IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Bouchard v. Facility Condition Assessment Portfolio Experts Ontario Ltd.,* 2024 BCSC 1870

Date: 20241009
Docket: S38308
Registry: Chilliwack

Between:

Joseph Raynald Alexandre Bouchard and 0935079 BC LTD.

Plaintiffs

And

Facility Condition Assessment Portfolio Experts Ontario Ltd., also known as Roth IAMS Ltd.

Defendant

Before: The Honourable Justice Walkem

Reasons for Judgment

Counsel for the Plaintiffs:	L.S. Smith J. Langelier
Counsel for the Defendant:	K. Armstrong, K.C.
Place and Date of Trial/Hearing:	Chilliwack, B.C. June 25, 2024 Abbotsford, B.C. June 26-27, 2024
Place and Date of Judgment:	Chilliwack, B.C. October 9, 2024

Table of Contents

Introduction

[1] The plaintiffs, Joseph Bouchard and 0935079 Ltd., seek judgment against Facility Condition Assessment Portfolio Experts Ontario Ltd. ("FCAPX"), also known as Roth IAMS Ltd. for outstanding payment of $5,000 plus contractual interest under the asset purchase agreement ("APA"). Mr. Bouchard also seeks judgment for the remainder of the three-year employment term from the termination date (which is 14 months). In the alternative, if no three-year employment term is found, Mr. Bouchard seeks damages for wrongful dismissal as well as costs. An order for the return of documents from the defendant from the initial pleadings was not argued.

[2] The defendant counterclaims for breach of restrictive covenants contained in the APA.

Background

[3] This dispute stems from the breakdown of a working and professional relationship over the course of nearly two years.

[4] FCAPX provides engineering and management consulting services. FCAPX is incorporated under the laws of Canada and registered as an extra-provincial company under the laws of British Columbia. FCAPX has a head office in Ontario, and an "Attorney Office" in Vancouver, B.C. Around 2018, FCAPX received a large contract with the City of Vancouver. To help carry out that contract, FCAPX needed to assemble a team to work in B.C.

[5] Mr. Bouchard is a registered professional engineer. Mr. Bouchard is the principal owner of 0935079 B.C. Ltd., previously known as Ally Engineering Ltd. ("Ally"), a company incorporated in British Columbia.

[6] Mr. Roth (President of FCAPX) and Mr. Bouchard had worked together, and entered discussions about FCAPX purchasing Ally, and Mr. Bouchard coming to work with FCAPX.

[7] Around August 31, 2018, Ally and FCAPX entered into a written agreement whereby FCAPX purchased assets of Ally under the APA.

[8] There are three key agreements between the parties: the APA; the Non-Solicitation and Confidentiality Agreement, also dated August 31, 2018; and the Employment Contract, offered August 17, 2018 and coming into force on September 4, 2018. The documents were drafted by counsel for FCAPX. Mr. Bouchard reviewed the documents with his own legal counsel and proposed changes. The agreements signed were the result of negotiations between the parties. In some cases, each of the three agreements covered the same topics, with differences across each of them. The Employment Contract provides that the provisions of the APA (referred to as the "Share Purchase Agreement" in the Employment Contract itself) supersede any relevant or related clauses in the Employment Contract.

[9] Each party sought security in the APA and associated agreements. Through the purchase of Ally, and bringing Mr. Bouchard into their company through the employment arrangements, FCAPX built a team to handle the City of Vancouver contract. They also established a foothold to expand their business in B.C., which Mr. Roth testified they had an interest in doing.

[10] Mr. Bouchard, through Ally, had taken out a business loan of approximately $200,000 of which $150,000 remained outstanding in 2018. Mr. Bouchard was concerned with being able to make the loan payments so that the loan would not impact his family financially.

[11] Mr. Bouchard negotiated a payment schedule that would cover payments for the business loan, and secured continued employment. Mr. Bouchard's testimony was that he thought the arrangement would allow him to do less administrative work.

[12] The parties agreed that the payment schedule of $5,000 per month was structured as it was to allow Mr. Bouchard to cover the $4,000 loan payments that he owed. FCAPX and Mr. Bouchard agreed to discuss the possibility of FCAPX

continuing to make payments to Mr. Bouchard to cover the loan beyond the amount they had agreed to, though there was no guarantee that this would happen.

