Court of King's Bench of Alberta

Citation: People Corporation v 2578649 Alberta Ltd. (Quinn Advisory Group), 2024 ABKB 711

Date: 20241129
Docket: 2401 05026
Registry: Calgary

Between:

People Corporation

Applicant

- and -

2578649 Alberta Ltd. dba Quinn Advisory Group, Jay Quinn, Tyler Patterson, Selina Metez and Margaret Archer

Respondents

Reasons for Decision
of the
Honourable Justice B.E. Romaine

I. Introduction

[1] People applies for injunctions against four former employees and their current employer. Breaches of both contractual and common law restrictive covenants have been alleged. In conclusion, People has only established sufficient grounds for an injunction against one former employer for a limited period of time.

II. Facts and Previous Decisions

[2] In May 2024, People Corporation applied for an interim injunction pending trial, which was refused: 2024 ABKB 375. Simard, J. summarized the facts before him on this application succinctly as follows:

> [2] In 2018, People bought all the shares (the "**Acquisition**") of Lane Quinn Benefit Consultants Ltd. ("**LQBC**"). Like People, LQBC was in the business of providing group insurance benefits to employers. The Defendant Jay Quinn ("**Quinn**") was the majority shareholder, the CEO and a director of LQBC, and the other individual Defendants were employees of LQBC. In the lengthy negotiations leading up to the Acquisition, the parties, including Quinn, were represented by legal and financial advisors. The purchase price was $20 million: $14 million in cash and $6 million in contingent compensation. After the Acquisition, the individual Defendants became employees of People. People and LQBC amalgamated in February, 2021.
>
> [3] Quinn resigned from his employment with People effective December 31, 2023. He then incorporated Quinn Advisory Group ("**QAG**") in January 2024, and it commenced business, doing the same kind of work as People. The other individual Defendants resigned from People, and then commenced working with Quinn and QAG.
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> . . .
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> [7] People carries on business throughout Canada and its growth model is to acquire smaller profitable firms who have strong reputations and client relationships, run by principals early in their career who will remain engaged in growing People's business after the acquisition. People says that this growth model means it is very important for People to retain an acquired firm's principals and key employees, because they could unfairly compete with People if they left. That is one of the reasons that People requires the principals of acquired firms like Quinn to enter into restrictive covenants.
>
> [8] Concurrently with the Acquisition, Quinn and People entered into an Executive Employment Agreement (the "**EEA**") and a Restrictive Covenants Agreement (the "**RCA**"). Quinn became the President of People's LQBC division. At the time of the Acquisition, the other individual Defendants were employed by LQBC, holding the following positions:
>
> (a) Tyler Patterson ("**Patterson**") was a sales consultant and account manager;
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> (b) Selena Metez ("**Metez**") was a senior account manager; and
>
> (c) Margaret Archer ("**Archer**") was a senior account manager.
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> [9] Commencing in February 2024, Patterson, Metez and Archer all resigned their employment with People and commenced working with QAG. Two other employees in People's LQBC division also resigned...
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> People's website states that it has 2,400 employees across Canada, working in 21 offices, with six of those offices located in Calgary.

[10] In February 2024, People began receiving notices of Agent of Record Change ("**AORs**"). AORs are issued by insurance providers when a client changes its insurance broker, also known for this purpose as an Agent of Record. People and QAG are both Agents of Record, and each of these AORs notified People that their client was leaving them and moving their policies to a different Agent of Record. Between February 19, 2024 and March 25, 2024, People received 63 AORs [77 at the time of the application] respecting clients who had been serviced by the Defendants or the other two individuals whom People believes have joined QAG.

. . .

[17] At the time of the Acquisition, Quinn was the CEO, majority shareholder and a director of LQBC. He took part in the negotiations. As noted above, concurrently with the Acquisition, he signed both the EEA and the RCA. Both agreements contained restrictive covenants in broadly similar terms, prohibiting Quinn from:

(a) using, disclosing or divulging People's confidential information;

(b) soliciting away from LQBC/People any client, prospective client, associate broker, employee or supplier;

(c) providing services to, catering to or accepting business from any client, prospective client or associate broker; and

(d) directly or indirectly competing with LQBC/People.

[18] The restrictions in the RCA were time-limited and the parties agree they expired in May, 2023. People does not rely on the RCA in this application.

[19] Under the EEA, Quinn was required to give six months' notice to terminate his employment. He did so on June 29, 2023, and his last day of employment with People was on December 31, 2023. The non-competition clause in the EEA was only effective while Quinn was an employee of People, so it expired on December 31, 2023. People had the ability to extend it by up to a further 18 months, by giving Quinn notice and then making additional payments to him, but it did not do so.

[20] The confidentiality covenant in the EEA has no end date. The non-solicitation and non-acceptance covenants in the EEA expire 24 months after Quinn's last day of employment, so they remain in force until December 31, 2025.

. . .

[22] Metez, Patterson and Archer entered into employment agreements with LQBC, years before People acquired it. Those employment agreements contain no restrictive covenants or confidentiality provisions.

[23] Patterson also entered into a Corporate Confidentiality Agreement with LQBC, in which he agreed that, during and after his employment, he would hold in confidence, and not use, disclose or give to others, any of LQBC's confidential information. There is no other restrictive covenant in that Corporate Confidentiality Agreement. People says that Metez and Archer also entered into the same type of

> agreement, but that it cannot locate copies of these agreements. If such agreements were signed, there is no evidence about what terms those agreements may contain.
>
> [24] People also put in evidence a LQBC document entitled "Corporate Policies and Procedures" (the "Policy") and some electronic documents that appear to record when the individual Defendants completed various employee training sessions. The LQBC Policy states that all employees agree to keep confidential and not to use or disclose any of LQBC's confidential information, during or after their employment. It does not contain any restrictive covenants. There is a place at the end of the LQBC Policy for employees and management to sign an acknowledgement. No signed acknowledgements were put in evidence. Therefore, there is insufficient evidence for me to find that the terms of the LQBC Policy were part of an agreement between the individual Defendants and LQBC or People.

[3] At the time of the application for an interim injunction, the Defendants had not yet questioned any of the Plaintiff's affiants nor filed their own evidence. The filing of additional evidence, cross-examination on affidavits and questioning has now been completed.

[4] Despite the fact that Simard, J. indicated that, given the incomplete record, all of his findings were without prejudice to this later application, and while this hearing is *de novo,* not an appeal and thus unfettered by Simard, J.'s decision and reasons, the above noted facts remain accurate and I have adopted them in this decision, except where otherwise indicated.

[5] The evidentiary record now discloses the following additional relevant facts:

(a) An additional former employee of the Applicant, Ana Furtado, who was the office manager of the LQBC division of People, has also jointed QAG. The Applicant has not joined Ms. Furtado as a party;

(b) Mr. Patterson acknowledged the LQBC Policy; and

(c) Mr. Quinn is the President, a director, and a 60% shareholder of LQBC.

[6] Counsel for the Defendants cite a Manitoba decision that involves People and a former employee that is similar to this case in many ways: ***People Corporation v Mansbridge***, 2012 MBQB 170, *appeal dismissed,* 2022 MBCA 37.

[7] People applied for injunctive relief against a departing employee, Mr. Mansbridge, and his new employer.

[8] The Manitoba Court of King's Bench was of the view that all three of the restrictive covenant clauses (which were substantially similar to those in this case) were unreasonable and, therefore, unenforceable. With respect to the confidentiality clause, the Court considered it ambiguous and overly broad, therefore being reasonable and unenforceable. With respect to the non-solicitation clause, the Court noted that, as it did not clearly state which clients were targeted, it was not possible for Mr. Mansbridge to know with whom he was not to conduct business. As such, the covenant was unreasonable and, therefore, unenforceable. Finally, with respect to the non-acceptance clause, the Court stated that, as it was subject to the greater obligations in the employees' wealth creation plan (an incentive plan for employees that is not an issue in this case), it was therefore ambiguous. Since it was a non-competition clause and suffered from the same ambiguities and overly broad effect as did the non-solicitation clause, the motion judge considered it to be unreasonable. People argued before the motion judge that, by

seeking an injunction narrower than the scope of the three covenants in the agreement, the Court should be able to read down illegal provisions to make them enforceable, a "blue-pencil" severance. The motion judge concluded that People was, in fact, seeking a "notional severance", which was not available, and that, in any event, a more restricted "'blue-pencil' severance" was also not available.

