

**COURT OF KING’S BENCH OF MANITOBA**

**B E T W E E N:**

MATIX LUMBER INC.,	) <u>Joshua Sadovnick</u>
	) <u>Sunny Mann</u>
	) for the plaintiff
plaintiff,	)
	) <u>J.A. Kagan</u>
- and -	) <u>Alyssa M. Mariani</u>
	) for the defendant,
TALAL AL-KAZIMI, HURA DEVELOPMENT INC.	) Talal Al-Kazimi
AND AKI DEVELOPMENT,	)
	) <u>Jeff Baigrie</u>
defendants.	) <u>Kara Moore</u>
	) for the defendant,
	) Hura Development Inc.
	)
	) <u>Kalev Anniko</u>
	) for the defendant,
	) AKI Development
	)
	) <u>Judgment Delivered:</u>
	) May 30, 2025

**TOEWS J.**

**INTRODUCTION**

[1] This is a motion by the plaintiff, Matix Lumber Inc. (“Matix”) for an interlocutory injunction against the defendants in respect of conduct in connection with customers, employees and subcontractors of Matix and in relation to confidential information of Matix

allegedly in the possession of the defendants. The motion also includes a request to enjoin the defendants from passing off as Matix personnel or affiliates, and a *Mareva* injunction and/or attachment order and related relief.

[2] It is the position of the defendant Talal Al-Kazimi (“Talal”) that he was wrongfully terminated from his employment with Matix and that Matix filed these motions based on unfounded allegations of wrongful conduct to justify both Talal’s termination and these motions for extraordinary injunctive relief. The wrongful conduct complained of by Matix consists of allegations that Talal diverted funds and opportunities from Matix, breached restrictive covenants in the employment agreement and breached other common law and fiduciary duties owing to Matix by Talal.

[3] The defendant Hura Development Inc. (“Hura”) is a general contractor which provides construction services to various communities, including First Nation communities in Northern Manitoba. The principal of Hura is Bassel Al-Kazimi (“Bassel”), the brother of Talal. It appears that the Matix claim against Hura is premised on the basis that Hura wrongfully benefited from wrongs allegedly committed by Talal by participating in a fraudulent scheme with Talal to the detriment of Matix.

[4] The defendant AKI Development Inc. (“AKI”) is the business name of a sole proprietorship carried on by a First Nations individual named Wallace Seymour (“Seymour”). Seymour has been operating as a building contractor under his own name and subsequently under the name of AKI for approximately a decade in total. It is in competition with Matix. There does not appear to be a specific independent claim against AKI by Matix, but rather there is an allegation by Matix that AKI is a tool being used by

Talal to improperly obtain work through conspiracy or fraud from First Nations communities that would otherwise have gone to Matix.

### **A SUMMARY OF THE EVIDENCE**

[5] Over the years Matix has offered building services including both on-site residential construction as well as commercial construction. It claims that the services it provides include turn-key rapid housing and that they provide specialized work that involves only a few service providers.

[6] Talal is a former Matix employee who had been with Matix for several years, and since February 5, 2024, pursuant to a specific agreement, as Matix's Chief – Northern Sales & Operations Officer (the "Employment Agreement"). The Employment Agreement purports to terminate all prior agreements between those two parties save that the employment relationship also includes the provisions of the Matix Employee Handbook (the "Employee Handbook"). The Employee Handbook is specifically incorporated into Talal's employment agreement by the terms of the Employment Agreement.

[7] The Employment Agreement and/or the incorporated terms of the Employee Handbook (collectively referred to as the "Agreements"), require Talal to return all of Matix's property upon termination and specifically sets out that Talal is in a fiduciary relationship with Matix. The Agreements require that Talal not engage in any other business or occupation without the consent of Matix or participate in any activity that would conflict with his employment duties and obligations. The Agreements prohibit the unauthorized disclosure of confidential information belonging to Matix and sets out an extensive and detailed list of what constitutes confidential information.

[8] The Agreements also provide for restrictive covenants in the form of confidentiality, non-solicitation and non-competition clauses as well as an injunctive relief clause whereby the parties agree that any breach of the restrictive covenants by Talal entitle Matix to enforce its contractual rights through injunctive relief without proof of actual damages.

[9] Matix alleges that on February 26, 2025, it discovered that Talal had misled Matix in respect of certain work he had been doing for two First Nations communities, White Dog First Nation ("WDFN") and Whitefish Bay First Nation ("Whitefish Bay"). Matix considered both communities to be its clients. Matix alleges that Talal advised that funding applications for housing related construction to a federal agency ("RHI Funding Applications" or "RHI") made on behalf of these two communities were unsuccessful. In fact, the applications were successful, and Matix alleges that Talal had improperly diverted the project work to Hura which is controlled by Bassel.

[10] The affidavit material filed by Matix states that Bassel lived in Saudi Arabia between 2014 and 2022 and during that time did not work in construction nor was he involved with projects similar to the RHI Funding Applications. Hura was incorporated approximately five months prior to becoming involved with WDFN. Matix disputes Hura's position that he met the chief of WDFN at a convention in Winnipeg and that Bassel became aware of the potential RHI project through the chief of the WDFN and not through his brother. Bassel's position is that he made the pitch for the RHI project directly to the WDFN chief and without the help, influence or involvement of his brother.

