Court of King’s Bench of Alberta

Citation: SHAC Solutions Inc v Guenther, 2024 ABKB 145

2024 ABKB 145 (CanLII)

Date: 20240325
Docket: 2308 00444
Registry: Medicine Hat

Between:

SHAC Solutions Inc.

Applicant

- and -

Carson Guenther, Doug Stebbings, Roxanne Doerksen, Laurie Penna, Rohdy Hay and Envirotech Humics Inc.

Respondents

Reasons for Decision
of the
Honourable Justice M.H. Hollins

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[1] The Applicant, SHAC Solutions Inc, manufactures humic acid, a compound used in agricultural, resource extraction and environmental applications. The individual Respondents were employees and/or directors of SHAC but left to start their own humic acid manufacturing company, Envirotech Humics Inc (EHI).

[2] SHAC has sued the Respondents for breach of their duties of confidentiality and fidelity to the Applicant, as well as for breach of contractual obligations under various Confidentiality and Employment Agreements, for unlawful interference with economic relations, passing off and civil conspiracy.

[3] Before me, SHAC applied for an interlocutory injunction pending trial, enjoining all the Respondents from involvement in the manufacture of humic acid, pending the trial of its claim.

[4] SHAC asserts clear breaches of contractual and common law duties of confidentiality and fidelity arising from the alleged taking and use of SHAC's secret process for manufacturing humic acid.

[5] The Respondents argue that: (1) the information at issue is not confidential but in the public domain, hence there is no breach of any duty of confidentiality; (2) the one Respondent with a non-competition covenant, Carson Guenther, cannot be bound by that covenant because SHAC breached its obligations to Mr. Guenther under that employment agreement, rendering the covenant unenforceable; and (3) any fiduciary obligations of the Respondent directors or employees expired prior to their involvement with the competing venture.

[6] The relief sought by SHAC is granted for the reasons set out herein.

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The Tri-Parte Test for Injunctive Relief

[7] The parties agree that the test which SHAC must satisfy in order to obtain its interim injunction is as set out in *RJR – MacDonald Inc. v. Canada,* [1994] 1 SCR 311 at p.334:

1. Is there a serious question to be tried?;
2. Will the applicant suffer irreparable harm if the injunction is not granted?; and
3. Does the balance of convenience favour the applicant or the respondent?

1. The Strong *Prima Facie* Case

[8] In Canadian jurisprudence, the threshold in the first arm of the *RJR-MacDonald* case has been raised to a "strong *prima facie* case" in certain types of injunction applications, including where the injunction is sought against former employees who would, if the injunction was granted, be deprived of their ability to earn a livelihood.

[9] A strong *prima facie* case is said to be one that is likely to prevail at trial. This obviously increases the evidentiary onus on an applicant, although with good reason. As Pentelechuk, J (as she then was) said in *IBM Canada Ltd v Almond*:

> Interlocutory injunctions represent extraordinary relief. Because an injunction provides relief without proof of the claim, it should only be considered in the case of serious harm where redress after trial would be neither fair nor reasonable: *Whitecourt Roman Catholic Separate School District No. 94 v. Alberta*, 1995 ABCA 260 (Alta. C.A.) at para 12, (1995), 169 A.R. 195 (Alta. C.A.); *Wild Rose Meats Inc. v. Andres*, 2011 ABQB 681 (Alta. Q.B.) at para 26, (2011), 530 A.R. 49 (Alta. Q.B.).
>
> The onus on an applicant is even higher when an injunction is sought against a former employee.
>
> Non-competition and non-solicitation agreements are considered restraints of trade that are contrary to public policy because they interfere with an individual's liberty of action. They are *prima facie* unenforceable. However, if the restrictive covenant, and the restraint of trade is reasonable, it will be upheld in recognition

> that parties are free to contract: *KRG Insurance Brokers (Western) Inc. v. Shafron*, 2009 SCC 6 (S.C.C.) at para 16-17, [2009] 1 S.C.R. 157 (S.C.C.) [*Shafron*].
>
> Accordingly, Courts require that an applicant seeking injunctive relief for breach of a restrictive covenant first establish a strong *prima facie* case.
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> In *BrettYoung Seeds Limited Partnership v. Dyck*, 2013 ABQB 319 (Alta. Q.B.) at para 13, (2013), 563 A.R. 138 (Alta. Q.B.), Wakeling J (as he then was), said an applicant will establish a strong *prima facie* case if it shows it will "probably prevail at trial" or is "likely to succeed at trial."
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> *IBM Canada Ltd v Almond*, 2015 ABQB 336 at paras.25-29

[10] I am not convinced that the “strong *prima facie* case” threshold applies here.

[11] Three of the five individuals – Roxanne Doerksen, Doug Stebbings and Laurie Penna, were directors of SHAC and owed completely separate – and higher – obligations of fidelity to SHAC than that of an employee. Of the five individual Respondents, only one, Carson Guenther, is alleged to have breached a non-competition covenant and he was a key employee who also had fiduciary duties. In other words, this is not primarily a case about restraining competition by mere employees.

