinder agreement from Great North?

A: I do, vaguely.

Q: Do you remember having a discussion with David Boutin (phonetic) about participating in the option plan?

A: I do.

Q: Was anybody else part of that meeting?

A: No.

Q: What do you remember Mr. Boutin telling you about the option plan?

A: He told me that it was basically a reward for being a good employee. He said that it was a plan that was pending investment of – the vesting of the option would depend on the sale of the corporation.

Q: Did he give you any further details about the option plan and the shareholder agreement?

A: He told me what he thinks they would be valued at pending a sale. Ultimately ended up being extremely exaggerated, to my knowledge.

Q: Did you ask for a copy of the option plan or the shareholder agreement?

A: **The shareholder agreement was never provided to me**. I think the joinder agreement was sent to me by email, I believe.

Q: Do you remember seeing a copy of the option plan from Mr. Boutin by email?

A: The option plan I believe I did, yeah.

Q: And do you remember Mr. Boutin inviting you to ask him or Greg Dowle any questions about things before signing?

A: I did sit with Greg and basically just talked about the value of said options specifically discussing the multipliers upon which the business could sell for and how that would translate over to a return on investments if there were options to purchase at the time.

Q: **Did Mr. Boutin provide you a printed copy of the shareholder agreement?**

A: He did not. …

[later]

Q: And were you excited about participating in the plan and having the opportunity to earn equity in the business?

> A: The way that it was presented to me, there was some excitement there.
>
> Q: And you were excited about the potential if the business was sold to share in the gains from that sale, right?
>
> A: Ultimately, yeah. I feel to date there has been details left out of that conversation. There was absolutely **no discussion about further covenants or responsibilities or duties to Great North that were joined by signing into this option plan**. [from pp 184-187] [emphasis added]

[42] As far as I can tell, no GNE evidence contradicts Penney's and MacDonald's evidence on this aspect. (See, in particular, the absence of contradictory evidence in the supplemental affidavit of Stephen Forberg sworn July 21, 2023 (paras 9-17) and the questioning of Caren Steele on July 11, 2024 (pp 13 and 14), both of which address this subject.)

[43] Penney and MacDonald argue the absence of notice makes the covenants unenforceable:

> [GNE's] failure to bring the oppressive terms of the restrictive covenants to [their] attention at the time the Joinder and Option to Purchase Agreements were entered into is fatal to their enforceability. A party's failure to provide notice of a particularly harsh or oppressive term on an unsuspecting party will generally render that term unenforceable [citing ***Battiston v Microsoft Canada Inc***, 2020 ONSC 4286 at paras 66-70]. A 24-month non-compete/non-solicit covering all of North America has been described as "occupational suicide" in the jurisprudence [footnote omitted]. [Respondents Joint Bench Brief, para 83].

[44] GNE's written argument assumed that, by signing the Joinder Agreements, Penney and MacDonald bound themselves to the SA, including the covenants.

[45] In oral argument, GNE took the same position, elaborating as follows:

> ***Battiston*** was overturned on appeal on this very [i.e. lack of notice] point: 2021 ONCA 727. [In that case], the employee had for sixteen years expressly agreed to [certain terms]. He consciously chose not to read [them], despite clicking a "read" box. … We say that Penney and MacDonald had the document, and they signed it. In it, they represented they had reviewed the Shareholder Agreement. And that they had had the opportunity to seek independent legal advice.
>
> The Shareholder Agreement is clearly binding on them. [synopsis of submissions]

[46] It is true that the ONSC-level decision in ***Battison*** was overturned by the ONCA in 2021 ONCA 727. I also note that leave to appeal the latter decision was denied in 2022 CanLII 67610 (SCC).

[47] However, that case is distinguishable on its facts. Per the ONCA decision:

> This [trial] finding cannot stand because the trial judge's conclusion that the notice provisions were not brought to the respondent's attention fails to address the following facts:
>
> > 1) For 16 years the respondent expressly agreed to the terms of the agreement.

> 2) **The respondent made a conscious decision not to read the agreement despite indicating that he did read it by clicking the box confirming such.**
>
> 3) By misrepresenting his assent to the appellant, he put himself in a better position than an employee who did not misrepresent, thereby taking advantage of his own wrong: see *Berlingieri v. DeSantis* (1980), 1980 CanLII 1823 (ON CA), 31 O.R. (2d) 1 (C.A.) at para. 18.
>
> **The trial judge erred by finding the respondent received no notice.** [paras 9 and 10] [emphasis added]

[48] The employee there was given reasonable access to the separate document and chose not to exercise it.

[49] As is clear from the above review of the evidence, that is not the case here.

[50] The ONCA's decision did not undercut the law bearing on the incorporation of separate documents into an agreement or the duty to give reasonable notice of "harsh and oppressive", unexpected, or any particular terms at all.