[9] In summary, the Court found that People had failed to establish that it had a strong *prima facie* case and the motion could be dismissed on that basis. However, People had also failed to establish that it would suffer irreparable harm not compensable in damages. The Court then concluded that the balance of convenience favoured Mr. Mansbridge for two primary reasons: his ability to work would be seriously impaired, and there was no evidence of actual harm being incurred by People that could not be compensable in damages. He dismissed the application with costs.

[10] The only material difference in the clauses in that case is that they lack the "exemption" language set out at the end of the non-solicitation and non-acceptance clauses of the covenants in this case, and also refer to Mr. Mansbridge's Wealth Action Plan with respect to the non-solicitation clause.

[11] The Manitoba Court of Appeal dismissed the appeal, noting that:

(a) when seeking to enforce restrictive covenants in an employment contract not involving a commercial sale of property, a "strong *prima facie* case" standard should be applied (citing ***RJR Macdonald*** at p 340);

(b) "over the years since the decision in ***RJR*** when courts across the country have dealt with interlocutory injunctions in the context of employment contracts involving a restrictive covenant, there has been a recognition that such cases will usually require a stricter standard.": para 24;

(c) the Court limited the application of a strong *prima facie* case to the non-solicitation and non-competitive clauses, "since different considerations may apply with respect to non-confidentiality clauses", and noted that "People concedes that the non-acceptance clause is a non-competition clause": paras 32, 33;

(d) "The existence of a clause in the employment contract whereby Mansbridge acknowledges the reasonableness of the post-employment obligations, does not make it so in fact, nor bind the Court. Many restrictive covenant cases contain a similar provision and this has not prevented courts from considering, on a principled basis, the reasonableness of the impugned restrictive clauses (see, for example, *Sanche* and *Dreco*).": para 38;

(e)

> In our view, once it was ascertained that a strong prima facie case standard was to be applied, it was reasonable for the motion judge to consider the likelihood of success of the arguments as to the clauses' ambiguity and reasonableness. He was required to address the merits and analyze the enforceability of these clauses applying this more

> stringent standard. Understandably, the motion judge noted that, when one reads the clauses as to non-solicitation and non-acceptance as a whole, including the subclauses relating to "business of any nature or kind ... similar to the People Corporation Business or any part thereof", the clauses suffer from ambiguity and, therefore, unreasonableness. In the particular circumstance of this case, he therefore concluded that People had failed to establish that it had a strong prima facie case and to meet this important threshold: para. 43;

(f) the Court noted that Mr. Mansbridge had transferred various pieces of information to himself before he left People, but denied using them. The Court accepted counsel's undertaking to return the information to People or destroy it in a manner acceptable to People. People raised both contractual and common law duties of confidentiality, but the Court declined to decide the issue of the standard that should be used in assessing whether an interlocutory injunction should be granted for a potential breach of a confidentiality clause, given the facts of the case;

(g) on the issue of irreparable harm, while there was evidence of clients having switched from People to Mr. Mansbridge's new employer, there was no evidence that this was a result of a solicitation by Mr. Mansbridge. In the event he was wrong in that regard, the motion judge had accepted evidence of quantifiable loss, but rejected People's submissions that there were other losses that were not quantifiable. In his view, difficulties in calculating the losses were not sufficient when compared to the extraordinary relief of an interlocutory injunction. The Court of Appeal deferred to this finding; and

(h) with respect to the balance of convenience, the Court noted that the decision to grant or not grant an interlocutory injunction does not rest on one factor alone, but on a consideration of all three branches of the test, although the failure to meet one might, in appropriate circumstances, be considered sufficient to defeat the request. The Court stated that it was loathe to interfere in what was essentially the motion judge's discretionary decision, and that he was entitled to conclude that there was no evidence of actual harm being suffered by People that could not be compensated in damages, and that granting the injunction would have a serious impact on the ability of Mansbridge to work in the industry.

III. Analysis

A. Appropriate Test

[12] The parties agree that the oft-cited three-part test set out in ***RJR- MacDonald Inc v Canada (Attorney General***), 1 SCR 311, is the appropriate test for granting an interlocutory injunction.

(a) Is there a serious issue to be tried;

(b) has the applicant demonstrated that it would suffer a substantial risk of irreparable harm if the injunction is not granted; and

(c) does the balance of convenience favour the granting of the injunction?

B. Serious issue to be tried

[13] The Applicant concedes that it must establish a strong *prima facie* case against the Defendants Patterson, Metez and Archer, but submits that it need only establish a serious issue to be tried with respect to Mr. Quinn. It submits that, where restrictive covenants are inextricably tied to the sale of a business, the standard that the applicant must establish is lower. Mr. Quinn submits that the test is a strong *prima facie* case. The first issue is therefore the appropriate standard to apply in assessing the first requirement of the ***RJR – MacDonald*** test with respect to Mr. Quinn.

1. Mr. Quinn

[14] Until his employment with People ended on December 31, 2023, Mr. Quinn was the President of People's LQBC division. As a senior executive, he was a fiduciary of People.

[15] In order to establish even the lower standard of a serious issue to be tried, the Applicant must rely on the non-solicitation provision, non-acceptance provision and confidentiality provision all found in Mr. Quinn's EEA. The covenants do not restrict Mr. Quinn from publishing an advertisement to the general public following his termination of employment, as he did. The wording of the covenants at issue is set out in Appendix A.

[16] There is nothing that prevents Mr. Quinn from competing with the Applicant and the issue is whether there is, at a minimum, a serious issue to be tried, or the more onerous strong *prima facie* case with respect to the surviving covenants of the EEA. This depends on whether the EEA is considered an employment contract or part of the share purchase Acquisition.

[17] Both parties cite and rely on the decision of the Supreme Court of Canada in ***Payette v Guay Inc.***, 2013 SCC 45.

[18] In that case, Guay acquired assets belonging to corporations controlled by Payette. The sale of assets agreement contained non-competition and non-solicitation clauses. The parties included a provision in the sale of assets agreement that Payette would work full time for Guay as a consultant for six months. After six months, the parties entered into a contract of employment. A few years later, Payette's employment was terminated. Notably, the employment agreement did not include any restricted covenants: the non-competition and non-solicitation covenants that Guay sought to enforce were clauses in the sale of assets agreement.

[19] The Court noted that the scope of a restrictive covenant depends on the context in which it was negotiated: para. 3. It stated:

> This appeal provides a clear illustration of how 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. It raises important issues relating to the interpretation of covenants limiting employment and competition that are set out in a contract for the sale of assets that leads, on an accessory basis, to the formation of a contract of employment. (*emphasis added)*

[20] The Court described why a person seeking to sell a business may have a problem unless he undertook to assure the purchaser that he, the vendor, would not later enter into competition.

> "A different situation…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 his own interest, knowledge and skills obtained during employment.": para. 5. (*emphasis added)*

[21] The Court noted that:

> To determine whether the restrictive covenants must be interpreted in light of the rules applicable to commercial contracts or the rules applicable to contracts of employment, it will be helpful to clearly identify the reason why the covenants were negotiated by considering, *inter ailia*, their wording as well as their context: para. 6. (*emphasis added)*

[22] The Court found that the restrictive covenants in the sale of assets agreement were lawful in a commercial context, unless they were shown to be contrary to public order, "for example because they are unreasonable with respect to one of the parties.": para. 9.

[23] The Court commenced its analysis by stating that:

a) the rules applicable to restrictive covenants relating to employment differ depending on whether the covenants are limited to a contract for the sale of a business or a contract of employment;

b) the application of different rules is a response to the imbalance of power that generally characterizes the employer-employee relationship when an individual contract of employment is negotiated, and its purpose to protect the employee: para. 36; and

c) the inclusion of non-competition and non-solicitation clauses in an agreement for the sale of a business is usually intended to protect the purchaser's investment, and enable the purchaser to build strong ties with its new customers without fearing, for a given period, competition from the vendor: para. 37.