APA

[13] The APA was signed on August 31, 2018. The APA at s. 2.1 provided that FCAPX would purchase from Ally "the goodwill and the right to operate the business" as well as "all intellectual property" which was to include email accounts and all records of Ally including customer lists. Ally was to provide all business records to FCAPX at closing. Excluded assets listed in s. 2.2 included: "The debt in the estimated amount of $150,000.00 payable to Community Futures Development Corporation of South Fraser". The total purchase price was $120,000. After an initial $5,000 deposit at closing, the purchase price was to be paid in 23 monthly installments of $5,000. The purchase price was allocated, as per s. 3.3, to inventory and equipment ($11,890); goodwill and IP ($41,028); contracted work backlog ($16,700); and potential business ($50,382).

[14] The APA contained a three-year consulting agreement clause, and a three-year restrictive covenants clause, which are at the heart of the dispute between the parties.

> 12. **CONSULTING AGREEMENT**
>
> The principal of the Vendor, [Mr. Bouchard] agrees to enter into an employment contract which shall be for no less than 3 years on terms agreeable to both the parties based on the existing employment of [Mr. Bouchard] by the Vendor. Any probationary periods for [Mr. Bouchard] shall be waived.
>
> 13. **RESTRICTIVE COVENANTS**
>
> …
>
> 13.3 The Vendor agrees that, other than in accordance with the employment agreement with the Purchaser, it will not for a period of three (3) years from the date of Closing, directly or indirectly in any manner whatsoever, including, without limitation, either individually or in partnership, or jointly, or in conjunction with any other person or persons, firm, association, syndicate, company or corporation, as principal, agent, shareholder or in any other matter whatsoever:

> a) directly or indirectly solicit, interfere with or endeavour to direct or entice away from the Purchaser any employee, contractor or any other person, firm or corporation dealing with the Purchaser; or
>
> b) Compete with the Purchaser directly or indirectly.
>
> c) anywhere within a radius of one hundred (100) kilometres from the location from which the Purchaser carries on its business, carry on or be engaged in or concerned with or interested in or advise, lend money to, guarantee the debts or obligations of or permit its name to be used or employed in carrying on any business which carries on the same or similar business as that of the Purchaser or which carries on business in competition with the business of the Purchaser.

Non-Solicitation and Confidentiality Agreement

[15] The Non-Solicitation and Confidentiality Agreement signed August 31, 2018 provided that:

> **2.2 Non-Solicitation of Business**
>
> To the full extent permitted by law, for a period of three (3) years immediately following the Closing Date, Conventor [Mr. Bouchard] will not directly or indirectly solicit, interfere with or endeavour to entice away from Purchaser any Person who was a customer or client or prospective customer or client of Purchaser within a radius of one hundred (100) kilometers from 33-42312 Yarrow Central Road, Chilliwack, British Columbia.

Employment Contract

[16] The Employment Contract consisted of a letter and two schedules, and provided that Mr. Bouchard would be employed as a Project Engineer, on a full-time permanent basis, and earn $91,000 per year. Schedule A of the Employment Contract stated that:

> Any conditions included in the Share Purchase Agreement between Ally Engineering and FCAPX will supersede any related/relevant clause within this agreement.
>
> [Emphasis added.]

[17] Schedule A contained the following non-solicitation clause:

> You hereby agree that, while you are employed by FCAPX and for one (1) year following the termination of your employment with FCAPX, you will not …(ii) directly or indirectly solicit, attempt to solicit, canvass or interfere with any customer or supplier of FCAPX in a manner that conflicts with or

> interferes in the business of FCAPX as conducted with such customer or supplier.

[18] Schedule B of Mr. Bouchard's Employment Contract was a "Confidentiality and Proprietary Information Agreement".

[19] The Employment Contract lists Mr. Bouchard's employment status as "Full-Time, Permanent" and provides for terms for Mr. Bouchard to resign as follows:

> Should you wish to resign your employment with *FCAPX* following successfully meeting the terms of the asset purchase agreement of Ally, you will be required to provide *Four* (4) weeks' written notice to enable us to transition your work.

[20] The Employment Contract provides for termination as follows:

> *FCAPX* may terminate your employment at any time for cause.
>
> *FCAPX* may terminate your employment without cause at any time by providing you with notice, or pay in lieu of such notice, and any severance pay required by the *Employment Standards Act.*
>
> In the event a temporary layoff is ever required, it may be implemented in accordance with the requirements of the *Employment Standards Act.*

[21] The Employment Contract was entered on August 17, 2018, and took effect on September 4, 2018.

Breakdown of Working Relationship

[22] Mr. Bouchard's work was out of his home office in Chilliwack, B.C. as well as at various sites in B.C., with a focus on Vancouver.

[23] In his employment with FCAPX, Mr. Bouchard continued some of the work he had done through Ally, including facility assessment reports for strata councils. FCAPX was interested in having Mr. Bouchard work more on the City of Vancouver contract, which involved more fieldwork and reporting.

