

Court of King’s Bench of Alberta

Citation: Occidental Petroleum Corporation v Boguslawski, 2025 ABKB 578

Date: 20251003
Docket: 2501 10132
Registry: Calgary

Between:

**Occidental Petroleum Corporation, OXY USA Inc.,
and Carbon Engineering ULC**

Applicants

- and -

Tom Boguslawski

Respondent

**Reasons for Decision
of the
Honourable Justice M.E. Burns**

I. Overview

[1] The Applicants, Occidental Petroleum Corporation (“Occidental”), OXY USA Inc. (“Oxy”), and Carbon Engineering ULC (“CE”) (collectively the “Applicants”), seek an interim injunction enforcing a non-competition covenant (the “Non-Competition Covenant”) set out in an employment contract between CE and the Respondent, Tom Boguslawski (“Mr. Boguslawski”).

[2] Mr. Boguslawski was employed by CE as a Project Engineer from April 3, 2019, to June 2025. CE is a climate solutions company primarily focused on developing Direct Air Capture

(“DAC”) technology. On May 27, 2025, Mr. Boguslawski resigned his employment with CE with an effective date of June 30, 2025, advising that he accepted a position with Phlair GmbH, a German company also focused on developing DAC technology.

II. Issue

[3] Should the requested injunction be granted?

III. Analysis

[4] Both parties agree that the tripartite test established in *RJR-MacDonald Inc v Canada (Attorney General)*, 1994 CanLII 117, [1994] 1 SCR 311 is applicable here [the “*RJR* test”].

[5] The *RJR* test requires the Applicants to demonstrate: (1) there is a serious issue to be tried; (2) irreparable harm will result if the injunction is not granted; and (3) the balance of convenience favours granting the injunction.

a. Is there a serious issue to be tried?

[6] The first branch of the *RJR* test has been modified in the employment context. For employment agreements between employers and employees, where the employees’ ability to carry on business or earn a livelihood is affected, it is “clear” that an applicant must establish a “strong *prima facie* case” to enforce a restrictive covenant amounting to a restraint of trade: *City Wide Towing and Recovery Service Ltd v Poole*, 2020 ABCA 305 at para 26, leave to appeal to SCC refused, 2021 CanLII 13260 (SCC) [*City Wide Towing*].

[7] The “strong *prima facie* case” standard has frequently been applied by Canadian courts when considering injunctions to enforce restrictive covenants in restraint of trade, including non-compete clauses: see e.g. *Renfrew Insurance Ltd v Cortese*, 2014 ABCA 203 at para 8; *Elsley v JG Collins Ins. Agencies*, 1978 CanLII 7 (SCC), [1978] 2 SCR 916 at 924-925 [*Elsley*]; *961945 Alberta Ltd (Servicemaster of Edmonton Disaster Restoration) v Meyer*, 2018 ABQB 564 at para 26 [*Meyer*]; *Globex Foreign Exchange Corp v Kelcher*, 2005 ABCA 419 at para 10; *Dreco Energy Services Ltd v Wenzel*, 2008 ABCA 290 at para 30 [*Dreco Energy*]; *People Corporation v Mansbridge*, 2022 MBCA 37 at para 3; *Belron Canada Incorporated v TCG International Inc*, 2009 BCSC 596 at paras 38–49, aff’d 2009 BCCA 577.

[8] In the Statement of Claim, the Applicants asserted multiple causes of action including breach of contract, conversion, breach of confidence, and breach of fiduciary duty. For this application, the only portion they rely on is the breach of the Non-Competition Covenant. As such, I will decide if the Applicants have a strong *prima facie* case on that cause of action only.

b. What is a strong *prima facie* case?

[9] The Supreme Court of Canada has explained that, in order for a strong *prima facie* case to be made out, a court must be satisfied that “there is a strong likelihood on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice”: *R v Canadian Broadcasting Corp*, 2018 SCC 5 at para 17 [emphasis in original]. Essentially, the Applicant is required to show that they will “probably prevail at trial” or are “likely to succeed at trial”: *Modry v Alberta Health Services*, 2015 ABCA 265 at para 37 [*Modry*], citing *IBM Canada Ltd v Almond*, 2015 ABQB 336 at para 29.

[10] To establish that there is a strong *prima facie* case here that would warrant injunctive relief, the Applicants would have to demonstrate that a court would likely find (i) that the restrictive covenant is reasonable and enforceable; and (ii) that the restrictive covenant in question has been breached.

c. Is the Non-Competition Covenant reasonable and enforceable?