[24] The Court noted that it was common ground that the agreement for sale in the case before it was a "hybrid" commercial and employment agreement, with two separate juridical acts within a single framework: para. 44.

[25] The Court provided the following guidance:

> To determine whether a restrictive covenant is linked to a contract for the sale of assets or to a contract of employment, it is, in my view, important to clearly identify the reason why the covenant was entered into. The "bargain" negotiated by the parties must be considered in light of the wording of the obligations and the circumstances in which they were agreed upon. The goal of the analysis is to identify the nature of the principal obligations under the master agreement and to determine why and for what purpose the accessory obligations of non-competition and non-solicitation were assumed: para. 45.

[26] The Court found that the reason Payette agreed to the restrictive covenants related to the sale of his business and not his post-sale services in the contract of employment, analyzing the language of the agreement of sale was as follows:

> Finally, it is important to note that, as of the date of his dismissal, the appellant Payette was no longer working for Guay inc. under the October 2004 agreement. Rather, he was doing so under the contract of employment of April 29, 2005, which had been accepted on May 26 of that year. This distinction is relevant for two reasons. First, the fact that there was a separate contract governing the employer-employee relationship between the two parties that did not contain restrictive covenants undermines the argument that the restrictive covenants in the October 2004 agreement are not enforceable. It also shows that such covenants did not form an essential aspect of the negotiations that resulted in the contract of employment. This corroborates the conclusion that the restrictive covenants were negotiated essentially in connection with the sale of Groupe Fortier's assets and must therefore be interpreted on the basis of commercial law: para. 51. (*emphasis added).*

[27] The Court then turned to considering whether the restrictive covenants were reasonable. As it had characterized the contract as a commercial contract, the burden was on Payette to prove that the covenants were reasonable. He failed to discharge that burden for the following reasons:

a) in a commercial context, a restrictive covenant is lawful unless it can be established on a balance of probabilities that its scope is unreasonable: para. 53; and

b) 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 favor it was granted, taking into account such factors as the sale price, the nature of the business's activities, the parties' experience and expertise and the fact that the parties had access to legal counsel: para. 61.

[28] The Court found the term of the non-competition clause to be reasonable. However, with respect to territorial scope, the Court found that the territory to which a non-competition covenant applies is "limited to that in which the business being sold carries on its trade or activities...as of the date of the transaction...a non-competition clause that applies outside the territory in which the business applies is contrary to public policy": para 65. In the ***Payette*** case, this was not at issue.

[29] The Court found that a determination that a non-solicitation clause is reasonable and lawful in the context of a contract for the sale of assets does not generally require a territorial limitation.: paras. 68-72. However, the Court drew a distinction between a commercial contract and a contract of employment in that regard, and also noted that "a territorial limitation is not absolutely necessary for a non-solicitation clause applying to all or some of the vendor's customers to be valid, since such a limitation can easily be identified by analyzing the target customers": para.73.

[30] An appeal of the Court of Appeal's decision to grant an injunction was dismissed.

[31] It is noteworthy that, while Payette acknowledged that his covenants were reasonable in the agreement at issue, the Court found that it was not bound by his acknowledgment, since the Court had to determine whether the covenants in question were valid. The Court commented that an acknowledgment was nevertheless an additional factor and an indicator that was both relevant to and useful for the assessment of whether the covenants are reasonable, and hence valid: para. 60.

[32] Applying these principles to the case before me, I find that the EEA is an employment agreement, and that People must establish a strong *prima facie* case with respect to the restrictive covenants.

[33] While the restrictive covenants in the RCA were linked to the Acquisition agreement, with recitals that state that it was a condition of People entering into the share purchase agreement that Mr. Quinn enter into the RCA, the recitals to the EEA do not include such a statement but merely state that "the Employee resigned as an officer and director of the Employer, and agreed to become employed by the Employer pursuant to the terms of this Agreement" (*emphasis added)*. The obligations in the EEA were not assumed in the context of a commercial contract, as were the obligations in the RCA, but in the context of a separate employment agreement. The EEA also includes a provision that acknowledges that Mr. Quinn has "direct and indirect commercial relationships" with People and has thus given covenants in the context of the other relationships, but that the covenants in the EEA "are not intended to be overridden, restricted or amended" by the other covenants. In addition, the EEA contains an entire agreement clause that provides that it is "the entire agreement between the parties hereto with respect to the employment" of Mr. Quinn.

[34] Despite the fact that the agreements were signed on the same day, on their terms they relate to different purposes, are between different parties and include restrictive covenants with different termination dates.

[35] The provisions of the RCAs regarding confidential information, non-solicitation, non-acceptance, and non-competition are substantively the same as those in the EEA. People therefore protected itself with respect to the Acquisition through the RCA, further evidence that the EEA's purpose was only to govern the contract of service between Mr. Quinn and People.

[36] The restrictions in the RCA served the purpose of protecting People's investment, enabling People to build strong ties with its new customers with respect to its acquisition without facing competition from Mr. Quinn, who fully abided by them.

[37] The EPA is not part of a "hybrid agreement". It is noteworthy that the restrictive covenants at issue in ***Payette*** were included in the sale of assets agreement, whereas here, they form part of a separate employment agreement.

[38] The "master agreement" referred to in ***Payette*** with respect to the Acquisition was the RCA, which imposed restricted covenants on Mr. Quinn for roughly five years, expiring on December 31, 2023.

[39] The "master agreement" with respect to Mr. Quinn's employment is the EEA. While Mr. Quinn cannot be said to have been in an unequal position with respect to negotiation of the terms of the employment agreement, the restrictive covenants in the EEA are covenants in the restraint of trade in that they seek to deny Mr. Quinn's right to exploit his knowledge and skills.

[40] In ***National Hearing Services Inc. dba Connect Hearing v Chiasson and Wave Audiology Inc. and 673638 N.B. Inc.,*** 2024 NBKB 18, the Court considered a situation similar to this case, where the applicant sought to enforce restrictive covenants in both a purchase agreement and an employment agreement. In ***National Hearing***, the execution of the employment agreement was a condition of the purchase agreement. Even so, the Court applied the heightened standard of a strong *prima facie* case, given that Canadian jurisprudence "has consistently held that a strong *prima facie* case is essential when seeking injunctive relief with respect to a restrictive covenant in employment agreement": para 58. The Court analyzed the employment agreement with respect to its separate purpose and subject matter from the purchase agreement.

[41] This case is distinguishable from ***Kavaros v Smith***, 2021 ABQB 714, in that, in ***Kavaros***, the employment of the plaintiff was clearly stated to be a condition of the commercial relationship.

[42] Restrictive covenants in an employment agreement are subject to certain special considerations:

(a) They are *prima facie* unenforceable as restraints on trade that are contrary to public policy: ***Shafron v KRG Insurance Brokers (Western) Inc.,*** 2009 SCC 6, at paras 16-17;

(b) a restrictive covenant will only be enforced if it is "reasonable", whether or not the restrictive covenant is obtained in a commercial context: ***Elsley v J.G Collins***, [1978] 2 S.C.R. 916, at paras. 924-925;

(c) reasonableness is measured in terms of time, geography and scope: ***Shafron***, para. 26;

(d) for a determination of reasonableness to be made, the terms of the restrictive covenant must be unambiguous: ***Shafron***, para. 27;

(d) reasonableness of the scope depends on whether the Applicant has a proprietary interest in the subject matter, whether the scope protects only that interest, and is unambiguous: ***IBM Canada Ltd. v Almond***, 2015 ABQB 336, at paras. 52-61; and

(e) a court in not permitted to change the scope, time or geography of the agreement by rewriting, or notionally severing a restrictive covenant in an employment contract to reflect what the court thinks is reasonable: ***IBM*** at paras. 71-75;

2. Application of the Serious Issue Requirement to Mr. Quinn

a. Solicitation of Employees

[43] Simard, J summarized the evidence presented by People in its attempt to establish that Mr. Quinn solicited People's employees to leave People and join QAG at paragraphs 43 and 55 of his decision. He found that there was no evidence establishing that Mr. Quinn solicited any People employees to leave People and join QAG.