[24] The working relationship between the parties became strained and ultimately broke down. FCAPX was unhappy with the work that Mr. Bouchard was doing, as they felt he was not prioritizing City of Vancouver work, he was late in filing reports,

and several projects were over budget. Mr. Bouchard was equally unhappy with the direction and content of the work that he was doing, in part because he did not want to spend as much time as his job required in reporting and related activities.

[25] A performance letter addressed to Mr. Bouchard dated September 18, 2019, noted that at a meeting FCAPX had expressed concern about Mr. Bouchard's management of the City of Vancouver project, and timing of his reports.

[26] Mr. Bouchard contacted IAMS in July of 2020 with a request to change working conditions. Two separate perspectives were revealed in the course of the ensuing discussions. Mr. Bouchard appears to have believed that IAMS would be open to discussing changes to his employment. IAMS, on the other hand, needed employees to help fulfill the contract that they had entered with the City of Vancouver, and took Mr. Bouchard's correspondence identifying his concerns with his employment as an indication that he was refusing to do that work.

[27] On July 13, 2020 Mr. Roth wrote to Mr. Bouchard a letter titled "Offer for Release of Asset Purchase Agreement Clause" which advised: "Notwithstanding our legal agreement we are open to try to facilitate a mutually agreeable split. We would consider releasing you from the covenant in the Asset Purchase Agreement." Proposed conditions of the release were that:

- FCAPX would not make its final payment of $5,000;
- Mr. Bouchard would resign, releasing any entitlement to severance or notice pay;
- Mr. Bouchard was partially released from the restrictive covenants and would agree to only provide Depreciation Reports and Renewal Project Management service to multi-unit residential clients in BC for a period of two years following acceptance of this agreement; and
- Mr. Bouchard would agree to pay 20% of his revenue to Roth IAMS for one year.

[28] The letter expressed concern that Mr. Bouchard had "discussed [his] displeasure with [his] current situation with a co-worker," and had initially been dishonest about this conversation with Mr. Roth.

[29] Mr. Bouchard did not accept the offer, and instead reiterated in emails on July 14 that he does not perform well in his current position as field assessor, but that he wanted to continue working with IAMS and to change some conditions of his employment.

Termination and Aftermath

[30] IAMS terminated Mr. Bouchard, without cause, on July 14, 2020. Mr. Bouchard was paid two weeks salary in lieu of notice. IAMS withheld the final $5,000 payment it owed to Mr. Bouchard under the APA, claiming that Mr. Bouchard had not provided all documents he was required to provide under the APA.

[31] It is common ground between the parties that their arrangement is covered by Ontario law, and that Mr. Bouchard was terminated without cause.

[32] In the immediate aftermath of his termination, Mr. Bouchard was concerned with making the loan payments and supporting his family. Initially, he did a few carpet cleaning jobs to make money.

[33] Mr. Bouchard then created a company through which he offered depreciation reports, targeted investigations and other engineering services.

[34] Mr. Bouchard worked with three companies, all strata corporations—LMS 2816, Strata Corporation KAS 748 and Strata Corporation NW2142—that he had worked for while working with the defendant. Mr. Bouchard argued that he did not solicit any business from the defendant, but rather that he was approached directly by clients and agreed to undertake work for them.

[35] IAMS argues that Mr. Bouchard has directly competed with them by doing engineering work, including with strata councils, which they say is work that they could do, or wanted to develop, within their company. Mr. Bouchard earned $81,799 ($17,062 through Bouchard Associates, and $64,737 through Aspis Holding Corp.), some of which was for carpet cleaning and work unrelated to engineering. The

defendant seeks to recover amounts which they argue Mr. Bouchard earned in violation of the restrictive covenants.

[36] The plaintiffs acknowledge that Bouchard Associates offered depreciation reports, warranty reviews for strata councils, and building condition assessments for commercial buildings, are overlapping services with the defendant. The plaintiffs argue that the defendant was not pursuing these areas of business as a main part of their business, and therefore that Mr. Bouchard offering these services through Bouchard Associates did not impact the defendant's business interests.

[37] Mr. Bouchard and Mr. Roth each testified, and no other witnesses were called. The parties largely agree on the facts, but disagree about the legal consequences flowing from those facts.

Issues:

1. What payment was Mr. Bouchard entitled to receive upon his termination without cause?

    a. Was there a three-year fixed term employment contract between Mr. Bouchard and the Defendant, and was Mr. Bouchard entitled to the balance of the contract?

    b. If Mr. Bouchard is not entitled to the balance of the contract, what is the appropriate notice period for his termination?

2. Are restrictive covenants made between Mr. Bouchard and the defendant valid and enforceable? If so, has Mr. Bouchard violated them, and to what extent?