[11] This Court has previously set out the questions that must be answered to determine whether a restrictive covenant is enforceable in the employment context in *People Corporation v 2578649 Alberta Ltd (Quinn Advisory Group)*, 2024 ABKB 711 at para 55 [*People Corporation*], citing *Meyer* at paras 35-55. The questions include:

- a. Do the restrictions protect a proprietary interest that is entitled to protection [and would a non-solicitation covenant suffice]?
- b. Are the restrictions reasonable in their geographic and temporal scope?
- c. Is the breadth of the restrictions reasonable?
- d. Are the restrictions in keeping with public interest?

[12] The above analysis must be undertaken in the context of two further considerations: (1) the courts have historically recognized the need for heightened scrutiny of restrictive covenants in the employment context; and (2) ambiguous or overbroad restrictive covenants are *prima facie* unenforceable.

d. Heightened scrutiny of restrictive covenants in the employment context

[13] Courts are particularly cautious about granting injunctions that enforce non-competition clauses in favour of employers, as these clauses are considered covenants in restraint of trade and are generally unenforceable unless they are reasonable in scope, duration, and geographic area. They are viewed as conflicting with public policy by limiting individual freedom and hindering free trade. See: *Shafron v KRG Insurance Brokers (Western) Inc*, 2009 SCC 6 at para 15 [*Shafron*] at paras 16–17.

[14] However, a general freedom to contract clashes with this restriction, and there are instances where a restrictive covenant will be found to be enforceable if it is “reasonable”: *Elsley* at 924-925. There are several factors that go into determining whether a restrictive covenant is reasonable and therefore enforceable.

[15] Non-competition clauses in the context of employment contracts attract considerably more scrutiny than non-competition clauses in the context of the sale of a business (see e.g. *City Wide Towing*), between two parties with equal bargaining power (see e.g. *Quick Pass Master Tutorial School Ltd v Zhao*, 2018 BCSC 683), or fiduciaries (see e.g. *Arc Compute v Anton Allen, Michael Buchel et al*, 2025 ONSC 1745).

[16] The Supreme Court of Canada has held that, on the basis of principle, public policy, and the nature of the relationship, considerably more scrutiny will be applied to a non-competition clause found in an employment contract compared to one found in a sale of a business. The absence of a payment for goodwill to departing employees and the well accepted power imbalance in favour of the employer justifies more rigorous scrutiny of restrictive covenants, such as non-competition agreements, in the context of employment contracts: *Shafron* at paras 21–22.

[17] However, the Applicants argue that Mr. Boguslawski was a key employee, which would mean he was a fiduciary and less scrutiny should apply. Employment relationships where fiduciary obligations are imposed possess three general characteristics:

- (1) The fiduciary has scope for the exercise of some discretion or power.
- (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
- (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

Frame v Smith, 1987 CanLII 74, [1987] 2 SCR 99 at para 61.

[18] Mr. Boguslawski was clearly not a key employee with fiduciary obligations. His salary level for his engineering position, three levels of reporting above him, and an inability to unilaterally exercise any power and discretion are not in dispute. The Applicants, large companies which are leaders in their respective industries, are not uniquely vulnerable to or at the mercy of a project engineer, even if he had some seniority.

[19] The Applicants and Mr. Boguslawski have an employer-employee relationship, an agreement with a well-recognized power imbalance, which requires this Court to engage in a more rigorous scrutiny of the Non-Competition Covenant.

e. Ambiguity and overbreadth

[20] The Supreme Court of Canada held at para 27 of *Shafron* that in the face of an ambiguous restrictive covenant, where it is not clear what activity is prohibited, the length of time that activity is prohibited for, or the scope of the geography that activity is prohibited in, it will not be possible for the Applicant to meet its burden:

[F]or 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.

[21] Ambiguous restrictive covenants are thus, by definition, *prima facie* unreasonable and unenforceable, and only if that ambiguity is resolved can a court move to consider whether the covenant is reasonable: *Shafron* at para 43. See also *961945 Alberta Ltd (Servicemaster of Edmonton Disaster Restoration) v Meyer*, 2018 ABQB 564 at para 36 [*Meyer*]; *M & P Drug Mart Inc v Norton*, 2022 ONCA 398 at para 35 [*M & P Drug Mart*]. For example, if it is not possible for a former employee to determine when they are breaching a restrictive covenant, it is “in essence unreasonable”: *Globex Foreign Exchange Corporation v Kelcher*, 2011 ABCA 240 at para 19.