[44] The evidence remains the same. However, People submits that new evidence establishes that Mr. Quinn initiated communications with Ms. Archer to invite her to move from People to QAG.

[45] The uncontradicted evidence from Mr. Quinn and Ms. Archer does not sustain this allegation. Ms. Archer in questioning on her affidavit said that she learned of the employment opportunity after Mr. Quinn texted her on January 15, 2024, in his capacity as a long-time friend with whom she had worked for 16 years, to wish her a happy New Year and to "give her the heads-up that I'm getting back into business". Ms. Archer testified that, independently and without Mr. Quinn's direction or suggestion, she looked at QAG's website and saw a job posting for an account manager position. She then asked Mr. Quinn if she could speak to him about being employed at QAG.

[46] Ms. Archer is 72 and had previously announced that she was planning to retire. Mr. Quinn says it surprised him that Ms. Archer was interested in continuing employment instead of retirement.

[47] In a later email, Mr. Quinn asked Ms. Archer if she had applied for a position through the website. He advised that he was "arms length" to the process, but that he had not seen her name on the most recent list of applicants. She told him that she had applied "the day that we chatted". Mr. Quinn advised her that "we had some issues with the site initially" and asked her to resubmit her application through the website. While the evidence of the emails is that Mr. Quinn contacted Ms. Archer after he became aware that her name was not on a recent list of applicants, it also indicates that Ms. Archer applied for employment with QAG on her own initiative. The submission that Mr. Quinn contacted her with the intention of soliciting her application is mere speculation. Both Ms. Archer and Mr. Quinn expressly testified that Mr. Quinn did not solicit her to leave her employment.

[48] People submits that Mr. Quinn and Ms. Archer should not be believed, on the basis that it cannot merely be coincidental that the day that Mr. Quinn set-up the QAG website, January 15, 2024, he chose to contact Mr. Archer to wish her a happy new year and advise her that he was getting back into business. However, given the evidence of their close friendship, and evidence that Ms. Archer had let Mr. Quinn, among others, know that she was planning to retire, this speculation about Mr. Quinn's intention does not stand.

[49] It should be noted that it was not until January 18, 2024 that Mr. Quinn updated his LinkedIn account to indicate that his employment with People had ended in December, 2023 and that he became President of QAG in January, 2024. It was not until January 25, 2024 that QAG announced its formation in a LinkedIn account. The announcements expressly fall in the exception to solicitation set out in section 5.04 of the EEA.

[50] Ms. Metez and Mr. Patterson learned of employment opportunities with QAG through the January 25, 2024 public posting on LinkedIn. Both have testified that Mr. Quinn did not solicit them for employment and there is no evidence to the contrary. Ms. Metez in her affidavit indicated that she was unhappy with her employment at People for various reasons, which is what prompted her to apply for a position at QAG. While this would not be relevant had she been solicited to leave by Mr. Quinn, she is clear that at no time did Mr. Quinn or anyone else at QAG solicit, encourage, or induce her to leave People. Mr. Patterson states in his affidavit that he learned of Mr. Quinn's new venture through his LinkedIn notice, and that, when he contacted Mr. Quinn about a position, Mr. Quinn directed him to the QAG website job postings. He also expressed unhappiness with his position at People, and felt he did not have a future at the company. In summary, People has not established either a strong *prima facie* case or the lesser standard of an issue to be tried with respect to Mr. Quinn's covenant not to solicit employees.

b. Solicitation of Clients

[51] People has adduced no evidence but speculation that Mr. Quinn solicited any client to move its business to QAG. Mr. Quinn swore in his affidavit that every former client of People for whom he was responsible who moved their business to QAG contacted him.

[52] People submits that there is evidence that Mr. Quinn directly solicited TotalCardiology, a People's client. This arises from the previously described email exchange between Mr. Quinn and Ms. Archer. In the exchange, Ms. Archer said that she would resubmit her application for employment when she gets back from Vancouver, and commented that she was "[j]ust with Trina at TotalCardiology." Mr. Quinn asked Ms. Archer to say hello, and Ms. Archer then advised that "Trina says hi and is going to call you". This is not evidence of solicitation of a client.

[53] However, People has raised another allegation about Mr. Quinn since its first application – that Mr. Quinn "indirectly" solicited clients by reason of the fact that Ms. Metez and Mr. Patterson were to his knowledge soliciting clients of People. The Clients solicited by Ms. Metez and Mr. Patterson benefitted QAG, their employer, and therefore it is possible that this indirectly benefited Mr. Quinn though his shareholdings of QAG, if the business profits.

[54] However, even if this can be considered indirect solicitation of clients, the prohibition of solicitation of "Clients" and "Prospective Clients" that forms part of this restrictive covenant is unenforceable, given its overbreadth and ambiguity.

[55] As noted by Simard, J. at para. 50, a restrictive covenant will not be enforceable if it is unreasonable. Ross, J. of this Court enunciated the questions that must be asked to determine whether a restrictive covenant is reasonable in ***961945 Alberta Ltd. (Servicemaster of Edmonton Disaster Restoration) v Meyer***, 2018 ABQB 564 at paras 35-55:

(a) Do the restrictions protect a proprietary interest that is entitled to protections;

(b) are the restrictions reasonable in their geographic or temporal scope, or are they overly broad;

(c) is the breadth of the restrictions reasonable; and

(d) are the restrictions in keeping with the public interest?

[56] People has established that it has a proprietary interest entitled to protection and there is no apparent public interest requiring the covenant to be found unenforceable. However, the issue is whether the non-solicitation of clients restrictive covenant is reasonable in its geographic scope, its temporal scope, and its breadth, and whether the restrictions are ambiguous.

[57] In ***Shafron*** the Court noted at para. 27:

> However, for a determination of reasonableness to be made, the terms of the restrictive covenant must be unambiguous. The reasonableness of a covenant cannot be determined without first establishing the meaning of the covenant. The onus is on the party seeking to enforce the restrictive covenant to show the reasonableness of its terms. An ambiguous restrictive covenant will be *prima facie* unenforceable because the party seeking enforcement will be unable to demonstrate reasonableness in the face of an ambiguity. (*emphasis added)*

[58] I find that the non-solicitation of clients restriction is unreasonable and unenforceable because the definitions of "Clients" and "Prospective Clients" are overly broad and ambiguous. The definition of "Clients" in the EEA includes all persons to whom a "member of the People Corporation Group", which would include the more than 2,700 employees of People and its subsidiaries across Canada, have sold products or provided services currently or within the 36 months prior to the alleged solicitation. The definition also includes, not only established clients, but persons on whom a member of the people Corporate Group "maintains...a file" in their "active records". The definition of "Prospective Clients" includes persons "who have been approached by or on behalf of any member of the People Corporation Group... within the 18-month period prior to" the date an alleged solicitation has taken place, despite not being a current client, and all persons "whom such member has determined should be approached...and in respect of whom a plan of action has been developed".

[59] It would not be possible for Mr. Quinn to determine if clients approached by the staff of QAG would fall within these very broad parameters.

[60] People submits that any over-breadth or ambiguity in the anti-solicitation covenant is remedied by the exception at the end of the covenant, which provides that the restriction does not apply to any "Clients" and "Prospective Clients" if Mr. Quinn can demonstrate that he had not "personally" communicated with the client or prospective client with respect to Peoples's business within the 5 year period preceding his date of termination, and had not received "Confidential Information" about the client from any employee of People within that period.