3. Does the defendant owe Mr. Bouchard a $5,000 payment under the APA?

Issue 1: What payment was Mr. Bouchard entitled to receive upon his termination without cause?

[38] The first question before the Court is whether Mr. Bouchard was employed under a three-year fixed-term contract. If so, the next question is whether the contract allowed for his early termination without cause. If early termination without cause was not permitted by the contract, then the proper measure of damages is a payout of the remainder of the fixed term, without a duty on the employee to mitigate. If early termination without cause was, however, permitted by the contract, the question then becomes whether Mr. Bouchard is entitled to common law notice, or entitled to only two weeks notice. This requires an examination of whether the clause relating to *ESA* provisions is enforceable.

[39] The plaintiff commenced employment on September 4, 2018 and argues he was entitled to employment for three years until September 4, 2021. He was terminated on July 14, 2020. The plaintiff argues that he is entitled to the 14 months' salary that he would have been paid to the end of the 3 year term.

[40] The law of contract interpretation, as set out in *Progressive Homes Ltd. v. Lombard General Insurance Co.*, 2009 BCCA 129 at para. 45, citing Professor Denis Boivin, *Insurance Law* (Toronto: Irwin Law, 2004) at 191, requires an assessment of the following:

> 1. the words used in the contract must be given their ordinary meaning, with the exception of expressions that have acquired a technical meaning within the industry.
> 2. the contract must be interpreted contextually, having regard to all sections of the agreement.
> 3. the objective of interpreting the contract is to give effect to the parties' true intentions. Hence, courts should avoid using a literal approach when the result would frustrate the reasonable expectations of either the insurer or the insured.
> 4. any ambiguity must be resolved against the interests of the party that wrote the agreement – *contra proferentem*.

[41] The plaintiffs argue that the termination clause in the Employment Contract is contrary to the three-year employment term in the APA and that the APA supersedes. They submit that a clear reading of the language of the APA and the "consulting agreement" clause was that the parties had agreed to a three-year term of employment and that the termination clause in the Employment Contract, to the extent that it permits the termination of employment prior to the completion of the three year term, should be deemed unenforceable as it is superseded by the APA term.

[42] The defendant argues that the contract was not a fixed term contract as the three year term was included for the sole benefit of the defendant—essentially, that the contract term simply indicated a requirement that Mr. Bouchard make himself available for a minimum of three years to the defendant. The defendant argues that the cover letter of the Employment Contract lists the position as a full-time permanent position and this suggests it was not intended to be a fixed term contract. They argue that effect should be given to the reasonable expectation of the parties reflected in these terms.

[43] The defendant further points out that it is possible for a fixed term contract to nonetheless provide for early termination: *Howard v. Benson Group Inc.*, 2016 ONCA 256 at para. 22 [*Howard*]; *Bowes v Goss Power Products Ltd.*, 2012 ONCA 425 at paras. 25-26; *Joss Covenoho v. Pendylum Inc.*, 2016 ONSC 4969 at para. 34 [*Joss Covenoho*]; and *Alsip v. Top Rollshutters Inc. (Talius)*, 2015 BCSC 1166 at para. 42 [*Alsip*].

[44] The defendant argues that Mr. Bouchard sought to be let out of the Employment Contract, and that the APA contemplated further terms such as the termination provision in the Employment Contract. It points to the correspondence and discussions between the parties, and the fact that Mr. Bouchard had been preparing a website to offer his services on his own and had warned his supervisor that he may not be available for work in the immediate future, as confirmation that he intended to leave his employment. The defendant also argues that the APA

contemplated that the parties would agree to further terms and is not a complete agreement.

Was there a three year fixed term employment contract between Mr. Bouchard and the Defendant?

[45] I do not accept the defendant's assertion that the three-year employment term was solely for its benefit. On the face of it, there was mutual value for the parties exchanged through a three-year employment term.

[46] The defendant built a team that would enable them to service the City of Vancouver contract they had acquired. Mr. Bouchard entered a three-year employment contract which would provide stability and allow him (barring any further agreement) to meet the requirement to repay the business loan that continued to be his responsibility and to care for his family. If there was no guarantee of employment for a fixed term in the particular context of this case, Mr. Bouchard would: have sold the company while still owing a significant business loan on it; be vulnerable to termination without cause and with minimal notice after the purchase completing; have lost a significant portion of his ability to make money by selling the company and entering the restrictive covenants; and, be left without employment and still responsible for paying off the remainder of the business loan used to build the company that the defendant now owned and continued to benefit from.