[22] In addition, even if the Non-Competition Covenant was not ambiguous, an overbroad restrictive covenant is equally problematic. When a restrictive covenant is overly broad in reference to prohibited activities or the type of business it is restricting, or its geographical and temporal scope, it is unreasonable and thus unenforceable: *Mason v Chem-Trend Limited Partnership*, 2011 ONCA 344.

[23] In *The Travel Company Ltd v Keeling*, 2009 ABQB 399, Germain J described the impact of an overbroad clause at paras 50-53:

[50] In *Shafroon*, the employment contract was held by the courts to be overly broad and the Supreme Court of Canada determined that two previously established tools to address unlawful restrictive covenants, (1) striking out only the offensive words or phrases and attempting to preserve the balance of the covenant, or (2) reading the entire contract down to make that which was overly broad more palatable, would no longer be the law in Canada, at least as it related to restrictive covenants found in employment contracts. As indicated above, the reason for this approach can best be stated as driven by public policy. Employers should not make their restrictive covenants so wide i.e. aim for the ‘sun’, in expectation the courts will land them safely on the ‘moon’ if they fall short and fail to establish that their impugned restrictive covenant is reasonable.

[51] This decision of the Supreme Court of Canada was foreshadowed in Alberta by *Globex Foreign Exchange Corp. v Kelcher*, 2005 ABCA 419 at para. 49, 262 D.L.R. (4th) 752 [*Globex*], where our Alberta Court of Appeal observed:

Employers should not be permitted to draft unreasonably broad restrictive covenants with the expectation that, should the matter ever come to trial, the court will simply re write the clause so as to make it enforceable.

[52] This approach is coherent with the recognized power imbalance between employers and employees: *Wallace v United Grain Growers Ltd.*, 1997 CanLII 332 (SCC), [1997] 3 S.C.R. 701 at paras 91-93, 152 D.L.R. (4th) 1. The courts cannot ignore the reality that the average employee will, in many instances, lack the knowledge and resources to critique or challenge an overly broad or onerous restrictive covenant demanded by an employer ...

[53] It may also be considered the general law in Canada on employment restrictive covenants that the enforceable restrictions will be shorter and narrower where the job is less sophisticated or entry level. As a continuum along the employment spectrum, the courts may be more willing to enforce restrictive covenants, or enforce them for longer periods as one moves from unskilled and introductory positions into either management or into circumstances where a great amount of proprietary material has been vested in the employee.

[24] An overbroad clause is an unreasonable clause, and the employer cannot rely on the Court to rewrite or narrow the covenant to make it reasonable. Additionally, the sophistication of the employee plays a role; the less sophisticated the employee, the greater the presumptive power imbalance, and the less likely an overbroad non-competition covenant will be enforced.

IV Application to these facts

[25] As part of a Confidentiality / Inventions / Non-Competition / Non-Solicitation Agreement signed by Mr. Boguslawski (the “Confidentiality Agreement”), the Non-Competition Covenant in dispute between the parties reads as follows:

5.1 You covenant and agree with the Company that you will not, without the prior written consent of the Company, at any time **within the period of twelve (12) months following the termination of your employment for any reason**, either individually or in partnership or in conjunction with any person, **whether as principal, agent, shareholder, director, officer, employee, investor, or in any other manner whatsoever**; directly or indirectly **advise, manage, carry-on, be engaged in, own or lend money to; or permit your name or any part thereof to be used or employed by** any person managing, carrying-on or engaged in a business which **is in direct competition with the Company's business within North America**.

(emphasis added)

[26] Following the termination of Mr. Boguslawski's employment, the Non-Competition Covenant, among other things, prohibits him from being employed by a company that is engaged in a business which is in direct competition with CE's business within North America unless he obtains written consent from CE.

[27] With the context of the above legal principles, I must apply the test set out in *People Corporation* to the clause to determine if the clause is reasonable and enforceable.

a. Protection of a Proprietary Interest

[28] Restrictive covenants will only be enforceable if they protect a legitimate proprietary interest: *Meyer* at para 40; *Elsley* at 925. These clauses must not cause a blanket restriction on an employees' freedom to compete or incapacitate the departing employee's ability to work; a desire to eliminate the employee as a potential competitor is not a valid proprietary interest: John D. McCamus, *The Law of Contracts*, 3rd ed (Toronto: Irwin Law Inc, 2020) at 527.