[12] Further, all the Respondents had obligations of confidentiality to SHAC, whether contractual or by virtue of the common law, and it is those duties, not really Carson Guenther’s non-compete covenant, which ground the Applicant’s *prima facie* case.

[13] In my view, confidentiality agreements should generally attract less strict scrutiny from the courts than agreements which clearly restrict the signatory’s ability to find employment elsewhere. The parties to confidentiality agreements can work wherever they wish, they just cannot use their former employer’s confidential information in doing so. This was noted, albeit in *obiter*, by the Manitoba Court of Appeal in *People Corporation v Mansbridge*, 2022 MBCA 37 at para.3, in a similar injunction application. Additionally, courts have recognized that injunctions issued to protect trade secrets, even in an employment context, may not attract the higher standard of proof; *Enviro Trace Ltd v Sheichuk*, 2014 ABQB 381 at para.4.

[14] Further, the Applicant challenged the proposition that an injunction would impede the Respondents’ ability to earn income, albeit not at EHI. Stebbings and Doerksen earn their incomes from livestock nutritional consulting and from vermicomposting, respectively. Rohdy Hay was retired when he came back to work at SHAC. Laurie Penna is an office administrator and so could work in any number of unrelated businesses. Carsen Guenther’s background was not in humic acid but rather, running a large farming operation which he still has.

[15] Accordingly, this case is closer, in my view, to *Foundational Capital Corp v Saxon*, in which Jeffrey, J declined to employ the higher standard because he did not accept the impact on the respondent’s livelihood had been established; *Foundational Capital Corp v Saxon*, 2011 ABQB 102 at para. 12.

[16] However, I note that my brothers Mah and Eamon, in *Orbis Engineering Field Services v Taifa Engineering Ltd,* 2019 ABQB 510 at para.53 and *GG & HH v 2306480 Alberta Ltd,* 2022 ABQB 58 at paras.90-92, respectively, applied the higher ‘strong *prima facie* case’ standard to cases of alleged breach of fiduciary duty and breach of confidentiality. Accordingly, and because this is somewhat of a hybrid case involving injunctive relief which will restrain trade generally, I

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will assess the evidence on the higher threshold of a strong *prima facie* case; a threshold which the Applicant meets in any event.

[17] Within this first arm of the test for injunctive relief, I will begin by introducing the Respondents and then look at the following grounds upon which the Applicant's case is based:

A. The SHAC manufacturing process is confidential information, which the Respondents are using at EHI;

B. The Respondents have contractual obligations to keep the information confidential; and

C. The Respondents have common law obligations, as former directors, to keep the information confidential.

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The Respondents

[18] Before examining the evidence on the *prima facie* case required, it will be helpful to reproduce a timeline of the individual Respondents' involvement with SHAC and with EHI.

[19] In 2017, an original group of shareholders purchased the assets of a predecessor company out of receivership. Those shareholders included Philip Fandrick, his mother Valerie Fandrick, his sister Crystal Fandrick, a long-time employee named Ashley Gavey and the Respondent Doug Stebbings. In 2019, Ashely Gavey sold her 20% interest to the Respondent, Roxanne Doerksen. Today, Philip Fandrick owns 60% of the SHAC shares and Roxanne Doerksen and Doug Stebbings each own 20%.

[20] Doug Stebbings has the longest association of all the Respondents with SHAC. In addition to being a shareholder throughout, he was a director from 2017 to October, 2022. He has had limited involvement with operations. As is discussed later, when things between the shareholders and directors became acrimonious, it was Mr. Stebbings who led the charge on attempting to either buy or sell the non-family shares. Failing that, it was his initiative to begin the competing company, EHI, of which he now owns 20% of the shares.

[21] Roxanne Doerksen was also a director of SHAC from 2019 to October, 2022. During some of that time, she also functioned as the President and CEO. She resigned as the CEO in March, 2022 to make way for the Respondent Carson Guenther to become CEO in April of 2022. Although she has her own composting business, and in fact, used SHAC (and now EHI) to supply her with humic acid, she was involved in the operations and the leadership of SHAC. She is now also a 20% in EHI.

[22] Carson Guenther was recruited by Roxanne Doerksen and Doug Stebbings to be SHAC's CEO. He was hired as CEO on April 4, 2022, went full-time in November of 2022 and resigned that position on March 15, 2023. Mr. Guenther signed both a Confidentiality Agreement and an Employment Agreement with a one-year post-termination non-competition covenant. He left on March 15, 2023 and became the Operations Manager for EHI. He is also the sole director and majority shareholder (60%) of EHI.

[23] The Respondent Rohdy Hay was hired as a casual employee of SHAC in May of 2022. He never served as a director and effectively resigned his employment in March of 2023 when he says that Carson Guenther recruited him to EHI.

[24] The Respondent Laurie Penna was hired as SHAC's office administrator in February of 2020. She became a director in October of 2022 and remained a director until she resigned as both employee and director in April of 2023 and became the office administrator of EHI.