[51] On this subject, see *The Law of Contracts* (5th ed. – 2005 – S.M. Waddams – Canada Law Book – Toronto):

> A line of cases going back to the 19th century holds that a document delivered by one party to the other at the time of the contract may be incorporated into the agreement if the document is the sort of document generally known to contain contractual terms and if the party seeking to rely on the document has taken reasonable steps to bring those terms to the other's attention. …
>
> The terms of a document will not be incorporated if the document is not of the type that would ordinarily be expected to contain contractual terms. [from pp 47, 48, and 49] [footnote omitted]

[52] Moreso the case (i.e. non-incorporation) where the separate document – here, the SA – is never provided.

[53] See also *Chitty on Contracts – Volume I – General Principles* (35th ed. – 2023), paras 16-006 and 16-007, especially:

> … It may also be the case that, where the document which has been signed is one that seeks to incorporate a set of terms and conditions but does not itself contain these terms and conditions, a signature may not of itself suffice to incorporate a term or condition in that document which is onerous or unusual, unless the document which was signed drew attention to the onerous or unusual term. [from para 16-007] [footnotes omitted] [emphasis added]

[54] See also ***Schaufert v Calgary Co-operative Assn Ltd***, 2021 ABQB 579 (Eamon J.) at paras 39-48.

[55] If GNE/118 intended to rely on the restrictive covenants in the SA, they had a practical obligation to give copies of the SA to the potential joiners, describe the SA's terms or at least the restrictive covenants to them, give them an opportunity to read and consider its terms (the entire

agreement or at least the covenants), or otherwise bring the terms (whole or subset) to their attention.

[56] And not describe the joinder agreements as simply "facilitating" potential share purchases.

[57] GNE is accordingly wrong in asserting that "[they] had the document" – neither Penney nor MacDonald ever received the shareholder agreement – and that "they represented that they had reviewed it and had received an opportunity for independent legal advice."

[58] On the latter aspect neither the OTP nor the JA contained either acknowledgment.

[59] And whether the SA contained either or both acknowledgments makes no difference, with neither individual ever receiving a copy of it.

8. Conclusion on shareholders' agreement

[60] For these reasons, I find that the restrictive covenants in the shareholders agreement are not enforceable against Penney or MacDonald.

[61] Translated into injunction-test terms, there is no serious (i.e non-frivolous) argument that Penney or MacDonald is subject to contractual covenants.

C. Fiduciary status and duration of fiduciary period

[62] GNE also argued that each of Penney, MacDonald and Monilaws were fiduciaries of GNE and thus owed various fiduciary responsibilities to it and that such responsibilities existed or should exist for two years from their departure i.e. through to June 2025.

[63] I will assume fiduciary status and focus on the appropriate duration of the fiduciary period.

[64] Here are GNE's written-brief submissions on this aspect:

> The duty to refrain from unfairly competing, by soliciting the former employer's customers and employees, has been held to last **up to two years** post-retirement [FN 113: See ***Jetco Heavy Duty Lighting v Fonteyne***, 2018 ABQB 345 … at para 199 (Justice D. R. Mah accounted for an **18-month** post-employment fiduciary period) …; ***Alberta Care-A-Child Ltd v Payne***, 2005 ABQB 561 … at para 95 (Justice S. D. Hillier accounted for a **19-month** post-employment fiduciary period) … ;] ***DiFlorio v Con Structural Steel Ltd***, 2000 CarswellOnt 316 at para 184 (**2-year** post-employment fiduciary period) … ***affd*** 2001 CarswellOnt 4702 (ONCA), leave to appeal refused [2002] SCCA No 51; ***Bonazza v Forensic Investigations Canada Inc***, 2009 CarswellOnt 3645 (**2-year** post-employment fiduciary period)]
>
> … where an employee has **already breached their duties**, the duration of post-employment **fiduciary obligation should be extended**, given the enhanced vulnerability caused by the breach. For example, in [***Easyhome Ltd v Casey***, 2009 ABQB 735], a 6-month fiduciary period was extended to 12 months because of the breach…. In ***KJA Consultants Inc v Soberman*** [2002 CanLII 49613 (ONSC) at para 12] …, a fiduciary period that might have otherwise been 12 to 15 months was extended to 18 months, because of the breach ....