[29] The legitimate proprietary interests that Courts have recognized include "trade secrets, confidential information, and trade connections of the employer": *Elsley* at 924. Confidential information and trade connections are self-explanatory.

[30] The Supreme Court of Canada has adopted the following criteria for information to be considered a "trade secret":

- the information must be secret in an absolute or relative sense (i.e. known only by one or a relatively small number of persons).
- the possessor of the information must demonstrate that he has acted with the intention to treat the information as secret.
- the information must be capable of industrial or commercial application.
- the possessor must have an interest (e.g. an economic interest) worthy of legal protection.

Merck Frosst Canada Ltd v Canada (Health), 2012 SCC 3 at para 109 [*Merck*]

[31] The Supreme Court of Canada has further clarified that a trade secret in the employment context has several characteristics, which include it being a plan, process, tool, mechanism, or compound known only to its owner and employees. It is usually understood to mean an unpatented formula or process only known to certain individuals "compounding some article of

trade having a commercial value”: *Merck* at para 107, citing *RI Crain Ltd v Ashton and Ashton Press Manufacturing Company Limited*, 1949 CanLII 111 (ON SC), aff’d 1949 CanLII 81.

[32] I am satisfied that the Applicants’ confidential information and trade secrets regarding new and emerging DAC technology is a legitimate proprietary interest. This includes confidential information and trade secrets regarding DAC processes generally, their electrochemical DAC project, a future commercial plant development, and the South Texas Direct Air Capture Project. Occidental and Oxy acquired CE in 2023 for this information, it has evident commercial value, and the information clearly falls under the umbrella of either confidential information or trade secrets.

[33] In addition, the Applicants must prove that this is an exceptional circumstance where, because of the nature of the business or Mr. Boguslawski’s employment, a non-solicitation clause would not suffice. The Supreme Court of Canada in *Elsley* at p 926 held:

Whether a restriction is reasonably required for the protection of the covenantee can only be decided by considering the nature of the covenantee’s business and the nature and character of the employment. Admittedly, an employer could not have a proprietary interest in people who were not actual or potential customers. Nevertheless, in exceptional cases, of which I think this is one, the nature of the employment may justify a covenant prohibiting an employee not only from soliciting customers, but also from establishing his own business or working for others so as to be likely to appropriate the employer’s trade connection through his acquaintance with the employer’s customers. This may indeed be the only effective covenant to protect the proprietary interest of the employer. A simple non-solicitation clause would not suffice.

[34] The Applicants argue this is one of those exceptional cases. They claim that Mr. Boguslawski’s exposure to trade secrets and confidential information was to such an extent that a simple non-solicitation covenant and his confidentiality obligations would not suffice. They also allege that he has not abided by the terms of the Confidentiality Agreement.

[35] With respect to the former, I cannot agree. Canadian courts have enforced restrictive covenants when the employee was a director, senior manager, personified the business, was a key employee, or was a fiduciary: see e.g. *BrettYoung Seeds Limited Partnership v Dyck*, 2013 ABQB 319 at para 12 [*BrettYoung Seeds*]; see also *Evans v The Sports Corporation*, 2013 ABCA 14; *Dreco Energy*. Here, Mr. Boguslawski was not a fiduciary or key employee, he did not personify the business (he did not even have any client interactions), nor was he a senior manager or director.

[36] With respect to the allegation that Mr. Boguslawski has not complied with the Confidentiality Agreement, the Applicants requested remedy lies in a different application. In the narrow scope of this application to determine whether a non-competition injunction should be granted, this is a consideration, but not a determinative one.

[37] The Applicants have met the onus to establish that they have a legitimate proprietary interest that is entitled to protection. I am satisfied that it is not simply a desire to eliminate competition. However, the Applicants’ position that this case warrants the extraordinary relief of enforcing a non-competition covenant is not tenable with the presence of a confidentiality and non-solicitation clause. This is not one of the exceptional cases described in *Elsley*.

b. Temporal and Geographical Scope

[38] As there is a legitimate proprietary interest that is entitled to protection, this Court must next examine if the geographical and temporal scope of the Non-Competition Covenant is reasonable. Restrictive covenants that are overly broad or ambiguous temporally or geographically will be unreasonable and therefore unenforceable: *Meyer* at para 41; *HL Staebler Company Limited v Allan*, 2008 ONCA 576 at paras 51–53; *Innersolutions Ltd v Hooper*, 2015 ABQB 258 at paras 52–57.