[25] In summary, all the Respondents were either employees or directors of SHAC at overlapping times. Mr. Stebbing and Ms. Doerksen were directors, Messrs. Guenther and Hay were employees and Ms. Penna was both an employee and a director.

[26] As is discussed later on, all of them were frustrated with the way the Fandrick family members ran the SHAC business. When Mr. Stebbing resigned as a director, he and Carson Guenther both tried to broker a purchaser of all the Fandrick shares in SHAC. When that did not happen, they incorporated EHI on April 11, 2023, and recruited the other Respondents to join.

A. Confidential Information

[27] If information is proprietary to a person or entity, then that person or entity has legal protections against the dissemination and misuse of that information. In other words, the information is treated, at law, as confidential. A great deal of the argument in this application centred around whether SHAC's process for manufacturing humic acid was proprietary to SHAC (and therefore confidential) or part of the public domain (and therefore not confidential).

i. The Patent

[28] The Applicant says that the process by which SHAC's humic acid is made is a family secret, first developed by Archie Fandrick, the father of Crystal and Philip Fandrick. Archie obtained a patent, filed in 1992, which has since expired. The Respondents say that the patent covers the SHAC process currently at issue. If so, they argue, the expiry of the patent would mean that the intellectual property protected by the patent has entered the public domain.

[29] The Applicant responds that the patent was a precursor to the current process but was expressly for use in oven cleaners and never contained all the details about the process used at SHAC.

[30] The patent is identified as a "Method for Cleaning or Extracting Hydrocarbon Based Substances". It does describe an "acqueous solution of hydrogen peroxide and an alkali metal hydroxide, particularly potassium hydroxide" effective in cleaning household or commercial ovens, although it says it may be useful for the extraction of hydrocarbons from soil. It gives a range of proportions for the ingredients but also says "It is to be understood by one skilled in the art that the relative proportions of hydrogen peroxide, water and alkali metal hydroxide may be varied..."

[31] The experience or skill used in the timing of adding ingredients in particular amounts at certain times, allowing the reactions to either proceed or stopping them in increments – this, the Applicant says, was never included in the patent but rather is the family's secret knowledge passed down from Archie to his children. I agree that the process described below – SHAC's current process – is not contained in or covered by the patent.

ii. The Secret Process

[32] Crystal Fandrick's Affidavit has the most comprehensible explanation for the SHAC manufacturing process and why it is, in SHAC's view, a trade secret. Essentially, it is the skill of watching the chemical reactions occurring and visually determining exactly when to stop or "kill" each reaction, in what temporal increments, to produce the highest quality product. Every

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time, the reactions can be a little bit different so it is this knowledge of the ideal timing – the kind of knowledge not easily reduced to writing – that is confidential to SHAC.

[33] There is a fair bit of information in the public domain about possible ingredients and varying opinions on which ingredients in which rough proportions yield the best result. I would call those "formulas". However, none of these disclose the *process* of how those ingredients are combined, for example, in what precise proportions, in what order or with what amount of time between each step. It is like making a cake without knowing that you generally combine the wet and dry ingredients separately before mixing them together. The ingredient list is the same but the result will not be.

[34] In support of the Respondents' argument, Carson Guenther's Affidavit attaches four scientific articles discussing the oxidation of lignates to extract or produce humic acid. As these articles make clear, a number of oxidizing compounds can be used, including nitric acid and sodium hydroxide. Most of the processes described involve latent oxidation over a 24-hour period, although one experiment was done on reactions over 1-hour increments and another over 4 and 6 hour periods.

[35] Carson Guenther admitted that he had not retrieved these articles for use in manufacturing humic acid at EHI and in fact, did not use them for that purpose. He acknowledged he relied on some of his knowledge and experience from SHAC when he moved to EHI and when asked to define that, he said he was using the "basic process of how oxidized lignate is made" learned at SHAC, including identifying the proper visual clues from the bubbles produced to know when to add the next component, or "kill the reaction" (pp.30-31 of the transcript of Carson Gunther's cross-examination).

[36] In any event, what emerges from the articles attached to Mr. Guenther's Affidavit is that there are indeed different ways to make humic acid. Different chemical compounds can be used and in different proportions. However, nowhere was there any discussion about a process similar to that described by Crystal Fandrick in her Affidavit, specifically watching the entire reaction and stopping it intermittently based on visual cues.

[37] I acknowledge that I am attempting to understand the basics of the chemical reactions and the content of these scientific articles without the benefit of expert evidence. I expect that most of the people involved in this case, including counsel, are in the same boat. However, what I took from this information is that the part of SHAC's process that it claims is secret is apparently secret, or at least it is not included in these scientific papers.

[38] Doug Stebbings says that SHAC's process is not confidential because he found information about manufacturing humic acid online. However, the only document he attaches to illustrate this is a 2011 application, called a Petition, by SHAC to the United States Drug Administration. This Petition does contain a list of ingredients, as well as identify the suppliers of those ingredients. However, the process is redacted (labelled "CBI-Deleted") with this qualifier:

> "The sections designated as CBI-deleted within this petition are limited solely to the product manufacturing process, which is considered a 'trade secret'. This process, in its entirety, is considered confidential in nature, and has been marked CBI-deleted in this copy."