[65] The yardstick for fiduciary-period length in Alberta comes from ***Anderson, Smyth & Kelly Customs Brokers Ltd v World Wide Customs Brokers Ltd***, 1996 ABCA 169:

> The next issue is **the temporal scope of Kelly's duty not to solicit the Appellant's clients.** The duty prevails only as long as the fiduciary relationship between the parties subsists. Had there been no direct solicitation by Kelly, how long would he have been prohibited from asking the Appellant's clients to transfer their business to him and his new affiliation?
>
> In my view, **the duty of a departing fiduciary employee subsists for so long after his termination as is reasonable in the circumstances to enable the former employer to himself contact his clients and attempt to retain their loyalty. The length of that period will obviously be affected by the nature of the position held by the departing employee. Generally, the higher the level of trust and confidence reposed in the employee, with a corresponding vulnerability of the employer, the longer the period will be.** Following the expiry of that period the departing employee is in the same position as any other former employee turned competitor -free to contact the clients of his former employer for the purpose of inducing them to follow him.
>
> …
>
> Given the degree of personal loyalty to the individual customs broker in this case and throughout the industry generally, I believe that it would have been reasonable for the Appellant to expect Kelly to have refrained from soliciting its clients for a **period of one year after his departure**. **During this time, the Appellant would have had the opportunity to solidify and secure its relationship with its clients and to compensate for any destabilizing effect Kelly's departure may have had.** After this one-year period, however, Kelly, like any other customs broker in the marketplace, would be entitled to approach the Appellant's clients to solicit their business. [paras 31, 32, and 34] [emphasis added]

[66] In ***HRC Tool & Die Mfg Ltd v Naderi***, 2015 ABQB 437, Ross J. applied the ***Anderson*** framework:

> As to the minimal solicitation that did occur, the call to Freudenberg-NOK took place **approximately three months** after Bahra and Naderi left HRC. **This was after a reasonable period of time that would have permitted HRC to contact everyone on its short customer list and attempt to retain their loyalty.** Indeed, there is no evidence that HRC did not in fact retain the loyalty of all of its clients. HRC continued to work for the same clients and did not attempt to prove that it lost any business to Prowest. [para 52] [emphasis added] [decision affirmed – 2016 ABCA 334; leave denied – 2017 CanLII 18656 (SCC)]

[67] Here is Mah J.'s discussion of duration in ***Jetco***, after reciting the ***Anderson*** framework (para 94 of ***Jetco***):

> **Durations in the case law tend to range from a few months to one year.**

- ***HRC*** trial decision at para 52, aff'd on this ground 2016 ABCA 334: **three months** of non-solicitation was found to be a reasonable as it would provide enough time for the former employer to "contact everyone on its short customer list and attempt to retain their loyalty";
- ***Torcana*** at paras 85-87: **six months** given that the employee had **only been with the employer for seventeen months**, but was the only salesperson, it was a highly competitive industry, and he "had the advantage of not only knowing who was in the industry, but he knew who the key contacts were",
- ***KJA Consultants Inc. v Soberman***¸ 29 CCEL (3d) 47, 2003 CanLII 13546 at para 47 (Ont Sup Ct J), aff'd 2004 CanLII 36050 (Ont CA): **one year** was appropriate given that the **employee had been with the company for thirteen years** and was "the "face" of KJA in a business that depends on personal relationships";
- ***Anderson, Smyth*** at para 33: **one year** "[g]iven the degree of personal loyalty to the individual customs broker in this case and throughout the industry generally".

...

At para 94 [of ***Alberta Child-A-Care Ltd v Payne***], Hillier J says:

> Recognizing that even fiduciaries are entitled to compete, subject to compliance with duties reasonably imposed by law, **a 3-year period for assessment of damages on the facts of this case would be excessive. A more reasonable time period would be about half that time.**

Looking at the fact that Jetco still had its foot in the door with the end users through SMS, and the **difficulty of restoring the relationships after Mr. Fonteyne left**, I assess the accounting period to be **18 months** from the date of Mr. Fonteyne's departure from Jetco. While there was some evidence that Jetco took longer to restore its relationship in full with SMS, it is not clear to me that this was the result of anything Mr. Fonteyne actively did, apart from just leaving Jetco. This is an **ample period during which Jetco could have restored its former relationships**. This accounting period relates to the mining sector customers only. **The same 18 month period may also be treated as the duration of the fiduciary period.** [emphasis added] [paras 95, 198 and 199] [emphasis added]

[68] GNE asserted various perceived off-side conduct by Penney, MacDonald and Monilaws resulting in lost or damaged client relationships:

- "Penney's conduct in **contacting Tristar Resource Management ..., an existing client** of [GNE] ...";
- "Penney, while still an employee of Great North, confirmed that the "[j]ust spoke with [someone]" from Vesta Energy and that [that person] was "excited for the next offering." ... Subsequently, Paloma contacted Vesta

> Energy in October 2023, using Great North's confidential pricing data to compare it against Paloma's own pricing to **try to obtain Vesta Energy's business**";
>
> - "... Penney **contacted Paramount and Birchcliff** to tell them his story [of leaving GNE]";
> - " ... Monilaws proactively solicited the business of Chevron prior to January 2024, which was a **maturing corporate opportunity and prospective client** that [he] was actively pursuing for Great North while employed at Great North. ...";
> - "Paloma now counts STEP Energy Services Ltd ... among its customers. ... While employed at Great North, Monilaws had been **actively pursuing STEP's business**...."; and
> - "Paloma provides services competitive to Great North to various **current and former Great North customers, including Whitecap, NuVista, Paramount, Athabasca Oil Sands, and Baytex. Former Great North customers include White Cap and NuVista**....."