[47] A plain and ordinary reading of the employment term—which "shall be for no less than 3 years"—does not indicate that the employment period of no less than three years applied only to a requirement on Mr. Bouchard to make his services available for that time period, with no reciprocal obligation on the company to offer the employment for at least three years.

[48] Section 12 of the APA provides that Mr. Bouchard "agrees to enter into an employment contract which shall be for no less than 3 years on terms agreeable to both the parties …" The Employment Contract provides for termination without cause with notice or pay in lieu according to the Ontario *Employment Standards Act,* 2000, S.O. 2000, c. 41. I accept that there is a conflict between these terms.

[49] On a contextual and ordinary reading of the APA and the Employment Contract, where there is a conflict between the terms of the APA and the Employment Contract, the terms of the APA supersede. The terms of the Employment Contract regarding termination are “related” or “relevant” to the three year term contained in the APA. Therefore, the fixed term established in the APA supersedes provisions allowing for without cause termination (at least within the first three years of employment).

[50] I find that Mr. Bouchard was employed under a minimum three-year term contract. Both parties, at the time of entering the agreement, appeared to also intend that the employment relationship could extend beyond that.

Is Mr. Bouchard entitled to the balance of the contract?

[51] Although there may be a fixed term employment contract, the contract can nevertheless provide for early termination: *Howard* at para. 22; *Joss Covenoho* at para. 34; and *Alsip* at para. 42.

[52] In *Howard*, there was an early termination clause which read:

> Employment may be terminated at any time by the Employer and any amounts paid to the Employee shall be in accordance with the Employment Standards Act of Ontario.

[53] This clause was found by the trial judge to be sufficiently ambiguous so as to be unenforceable, and this finding was not contested on appeal: *Howard* at para. 11.

[54] In *Joss Covenoho*, the agreement between the Plaintiff and Defendant read:

> 2.1 The term of this Agreement will commence on the date of this Agreement and will continue in full force and effect unless the Agreement is terminated as follows:
>
> (a) immediately by PENDYLUM providing written notice to you if you violate or fail to honor any of these provisions of this Agreement or fail to perform your duties as set out in Appendix A in a satisfactory manner as determined by PENDYLUM (known as Cause); or if the PENDYLUM Client to which you have been contracted terminate[s] its contract with PENDYLUM for your services; OR
>
> (b) by either party providing written notice of at least two (2) weeks to the other.

[55] The trial judge found that the language of the early termination provisions found in Article 2.1 was clear and unequivocal, and that effect should be given to the reasonable expectations of the parties reflected by the words they have agreed upon: *Joss Covenoho* at para. 34. A Pendylum Client had indeed decided to terminate its contract with Pendylum for the plaintiff's services, and Article 2.1(a) was therefore a sufficient basis for early termination.

[56] In *Alsip*, the main issue was whether or not the contract was for a fixed term, and there was no suggestion of a clause to allow early termination.

[57] In this case the reasonable expectations of the parties, construed objectively and given the context of the contract, was to have an employment arrangement which lasted at least three years. The three year minimum requirement superseded the Employment Contract clause which allowed for termination without cause with notice or pay in lieu. *Joss Covenoho* (as well as *Howard* and similar lines of cases) are not particularly analogous as there were no superseding clauses or multiple separate agreements in those cases. Furthermore, in *Joss Covenoho*, there was a level of specificity in the early termination provision—outlining a specific event which would trigger early termination and which did end up occurring—which also is not present here.

[58] I find that in the present case, the contract between the parties did not provide for without cause early termination of the three-year fixed-term.

[59] In *Howard* at paras. 28-30 and 44, the Ontario Court of Appeal found that appropriate damages for breach of a fixed term contract is a pay out of the remainder of the fixed term, with no obligation on the employee to mitigate their damages.

[60] I find the defendant owes to Mr. Bouchard the equivalent of the remainder of the three-year employment contract, in line with the Ontario authority given the choice of law clause contained within the Employment Contract and both parties

having conceded that their arrangement is covered by Ontario law. The two weeks pay already paid to Mr. Bouchard should be deducted from this award.

Issue 2: Are restrictive covenants made between Mr. Bouchard and the defendant valid and enforceable?

[61] By way of counterclaim, the defendant argues that Mr. Bouchard was bound by restrictive covenants to not compete with it.

[62] As laid out above, the relevant restrictive covenant in the APA requires Mr. Bouchard, for a period of three years from the date of closing, to refrain from: competing with the defendant directly or indirectly; soliciting, interfering with or enticing away from the defendant any person, firm or corporation dealing with the defendant; and, carrying on or being engaged in any business which carries on the same or similar business as the defendant or which carries on business in competition with the defendant's business anywhere within a radius of one hundred kilometres from the location from which the defendant carries on its business.

