KING'S BENCH FOR SASKATCHEWAN

Citation: **2025 SKKB 60**

Date: **2025 04 29**
File No.: KBG-RG-00940-2024
Judicial Centre: Regina

BETWEEN:

BLACKBIRD SECURITY INC.

PLAINTIFF

- and -

MICHAEL McINTYRE and EYEQ SECURITY SERVICES INC.

DEFENDANTS

Counsel:

Abby Beavereye	for the plaintiff
No one appears	for the defendants

JUDGMENT
April 29, 2025

MITCHELL J.

I. Overview

[1] The corporate plaintiff, Blackbird Security Inc. [Blackbird], sued the defendants, Michael McIntyre [McIntyre] and EyeQ Security Services [EyeQ], jointly and severally for breaches of McIntyre's employment contract with, and his fiduciary duty owed, to Blackbird. Blackbird bases its claim against EyeQ on vicarious liability.

[2] Blackbird is a security services company incorporated in the Province of

British Columbia but registered to conduct business in Saskatchewan.

[3] EyeQ is a security services company with a head-office located in Winnipeg, Manitoba, and conducts business in Saskatchewan, specifically Regina.

[4] McIntyre commenced employment as a Field Supervisor with Blackbird in January 2023. At the time of his departure on December 7, 2023, McIntyre served as Blackbird's Business Development Manager in Saskatchewan. In that capacity, he was the primary point of contact for Blackbird's clients in this province.

[5] Immediately after McIntyre left Blackbird, he joined EyeQ, a competitor of Blackbird in the security protection industry. He was initially employed as EyeQ's District Security Manager. Later in 2024, McIntyre received various promotions, and currently serves as that company's Western Canada Regional Manager.

[6] Blackbird issued its statement of claim against both McIntyre and EyeQ on April 22, 2024.

[7] McIntyre and EyeQ were formally served with this pleading on May 1, 2024, and April 26, 2024, respectively.

[8] McIntyre and EyeQ were noted for default on May 21, 2024, pursuant to sub-Rules 3-15(3), 3-21, and 3-23(1) of *The King's Bench Rules*.

[9] Blackbird now applies pursuant to Rule 3-26 of *The King's Bench Rules* for an assessment of the damages it allegedly has incurred because of McIntyre's solicitation of Blackbird's clients and employees in contravention of the non-solicitation restrictive covenant contained in McIntyre's employment contract.

[10] Blackbird submits it is entitled to monetary damages for these alleged breaches totalling $492,860.40 jointly and severally against the defendants

[11] These reasons explain why I conclude that judgment for Blackbird is granted, in part.

II. Issues

[12] The three general issues raised on this application are:

A) Has Blackbird proved its claim for purposes of Rule 3-26 of *The King's Bench Rules*?

B) What is the appropriate amount of Blackbird's monetary damages?

C) Is EyeQ vicariously liable to pay these damages?

D) Costs?

[13] I conclude as follows:

A) Blackbird has proved its claim against McIntyre and EyeQ jointly and severally by reason of the fact they failed to defend against it and were noted in default;

B) Blackbird is entitled to monetary damages in the amount of $223,882.40;

C) EyeQ is vicariously liable for these damages; and

D) Costs are payable to Blackbird in the amount of $2,500.

III. Analysis

A. Has Blackbird Proved Its Claim for Purposes of Rule 3-26?

[14] Rule 3-26(1) of *The King's Bench Rules* provides in part that "on default of defence by one or more defendants the plaintiff may apply without notice to the

Court for an order for judgment" [emphasis added].

[15] In Saskatchewan for almost a century now, the law holds that, should a defendant fail to defend a claim commenced against it, they have conceded liability. See: *Hill v Stephen Motor & Aero Co., Ltd.*, [1929] 3 DLR 676 (CanLII) (Sask CA) [*Hill*]. The default in pleading means that the defendant has admitted the causes of action stated in the statement of claim and the right of the plaintiff to some damages in respect of them: *Hill* at para 2. It is an "implied admission…by the defendant of the plaintiff's right to the relief claimed in the statement of claim": *Hill* at paras 3 and 10.

[16] Not surprisingly, this principle of law has been followed and endorsed by many judges of this Court since then. More recent examples include: *ABC v XYZ*, 2020 SKQB 190 at paras 20-23; *Houseman v Harrison*, 2020 SKQB 36 at para 15; *C.M. v L.M.*, 2014 SKQB 102 at para 2, 443 Sask R 11; and *Wagner v Lansdowne Equity Ventures Ltd.*, 2009 SKQB 498 at para 25, 363 Sask R 1.