[69] These reported events do not go very far in showing damaged client relationships, let alone any caused by off-side conduct by any of the respondents.

[70] Here are Penney, MacDonald and Monilaws on this subject (excerpts from main brief):

> ... to the extent there was an attempt to solicit Visa, which is not admitted but denied, the evidence is that Vista remains Great North's number one account, so the alleged solicitations was unsuccessful. [COMMENT: I do not recall GNE pointing to any evidence showing any particular loss of Vista business at GNE.] [CHECK]
>
> The evidence of both Paloma and Caren Steele [a GNE representative] is that of the five customers of Paloma Canada are are/were customers of Great North, each reached out to Paloma for support; moreover, of these five, three advised Paloma that Great North informed them that it would not be able / could not provide the equipment or services sought. In fact, Great North referred at least one of its customers to Paloma.
>
> [later]
>
> Great North referred Whitecap to Penney and Paloma when it was unable to provide Whitecap with the assets by [a certain] project start date[.]
>
> Great North referred NuVista Energy Ltd. to Penney and Paloma, as great North could not meet NuVista's asset needs for the remainder of 2024[.]

[71] The above excerpts from both GNE's and the respondents' briefs (with similar submissions and evidence in the respondents' supplementary brief at paras 5, 6, and the second half of para 14]) were all anchored to affidavit evidence.

[72] None of that evidence seemed to be materially contradicted i.e. both side's contentions here appear to be borne out.

[73] The net result, I find, is that GNE did not demonstrate materially damaged client relationships, or at least none caused by off-side conduct by any, some or all of the individual respondents, or at least to the extent that more than thirteen months (i.e. the current duration of the interim injunction) is needed, likely needed, or even possibly needed, to repair any such damage.

[74] As for the two Ontario cases featuring two-year fiduciary periods, I start with ***DiFlorio v Con Structural Steel Ltd*** (cited above). Here is the key "duration" excerpt:

> **Length of Non-Solicitation**
>
> I have concluded that Roland, Bertolo and Grace breached their fiduciary duties to Rocca by soliciting former Rocca clients. Since a breach has occurred, one must determine the length of the period during which the fiduciaries were obliged not to solicit Rocca's former clients.
>
> The plaintiff sues for damages based upon a non-solicitation period that begins on the date the Agreement was closed and lasts for three years. However, the plaintiff also provides detailed calculations referring to a two-year period starting on March 1, 1990, the date Con Steel began active business. The defence made no submissions on the reasonableness of the two-year period. I note that both accountants, in their respective reports, calculated damages using the two-year period.
>
> **Several indicia in the evidence before me are helpful in determining what constitutes a reasonable period of non-solicitation.**
>
> First, the **shareholder agreement** entered into by Bertolo and Roland **stipulates a two-year non-competition period.**
>
> A **second factor** relevant to the length of the non-solicitation period is **how long it would take to replace the expertise lost**. Bertolo acknowledged in his evidence that it would take time to train somebody to replace him, as he had been the key person preparing quotes for ten to fifteen years. Bertolo acknowledged that he had learned the steps involved "a little bit at a time". Although Rick D'Andrea was hired to assist with the preparation of take-offs, he was no replacement for Bertolo.
>
> D'Andrea had an erratic work history. Most importantly, he lacked the rapport with clients that Bertolo had developed over a period of years: see Anderson, Smyth & Kelly Customs Brokers Ltd. v. World Wide Customs Brokers Ltd., supra at para. 32.
>
> A **third yardstick** relevant to determining the appropriate length of the non-solicitation period is the **range of notice that Bertolo would have received if he had been terminated without cause**. The well established principle that an employee terminated without cause is entitled to reasonable notice of that termination is articulated by Iacobucci J. in the following passage from *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 at 737-738:
>
> > In determining what constitutes reasonable notice of termination, the courts have generally applied the principles articulated by

> McRuer C.J.H.C. in *Bardal v. Globe & Mail Ltd.*, [1960] O.J. No. 149, 24 D.L. (2d) 140 (Ont. H.C.) at p. 145:
>
> There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant.

I concur with the plaintiff's submission on the notice period. Given his thirty years of service, his age, and his responsibilities with senior management, **Bertolo would have been entitled to between 18 months and 24 months of notice if he had been terminated without cause**.