[63] The non-solicitation clause in the Employment Contract required that, for one year following the termination of employment, Mr. Bouchard would not directly or indirectly solicit, attempt to solicit, canvass or interfere with any customer or supplier of FCAPX in a manner that conflicts with or interferes in the business of FCAPX as conducted with such customer or supplier.

[64] The Non-Solicitation and Confidentiality Agreement included a non-solicitation clause stipulating that for a period of three years immediately following the closing date, Mr. Bouchard would not directly or indirectly solicit, interfere with or endeavour to entice away from the defendant any person who was a customer or client or prospective customer or client of the defendant within a radius of one hundred kilometres of a specific address in Chilliwack, BC.

[65] The clauses and their differences are summarized in the following table:

	Activity Restriction	**Geographic Scope**	**Temporal Scope**

APA restrictive covenant	no competing with the defendant directly or indirectly; no soliciting, interfering with or enticing away any entity dealing with the defendant	no geographic scope specified	3 years from closing date
	no carrying on or being engaged in any business which carries on the same or similar business as the defendant or which carries on business in competition with the defendant's business	radius of 100 km from the location from which the defendant carries on its business	
Employment Contract non-solicitation clause	no direct or indirect solicitation or interference with any customer or supplier	no geographic scope specified	1 year from termination of employment
Non-Solicitation and Confidentiality Agreement non-solicitation clause	no direct or indirect solicitation, interference with or enticement away of any person who was a customer or client or prospective customer or client	radius of 100 km from a specific address in Chilliwack, BC	3 years from closing date

[66] Both parties agreed in argument that the relevant term is the restrictive covenant in the APA, given that the terms of the APA supersede the terms of the Employment Contract. They disagree over whether the covenant is valid and enforceable.

[67] The defendant argues that the restrictive covenant in the APA is geographically concise and reasonable. In testimony, Mr. Roth argued it applied to where Mr. Bouchard worked at his home office and also Vancouver. The defendant argues that this restriction was an important part of what the defendant purchased when they entered the APA, as they were interested in establishing their business in B.C.

[68] The defendant argues that restrictive covenants contained in agreements for a sale of business assets are presumptively enforceable unless the vendor can show that they are unreasonable.

[69] The plaintiffs argue that the restrictive covenant in the APA is invalid and unenforceable because the geographic area and temporal scope of the restriction are ambiguous and overbroad. The differing clauses set out in the above table highlight the apparent discrepancies on key terms including geographic and temporal restrictions. They further argue that it does not represent a reasonable balance between the parties, and the public interest in avoiding restraint of trade.

[70] The plaintiffs point to the fact that the APA prevents Mr. Bouchard from competing with the defendant "within a radius of one hundred (100) kilometres from the location from which the Purchaser carries on its business". The plaintiffs argue that the defendant does not have a specific business location where business is carried out but carries out business across Canada and in several locations in the United States. Mr. Bouchard argued that he thought the restrictive covenant was operable throughout North America.

[71] *Payette v. Guay Inc.,* 2013 SCC 45 at para. 4 indicates that "the scope of a restrictive covenant will vary with the nature of the relationship between the parties to the contract and the context in which the covenant was made". The Supreme Court of Canada further commented:

> [5] In *Elsley v. J. G. Collins Insurance Agencies Ltd.*, [1978] 2 S.C.R. 916, Dickson J. commented eloquently on the importance of distinguishing the scope of a restrictive covenant linked to a commercial agreement from the scope of one linked to a contract of employment:
>
> > The distinction made in the cases between a restrictive covenant contained in an agreement for the sale of a business and one contained in a contract of employment is well-conceived and responsive to practical considerations. A person seeking to sell [their] business might find [themselves] with an unsaleable commodity if denied the right to assure the purchaser that [they], the vendor, would not later enter into competition. Difficulty lies in definition of the time during which, and the area within which, the non-competitive covenant is to operate, but if these are reasonable, the courts will normally give effect to the covenant.
> >
> > A different situation, at least in theory, obtains in the negotiation of a contract of employment where an imbalance of bargaining power may lead to oppression and a denial of the right of the employee to exploit, following termination of employment, in the public interest and in

> [their] own interest, knowledge and skills obtained during employment. [p. 924]

[72] This is a case where the restrictive covenant is linked to a commercial agreement, rather than a contract of employment.

[73] Non-competition clauses are interpreted differently in the context of the sale of a business as opposed to the employment context. In an employment context there is concern about the power imbalance between the parties and restricting the free will or options of individual employees. A different scope of restriction is allowed when the restriction occurs as part of the sale of a business versus an employment contract *simpliciter*. In an asset purchase, the restriction or agreement to not compete is itself part of what is being sold by the vendor.