[17] Applying *Hill* and its progeny, I am satisfied that by failing to defend against Blackbird's statement of claim, McIntyre and EyeQ have jointly and severally admitted the causes of action set out in it. McIntyre has effectively admitted his breach of the non-solicitation clause in his employment contract with Blackbird, as well as a breach of the fiduciary duty he owed to Blackbird. EyeQ has effectively admitted it is vicariously liable for any damages owing to Blackbird occasioned by McIntyre's misconduct.

[18] Accordingly, the only issues to be decided now are the appropriate amount of damages to which Blackbird is entitled because of the defendants' illegal conduct, and costs.

[19] That said, I have reviewed the extensive material filed on this application by Blackbird's counsel and, had it been necessary for me to do so, I would find that

Blackbird has proved its claims on a balance of probabilities.

[20] First, it is obvious to me that McIntyre breached the non-solicitation clause contained in his employment contract with Blackbird. That contract stipulated in Article 10 that after leaving Blackbird's employ, McIntyre would not solicit any Blackbird customers to join him at any other company such as EyeQ, or entice current Blackbird employees to leave the company, for "a period of twelve (12) months after the end of [his] employment for any reason".

[21] The affidavit evidence presented at this hearing indicates that in McIntyre's resignation letter to his employer, he acknowledged and accepted this non-solicitation clause stating: "I will honor my previous contract that was signed back in February, of not approaching any guards, cites and clients for a period of 12 months from the date of this resignation". See: Affidavit of Ranko Vukovic sworn February 12, 2025 at para 21, and Exhibit I.

[22] The affidavit evidence further demonstrates that, contrary to his undertaking and the non-solicitation clause in his employment contract, McIntyre enticed 8 long-standing clients of Blackbird to leave and follow him to EyeQ within 12 months of his departure from Blackbird. As well, McIntyre attempted to poach a valued employee of Blackbird – unsuccessfully, it turns out – again within 12 months of his departure.

[23] I am satisfied that the non-solicitation clause in McIntyre's employment contract was reasonable and accords with similar clauses found in standard employment contracts in other industries. See, for example: *MD Physician Services Inc. v Wisniewski*, 2017 ONSC 2772 at paras 102-103, aff'd 2018 ONCA 440 at para 11; *Catch Engineering Partnership v Mai*, 2023 ABKB 279 at para 18 [*Mai*]; and *Rawlco Radio Ltd. v Lozinski*, 2012 SKQB 460.

[24] Moreover, I am also satisfied that the evidence bears out Blackbird's claim that McIntyre deliberately violated the non-solicitation clause in his employment contract, and his undertaking to abide by it in his resignation letter to Blackbird. Blackbird's claim that McIntyre breached his employment contract has been proved on a balance of probabilities.

[25] I am further satisfied on a balance of probabilities that, based on the affidavit evidence setting out McIntyre's managerial position and professional responsibilities with Blackbird, he owed fiduciary obligations to that company. See, especially: *Impact Security Group Inc. v Brown*, 2021 SKQB 226 at paras 47-53 and 65-67 [*Impact Security*].

[26] I acknowledge that McIntyre's fiduciary obligation stands independently from a contractual non-competition or non-solicitation clause. See: *Garda Canada Security Corporation v Milton Ramirez, AAA Security Group Ltd.*, 2011 SKQB 294 at para 26. Yet, absent such a contractual term, it may be difficult to establish a breach of a fiduciary obligation. See: *Impact Security* at para 106; and *Barton Insurance Brokers Ltd. v Irwin*, 1999 BCCA 73 at para 39, 170 DLR (4th) 69.

[27] I am persuaded on a balance of probabilities, however, that McIntyre violated his fiduciary obligations to Blackbird for the same reasons I found he breached his contract of employment. Consequently, a claim for breach of fiduciary duty has also been made out.

B. What is the Appropriate Amount of Monetary Damages?

[28] Blackbird is seeking monetary damages in the amount of $492,860.40 jointly and severally against the defendants. It asserts it is entitled to compensation for lost profits occasioned by these breaches for three years.