[61] I agree with Simard, J. when he notes at paragraphs 66 and 67 of his decision with respect to the same exception provision included in the non-acceptance covenant:

> ... the proviso does not narrow the restriction to a reasonably knowable group of people. For example, Quinn would be in breach of the restriction if:
>
> (a) he accepted business from a person (for illustrative purposes in this example, "A", a private company based in Montreal) who was not and had never been a People client, with whom Quinn had never personally communicated and whose business he did not solicit;
>
> (b) a People employee working in another People office ("B"), whom Quinn had never met or communicated with and who had never communicated with A, determined that A should be approached to be a client of People and with respect to whom he (B) had made a plan of action to approach (all unknown to Quinn); and
>
> (c) another People employee ("C"), who had no knowledge of A, or of B's plans to approach A, had made a statement to Quinn about "D", whom C knows personally, but who is also an officer of A.
>
> C, by mentioning D's name to Quinn, would thereby have informed Quinn about a contact person of A, and under the EEA, Quinn would have received Confidential Information about a Prospective Client. By accepting business from A, Quinn would be in breach of the non-acceptance covenant.

[62] This example with the necessary substitution of Ms. Metez and Mr. Patterson where appropriate, is equally persuasive in considering the exception in the language of the non-solicitation covenant.

[63] People also submits that the defined terms can effectively be read down to only include clients that the staff of QAG know to be clients of People, because the alleged solicitation refers only to those clients. However, it is how the restrictive covenant is written that is relevant, and it is not appropriate for the Court to clarify an ambiguous and unreasonable covenant through reading down the language during an injunction application. . I also agree with Simard, J.'s comments on why severance would not be appropriate in this case: paras 61-63.

[64] Since the non-solicitation of clients restrictive covenant would be unenforceable due to over-breadth and ambiguity, it does not matter if Mr. Quinn could be said to have breached it "indirectly".

[65] People submits that new evidence indicates that Mr. Quinn solicited business from Russell Lane. It submits that Mr. Lane is an "associate broker" who referred clients to the LQBC division of People, referring to a list of Associate Brokers attached to the share purchase agreement. People submits that Mr. Quinn's discussions with Mr. Lane after he left his employment with People were a breach of his non-solicitation covenants.

[66] Mr. Quinn testified during questioning on his affidavit that he had discussions with Mr. Lane in January of 2024. He noted that he and Mr. Lane were old friends, who had known each other for about 30 years, and that Mr. Lane had been a mentor to him. He was not aware of any written agreement between Mr. Lane and People. He acknowledged that Mr. Lane was listed as an associate broker in an appendix to the share purchase agreement when he was shown that document.

[67] Mr. Quinn testified that Mr. Lane, who has his own company with his own client relationships, told him during their discussions that he was going to bring his clients over from People to QAG. Given their long-standing relationship, this was not a surprise to Mr. Quinn. Mr. Quinn denies having discussions with Mr. Lane that would circumvent his non-solicitation covenant. It is not solicitation when an associate broker reaches out to the covenantor.

[68] There is no evidence to the contrary from People, other than their assertion that certain clients of Mr. Lane that had been clients of People are now clients of QAG.

[69] It does not matter whether the Applicant must establish merely an issue to be tried or a strong *prima facie* case, the Applicant has failed to establish the first requirement of ***RJR-MacDonald*** with respect to Mr. Quinn's non-solicitation covenant.

c. Breach of Confidentiality Covenant

[70] There is no evidence that Mr. Quinn breached his covenant not to use People's confidential information, other than People's speculative assertions. Mr. Quinn swore in his affidavit that he did not use any such information, other than general knowledge that he possessed due to his approximately 23 years with LQBC and People.

[71] People submits that information about "the primary contact person or people in charge of group benefits at these companies"; and "information about their benefits plans" is confidential information, falling within the confidentiality covenant.

[72] While the definition of "confidential information" in the EEA purports to include these types of information, the proviso to the definition makes it clear that information that is publicly available is not confidential information.

[73] Business contact information is not confidential. By its very nature, such information is publicly and intentionally disseminated by the person and also the organizations for whom they work so that they can be contacted for business.

[74] By the same token, information about benefits plans is not confidential or proprietary to People. It is information that is known to the employer that acquires the benefit plan for its employees, known to, and available from, the insurers if the client authorizes disclosure of the information, and is widely disseminated by such clients to its own employees and prospective employees.

[75] The uncontested evidence of Mr. Quinn, Ms. Metez and Ms. Archer is that Mr. Quinn told each and every one of the other individual Respondents at the outset of their employment that no use of any confidential information from People was permitted.

[76] I agree with Simard, J. that the Court is unable to infer from the mere fact that a number of clients and one or more brokers moved their business to QAG that Mr. Quinn breached the confidentiality covenant: para. 46.

d. Non-Acceptance Covenant

[77] Simard, J. found that the non-acceptance covenant was a form of non-competition provision: paras 50 to 70. The evidence before this Court with respect to this issue has not changed, and I agree with Simard, J.'s characterization. It is also noteworthy that, on the appeal of the ***Mansbridge*** KB case, People conceded that a substantially similar non-acceptance covenant was a form of non-competition provision.

[78] People now submits that its concession before the Manitoba Court of Appeal is irrelevant, since the non-acceptance covenant in that case is slightly different from the one in Mr. Quinn's EEA in that it did not include the exception language found in this case. However, the differences do not detract from the characterization of the covenant.

[79] In any case, it is not necessary to rely on People's concession. I agree with Simard, J. that the covenant at issue prevents competition in that it prevents Mr. Quinn from providing competitive services to former clients of People, regardless of whether Mr. Quinn solicits these clients or they approach him of their own volition: para 59.

[80] Simard, J. found that there was evidence that Mr. Quinn, in establishing QAG in direct competition with People, had provided services to, catered to or accepted business from clients, prospective clients or associate brokers of People and that this could potentially support a finding of a serious issue to be tried: para. 48.

[81] I agree that, whether the test is a serious issue to be tried, or a strong *prima facie* case basis, the evidence would be sufficient to satisfy the first branch of the RJR McDonald test if the non-acceptance restrictive covenant were reasonable and lawful.

[82] Simard, J. found the covenant not to be reasonable, given that the lack of geographical limitation means that the prohibition goes beyond the territory of Alberta and British Columbia, the provinces in which LQBC operated a the time of the acquisition. He also found that the

covenant exceeds what is necessary for the protection of People's legitimate interests and is contrary to public order.

[83] Simard, J. analyzed the question of whether the non-acceptance covenants were reasonable in accordance with his finding that the EEA was a commercial agreement, rather than an employment agreement. He followed the guidance of the Supreme Court in ***Payette*** about taking a commercial approach to the analysis of restrictive covenants, as follows at para 52 of his decision:

> (a) the non-association covenant is lawful unless it can be established on a balance of probabilities that its scope is unreasonable (at para 58 of ***Payette***);
>
> (b) the defendant has the burden of proving that the terms of the non-association covenant are unreasonable (at para 57 of ***Payette***);
>
> (c) 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, considering factors such as 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 (at para 61 of ***Payette***);
>
> (d) the circumstances of the parties' negotiations, including their level of expertise and experience and the extent of the resources to which they had access at that time (at para 62 of ***Payette***); and
>
> (e) in principle, the territory to which a non-competition covenant applies is [TRANSLATION] "limited to that in which the business being sold carries on its trade or activities . . . as of the date of the transaction": ... A non-competition clause that applies outside the territory in which the business operates is contrary to public order (at para 65 of ***Payette***).

[84] Simard, J. rejected the Applicant's submission that ***Payette*** established that non-acceptance covenants do not require geographical limitations to be enforceable, citing para 69 of the decision. He noted that …"[w]hile the Court did not say explicitly, its reasoning indicates that it implicitly found [the restriction at issue] was a non-solicitation covenant and not a non-competition covenant": para 58.

[85] While I agree with Simard, J's characterization of ***Payette*** and his findings with respect to the lack of geographical limits in the non-acceptance covenant, I go farther and find the non-acceptance covenant is also not reasonable because of the breadth of the definitions of "Clients" and "Prospective Clients", as discussed previously with respect to the non-solicitation covenants.

[86] Therefore, the non-acceptance covenant in the EEA is over-broad and is contrary to public order, and People has not established the first requirement of the ***RJR MacDonald*** test with respect to this covenant.