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[39] In my opinion, this simply illustrates that SHAC, while acknowledging that the ingredients themselves might not confidential, went to some lengths to protect the actual process it used to make the humic acid.

iii. The Respondents' Admissions

[40] All the people who know the SHAC process were taught the process by Crystal or by someone that Crystal trained. For example, Crystal taught her husband, Kevin, and together they taught Carson Guenther. Carson taught Rohdy Hay. All the Respondents conceded that SHAC's process for making humic acid was not written down anywhere but was taught by one person to another without exception.

[41] Roxanne Doerksen says that she knew the "basic process" from her prior work in vermicomposting but admitted on cross-examination that she had only "low level understanding". In fact, she admits to having learned the SHAC process from her daughter, Ava, who was taught the process by Crystal. She acknowledged that the SHAC process was "unique", a word she used several times in her cross-examination, and that when she swore in her Affidavit that she personally knew that the methods used by SHAC and EHI were substantially different, she "mis-spoke".

[42] As mentioned above, Carson Guenther also admitted that he used the process taught to him at SHAC at EHI. Certainly, the speed with which four people with no real prior experience in manufacturing humic acid were able to incorporate and get a competing product to market implies that they were not learning a brand new manufacturing process from scratch.

[43] Although I address the contractual obligations of the Respondents later on, in terms of the confidential nature of the information, it must be recognized that every one of these people except Doug Stebbings signed a Confidentiality Agreement. There has been no argument advanced that those Confidentiality Agreements are not enforceable. Therefore, some weight can be given to the Respondents' recognition that SHAC had proprietary information that it sought to protect by contract. Indeed, most or all of the Respondents acknowledged on cross-examination that they were aware, during their time at SHAC, that SHAC considered its process to be confidential.

[44] SHAC points to the fact that EHI has taken steps to protect its own, similar, information, agreeing to produce material in this action only with confidentiality protections in place. That is fine, of course and to be expected in litigation of this sort. However, no real explanation has been offered for why one company's information is confidential while the other's is not. During Doug Stebbing's cross-examination, he deposed that EHI's current process is proprietary but SHAC's is not. After a number of objections from counsel, he eventually just said he could not answer that question.

iv. Other Confidential Information

[45] Although the confidential nature of the SHAC process was the central issue at this application and will likely remain the central issue at trial, it is worth noting that there was other information that the Respondents either expressly or impliedly took from SHAC.

[46] For example, when he was cross-examined, Carson Guenther admitted (eventually) that the EHI Application Guide was "probably" a straight copy of SHAC's Application Guide, given several passages that were identical, even where the content was not actually true of EHI. Carson

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Guenther was also alleged, on the day he left SHAC, to have taken a number of photographs of SHAC's equipment and its set up for his own use.

[47] And lastly, we know, because Carson Guenther admitted, that EHI has sold product to SHAC customers, suggesting that EHI has some client information allowing them to solicit these customers.

[48] I find that the Applicant has established that the process it uses for manufacturing humic acid, which it shared with certain of the Respondents, is confidential information belonging to SHAC. I emphasize that this is a preliminary finding and is not intended to bind or in any way affect the findings of the trial judge.

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B. Employment and Confidentiality Agreements

[49] The second area of dispute in terms of a strong *prima facie* case relates to the underlying claims and defences around the enforceability of the various agreements upon SHAC relies. This is important, not just for its hopes of establishing a strong *prima facie* case, but for its argument that the remaining arms of the test – irreparable harm and balance of convenience – are somewhat relaxed if a clear breach of an (enforceable) negative covenant can be shown.

[50] I will deal first with Carson Guenther's non-competition covenant.

[51] As mentioned, Carson Guenther was recruited by Roxanne Doerksen and Doug Stebbings to come into SHAC as its CEO. Both Stebbings and Doerksen had been unhappy with the way the company was being managed and operated for some time and thought that Carson Guenther might be able to turn things around.

[52] Carson Guenther came on as a part-time CEO on April 4, 2022. On that date, he signed a Confidentiality Agreement, which I will describe later in these reasons. He also signed an Employment Agreement, which was renegotiated and amended on November 1, 2022, the date on which Carson Guenther became the full-time CEO. Clause 17 of Guenther's Employment Agreement provided that for one year after the termination of his employment, he would not engage with any business competing with SHAC within North America.

[53] This is a restraint of trade and *prima facie* unenforceable unless the employer can show the necessity of such a protection and that the protection contracted for is no more than necessary to protect its legitimate interests in curtailing competition.

[54] It is admitted that SHAC had clients in Canada, the US and Mexico. In fact, one of those clients in the US is now buying its humic acid from EHI so apparently this geographically restricted covenant was, at least on its face, reasonable. Although it is beyond the scope of these reasons, I also query what place geographical limits or our treatment of them have in a time of wide online commerce. In terms of the one-year time limit, as noted in *IBM*, courts have, depending on circumstances, accepted non-competition covenants for a year or more; *IBM* at para.64.