Taking into account these indicia, and the facts and circumstances of this case, I conclude that a reasonable period of non-solicitation for Roland and Bertolo is two years. That two-year period started running on the date that Con Steel opened. This time frame is reflected in the two accountants' reports. [paras 176-184] [emphasis added]

[75] A few observations about ***DiFlorio***:

- this Ontario decision applies a different framework, or set of factors, than the yardstick-for-Alberta decision in ***Anderson*** (cited above);
- in any case, the first factor (reference to contractual limits) has no relevance here, with Penney and MacDonald not being subject to contractual limits (as explained earlier) and the analogous limit in Monilaws' employment contract being one year, which has now expired;
- on the second factor, while GNE provided insufficient evidence that it needs another 11 months, or any particular additional period, within which to "staff up"; and
- on the third ("reasonable notice") factor, I do not see its relevance when setting the "fiduciary period", with no obvious overlap between these two conceptually distinct time periods. Here see ***Torcana Valve Services Inc v Anderson***, 2007 ABQB 356 (Graesser J.) at paras 68-71 and 83-87 (particularly (from para 71) "… the reasonable notice period for a dismissed employee does not automatically correlate to the period during which a fiduciary continues to be bound by his fiduciary obligations"). And ***Capital Estate Planning Corp v Lynch***, 2011 ABCA 224 at para 65 (distinction between "reasonable notice by employee to resign" and fiduciary periods).

[76] Accordingly, even if the duration framework in ***DiFlorio*** were applicable, GNE did not show, on the facts here, that a two-year fiduciary period is warranted.

[77] The other "two-year" Ontario case – ***Bonazza v Forensic Investigations Canada Inc*** [2009] OJ No. 2626 – is equally inapplicable. In that case, the key finding was that an arbitrator

did not err in "mirror[ing] his findings and conclusions concerning the contractual obligations as fiduciary obligations. The restriction was clearly intended to be time limited to the same two-year period contemplated by the employment contract" – see QL headnote and para 19 of the judgment.

[78] In other words, the two-year fiduciary period had a clear connection to a two-year contractual restriction.

[79] In ***Confidentiality, Intellectual Property and Competitive Risk in the Employment Relationship*** [2004] Cdn Bar Rev (Vol 83) 585 at 612, after surveying Canadian law at the time, Richard Brait and Bruce Pollock concluded:

> In the case of non-competition and non-solicitation clauses, the reasonable duration of a restraint has been equated to the length of time during which the employee has an advantage over the former employer because of his or her knowledge of and influence over customers. In this context, courts are **not likely to uphold a restrictive covenant that lasts longer than 18 months**, although longer periods have been upheld in cases dealing with professionals, particularly where they have sold their businesses. [footnotes omitted] [emphasis added]

[80] For general overviews of the "duration" case law, see ***Canadian Employment Law***, S. R. Ball (looseleaf ed. current to release #1, 2/2024), title 7:17 – "Reasonableness of Temporal Restraint" and ***The Law of Dismissal in Canada***, Howard A. Levitt (looseleaf ed. current to rel. 10 11/2021), title 12.14 – Non-solicitation (General), p. 12-49 starting with "The duty of a departing fiduciary employee …."

[81] The current case is analogous to ***Chen v 1054899 Alberta Ltd***, 2013 ABPC 150, where Higa J. rejected a two-year fiduciary period:

> In this action, the **Defendant has failed to address and satisfy the onus to establish that the non-solicitation clause is reasonable, especially as it relates to the temporal restriction.** The Defendant spoke generally to the reason for the clause and to protect her "investment" and efforts in conducting a small business. The Court acknowledges these are legitimate business reasons for inserting a non-solicitation clause in the Agreement. However, very little evidence was tendered to prove the reasonableness of the clause.
>
> The Court heard **no evidence as to why a 24-month period restriction is necessary and reasonable.** No evidence was tendered indicating how many music teaching providers are in Calgary or how many individuals are providing music instruction. The Court has no idea as to what the commercial market is relating to the provision of music lessons and obtaining students. No evidence was given relating to how students are obtained and retained. Some evidence was tendered relating to student turnover and the retention rate for other instructors. However, no evidence was tendered to prove the reasonableness of the clause at the time the contract was entered into. [paras 20 and 21] [emphasis added]

[82] A final factor against an extended fiduciary period here is the relatively short periods during which each of the individual respondents occupied their end-stage positions at GNE.

[83] It was those positions for each of them, as described in paras 68-74 of GNE's brief, that constituted them (per GNE) as fiduciaries.

[84] Penney served as Frac Operations Manager only from May 2021 i.e. only slightly longer than two years, with his departure in mid-June 2023.

[85] MacDonald served as MWFC Projects Group Manager from May 6, 2021, also only slightly longer than two years, with his departure at the same time.

[86] Monilaws only joined GNE, as MFWC Missile Manager on October 3, 2022 i.e. worked only (approximately) nine months, before his departure at the same time.