3. Application of the Serious Issue to be Tried Requirement to Mr. Patterson

[87] Mr. Peterson is 34 years old and has been engaged in the health benefits insurance industry for 8 years. He signed a "Corporate Confidentiality Agreement" when he commenced work with LQBC in 2016 which provided that he hold in confidence confidential information of the company during and after his employment Confidential information was defined as information that has economic value to the company or is deemed proprietary and confidential by the company. This document does not have a term limit. Mr. Patterson also reviewed and acknowledged certain People "Employee Policies and Procedures" from time to time. These policies, while they refer to confidentiality of information, do not include an attempt to impose non-compete or non-solicitation covenants.

[88] Ultimately, Mr. Patterson was responsible for about 60 clients while he worked at People, of which about 25 followed him to QAG, out of about 400 former LQBC clients and about 3000 People Corp. clients.

a. Confidentiality

[89] There is no evidence that Mr. Patterson took confidential information with him when he left People.

[90] People submits that Mr. Patterson "suspiciously" transmitted confidential information to himself on the day he submitted his resignation, in which he gave notice to People. The uncontradicted evidence is that Mr. Patterson merely sent the following information from his People Corporation email account to his personal email account, for the purpose of being able to access the information when he was travelling: (a) a list of potential customers (who were not People clients) generated by a third-party service provider that Jeff Nichol had purchased and shared with Mr. Patterson so that they could cold call for clients; (b) a high-graded subset of that same list that Mr. Patterson determined were worthy of cold-calling but which he testified turned out to be "a complete waste of time"; (c) a credit card authorization that Mr. Patterson had provided to the Ranchmans' Club to pay his membership account; (d) a draft letter that Mr. Patterson was working on to explain rate increases to a client; (e) a promotion sheet that Mr. Patterson was asked to review; and (f) a "puppy waiver" that Mr. Patterson needed to complete to enroll the new family dog into obedience training.

[91] It was also suggested that Mr. Patterson had illegally accessed certain information on a software system, and on what is referred to as the "Renewal Tracker" but the uncontradicted evidence is that it was part of his employment duties to do so.

b. Non-Solicitation

[92] Mr. Patterson is not bound by any contractual restrictive covenants. Mr. Patterson has confirmed that he contacted at least 25 clients that he serviced while at People following his engagement with QAG for the purpose of soliciting their business to QAG, and they all became clients of QAG. People submits that Mr. Patterson misled some of these clients, but there is no evidence other than unpersuasive hearsay evidence to support this allegation.

[93] People submits that Mr. Patterson was a fiduciary of People, and therefore owes common law duties to it as his employer.

[94] Most employees are subject only to contractual limitations relating to the disclosure of information, and after termination of employment, non-solicitation of previous clients, but, if an

employee is a fiduciary, he or she will owe certain obligations flowing not from contract, but from the nature of his or her position and the employer's vulnerability. The Supreme Court in ***Lac Minerals Ltd. v International Corona Resources Ltd.,*** [1989] 2 S.C.R. 574 at para. 596 cautioned, however, that such duties are "reserved for situations that are truly in need of the special protection that equity affords."

[95] In ***Canadian Aero Service Ltd. v O'Malley*** [1974] S.C.R. 392**,** the Supreme Court held that for a fiduciary obligation to attach to an employee, the employee must be in a position to exercise some independent power or discretion over the employer's business. In ***Frame v Smith,*** [1987] S.C. J. No. 49 at para. 60, the Supreme Court described the three defining characteristics of a fiduciary employee:

(a) The fiduciary has scope for the exercise of some discretion or power;

(b) the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests; and

(c) the beneficiary is particularly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

[96] While a fiduciary employee is typically a "key employee", it is the substance of the position rather than the title that is determinative. A key employee generally exercises control over daily operations, or is integrally involved in decision making: ***Zoic Studios B.C. Inc. v Gannon*** [2012] BC No. 1883; ***Imperial Sheet Metal Ltd. v Landry***, [2007] N.B.J. No. 226 at para.60. Salespersons are generally not fiduciaries: fiduciary status is usually limited to senior or executive management.

[97] As noted in ***Imperial Sheet Metal*** at para. 63:

> …A "key" employee is: (1) an integral and indispensable component of the management team that is responsible for guiding the business affairs of the employer; (2) necessarily involved in the decision-making process; and (3), therefore, has broad access to confidential information that if disclosed would significantly impair the competitive advantages that the former employer enjoyed. These employees fall within the categories: "top management", "senior management" or "key management". (*emphasis added).*

[98] The evidence does not establish that Mr. Patterson had scope for the exercise of discretion or power, or that he could unilaterally exercise power. The uncontradicted evidence indicates that Mr. Patterson was not responsible for guiding the business affairs of People, nor was he involved in the decision-making process.

[99] However, Alberta Courts have recognized that the vulnerability of the employer to unfair competition by the employee can give rise to an *ad hoc* fiduciary relationship:

> Where an employer by the nature of his business is particularly vulnerable to loss by soliciting of his clients' business, a senior employee stands in a fiduciary relationship to his employer and, whether or not he takes with him customer lists and other employer's property, he owes a duty to the employer not, after leaving his employ, to solicit his clients' business: ***HRC Tool & Die Mfg. Ltd. v Naderi***, 2015 ABQB 437, affirmed 2016 ABCA 334 at para.29, citing ***Edgar T Alberts Ltd. v Mountjoy***, 79 DLR (3d) 108 (HC).

[100] A broader approach to when an employee may be found to be a fiduciary is found in ***Edgar T. Alberts v Mountjoy***, (1977), 16 O.R. (2d) 682. In that case, it was suggested that:

> …a fiduciary is not to be defined by the position held by the employee, but rather by the relative strength of the relationship between the employer's customers and the former employee. The more likely it is that the customer will follow the employee, rather than remain with the employer, the easier it is to sustain the allegation that the former employee is a fiduciary - so the reasoning goes.

[101] ***Alberts*** has been criticized for this approach, as this definition results in many more "humble" employees falling within an overly broad definition of fiduciary.

[102] This approach appears to be confined to the insurance brokerage business where the relationships between brokers and clients are perceived to be delicate and sensitive.

[103] However, the Court in ***HRC Tool & Die*** recognized the policy issues inherent in a broad concept of fiduciary relationships in an employer-employee relationship context: paras. 30-35.

[104] The Court noted that the Supreme Court had observed in ***Elder Advocates of Alberta Society v Alberta,*** 2011 SCC 24 that, "[a]s useful as the three "hallmarks" referred to in Frame are in explaining the source fiduciary duties, they are not a complete code for identifying fiduciary duties": para. 39.

[105] In ***HRC Tool & Die***, the Court concluded that, despite the presence of the Frame indicia with respect to at least one of the employees at issue, neither were fiduciaries.

[106] However, the issue before me is not whether Mr. Patterson is a fiduciary, but whether People has established a strong *prima facie* case that he may have been. On the evidence of People's vulnerability with respect to Mr. Patterson's strong relationship to his clients, People has established such a strong *prima facie* case.

[107] It does not follow that a different conclusion could be made at trial, after taking into account public policy issues and a more complete analysis of the same hallmarks.

[108] I note that Mr. Patterson reviewed and acknowledged People's Code of Business Conduct and Ethics, which included an express requirement to act in the best interests of People which can be argued is an undertaking to act in the best interests of an employer.

[109] However, People in its draft order seeks to impose on Mr. Patterson a raft of restrictive covenants similar to the contractual ones that are imposed on Mr. Quinn. This is inappropriate: the issue is the scope of Mr. Patterson's common law duty – not to solicit clients of People for a "reasonable time". In many cases, this period approximates one year from the date the employee left his employment. As a trial in this matter may not occur for more than a year from the date of this decision, the limited interim injunction granted in this case with respect to Mr. Patterson will expire on February 7, 2025, a year after his resignation from People.