[55] In the case at bar, the fact that EHI was able to jump-start production of humic acid virtually immediately, with all of SHAC's former employees, making and selling a product that is chemically similar, packaged and sold in a similar way, to the same client base, speaks to the importance of a limited restrictive covenant for the CEO. I will also point out that I need not make a finding that the non-compete is, in fact, enforceable because SHAC's stronger case is based on the fiduciary and confidentiality duties of, *inter alia*, Mr. Gunether.

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[56] In the alternative, Mr. Guenther argues that the non-competition agreement is unenforceable because SHAC breached the terms of his employment agreement by failing to pay him a bonus for 2022 as required by Clause 4 of the Employment Agreement.

[57] There are a number of cases standing for the proposition that an employee who is wrongfully terminated should be released from his or her own covenants not to compete with that employer. Presumably, the rationale is that it would be manifestly unfair for an employer to wrongfully terminate someone and then simultaneously keep them from mitigating their damages by finding work elsewhere.

[58] That does not describe this case at all. Mr. Guenther was not terminated at all. He resigned to join Mr. Stebbings in a competing business. While that does not obviate a claim for an unpaid bonus, it certainly distinguishes his situation from the cases relied on by the Respondents.

[59] Mr. Guenther admitted on cross-examination that he did not even ask about the bonus in March, 2023 “after [he] was done”. After being told that the company was awaiting its fiscal year end numbers, he never raised the entitlement to a bonus again until it appeared in pleadings in this Action. In fact, he acknowledged on cross-examination that the bonus “wasn’t a massive issue...until all this [the litigation] started”. This is not a compelling argument for constructive dismissal.

[60] Therefore, I find that Mr. Guenther’s Employment Agreement, including the non-competition covenant, is *prima facie* enforceable and that he is in clear breach thereof. Those findings may change at trial but, with the evidence that I have, that is the most reasonable conclusion.

[61] Even if I had not found the Employment Agreement to be enforceable, Carson Guenther signed a Confidentiality Agreement, as did Roxanne Doerksen, Laurie Penna and Rohdy Hay. The preamble to the Confidentiality Agreement reads in part as follows:

> SHAC has invested and will continue to invest considerable effort and expense in the design and development of certain products for sale and use in agricultural, oil and gas and other industries and other Proprietary Information (as defined below)...Recipient acknowledges and agrees that for the purposes of effectuating the Business Relationship, SHAC will disclose the Proprietary Information (as defined below) to Recipient. SHAC has taken and will continue to take all reasonable steps necessary to protect the secrecy and proprietary nature of Proprietary Information. Recipient acknowledges and agrees that any misappropriation, thief [sic], unauthorized use or improper disclosure would cause irreparable harm to SHAC.

[62] Unlike the Non-Competition Agreements, the Respondents advanced no argument that these agreements were unenforceable. Rather, they relied on the argument that the SHAC process for manufacturing humic acid is in the public domain and therefore falls outside the contractual definition of “confidential information”. That definition includes, *inter alia*, “any useful methods, process [sic]...which is being used by SHAC”, analyses and any information regarding SHAC’s customers.

> I have already explained my reasons for finding that the SHAC process is, *prima facie*, confidential and thus, by the terms of these Agreements, cannot be used,

> disclosed, reproduced or reverse engineered. The Confidentiality Agreements, signed voluntarily by the Respondents in consideration of their positions as employees and/or directors, are being breached by each of them in using that information for the benefit of EHI and themselves.

C. Fiduciary Obligations of Directors and Key Employees

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[63] Surprisingly, very little oral argument was devoted to the duties of the individual Respondents as directors and former directors of SHAC. While s.122 of *the Alberta Business Corporations Act* speaks to the duties of fidelity of a director while serving as a director, the common law has always recognized that some of those duties of fidelity, particularly relating to the use of confidential information, survive the resignation of a director.

[64] The circumstances under which the Respondents left SHAC bear comment here. It is clear from the Respondents' Affidavits that all of them were fed up with the Fandricks. They perceived, perhaps correctly, that the Fandrick family members were focused on their internal family arguments at the expense of the management of the company. This was hurting SHAC financially and hampering the Respondents' efforts to improve its profitability and its reputation.

[65] Several of them thought the easiest solution was for the Fandricks to sell their shares but there was no Unanimous Shareholders Agreement to force a sale. As far back as January, 2023, both Carson Guenther and Doug Stebbings were involved in conversations about buying the Fandricks' SHAC shares. However, Philip Fandrick would not agree to completely disassociate himself of the business nor to sign a USA. Neither Carson Guenther nor Doug Stebbings were prepared to buy further shares of SHAC without a USA.

[66] SHAC's financial ability to buy out Doug Stebbings and Roxanne Doerksen was also in question, even though at some later point, Stebbings and Doerksen were prepared to walk away for very little recovery on their investment, essentially the forgiveness of outstanding invoices plus some product.