[74] In assessing whether a restrictive covenant goes beyond what is reasonable to protect the business, *Payette* outlines three factors which are assessed include the time period, the geographic area, and scope of activity restrained:

> [58] Whether non-competition and non-solicitation clauses in a contract for the sale of assets are reasonable must be determined on the basis of the rules that govern freedom of trade so as to favour the application of such restrictive covenants: *Burnac Corp. v. Les Entreprises Ludco Ltée*, [1991] R.D.I. 304 (Que. C.A.). This means that the criteria for analyzing restrictive covenants in a contract for the sale of assets will be less demanding and that the basis for finding such covenants to be reasonable will be much broader in the commercial context than in the context of a contract of employment. I am therefore of the opinion that, in the commercial context, a restrictive covenant is lawful unless it can be established on a balance of probabilities that its scope is unreasonable.
>
> …
>
> [61] In a commercial context, a non-competition covenant will be found to be reasonable and lawful provided that it is limited, as to its term and to the territory and activities to which it applies, to whatever is necessary for the protection of the legitimate interests of the party in whose favour it was granted: *Copiscope Inc. v. TRM Copy Centers (Canada) Ltd.*, 1998 CanLII 12603 (Que. C.A.). Whether a non-competition clause is valid in such a context depends on the circumstances in which the contract containing it was entered into. The factors that can be taken into consideration include the sale price, the nature of the business's activities, the parties' experience and expertise and the fact that the parties had access to the services of legal counsel and other professionals. Each case must be considered in light of its specific circumstances.

[75] The defendant further cites *Diamond Delivery v. Calder*, 2023 BCSC 194 at para. 93 for the enforceability of restrictive covenants in a commercial context:

> [93] In the commercial context, a restrictive covenant will be reasonable and lawful provided that its territorial scope and limitations on activities only go as far as necessary to protect the interests of the party in whose favour it was drafted. In the employment context, such restrictions are generally unenforceable unless they can be demonstrated to be reasonable.

[76] In *Shafron v. KRG Insurance Brokers (Western) Inc*., 2009 SCC 6, in the context of a restrictive covenant arising in an employment contract and thus attracting a higher standard of scrutiny, the Supreme Court of Canada stated:

> [43] … a restrictive covenant is *prima facie* unenforceable unless it is shown to be reasonable. However, if the covenant is ambiguous, in the sense that what is prohibited is not clear as to activity, time, or geography, it is not possible to demonstrate that it is reasonable. Thus, an ambiguous restrictive covenant is, by definition, *prima facie* unreasonable and unenforceable. Only if the ambiguity can be resolved is it then possible to determine whether the unambiguous restrictive covenant is reasonable.

[77] A restrictive covenant that is overly broad in reference to prohibited activities, or types or business, or geographic or temporal scope, is unreasonable and unenforceable: *Mason v. Chem-Trend Limited Partnership*, 2011 ONCA 344.

[78] In the APA, the defendant purchased Ally's goodwill and IP for $41,028 and potential business for $50,382.

[79] In terms of temporal scope, the restrictive covenant specified a period of three years after the date of closing. Given that closing was August 31, 2018, this period would run until August 31, 2021. This is not an overly broad time frame. It is reasonable, especially considering the context of the agreements, in which Mr. Bouchard was to be employed by the defendant for the three-year term in which the restrictive covenant was operative.

[80] In terms of the prohibited activities or types of business, the restriction is on competing with the defendant directly or indirectly, from interfering with or enticing away from the defendant any entity dealing with the defendant, and from Mr.

Bouchard carrying on “the same or similar business” or “business in competition” with the business of the defendant. These terms are reasonable and not overly broad given the context of a contract for the sale of assets, in addition to the context that Mr. Bouchard was to be employed by the defendant. Had the agreements been performed as anticipated, these fairly broad restrictions on Mr. Bouchard’s activities would only have been in force for the period in which Mr. Bouchard was employed by the defendant.

[81] The geographic location in which the restrictive covenant operates is arguably ambiguous. The restriction on competing with the defendant directly or indirectly, and the restriction from soliciting, interfering with or enticing away from the defendant any entity dealing with the defendant, does not specify a particular geographic area. However, the restriction from Mr. Bouchard carrying on “the same or similar business” or “business in competition” with the business of the defendant applies to “one hundred (100) kilometres from the location from which the defendant carries on its business”. The defendant did not specify, in either its argument or pleadings, the geographic location in which the restrictive covenant was operative. Mr. Bouchard testified that he thought it applied across North America, given the defendant carries out business across Canada and the United States.