4. Application of the Serious Issue to be Tried to Ms. Metez

[110] People submits that it should be "inferred" that Ms. Metez signed certain policies and agreements after the merger between LQBC and People, but she deposes that she does not recall entering into these agreements, and no such executed documents have been produced by People. In the face of her evidence, it is not appropriate to make this inference.

[111] Since there is no evidence that Ms. Metez is bound by any written contractual breach of restrictive covenant, People's only allegation against her is that she was a fiduciary of People, and thus in breach of her common law duty not to solicit clients of People.

[112] Simard, J. found that, on the basis of the evidence before him, People had not established that Ms. Metez was a fiduciary of People: para. 36. He noted that there was no evidence that she was a "key" or "senior" employee, that she "may be [a fiduciary]" because she was a "junior" employee who joined QAG and because she may be a fiduciary with respect to the clients for which she acted as a sales consultant, but that more evidence would be required to make such a finding.

[113] Ms. Metez admitted during her cross-examination on affidavit that she had contacted five clients that she had worked with closely when she was with People. She advised that she had the contact information and information about benefits plans with respect to these clients in her head. People does not allege that she breached confidentiality restrictions. It is still accurate that she was not a key or senior employee.

[114] Applying the Frame hallmarks to Ms. Metez to determine whether she was a fiduciary with respect to People, rather than merely to her clients, leads me to find that she was not a fiduciary of People. She had relationships with far fewer clients than Mr. Patterson. If all of the People salespersons were considered to be fiduciaries by virtue of their relationships with clients, about half of the People workforce in Calgary would be considered fiduciaries, an unwarranted expansion of the concept of fiduciary status with attendant onerous obligations to ordinary employees. Ms. Metez had little, if any, scope for the exercise of discretion or power. Ms. Metez did not give any undertaking to act in People's best interest. There is no serious issue to be tried with respect to Ms. Metez.

5. Application of the Serious Issue to be Tried to Ms. Archer

[115] There is no evidence that Ms. Archer is bound by any written contractual breach of restrictive covenants. Ms. Archer was not a senior employee and not a fiduciary of People.

[116] However, there is evidence that, prior to her departure, Ms. Archer sent emails that included a list of 48 clients and upcoming activities that need to be performed for those clients to herself. Justice Simard noted at para 38 that:

> Similarly, there is no evidence that Archer conducted any solicitation or used any confidential information of People. Based on the redacted document in evidence, I find that the information that she emailed from her People email account to her personal email account contains very little information about People's clients, and is mostly in the nature of providing updates on the files to the remaining People employees. While some of those clients have sent AORs, apparently moving their business to QAG, all such clients were being serviced by either Quinn or Patterson. As I will describe below, there is sufficient evidence to conclude that Patterson has solicited People clients, but the suggestion that Archer has done so, or has used confidential information of People to do so, is speculative only. There is no strong *prima facie* case as against Archer on any of the pleaded causes of action.(*emphasis added)*

[117] Ms. Archer's new evidence is that, after transmitting those materials to herself, she reflected on whether she should have done so, decided she should not have, and unilaterally

deleted all of this information prior to starting employment with QAG (on either February 24 or 25, 2024), and that she did not share that information with anyone.

[118] There is no strong *prima facie* case of any breach of any duties, contractual or by common law, by Ms. Archer.

[119] People also submits that there is some significance to the evidence that Ms. Archer told Mr. Quinn on January 30, 20254 that she was going to Vancouver the next day with respect to one of Mr. Lane's clients. This was when Mr. Quinn asked Ms. Archer if she had applied through the website, since he had not seen her name on a list of applicants. No inferences can be drawn from this casual exchange of information. There is no serious issue to be tried with respect to Ms. Archer.

C. Irreparable Harm

[120] Simard, J. cited the description of the nature of irreparable harm from the Supreme Court test in ***RJR-MacDonald*** at 341, as follows (citations omitted):

> "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision ...; where one party will suffer permanent market loss or irrevocable damage to its business reputation ... ; or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined...

[121] The second category of irreparable harm does not arise in this case, since there is no danger of People being put out of business or suffering permanent market loss or damage to its business reputation.

[122] Simard, J. found at para. 76 that:

> In this case, People has been able to quantify its damages flowing from the loss of the clients who have left and whom it suspects have moved their business to QAG. It has quite precisely calculated the revenue it has lost as a result of these clients leaving: approximately $1 million - $1.2 million per year. This precise quantification is not surprising, given the nature of People's business. People's revenue is generated from the commissions that its clients pay it, and after a client submits an AOR, it starts paying commissions to its new Agent of Record and stops paying commissions to People.

[123] Thus, Simard, J. found that it could not be said that people's losses are unquantifiable. The additional evidence at this hearing with respect to the lost revenue from clients who have moved their business to QAG can also be quantified with respect to lost revenue.

[124] Thus, People's losses are not "irreparable" for the first reason enunciated in ***RJR-Macdonald***.

[125] However, as Simard, J. noted, People's harm could still qualify as "irreparable" if that harm could not be cured.

[126] Simard, J. distinguished the two cases that People cited in support of its submission that the losses are inevitable because they involve the loss of clients. I agree with his analysis (paras. 81 – 83), and agree that the loss of clients, even at the rate claimed by people, would not result in anything other than a quantifiable money loss to People.

[127] Simard, J. found no basis to find irreparable loss of market share on the evidence before him. New evidence indicates the breadth of People's market across Canada with 2400 customers and 3000 employees, compared with the relatively small number of former clients that have left in Calgary, where People has an additional 6 offices. People cannot establish a loss of market share on the basis of this evidence. It is notable that when Mr. Quinn resigned, there were only 7 employees still employed at LQBC.

[128] The evidence of poor employee morale and frequent and numerous resignations of employees in the LQBC division of People before exodus to the QAG dispels the suggestion that the subject resignations had much effect on employee morale.

[129] Simard, J. therefore concluded that People had not established that it would suffer a substantial risk of irreparable harm in the period leading up to the July application. He then concluded that, on the evidentiary record before him, People had established only that there was a serious issue to be tried against one of the Defendants, and that, given a full application to be heard in the future, the balance of convenience favours the Defendants. I have reached the same conclusion despite the full application.

[130] People submits that Simard, J.'s analysis in incorrect because it cannot say at this time how many more clients will leave. However, to the extent that further clients may leave prior to the termination of Mr. Patterson's restriction on soliciting clients, that information will be available at trial.

[131] People also says that it is not possible to say how long clients would have remained with People if they hadn't left. However, the non-solicitation covenants have a termination date – 2 years for Mr. Quinn and 1 year for common law breaches, and it is that period of time that encompasses any damages. Damages, if any, could be calculated as the sum of profit lost from the number of clients lost during the length of the appropriate restrictive covenant. On the evidence thus far, the number of clients solicited by Mr. Patterson, should he be found to be a fiduciary, and the profits lost during the year that Mr. Patterson would likely be subject to a common law restriction on solicitation, should not be difficult to ascertain.

D. Balance of Convenience

[132] As there is no serious issue to be tried with respect to the other Defendants, the issue of balance of convenience is only of relevance with respect to Mr. Patterson.

[133] The adequacy of damages usually decides the balance of convenience against an injunction, as there is no evidence of irreparable harm: ***Potash Corp. of Saskatchewan Inc. v Mosaic Potash Esterhazy Ltd. Partnership,*** 2011 SKCA 120 at para. 113(b) (Sask. C.A.)

[134] However, as noted by People, where an injunction seeks to simply prohibit the continued breach of existing covenants and duties, the balance of convenience favours the Applicant. I agree that there is no "colour of right" in being able to continue to breach restrictive covenants for personal gain. This Court noted in ***Wild Rose Meats****:*

> In *Debra's Hotels Inc. v Lee (1994),* 159 A.R. 268 at para. 36, Hunt, J. in considering the balance of convenience quoted Justice Megarry in a notable English case as follows:
>
> > Stripped of the persuasions of counsel for the defendant's advocacy, the proposition is: "I am making handsome profits by doing what I covenanted and undertook not do; therefore it would be wrong for the court to stop me." I can conceive of few propositions calculated to appeal less to equity.
>
> The same can be said of this case. The balance of convenience in this case favours Wild Rose: ***Wild Rose Meats Inc. v Andres,*** 2011 ABQB 681 at para. 56; Also ***AllWest Insurance Services Ltd. V Meredith Phendler,*** 200 BCSC 2 at para. 67.