[67] There was an emergency shareholders' meeting on February 8, 2023. A lawyer attended, apparently at Doug Stebbings' request, and suggested that the only way forward was for all shareholders to go their "own direction". This apparently precipitated Doug Stebbings' meetings with another lawyer, who advised Stebbings that he was free to start his own competing company.

[68] There were offers outstanding through February but no resolution. Both Doug Stebbings and Carson Guenther seemed to realize that there could be legal implications to competing without SHAC releasing them from their obligations. They tried to convince Philip Fandrick that the market was large enough to absorb another competitor without harming SHAC. Subsequent communication from Doug Stebbings to Philip Fandrick, was less upbeat, threatening that if SHAC didn't buy he and Roxanne Doerksen out at fair market value, "I can make [SHAC's] world very miserable". A subsequent email was even more to the point, where Mr. Stebbings cautions Philip Fandrick to "be aware of the potential harm Roxanne and I can bring to SSI as shareholders when we do not wish to remain as shareholders".

[69] Meanwhile, Carson Guenther's offers for 100% of the shares had gone nowhere, for all the same reasons. So when Doug Stebbings asked Carson if he would be interested in joining Doug Stebbings' new company, Carson Guenther agreed on the conditions that it was legal to do

so and that he would have full operational control. According to Carson Guenther, this conversation happened in late February, 2023.

[70] Carson Guenther, as the CEO, knew everything about SHAC's operations, including the process for SHAC's manufacture of humic acid, the suppliers, the customers, the regulatory approvals processes, labelling and shipping – every aspect of the business. He could not be anything other than a key employee and a fiduciary. He breached those obligations by taking confidential information and using it to compete with his former employer and by agreeing to do so while he was still the CEO of SHAC. Further, he brought with him Laurie Penna and Rohdy Hay, who had contractual obligations of confidentiality of their own.

[71] Roxanne Doerksen says she went along with Doug Stebbings plan because it seemed like the only way to ensure a "reliable local supply of humic acid". She began to discuss investing in a competing company with Doug Stebbings, within months of her resignation as a director.

[72] Laurie Penna, who was the office administrator, was still a SHAC director when she engaged with EHI. She resigned in April, 2023 and began working with EHI virtually immediately. Similarly, Rohdy Hay went on vacation in February and returned in March to an offer from Carson Guenther to join EHI, which was not yet even incorporated.

[73] It is trite law that some fiduciary duties survive for some period of time after a director's resignation. In *BrettYoung Seeds*, Wakeling, J, as he then was, said this:

> A person who was a fiduciary employee may compete with a former employer after his employment has ended if he complies with the obligations which survive the end of the employment relationship.
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> A former fiduciary employee may not, after the end of the employment relationship,
>
> > (a) use the former employer's proprietary information in a manner contrary to the former employer's best interests;
> >
> > (b) use the former employer's corporate opportunity unless the former employer has unequivocally decided not to pursue it;
> >
> > (c) solicit customers of his or her former employer until a reasonable period of time has elapsed following the end of his employment by the former employer;
> >
> > (d) offer employment to employees of his former employer until a reasonable period of time has elapsed following the end of his employment by the former employer.
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> *BrettYoung Seeds Limited Partnership v Dyck*, 2013 ABQB 319 at paras.97-98 (footnotes omitted)

[74] The survival of fiduciary duties beyond resignation has been recognized in other cases of our court and of the Court of Appeal in this Province. In *Physique Health Club v Carlsen*, the Alberta Court of Appeal addressed the scope of the fiduciary duty of departing employees. In regard to competing with a former employer, the Court said this:

> (3) Competition with the Plaintiff after the employment relationship has ceased does not of itself constitute a breach of the fiduciary duty. *Metropolitan*

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> *Commercial Carpet Centre Ltd. v. Donovan et al.* (1989), 91 N.S.R. (2d) 99 (T.D.), per Davison J. at page 103:
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> Even top management, in the absence of a contract, have the right to leave their employment and form a company ... which is in direct competition with their former employer.
>
> (4) The right to compete is qualified; the employee must not actively solicit the business of specific customers of the employer. The restriction continues "for a reasonable period of time after termination of the employment". *Sure-Grip Fasteners Ltd. v. Allgrade Bolt & Chain Inc., supra* at page 290.
>
> (5) After the employment relationship has terminated, the employee must not use or disclose confidential information learned in the course of his or her employment, but the obligation does not extend:
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>> ... to cover all information which is given to or acquired by the employee while in his employment, and in particular may not cover information which is only 'confidential' in the sense that an unauthorized disclosure of such information to a third party while the employment subsisted would be a clear breach of the duty of good faith. (*Faccenda Chicken Ltd. v. Fowler* (1985), [1986] 1 All E.R. 617 at 625 (C.A.)).
>
> *Monarch Messenger Services Ltd. v. Houlding* (1984), 56 A.R. 147, affirmed (1986), 13 C.C.E.L. xxxvi (Alta. C.A.), is to a like affect. O'Leary J. (now J.A.) stated at page 152:
>
>> An employee will not be permitted, following termination of his employment, to use for his own benefit confidential information acquired in the course of his employment or information which is 'special or peculiar to his ex-employer'. On the other hand, it is equally clear that following termination of the relationship an employee is free to use for his own benefit or for the benefit of third parties any skill and general knowledge which he acquires during the course of his employment.
>
> (6) Employees who are fiduciaries of their former employer breach those obligations when they take a confidential customer list and use trade secrets of the former employer for use in a competing enterprise. *Tree Savers International Ltd. v. Savoy* (1992), 84 Alta. L.R. (2d) 384 (C.A.).
>
> *Physique Health Club Ltd v Carlsen*, 1996 ABCA 358 at p.358, leave refused, 1997 CarswellAlta 1287 (SCC); see also *IBM Canada Ltd v Almond* at para.97.