[87] These relatively short periods of employment weigh against extending the fiduciary period beyond (the present) thirteen months.

[88] All said: GNE did not provide any material evidence showing or even suggesting that a further 11 months, or any other incremental period is needed or would help GNE to accomplish whatever client-relationship damage control it has not already remedied and otherwise work to retain the loyalty of their time-of-respondents'-departure clients i.e. to achieve the objectives identified in ***Anderson*** (ABCA).

[89] GNE did not offer or, in any case, make out a fallback position i.e. if its request for two years (total) was denied.

[90] GNE also sought an extension of the fiduciary period for asserted post-employment breaches of fiduciary duties (para 80 of its written brief).

[91] I decline this request:

- in ***Anderson***, the Court of Appeal was also faced with asserted post-employment breaches, yet set the fiduciary period (there, one year) without any discussion of a "base" period and an "extension" for those breaches;
- the Court of Appeal declined a similar request in ***Dreco Energy Serviceds Ltd v Wenzel***, 2008 ABCA 290, concluding as follows:

  > At trial, any issues regarding the length and scope of the injunction will be considered and balanced against any continuing right to injunctive relief. Moreover, if the trial judge determines that a few more months ought to have been added to this injunction, the appellants can be compensated with damages. [paras 23 and 24]; and

- as explained above, GNE has not offered compelling evidence to show how any incremental extension of the injunction will make a material difference in recovering its balance in the ***Anderson*** sense.

[92] In conclusion here, I find that GNE has not shown the existence of a serious issue to be tried about the duration of the fiduciary period, with no material evidence supporting an extension beyond the release of this judgment.

D. Confidential information

[93] GNE also argues that the individual respondents had and continue to have confidential information belonging to it and have misused that information, including releasing some or all of

it to Paloma, since leaving GNE (brief, paras 116-125). (As noted below, the focus here shifts to Paloma.)

[94] GNE defined "Confidential Information" as including:

> … customer lists, vendor information, financial information, pricing models, costs structure, technical know-how, proprietary designs, engineering information, and corporate opportunities that belonged to Great North and/or 118 (para 2, GNE brief).

[95] GNE first points to an employee's common-law duty not to misuse the employer's confidential information, before or after employment.

[96] It next points to confidential-information terms in the Shareholders' Agreement. On this aspect, I have already found that Penney and MacDonald did not undertake any enforceable obligations under that agreement.

[97] It finally points to stand-alone confidential-information agreements with MacDonald ("confidentiality agreement") and Monilaws (employment contract).

[98] Its core position on this aspect is here (paras 124-125):

> The [individual respondents] have already agreed to be enjoined from permanently using the Confidential Information.
>
> However, given Paloma has access to the Confidential Information, and evidence suggests Paloma has utilized such Confidential Information to improperly solicit employees and customers of Great North and apparently springboarded its Canadian business, any injunctive relief against the [individual respondents] cannot be effective without applying equally to Paloma. In cases involving departing employees misappropriating confidential information, courts have extended injunctive relief to the new employer [footnote omitted].

[99] Accordingly, GNE asks that the current injunction be extended to Paloma, barring them from using the asserted confidential information.

[100] This request presumes that the information in question has remained confidential throughout i.e. "has the necessary quality of confidence about it" (quoting GNE's brief at para 120, in turn citing ***Cadbury Schweppes Inc v FBI Foods Ltd***, [1999] 1 SCR 142 at para 75).

[101] However, that is not the case here.

[102] Here I accept the respondents' argument that GNE waived the (possible) confidential character of certain information and documents disclosed in or exhibited to various GNE-representative affidavits in these proceedings (the "proposed-to-be-sealed information"). (As discussed further below, GNE has also applied to now seal that information.)

[103] GNE did not provide an exhaustive list of the confidential information it contends the individual respondents took or carried with them when they left GNE and (per GNE) passed along to Paloma. i.e. not just (for instance) "customer lists" but specific ones.

[104] As far as I can tell, a large (if not virtually complete) overlap exists between the confidential information allegedly misappropriated and the proposed-to-be-sealed information.

[105] GNE did not offer a reconciliation here i.e. identifying allegedly-taken confidential information not falling within the proposed-to-be-sealed information.

[106] For now, I will proceed on the basis that the confidential information viewed by GNE as taken improperly is the same as the proposed-to-be-sealed information i.e. in attempting to make its initial injunction case and to obtain the extension sought here, GNE not only identified allegedly embargoed information but included it, with all details, collectively, in its various supporting affidavits.

[107] In its application for a sealing order now, GNE relies on five affidavits from June and July 2023 and one from July 2024.

[108] As far as I can tell, none of those affidavits illuminate the circumstances in which the now-sought-to-be-sealed information and documents came to be filed in the first place i.e. put on the public (i.e. court) record.