[82] The use of the words “from the location from which the defendant carries on its business” implies a single geographic region in which the covenant operates. The language of the Non-Solicitation and Confidentiality Agreement, signed on the same date and in conjunction with the APA, gives a specific address in Chilliwack, and stipulates that its non-solicitation clause applies within 100 kilometers of that location. In my view, given the wording of the APA implying a single location to which the covenant applies, the restriction from Mr. Bouchard carrying on “the same or similar business” or “business in competition” with the business of the defendant applies to 100 km of the Chilliwack address (33-42312 Yarrow Central Road, Chilliwack, British Columbia). The rules for contract interpretation direct a court to search for an interpretation from the whole of the contract that advances the intent of the parties at the time they signed the agreement.

[83] I find, on a balance of probabilities, given the context of this case, with a commercial agreement in which goodwill and potential business was bargained and paid for, and which included a contract for Mr. Bouchard to be employed for three years, three concurrent years of non-competition and restraint of Mr. Bouchard's business activities within the same sector was the objective intention of the parties, and is reasonable under all of the circumstances. The geographic area was to be the radius of 100 kilometres from where Mr. Bouchard performed his work for the company.

[84] I find that some of the work Mr. Bouchard performed through Bouchard Associates and Aspis Holding Corp. was in breach of the restrictive covenant in the APA. Some other work that he performed—such as carpet cleaning and other services that were not in competition with the work of the defendant—was not in breach of the restrictive covenant.

[85] I then turn to the question of the appropriate measure of damages for breach of contract by Mr. Bouchard.

[86] I disagree with the defendant's position they are entitled to all of Mr. Bouchard's earnings. The ordinary form of monetary relief for breach of contract is an award of damages, measured according to the position which the contracting party would have occupied had the contract been performed as intended: *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 at para. 50.

[87] I find, on a balance of probabilities, that the defendant would have continued to receive the work from the three clients that then became Mr. Bouchard's clients—LMS 2816, Strata Corporation KAS 748 and Strata Corporation NW2142. Mr. Bouchard earned $29,560.25 from those three clients. I find, on a balance of probabilities, that other work that he performed, both through Bouchard Associates and Aspis Holding Corp., did not lead to any loss of profits for the defendant.

[88] The correct measure of damages would be the earnings from those three clients, minus an accounting for what would have been the defendant's actual profit

margin and expenses. See e.g., *Rogers & Rogers Inc. v. Pinehurst Woodworking Company Inc.*, 2005 CanLII 45977 (Ont S.C.) at para. 17.

[89] The defendant made a claim to all revenue and no argument was before me about the actual profit or expense margins. I did not have evidence before me to calculate what, if any, discount to account for business expenses is fair in the circumstances, to determine actual profit that the defendant would have enjoyed. I consider a deduction for expenses of 30% to be a reasonable estimate of expenses margin for determining damages. For the purposes of achieving a timely and expedient resolution of this issue, have set this amount. Therefore, Mr. Bouchard owes $20,692.18 for breach of the restrictive covenant. (That is: Actual amount the plaintiff's earned from the former clients – (minus) a presumed 30% for expenses = amount awarded as damages). The parties are at liberty to make further written submissions within thirty days of these reasons being released, if they believe a different expense ratio should be applied to determine damages, and are unable to come to an agreement on their own.

Issue 3: Does the defendant owe Mr. Bouchard a $5,000 payment under the APA?

[90] The defendant withheld the final $5,000 payment under the APA (due in August) from the plaintiff. The defendant argues that Mr. Bouchard refused to provide documents that they were required to provide under the contract.

[91] Mr. Bouchard said that he made a Dropbox link, valid for two weeks, available for the defendants to access and download the documents from cloud storage. The defendant does not dispute that Mr. Bouchard forwarded the link, and that the defendant apparently did not attempt to download the documents during this time. Mr. Bouchard said that he has the documents at his residence (where he worked while working with the defendant) and that the documents are available for pick up there at any time. The defendant points to correspondence which indicates that in the midst of the relationship breakdown they sent someone to pick up the documents, unsuccessfully, on two occasions. The defendant had also required Mr.

Bouchard to sign an agreement about how he would use the documents which he refused to do.

[92] This is an example of a matter that should have been easily resolvable between the parties. Indeed, in argument, I took the parties to agree on this.

[93] Mr. Bouchard shall arrange to have the documents sent to his legal counsel's office within three weeks of this decision. The defendant will then pick up the documents within a three week period. Within one week of the documents being picked up, the defendant will pay to the plaintiffs—via the plaintiffs' legal counsel—the $5,000 plus 6.5% per annum on the default amount per s. 3.2(b) of the APA.

"A. Walkem J."