[29] The following chart identifies the amounts claimed for each year and how

Blackbird calculated them:

Year One	**$225,442.40**	$213,942.40 lost profits for the first year + $11,500 administrative expenses incurred dealing with the client poaching.
Year Two	**$160,456.80**	75% of $213,942.40, the amount claimed for lost profits in the first year.
Year Three	**$106,971.20**	50% of $213,942.40, the amount claimed for lost profits in the first year.
Total	**$492,860.40**	

[30] Blackbird's counsel explained that she arrived at this number by applying the formula utilized by the Court in *Mai*. Indeed, Blackbird placed great reliance on the application of *Mai* to its situation. It is useful, then, to review briefly the facts and reasoning in that case.

[31] The defendant in *Mai* was an electrical engineer employed by the plaintiff, Catch Engineering Partnership [CEP]. While at CEP, the defendant provided engineering services to one of its clients, Canadian Natural Resources Limited [CNRL] almost exclusively for approximately one year. Shortly after that, the defendant left CEP and was immediately hired by another company, Noramtec. Once there, the defendant persuaded CNRL to retain him to do essentially the same work for it as he had done when employed by CEP.

[32] At the time he joined CEP in February 2019, the defendant signed an agreement which included a non-solicitation clause like the one found in McIntyre's employment contract with Blackbird. As reproduced at para. 18 of *Mai*, it stipulated, for example, that:

> [18] …
>
> … for a period of twelve (12) months from the effective date of termination of employment … the Employee shall not:

> …
>
> (b) Directly or indirectly contact or solicit any customers of CEP or any of its subsidiaries or affiliates with whom he or she has dealt during the twelve (12) months prior to his or her termination, for the purpose of inviting, encouraging or requesting any CEP customer to transfer from CEP to the Employee or the Employee's new employer, or to otherwise discontinue its patronage and business relationship with CEP, …

[33] Additionally, the agreement included a clause that stipulated, as outlined in *Mai* at para 18:

> [18] …
>
> … for a period of twenty-four (24) months from the effective date of termination of employment … the Employee shall not:
>
> …
>
> (c) solicit, induce, recruit or encourage any of CEP's employees or contractors that existed before or after entering into this Agreement.

[34] After a trial in which CEP alleged the defendant had breach these terms, the Court found firstly that the non-solicitation clauses in the agreement between CEP and the defendant was reasonable and enforceable. See: *Mai* at paras 31-38.

[35] Secondly, the Court found that the defendant had clearly and unequivocally breached the non-solicitation clause of the agreement by inviting CNRL to leave CEP and contract with him through the auspices of his new employer, Noramtec. See: *Mai* at paras 40-42.

[36] Thirdly, the Court determined that the defendant's actions in relation to CNRL represented "a flagrant breach of the duty of good faith owed to [CEP]": *Mai* at para 60. However, the Court concluded that the indicia of a fiduciary relationship

between CEP and the defendant was absent. See: *Mai* at para 66. This was because the defendant "was not part of the management team" and had no "decision making responsibilities with respect to the overall business of [CEP]": *Mai* at para 63.

[37] The following five general legal principles informed the Court's analysis on damages:

1) The plaintiff must establish on a balance of probabilities that the damages claimed are a reasonable and probable consequence of the breaches of the non-solicitation clause: *Mai* at paras 67-68; *Indutech Canada Limited v Gibbs Pipe Distributors Ltd.*, 2011 ABQB 38 at para 479, 508 AR 1 [*Indutech Canada*]; and *Eastwalsh Homes Ltd. v Anatal Developments Ltd.* (1993), 12 OR (3d) 675 (CA) at 687 [*Eastwalsh Homes*];

2) Only damages flowing from those breaches are compensable: *Mai* at para 67;

3) If the plaintiff is not able to establish a loss or where the loss proven is trivial, it is possible the plaintiff might recover only nominal damages: *Mai* at para 68; *Indutech Canada* at para 479; and *Eastwalsh Homes* at 687;

4) Where it is clear that the plaintiff suffered loss but damages are difficult to quantify, it does not mean the Court should relieve the defendant of the necessity to pay them: *Mai* at paras 68 and 73; *Eastwalsh Homes* at 687; *Penvidic v International Nickel*, [1976] 1 SCR 267 at 298; and *Quick Pass Master Tutorial School Ltd. v Zhao*, 2022 BCSC 1846 at para 96 [*Zhao*].