[109] That is despite these assertions in GNE's brief in support of the proposed sealing order:

> Any delay by the Applicants in seeking the restricted court access order was due to inadvertence and not a waiver of confidentiality. There has been a demonstrated intention throughout this action by the Applicants to protect the confidentiality of the Confidential Documents, as well as its confidential information generally. Moreover, the fact the Confidential Documents may have been available has not resulted in the Confidential Documents becoming widely accessible to would-be competitors or the public.

[110] Those are remarkable assertions:

- as noted, none of the affidavits describe the circumstances in which this information was filed i.e. explain (if possible) how it was filed "inadvertently" and was not a waiver of confidentiality;
- the "demonstrated intention … to protect the confidentiality of the Confidential Documents" is not detailed;
- in any case, it is hard to square any such intention with a 12- or 13-month gap between the filing of the affidavits in question and the present bid to seal; and
- how could GNE know whether filing the information with the Court has "not resulted in [the information] becoming widely accessible? (In any case, as noted, no evidence was referenced to anchor this assertion.)

[111] The law is clear that filing otherwise-confidential information in court, absent a sealing order at the time, reflects a waiver of confidentiality: ***Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc***, 2001 SCC 51 (CanLII), [2001] 2 SCR 743:

> ... **If [an] adverse party** chooses to use the evidence or information obtained on discovery at the hearing on the merits and **files it in the court record for that purpose, any expectation of confidentiality disappears**. Only exceptional grounds such as, for example, the interest of one party in protecting trade secrets or specially privileged information, such as professional privilege or *in camera* hearings concerning individuals' conditions, will result in the court maintaining

> the partial or complete secrecy of certain information, during the trial and in the court records. Therefore, the obligation of confidentiality will sometimes be no more than just one phase in the gradual disclosure of information that was originally private.... [para 43] [emphasis added]

[112] See also ***Deloitte & Touche LLP v. Institute of Chartered Accountants of Alberta (Complaints Inquiry Committee)***, 2008 ABCA 162:

> **In this case the complainant filed the report with the courts. Any claim of privilege or confidentiality was waived.** Specifically, by filing the report the complainant is deemed to have waived confidentiality pursuant to Rule 208.1(e) to the extent reasonably required to permit the expert to discharge its obligations to the court.…
>
> …… when Mr. Dalla-Longa advised Mr. Preston that **the report had been filed in court,** the latter was entitled to proceed on the basis that **confidentiality had been waived.**…
>
> … As just noted, **the complainant waived privilege and confidentiality with respect to the report and the circumstances under which it was prepared when she filed the report in court.** The **finding** of the Appeal Tribunal that **confidential information was released** (and that therefore the appellant falsely indicated the contrary) is based on an **incorrect assumption about the effect of filing a privileged document in court,** and the obligations of expert witnesses, and is an unreasonable conclusion. [paras 98, 103, and 106] [emphasis added]

[113] And ***Boulos v. Canada (Public Service Alliance)***, 2012 FCA 193:

> In my view, assuming without deciding that a litigation privilege did protect the confidentiality of any information currently on this Court's public record, **Mr. Boulos waived that confidentiality by failing to take any steps to assert and protect it, such as by a motion to seal the Court's file.**
>
> **Now that the information has been placed in a public file, his submission that the Board should have kept it confidential is moot.** I am not satisfied that Mr. Boulos has met the criteria established in *Borowski v. Canada (Attorney general)*, 1989 CanLII 123 (SCC), [1989] 1 S.C.R. 342 governing this Court's exercise of its residual discretion to hear and determine a matter that is moot. [paras 29 and 30] [emphasis added]

[114] And ***Mayer v Rubin***, 2017 ONSC 3190 (Nordheimer J.):

> In terms of the second test for leave to appeal, the moving parties have not pointed to anything that would satisfy me that there is good reason to doubt the correctness of the motion judge's decision. **The motion judge found that, assuming there was confidential information imparted, the moving parties had waived the confidentiality by placing the material in the motion record and filing it with the court. More specifically, the motion judge said, at para. 14:**
>
> > **The respondents' evidence includes a full description of the purportedly confidential issues that Mr. Juroviesky had**

> **discussed with Mr. Handelman including a copy of the May 5, 2015 email. Mr. Juroviesky served the motion record on the applicant's counsel and filed it with the court in the ordinary course. The motion record is currently in the public record and is available to all who might attend the courthouse and search the court's files.** In addition, during cross-examination of Ms. Mayer for this motion, Ms. Tourgis showed the email to Ms. Mayer and asked questions about it.