[135] As noted by People, an injunction with respect to Mr. Patterson would not prohibit him from continuing to work with clients he has already solicited, or to obtain new clients that are not solicited from People. Thus, there will be no significant interference with his income-earning capacity. People has provided an undertaking to pay damages if this injunction causes Mr. Patterson to suffer damages.

[136] Thus, equity favours granting an injunction with respect to Mr. Patterson, limited in its terms as described herein.

IV. Conclusion

[137] If the parties are unable to agree on costs, they may make written submissions.

Heard on July 22 and 23, 2024.

Dated at the City of Calgary, Alberta this 29th day of November, 2024.

B.E. Romaine
J.C.K.B.A.

Appearances:

David Marshall, Erin Baker, Evan Best and Emily Amirkhani
for the Plaintiff/Applicant

Sean Smyth, KC and Shana Wolch
for the Defendants/Respondents

Appendix A

1. EEA Definitions

1.01 **Defined Terms** The terms used in this Agreement and in any Schedule and not otherwise defined shall have the following meanings:

(b) "**Associate Broker**" on any particular date means:

(i) any Person who has executed an associate broker agreement with any member of the People Corporation Group or who has any other written or oral contract with any member of the People Corporation Group pursuant to which the Person has referred or may refer Clients to any member of the People Corporation group and is paid or entitled to be paid a commission, referral fee or other consideration for doing so; and

(ii) any Person who has, in the two-year period immediately prior to the particular date, referred a Client to any member of the People Corporation Group and has or is entitled to receive a commission, referral fee or other consideration for doing so;

…

(e) "**Clients**" or, individually, "**Client**" on any particular date means all Persons for whom a member of the People Corporation Group has established and maintains an account or file in the active records of any member of the People Corporation Group. These terms also include all Persons to whom any member of the People Corporation Group has sold products or provided services in the course of or in furtherance of the People Corporation Business or any part thereof within the thirty six months immediately preceding the particular date;

…

(h) **"Confidential Information"** includes all information relating to the People Corporation Business however stored, recorded, copied or remembered, whether in existence on the date hereof or arising subsequent hereto, and whether developed by the Employee or any other Person. Without limiting the generality of the foregoing, Confidential Information includes:

(i) information about any current or prospective employee, Associate Broker or contractor of the People Corporation Group;

(ii) information about the People Corporation Business and acquisition strategies, negotiations and related materials, including term sheets and draft and executed documents in respect thereof;

(iii) information about any Client or Prospective Client, including without limitation their identities, contact persons and information relating to their businesses;

(iv) financial information about any member of the People Corporation Group;

(v) business plans of any member of the People Corporation Group;

(vi) business processes, pricing information, marketing material and advertising material related to the People Corporation Group or the People Corporation Business;

(vii) equipment configurations, system access codes and passwords;

(viii) computer programs existing or under development and all information related thereto including algorithms, specifications, flow charts, listings, source codes and object codes owned by any member of the People Corporation Group or to which any member of the People Corporation Group has access; and

(ix) studies and research of or relating to any member of the People Corporation Group.

Notwithstanding the foregoing, the term "Confidential Information" does not include information that the Employee can demonstrate with evidence that would be acceptable to a court of competent jurisdiction is publicly available through no fault or action of the Employee. For greater certainty, any combination of information which includes both Confidential Information and information that is publicly available shall be considered "Confidential Information.";

…

(z) "**People Corporation Business"** means the business currently, and from time to time, carried on by the Employer and the other members of the People Corporation Group (excluding the business carried on by People First HR Services Ltd. other than its human resource consulting services), including the business more particularly described in Schedule A;

(aa) "**People Corporation Group**" means People Corporation and its "associates" ad "affiliates" and "subsidiary bodies corporate" (as each such term is defined in the OBCA), including the Lane Quinn Group and "member of the People Corporation Group" means any one or more of them;

(bb) **"Person"** includes an individual, a corporation, a partnership, an association, a trust, an unincorporated organization, a governmental body, a firm, a joint venture, a syndicate or any other entity of any kind whatsoever;

(cc) **"Prospective Clients"**, or individually, **"Prospective Client"**, on any particular date, means all of those Persons who have been approached by or on behalf of any member of the People Corporation Group to become a Client within the 18-month period prior to that date but who are not Clients on that particular date and all of those Persons whom such member has determined should be approached to become a Client and in respect of whom a plan of action has been developed to make such approach, which determination and plan of action are evidenced by the member's internal documentation to such effect, within the 18-month period prior to that date but who are not Clients on that particular date;

2. Quinn Covenants

5.02 **Confidential Information** The Employee acknowledges that the Employee has had access to Confidential Information prior to the Term and that the Employee will continue to have access to Confidential Information during the Term. The Employee further acknowledges that Confidential Information is the exclusive property of any proprietary to and a trade secret of the Employer and the other members of the People Corporation Group. During the Term and at all times thereafter, the Employee shall regard and preserve as confidential, all Confidential Information.

Except as required for the Employee to perform the Duties, the Employee shall not, directly or indirectly, use, disseminate, disclose, communicate, divulge, reveal, publish, copy, make notes of, input into a computer database or preserve, in any manner, any Confidential Information or any Intellectual Property, unless the Employee first receives permission to do so from an authorized representative of the Employer.

. . .

5.04 **Non-Solicitation** The Employee covenants and agrees that the Employee shall not, for the Restricted Period, on the Employee's own behalf or on behalf of any other Person, directly or indirectly through any other Person, without the prior written consent of the Designate, other than for the purposes of fulling the Duties:

(a) approach, solicit or initiate or invite communication with any Client or Prospective Client in respect of business which is the same as or similar to the People Corporation Business or any part thereof;

(b) approach, solicit or initiate or invite communication with any Client or Prospective Client for the purposes of directing business away from the People Corporation Group or inducing the Client or Prospective Client not to deal with the People Corporation Group;

(c) approach, solicit or initiate or invite communication with any Associate Broker or with any employee any member of the People Corporation Group for the purposes of inviting, inducing or attempting to induce the Associate Broker or employee to terminate its employment or engagement with the People Corporation Group or to refer or direct business similar to the People Corporation Business to Persons other than the People Corporation Group; or

(d) approach, solicit or initiate or invite communication with any Supplier for the purposes of directing business away from the People Corporation Group, inducing the Supplier not to deal with any members of the People Corporation Group or to deal with any of the members of the People Corporation Group on less favourable terms.

The restrictions in Sections 5.04 (a) and (b) shall not apply to any Client or Prospective Client after the Effective Date of Termination, if the Employee can demonstrate that the Employee had not personally communicated with the Client or Prospective Client in respect of the People Corporation Business within the five-year period immediately preceding the Effective Date of Termination and had not received Confidential Information about the Person from any member of the People Corporation Group within

that five-year period. Further, the restrictions in Sections 5.04 (a), (b), (c) and (d) do not apply to restrict the Employee from publishing an advertisement to the general public following the Effective Date of Termination.

5.05 **Non-Acceptance** The Employee covenants and agrees with the Employer that the Employee shall not during the Restricted Period, except for the purposes of fulfilling the Duties, directly or indirectly through any other Person, without the prior written consent of the Designate, provide services to, cater to, accept business from or accept as a client, any Client, Prospective Client or Associate Broker, in respect of business of any nature or kind that is the same type of or similar to, the People Corporation Business or any part thereof.

The restrictions in this Section 5.05 shall not apply to any Client or Prospective Client after the Effective Date of Termination, if the Employee can demonstrate that the Employee had not personally communicated with the Client or Prospective Client in respect of the People Corporation Business within the five-year period immediately preceding the Effective Date of Termination and had not received Confidential Information about the Person from any member of the People Corporation Group within that five-year period.