[75] Whether fiduciary duties survive for 6 months, 12 months or longer is moot in this case, as there was no “reasonable” cooling off period, whatever that might have been. The time between the resignations of all the directors/CEO and their involvement in a new competing company was minimal, to say the least.

[76] Doug Stebbings and Roxanne Doerksen resigned as directors in October, 2022 but within 3 months, were planning a competing venture. Further, between October, 2022 and the end of

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February, 2023, they were still participating in high level conversations about the business and a possible share purchase in their capacity as shareholders. During this same time, they began to actively recruit SHAC employees with knowledge of the SHAC manufacturing process, client information, equipment and regulatory requirements while all those people were still employed with SHAC and with full knowledge of the contractual obligations of confidentiality owed by those employees to SHAC.

[77] Carson Guenther resigned as CEO on March 15, 2023 and was EHI's CEO within weeks. He admits to having conversations with Doug Stebbings about joining EHI well before he himself resigned. Carson then hired Laurie Penna and Rohdy Hay Rohdy Hay, whom although they are not likely fiduciaries, had signed Confidentiality Agreements. Most of them said the decision to proceed with EHI was made the first week of April or thereabouts. Rohdy Hay says that they were producing product sometime between April and June of 2023.

[78] I am not convinced that any of the Respondents with fiduciary obligations to SHAC were clear of those obligations when they began to act against SHAC's interests.

[79] I return to the fact the SHAC's claim is for misuse of confidential information and/or trade secrets. Conceptually, there is no time limit on using another's confidential information. As Justice Veit noted:

> It is also important in this context to recognize that, where there is a true trade secret, there is no time limit after which the owner of the secret loses its proprietary right. See, for example, the following comments in *Evans*: [Evans v Sports Corp, 2013 CarswellAlta 19]
>
> > 238 There has never been any general requirement for temporal limitations on the wrongful disclosure of truly confidential or proprietary information by former employees. At common law, employees may not disclose their employer's confidences. They are only released from such obligations when the information is no longer confidential or proprietary, or limitation periods have passed. It is illogical to suggest that an employer must, to validly protect its confidences and proprietary information, specify a reasonable date after which a former employee is free to use the information for his own benefit and to the detriment of the former employer. These types of restrictions are not the sorts of restrictions that are *prima facie* in restraint of trade and void, and presumed to be unenforceable.
>
> *Enviro Trace* at para.31.

[80] I therefore conclude that the Applicant has established a strong *prima facie* case that:

1. The SHAC process, as distinct from the ingredients used, is *prima facie* confidential information.
2. Carson Guenther has an enforceable non-competition covenant, which he has breached and continues to breach.

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3. Even if Carson's non-competition covenant was not enforceable, he had common law duties of confidentiality given his position as CEO and his training on the SHAC process.

4. The other Respondents, excepting Doug Stebbings, also have Confidentiality Agreements which were not challenged as being unenforceable.

5. In addition to their contractual obligations of non-competition (for Carson Guenther) and confidentiality for the rest of the Respondents, the three Respondents who formed EHI (Guenther, Stebbings and Doerksen) owed common law fiduciary duties to SHAC, which they also breached.

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2. Irreparable Harm

[81] Where a strong *prima facie* case has been made out on the basis of a breach of a clear covenant - here the contractual and common law duties of confidence owed by the Respondents – the court must still consider the second and third arms of the *RJR-MacDonald* test, although they may be given less weight; *City Wide Towing and Recovery Services Ltd v Poole*, 2020 ABCA 305 at para.26.

[82] Given the case made out here by the Applicant, I agree that some degree of harm can be assumed to result from the Respondents' actions as discussed above. However, the Applicant must still present evidence concerning irreparable harm and I find that it has done so.

[83] I begin with the loss of customers and sales. There are some customers who have already moved their business to EHI. Although I do not think it appropriate to include the sales of product to Stebbings and Doerksen (who were also customers of SHAC) as "lost" sales given the degree of acrimony between these parties, there are other customers who have left too.

[84] For example, Whalen AG, is an American company whose principal met with Carsen Guenther at a trade show in January, 2023 (presumably, his attendance was paid for by SHAC as he was there on SHAC's behalf). After that meeting, Whalen ordered no further product from SHAC and would not return phone calls from Philip Fandrick. Whalen AG has been a customer of EHI from its inception.