I have no doubt regarding the correctness of the motion judge's conclusion that, having done so, the moving parties had voluntarily and intentionally disclosed the very confidential information that they claimed, through their motion, they wished to protect. As the motion judge pointed out, there were processes available to the moving parties by which they could have raised the issue without revealing the confidential information. The moving parties choose not to avail themselves of any of those processes. [paras 5 and 6] [emphasis added]

[115] And ***SRM Global Master Fund Limited Partnership v. Hudbay Minerals Inc***, 2009 CanLII 9377 (ON SC) (Wilton-Siegel J.):

> The engagement letter is not, technically, subject to a confidentiality provision, although the fairness opinion is subject to such a provision in the engagement letter. **Even if these documents are governed by the confidentiality provision in the GMP engagement letter, however, their principal terms are set out in the Wellings' affidavit which has been filed with the court and, accordingly, I think any confidentiality has been waived**. There is, therefore, no general interest in confidentiality that remains in respect of these documents. [para 12] [emphasis added]

[116] For an example of true inadvertence, see ***Mosquera v. Health Professions Appeal and Review Board***, 2021 ONSC 8365 (Hackland J.):

> ... in the Board's record of proceedings, **the medical record of a third party with a similar name to the applicant was inadvertently included and this information must be sealed, and a non-publication order made, to protect this person's privacy.** The applicant was in agreement with this relief and the requested orders are granted. [para 3] [emphasis added]

[117] Again, GNE offered no evidence to explain how information and documents apparently accurately described and exhibited, in affidavits sworn by corporate representatives with knowledge of the material, could be fairly characterized as "inadvertently filed."

[118] Applying the principle illuminated by the noted cases, I find that GNE waived the confidentiality of all corporate information and documents filed in court.

[119] If I am wrong on that aspect, I alternatively adopt and accept the "never confidential or no longer confidential" arguments made by the respondents at paras 103-112 of their brief, which were not materially countered by GNE.

[120] Returning to Paloma: assuming for the sake of discussion that Paloma received any such information via the individual respondents (or otherwise), GNE's actions in putting that

information on the court record and (accordingly) waiving confidentiality released Paloma from any responsibility or exposure for (allegedly) misusing that information.

[121] Or, alternatively, for the reasons outlined in the noted paragraphs, Paloma did not receive any such information or, if it did, it was not confidential in the first place or was no longer confidential when it received it.

[122] Meaning no serious issue to be tried relating to Paloma's (possible) use of such information.

E. "Knowing assistance" and conspiracy

[123] GNE also sought to extend the injunction to the Paloma entities on these two bases (paras 109-115 and 150-155 of its brief).

[124] On these aspects, I accept the respondents' counter-arguments (paras 117-124 of their brief).

[125] In short, the evidence does not support either allegation, especially in light of the insulating measures taken by Paloma as described in paras 120-121.

[126] Meaning no serious issue to be tried here either.

F. Irreparable harm and balance of convenience

[127] On irreparable harm, I accept the respondents' arguments at paras 134-138 of their brief.

[128] In a nutshell, GNE has not provided sufficient evidence to show a material risk of irreparable harm in the current circumstances i.e. at the 13-month mark of the existing injunction i.e. what aftershocks it is continuing to experience and reasonably expects to experience over the next 11 months i.e. that is has not already adjusted to or for.

[129] Or, in any case, that any prejudice caused by any off-side conduct by the respondents, if ultimately proven at trial, cannot be quantified and remedied by money damages.

[130] On balance of convenience, GNE's position was anchored on perceived violations of contractual commitments, fiduciary duties, and confidential-information obligations.

[131] As explained above, the contractual commitments either never existed or have expired, the fiduciary period for the observance of any fiduciary duties is now (appropriately) expiring (i.e. on the release of this judgment), and GNE's own actions undermined the confidential character of the information in question.

[132] In these circumstances, the balance of convenience clearly favours the respondents, who should now be a liberty to compete freely in this market.

G. GNE's sealing-order application

[133] I decline to grant this application in the absence of evidence detailing the circumstances of the filing of the affidavits in question and, in particular, how (if possible) the inclusion of the information in question was inadvertent.

H. Conclusion and costs

[134] With no serious issue to be tried, no material risk of irreparable harm, and the balance of convenience favouring the respondents, I dismiss GNE's application to extend the lifespan of the existing injunction to 24 months and to extend its reach to the Paloma entities.

[135] Given this decision, the existing injunction is hereby terminated.

[136] On costs, the respondents are entitled to costs.

[137] If the parties are unable to agree on the scale (indemnity, partial indemnity, enhanced, Schedule C multiplier, Schedule C base, other) or quantum of costs by September 13, 2024, the respondents' costs submissions (letter form – maximum 4 pages, excluding attachments e.g. draft bills of costs, case law, etc) are due by September 27, 2024, with GNE's due October 11, 2024.

Heard in Edmonton, Alberta via Webex on the 14th day of August, 2024.
Dated at Edmonton, Alberta this 6th day of September, 2024.

Michael J. Lema
J.C.K.B.A.

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