(1) Temporal Restriction

[39] The amount of time the non-competition agreement is in force for is important in determining its reasonableness. The following are important considerations:

As with other aspects of a restraint in trade, the temporal limits that a restrictive covenant places on an employee must be reasonable between the parties and must not overreach what the employer is entitled to protect. Each case depends on its own facts as to what time restraint is reasonable. The reasonableness of a temporal restraint will be determined partially by the nature of the business of the employer and the occupation of the employee. A factor in determining whether temporal restraint is reasonable is that it must end at a known time.

[Footnotes Omitted]

Stacey Reginald Ball, *Canadian Employment Law* (Toronto: Thomson Reuters), §7:17. Reasonableness of Temporal Restraint cited with approval in *Great North Equipment Inc v Penney*, 2024 ABKB 533 at para 80.

[40] The Non-Competition Covenant provides the restraint will last for a “period of twelve (12) months.” It is not ambiguous and clearly ends at a defined time (twelve months after employment ends).

[41] Mr. Boguslawski argues that the time period is unreasonable because it is arbitrary. He argues that the Applicants cannot specify what projects, clients, or information would be at risk during the restriction period and they have not tendered any evidence that his employment could accelerate Phlair’s entry into the marketplace. I disagree.

[42] In my view, the one-year period is objectively not unreasonable and there was no evidence presented that it is unreasonable. In the context of a new and rapidly developing industry such as DAC, a twelve-month restriction is a reasonable means of protecting the Applicants’ interests during a period of significant change and competition.

(2) Geographical Restriction

[43] The Alberta Court of Appeal held in *City Wide Towing* that “[a] non competition covenant will be reasonable ‘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’”: *City Wide Towing*, citing *Payette* at para 61 [emphasis in original].

[44] The geographical scope should, in principle, be limited to the territory in which a business operates. Spatial restraints beyond that are contrary to public order: *Payette* at para 65.

[45] The geographical scope of the Non-Compete Clause is “within North America.” “North America” is not defined in the Employment Agreement but is presumed to include at least Canada, the United States, and Mexico.

[46] The question then becomes whether the geographical scope is overbroad and thus restricts more than it must.

[47] The Applicants argue that it is necessary for the Non-Competition Covenant to apply to the entirety of North America because there are only a limited number of locations in North America that have the appropriate geology and sufficient renewable energy to operate DAC facilities, and that when DAC facilities generate CDR credits, the purchasers are located and operate throughout North America.

[48] In support of this proposition, the Applicants cite McDonald J (as he then was) explaining that “the effect of a covenant in restraint of trade is not to be determined so much by previous judicial decisions but rather upon the circumstances of ‘infinite variety’ surrounding every contract” and that with the development of technologies like the internet “depending upon the business in question, earlier decisions relating to geographic scope in particular will have less relevance”: *Ensign Drilling Inc v Lundle*, 2007 ABQB 357 at para 97 [*Ensign Drilling*].

[49] It is true that other non-competition covenants have been found to be enforceable with no geographic limitations (see e.g. *Bratton v Sinnige*, 1988 CanLII 10273 (ON SC), 15 ACWS (3d) 21 (Ont. HCJ), or where the non-competition covenant encompassed a geographical scope that extended to locations where the employer did not carry on business at the time of contract formation (see e.g. *Ensign Drilling*). However, those cases did not involve employer-employee covenants.

[50] Considering the parties’ relative bargaining positions and the fact that the Applicants only operate their business in British Columbia and Texas, a restriction to all of North America is unreasonable. The Applicants do not operate in Mexico, nor do they purport to have customers there. This is more than is reasonably necessary to protect a legitimate proprietary interest.

[51] Moreover, even if I do accept that only a limited number of locations in North America have the appropriate geology and sufficient renewable energy, why not restrict the scope of the covenant to those areas? In these circumstances, an Alberta, British Columbia, and Texas restriction, for example, may have been reasonable. The entire continent of North America goes well beyond that; the Applicants only operate in one province and one state. The geological restriction is unreasonable and unenforceable.

c. Breadth of Restriction

[52] Restrictive covenants must be no broader than necessary to protect the employer’s legitimate commercial interests: *Brett Young Seeds* at para 91, citing *Maguire v Northland Drug Co. Ltd.*, 1935 CanLII 35 (SCC), [1935] SCR 412; *HF Clarke Limited v Thermidaire Corp Ltd.*, 1973 CanLII 41 (ON CA), [1973] 2 OR 57 at 66.