[85] While it is often said that tracking sales of defecting customers is the definition of quantifiable damages, for a business in peril, there are other ramifications of this dynamic. For example, SHAC has lost all or virtually all its active employees to EHI. The process of hiring and training new employees or scrambling to cover the operations and administration of a small company are damages that are not easily calculable. That situation, particularly competing against a company that was ready to launch virtually immediately, has put SHAC in an extremely defensive position where it is susceptible, not just to losing existing business but to losing prospective customers to EHI as well (see *Enviro Trace* at para.37).

[86] The fundamental basis of the lawsuit is the misuse of SHAC's trade secret. As Justice Veit pointed out, once a secret is divulged, money cannot make it a secret again; Enviro Trace at para.5.

[87] Philip Fandrick's Affidavit says that SHAC will be put out of business if this injunction is not granted. While EHI says it will also be put out of business if the injunction is granted, that is properly dealt with under the balance of convenience. The Respondents do not deny that a failure to grant this injunction will likely mean that SHAC will lose its entire business.

[88] Carson Guenther argues that his one-year non-competition covenant has almost expired so the Applicant cannot prove irreparable harm. This argument, at its best, still relies on the assumption that SHAC's losses are restricted to customers whose sales have gone to EHI and have been recorded there. I do not accept that assumption for the reasons outlined above. Further, we cannot know exactly which losses are attributable to Carson Guenter. Would Rohdy Hay have left SHAC without Carson asking him to? Would EHI have taken longer to become operational without SHAC's former CEO in their employ?

[89] EHI also complained that SHAC had taken too long to bring its injunction application, specifically by not doing so as soon as Doug Stebbings threatened to compete against SHAC. While there were some indications by June, 2023 (Laurie Penna's employment at EHI, for example, or Doug Stebbings threat to sell a competing product "very soon"), Philip Fandrick says he did not know they were selling a competing product until a customer told him in September, 2023. Whether it was June or September, I find that the Applicant moved with sufficient dispatch.

[90] Accordingly, I find that, to the somewhat lower standard required, SHAC has established irreparable harm has occurred and will continue to occur in the absence of the injunctive relief sought.

3. Balance of Convenience

[91] The third arm of the *RJR-MacDonald* test is the analysis of which party would likely suffer more in the event the injunction is granted or refused. As with the second arm of the test, the burden of proof is lowered on an Applicant having proven a strong *prima facie* case to then prove the balance of convenience also favours the injunction.

[92] The potential impacts on SHAC if the injunction is not granted have been canvassed above. Most importantly, this includes the possibility that SHAC will be driven completely out of business, a prospect that both sides seem to acknowledge.

[93] EHI says they will suffer the same fate if the injunction is not granted. I accept that statement, subject to the length of time until trial. Given that it appears the primary, if not sole, issue is the confidential nature of the SHAC process, perhaps some thought could be given to a streamlined trial or a trial of an issue with limited expert evidence.

[94] In any event, faced with two companies, both of which say they may or will go out of business, the equities must favour the company, which on a *prima facie* basis, has been wronged, not the alleged wrongdoers.

[95] The Respondents have raised the sufficiency of SHAC's undertaking, which I will deal with here. As mentioned, SHAC's financial situation is somewhat precarious, although a deep dive into its financials is not practicable during an already dense injunction application. There was not enough information available to me to confidently say that SHAC's undertaking was sufficient or insufficient.

[96] As EHI had not yet cross-examined on SHAC's financials, it may wish to consider an application for security for costs, although in either case, my own observation is that the Applicant's case is so strong that I would not likely have extinguished its claim on that basis in any event.

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[97] I find that the balance of convenience favours the Applicant, essentially because if someone has to go out of business, it should be the business that should never have been created.

Conclusion

[98] This is a difficult decision because of the stakes. I also have a great deal of sympathy for the minority shareholders of SHAC, given the descriptions of its management. I do not blame them for wanting out and I understand their frustration at seeing an opportunity to have the business succeed but watching that opportunity being thrown away by their co-owners.

[99] Unfortunately, while they may have had some legal options as minority shareholders, they did not have the option, as fiduciaries and parties to confidentiality agreements, of simply taking the core confidential information from SHAC and using it to form a more profitable and functional company. It is a shame that the parties could not have seen a business solution to their disagreements. Perhaps that is still a possibility, pending trial.

[100] The Applicant has established a strong *prima facie* case for breach of contractual and other duties of fidelity and confidentiality. I have not addressed the passing off action as it was not necessary to do so. The Applicant has also established a likelihood of irreparable harm. I have found that the balance of convenience favours the Applicant.

[101] The interlocutory injunction sought - enjoining the Respondents or any of them, from the manufacturing of humic acid products - is granted.

[102] If the parties cannot agree on costs of this application, they may advise my office.

Heard on the 04th day of March, 2024.
Dated at the City of Medicine Hat, Alberta this 25th day of March, 2024.

M.H. Hollins
J.C.K.B.A.

Appearances:

Richard A. Low
for the Applicant

Richard N. Billington, KC
for the Respondents

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