5) In some cases, it may only be possible to estimate the damages

> suffered. This involves estimating the value of the loss flowing from the breach of contract, and awarding damages on a proportionate basis: *Mai* at para 68; *Indutech Canada* at para 479; *Eastwalsh Homes* at 687; *Zhao* at para 9; and *Nickel v Takhar*, 2020 BCSC 1462 at para 62.

[38] In *Mai*, the Court applied the following formula – the formula which counsel for Blackbird urges me to employ in this case – to determine the appropriate amount of damages suffered by CEP. For the first year the non-solicitation was effective, the Court determined CEP's loss was 100% of the amount CNRL paid to it for the plaintiff's services. See: *Mai* at para 79.

[39] For the second year, the Court discounted this amount by 25%. The Court awarded damages for a third year, even though the non-solicitation clause had expired because it appeared that CNRL would have continued to utilize CEP's services had the plaintiff not left its employ and joined Noramtec. Those damages were discounted by 50% for "contingencies such as higher salary, labour burden, or overhead or reduced utilization of the contractor by CNRL". See: *Mai* at para 80.

[40] I am not persuaded this formula is appropriate for purposes of assessing damages in this case, however, for the following three reasons.

[41] First, unlike *Mai*, the non-solicitation clause at issue here operated for only one year after McIntyre left Blackbird. Clearly, at the time they entered into the agreement containing that clause, both parties – McIntyre and Blackbird – deemed one year sufficient to limit McIntyre's contact with previous customers.

[42] Second, only one of the eight companies that McIntyre enticed away from Blackbird during that first year had a written agreement with Blackbird. The remainder were simply oral agreements which those companies could have terminated at any time,

and especially after McIntyre's non-solicitation clause had expired. The same, it may be said, for the company which had a written agreement.

[43] Third, in view of these factors, it is speculation at best to think those companies would have chosen to remain with Blackbird after the expiry of the non-solicitation clause in question. There would have to be strong reasons to believe that the company would continue to suffer lost profits following the expiration of that clause, reasons which, in my opinion, are not found in the record.

[44] For these reasons, I determine that Blackbird is only entitled to be compensated for damages it suffered during the life of the non-solicitation clause, namely, for one year after McIntyre's employment ended.

[45] Having determined that, it is necessary now to quantify those damages.

[46] Blackbird filed the Affidavit of Madhav Bansal sworn February 21, 2025 [Bansal Affidavit]. In the lengthy Bansal Affidavit, the affiant, who is currently Blackbird's Regional Manager in Saskatchewan, sets out in considerable detail the lost profits Blackbird suffered due to the migration of eight of its customers to EyeQ during the duration of the non-solicitation clause in McIntyre's agreement.

[47] The Bansal Affidavit quantified profits lost because Blackbird had to decrease its service rates for another customer in order retain it. This reduction amounted to a profit loss of $40,079.27 for one year. See: Bansal Affidavit at paras. 64-71.

[48] The Bansal Affidavit explained that Blackbird had to increase the salary paid to a valued employee to ensure she did not leave and sign on with EyeQ. This cost Blackbird an additional $1,560 for the first year after McIntyre left. See: Bansal Affidavit at paras. 107-108.

[49] Finally, the disruption to Blackbird's operations in Saskatchewan caused by McIntyre's breaching of the non-solicitation clause and the exodus of some of its longtime customers, required executives to come to Saskatchewan from British Columbia to stabilize its on-going business in this province. These expenditures are itemized in the Bansal Affidavit at paras. 109-110 and Exhibit MM, and total $11,500.

[50] All together, Blackbird asserts that it is entitled to damages in the amount of $225,442.40 ($213,942.40 + 11,500).

[51] I have reviewed the documentation submitted by Blackbird as explained and exhibited in the Bansal Affidavit. I am satisfied on a balance of probabilities that the information provided supports the company's claim for damages, save in one aspect.

[52] I do not think the amount claimed for the retention of the employee is appropriate. I infer this claim – modest though it was – demonstrates that Blackbird more likely than not was not paying her a market wage commensurate with her experience and responsibilities. I would disallow the claim of $1,560 for salary enhancement for this employee.

[53] Consequently, the amount of damages to which Blackbird is entitled for breach of the non-solicitation clause in its agreement with McIntyre is $223,882.40 (($213,942.40 - $1,560) + 11,500). It is so ordered.