[53] At this stage, the analysis is fact and case specific. The Court must keep in mind that the Non-Competition Covenant must be “determined only upon an overall assessment of the clause, the agreement within which it is found, and all of the surrounding circumstancing”: *Elsley* at 924.

[54] The issue then lies with determining what the prohibited activity or activities are. Per the Non-Competition Covenant, Mr. Boguslawski is not permitted to:

[E]ither individually or in partnership or in conjunction with any person, whether as principal, agent, shareholder, director, officer, employee, investor, or in any other manner whatsoever; directly or indirectly advise, manage, carry-on, be engaged in, own or lend money to; or permit your name or any part thereof to be used or employed by any person managing, carrying-on or engaged in a business which is in direct competition with the Company's business within North America.

[55] The first issue is whether “a business which is in direct competition with the Company's business within North America” should have been defined in the Employment Agreement.

[56] The Applicants argue that the Non-Competition Covenant itself does not need to describe CE's business to determine what businesses are “in direct competition with” CE, as it can be gleaned from an overall assessment of the clause and the agreement in which it was found. The Employment Agreement states that CE is “in the business of direct air capture and fuel synthesis utilizing atmospheric CO₂.” The Applicants state that this, in conjunction with the Non-Competition Covenant, would allow a sufficient meaning to be elucidated.

[57] One problem with this argument is that CE does not operate in fuel synthesis, nor does it offer commercialized air-to-fuel processes, and Mr. Boguslawski did not work in this area. This, by definition, would go further than reasonably necessary to restrain Mr. Boguslawski, or at least be ambiguous as he could be prohibited from working in areas of business in which CE does not actually operate, or for which he was not involved with during his employment.

[58] In my view, the lack of definition for the term “is in direct competition” leads to additional ambiguity, for example:

- Does it refer to only companies operating in the same type of DAC technologies, or more broadly any company engaged in carbon capture or climate solutions?
- Does it apply to companies with any DAC presence in North America, or only those actually able to “directly” compete on the same scale as the Applicants?
- Does it apply to companies that sell CDR credits to the same customers even if they do not physically operate within North America?

[59] The second issue is that it is not clear what activity is expressly prohibited. According to the Non-Competition Covenant, Mr. Boguslawski is precluded from acting “either individually or in partnership, whether as principal, agent, shareholder, investor, or in any other manner whatsoever” to directly or indirectly “advise, manage, carry-on, be engaged in, own or lend money to” or to “permit [his] name or any part thereof to be used” by a direct competitor.

[60] Because the Non-Competition Covenant is so broad and undefined, it is difficult to ascertain what is actually prohibited. Would passive investment in a competitor's business be prohibited? What about investing in a mutual fund that holds shares of the competitor, would that breach the covenant? Would working for a company tangentially related to CE's business (i.e., a financial intermediary that sells CDR credits which are the principal source of revenue for CE's business) breach the restrictive covenant?

[61] The activities the Non-Competition Covenant attempts to restrict are also too broad. The clause attempts to limit Mr. Boguslawski from being involved “in any manner whatsoever” in any business that is in “direct competition” with CE. A clause that prevents an employee from being involved in a competitive business in a role of any kind has been found to be overbroad: *Wyse Meter Solutions Inc v Papanicolopoulos*, 2024 ONSC 840 at para 63 [*Wyse*].

[62] Here, what the Applicants have asked for goes well beyond merely restricting employment. The breadth of the clause, especially considering the phrase “or in any manner whatsoever,” even tailored as it was to businesses that are in “direct competition,” is such that it could (and would) capture conduct that is far removed from the core of CE and the Applicant’s business, such as passive investment. This is a hallmark of an overbroad clause.

[63] Additionally, persuasive authority from Canadian courts have held that where a restrictive covenant prevents a former employee from being a passive investor in a competing entity it is unreasonable: *M & P Drug Mart* at para 47; *Wyse* at para 63.

[64] Either ambiguity alone would likely be fatal to the applicability of the Non-Competition Covenant. When both are read together in conjunction with the advanced scrutiny on employer-employee restrictive covenants the ambiguity is, in my view, fatal to the reasonableness and therefore the enforceability of the Non-Competition Covenant.