C. Is EyeQ Vicariously Liable to Pay These Damages?

[54] The final issue to be canvassed is EyeQ's vicarious liability for the damages payable to Blackbird because of McIntyre's illegal conduct. I acknowledge that it is not strictly necessary for me to do so, since because of its default, EyeQ has effectively admitted such liability. However, it is helpful to consider this issue briefly.

[55] In *671122 Ontario Ltd. v Sagaz Industries Canada Inc.*, 2001 SCC 59 at para 25, [2001] 2 SCR 983 [*Sagaz Industries*], Major J. for the Court stated that vicarious liability "is a theory that holds one person responsible for the misconduct of another because of the relationship between them". It is "considered to be a species of strict liability because it requires no proof of personal wrongdoing on the part of the person who is subject to it": *Sagaz Industries* at para 26.

[56] The Court went on to explain that "the most common [relationship] to give rise to vicarious liability is the relationship between master and servant, now more commonly called employer and employee": *Sagaz Industries* at para 25.

[57] Once a breach of a non-solicitation clause in an employment contract or a fiduciary obligation is established on a balance of probabilities, a plaintiff is entitled to damages to be calculated by quantifying the plaintiffs' loss of profits. See, for example: *LID Brokerage & Realty Co. (1977) Ltd. v Budd*, [1992] 2 WWR 453 (Sask QB) at para 28; and *57134 Manitoba Limited v Palmer* (1985), 65 BCLR 355 (SC), aff'd (1989), 37 BCLR (2d) 50 (CanLII) (CA) [*Palmer (CA)*].

[58] Provided the employer benefits from the misconduct of its employee, its lack of knowledge of the employee's misconduct, and its illegality does not exempt the employer from being held vicariously liable for it. See, especially: *Palmer (CA)* at paras 24-26; and *Canwest Propane Inc. v Steele* (1990), 76 Alta LR (2d) 245 (CanLII) (QB) at paras 25-26.

[59] Here, Blackbird's counsel provided extensive documentary evidence demonstrating lost profits suffered and additional expenses incurred by the company for the year after McIntyre left its employ. I have already determined those losses to be $223,882.40.

[60] I am further satisfied on a balance of probabilities that even though EyeQ

may not have known or been aware of McIntyre's illegal conduct by breaching the non-solicitation clause in his employment contract with Blackbird, EyeQ can be held vicariously liable for those damages. Clearly, EyeQ profited from the acquisition of the eight companies which were previously customers of Blackbird, an acquisition directly related to its employment of McIntyre.

[61] Accordingly, I find that EyeQ is vicariously liable for the damages payable to Blackbird.

D. Costs

[62] Finally, I address the issue of costs.

[63] Rule 11-1 of *The King's Bench Rules* gives a judge discretion to award costs. The general rule is that the successful party in any action is entitled to costs. See: Rule 11-7; and *British Columbia (Minister of Forests) v Okanagan Indian Band,* 2003 SCC 71 at paras 20-21, [2003] 3 SCR 371.

[64] Rule 11-1(3)(a) provides that the Court may "fix all or part of the costs with or without reference to the Tariff". Rule 11-1(4) identifies numerous factors that the Court may consider when in exercising this discretion. These factors include the result of the proceedings, the amounts claimed and recovered, the importance of the issues, the complexity of the proceedings, and the conduct of the parties within the proceedings. See, for example: *Thomas v Saskatchewan Indian Gaming Authority Inc.*, 2021 SKCA 164 at para 46.

[65] Taking these factors into account – especially the failure of the defendants to even engage with Blackbird in this litigation – I order Blackbird shall have its costs which I fix at $2,500.

IV. Orders

[66] To summarize, I make the following orders:

1) Blackbird has proved its claim against McIntyre and EyeQ jointly and severally by reason of the fact they failed to defend against it and were noted in default;

2) Blackbird is entitled to monetary damages in the amount of $223,882.40 plus prejudgment interest pursuant to *The Pre-judgment Interest Act*, SS 1984-85-86, c P-22.2;

3) EyeQ is vicariously liable for those damages;

4) Blackbird shall have its costs fixed at $2,500; and

5) Rule 10-4 of *The King's Bench Rules* is waived.

[67] In conclusion, I commend Blackbird's counsel, Ms. Beavereye, for the extensive written documentation she submitted on behalf of her client, and her excellent written and oral legal submissions. They were of great assistance to me.

J.
G.G. MITCHELL