[65] I also again note that, per *Shafron*, this Court is not empowered to read down the Non-Competition Covenant or strike out offending words or clauses to remedy the ambiguity or overbreadth; it is not curable by this Court.

d. Public Interest

[66] If the Applicants had established that the Non-Competition Covenant was reasonable and enforceable, the onus would shift to Mr. Boguslawski to establish that there is a public interest consideration that would lead to a conclusion that the covenant is unreasonable: *Elsley* at 928.

[67] Generally, restrictive covenants that interfere with the ability of employees to freely ply their trade will be considered unreasonable, although courts will allow a general freedom to contract: *Shafron*. General public policy concerns and community interests are also relevant: see *Meyer* at paras 51–52.

[68] Mr. Boguslawski argues that the Non-Competition Covenant should not be enforced against him due to his position as an entry-level project engineer with no managerial authority, specialized responsibilities, or unique access to confidential information. He submits that the restrictions sought by the Applicants are overbroad and lack principled justification, particularly considering the public interest considerations in the carbon removal industry, namely combating global warming and decreasing the current shortage of high-quality CDR credits.

[69] I disagree. If the Non-Competition Covenant was reasonable and enforceable, Mr. Boguslawski could still work in his chosen vocation as an engineer, project manager, or both (as he did in his role with CE). The DAC industry would not be overly affected by losing one engineer who, by Mr. Boguslawski’s own admission, was not an industry-leading expert in DAC technology.

[70] There is no overriding public interest that would make the Non-Competition Covenant unenforceable here.

e. Effect of Mr. Boguslawski Acknowledging and Understanding the Non-Competition Covenant

[71] The Applicants argue that because Mr. Boguslawski admitted that he understood the scope of the Non-Competition Covenant, acknowledged that he would be able to find suitable work in a business not engaged in DAC technology, and executed a contract with provisions where he agreed the Non-Competition Covenant was reasonable and enforceable, it is reasonable.

[72] The Supreme Court of Canada has been clear that a court is not bound by an employee acknowledging that the impugned restrictive covenant was reasonable, although it is an additional factor that is relevant and useful to the determination of whether a restrictive covenant is reasonable: *Payette* at para 60.

[73] Additionally, though Mr. Boguslawski admitted he had understood the scope and agreed with it, the context of the employee-employer relationship matters. I accept that he was one of many project engineers, and though he was promoted to Lead Project Engineer, this did not come with a salary increase or any change in responsibility. Though Mr. Boguslawski was not a completely unsophisticated entry-level employee, the power imbalance between him and the Applicants was still one where he likely lacked bargaining power, and there is no evidence he had the opportunity to negotiate the terms of his Employment Agreement.

[74] In such circumstances, his acknowledgment of the Non-Competition Covenant's reasonableness cannot, on its own, cure the ambiguity or overbreadth of the restrictive covenant. Courts must remain vigilant to the realities of employment relationships and cannot rely solely on an employee's acquiescence to validate a clause that is otherwise unenforceable.

[75] I find the Non-Competition Covenant is unenforceable due to ambiguity, and that it goes much further than reasonably necessary geographically and in the scope of activities it covers to protect legitimate proprietary interests.

f. Conclusion on First Branch of the *RJR* Test

[76] Having found the Non-Competition Covenant is unreasonable and unenforceable, I do not need to determine whether the restrictive covenant in question has been breached. The Applicants have failed to establish a strong *prima facie* case and therefore have not met the first branch of the *RJR* test. It is unnecessary for me to consider the second and third branches of the *RJR* test.

V. Conclusion

[77] As the Applicants have failed to discharge their onus to prove that it is just and equitable in the circumstances to grant an injunction, the application is dismissed.

[78] As Mr. Boguslawski has been successful on this application, he is presumptively entitled to costs. Costs, if not agreed to between counsel, may be addressed by written submissions provided to the court by October 31, 2025. Submissions to be limited to 3 pages not including a draft bill of costs, offers exchanged and authorities.

Heard on the 12th day of September, 2025.

Dated at the City of Calgary, Alberta this 3rd day of October, 2025.

M.E. Burns
J.C.K.B.A.

Appearances:

Andrew Pozzobon and Aidan Paul
Borden Ladner Gervais LLP
for the Applicants

Michael Hernandez
Bow River Law LLP
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