[11] Bassel stated that on August 23, 2023, he and the WDFN chief signed a contract for approximately \$10 million, but Matix notes that the contract has not been produced by either Hura or the WDFN chief. Payment was made to Hura by way of a cheque in the amount of approximately \$5.7 million. The cheque was payable to Hura, but was delivered to Talal and not Hura.

[12] Matix stated that WDFN reached out to Matix when Talal requested an additional \$2.5 to \$2.7 million in furtherance of the contract and that WDFN was under the impression that Talal was working for Matix on the RHI contract. Matix stated that Talal was not acting on its behalf in respect of the contract with WDFN.

[13] Matix stated it learned that on about March 4, 2025, Talal, Hura and AKI had commenced working on a RHI project for Whitefish Bay and that Talal had repeatedly misrepresented Hura as a Matix affiliate. Furthermore, Matix learned that Talal was involved in work on a RHI project with a third First Nation ("OPCN") and that he attempted to divert additional work from Matix, who considers OPCN its client as well.

[14] Matix stated that on or around December 1, 2023, Talal entered into an agreement with OPCN for the design and build of ready-to-move houses and that Talal caused OPCN to believe that it was entering into this agreement with Matix. Matix alleges that payments made to Talal, and companies related to him, by OPCN were made under the impression that it was paying Matix for the homes.

[15] In response to the evidence presented by or on behalf of Matix, Talal's evidence is that he was wrongfully terminated from his employment with Matix and that the allegations of wrongful conduct on his part are unfounded. It is his evidence that he was

given express permission by Matix's former principal to engage in non-Matix work and that the three First Nations referenced in the material – WDFN, Whitefish Bay, and OPCN – decided to choose a service provider other than Matix.

[16] Talal admits that as a result of his work with Matix, he learned about the unique challenges that First Nations face with respect to housing and construction projects, and that in the course of his employment he developed strong personal relationships with many of the people he worked with and for in those communities. He notes that Matix is primarily a building material supplier and a general contractor for the construction of ready-to-move ("RTM") residential houses. Matix relies primarily on subcontractors to build the RTM houses that it supplies and has several competitors in the building supply and pre-built home industries.

[17] Talal stated that in his role of Chief – Northern Sales and Operations, he was responsible for preparing proposals as well as building material packages and drawings. He oversaw building material orders and was responsible for ensuring the timely delivery of product. He provided support to those working directly on the projects and ensured that clients were kept informed of the status of the projects.

[18] It is Talal's evidence that he had no responsibility for the hiring and firing of staff or the ability to make decisions about salary increases, or disciplinary action against employees without the approval of the principal of Matix, Sue Matic. In respect of the management of projects, including the purchasing of material or the development of the company's business strategy, he was not ordinarily responsible for these tasks or for carrying out management responsibilities generally.

[19] Tamal stated that when he joined Matix, he was authorized by the former principal of Matix, Ms. Matic's father Tony, to continue to carry on his own design work and worked with Ms. Matic through another corporation ("1014"), which since its incorporation in 2014, has actively competed with Matix by doing construction work in Northern Manitoba. He stated that the incorporation of 1014 was Ms. Matic's idea and was intended to allow her to avoid the sharing of profits with her business partner in Matix.

[20] Talal stated that the involvement of AKI with the project on the OPCN First Nation was the decision of that First Nation and it was hired to perform work for the OPCN project involving the construction of four RTM houses. He stated he is not involved with AKI, including the decision to award AKI the OPCN project.

[21] It is the affidavit evidence brought on behalf of AKI that it is not bound by any restrictive covenants and owes no legal duties to Matix. AKI stated that the evidence does not demonstrate that it is a part of a plan to assist Talal to steal or otherwise improperly take work on First Nations communities that these communities were contractually required to give to Matix.

[22] The defendant Hura denies that it benefited from wrongs committed by Talal by participating in a fraudulent scheme as alleged by Matix. It stated that it is a general contractor providing construction services to First Nations communities. Bassel stated in his evidence that he is a permanent resident of Canada who graduated from the University of Manitoba. After graduation he worked primarily on the Rosseau River Anishinabe First Nation where he inspected RTM homes for an engineering and project management company. He spent a number of years working in the Middle East, returning

to Canada in 2022 with his family. He travels periodically to the Middle East where he works as a consultant. He stated that he established connections with First Nations communities by attending several general assemblies and meetings. It was through the connections he developed which he states led to the contracts with First Nations communities, including the WDFN housing project.

### **THE ISSUE RAISED BY THIS MOTION AND THE APPLICABLE LAW**

[23] The primary issue raised by this motion is whether Matix is entitled to injunctive relief against the defendants. Other preliminary or secondary issues can be considered and dealt with in the context of the request for injunctive relief.

[24] The parties are agreed that the test for the granting of injunctive relief is set out in ***RJR MacDonald Inc. v. Canada***, [1994] 1 S.C.R. 311 (SCC). There are three elements to this test including:

- a) Is there a serious issue to be tried?
  - b) Would the applicant suffer irreparable harm if the injunction is not granted?
- and
- c) Does the balance of convenience favour the granting of an injunction?

[25] The three parts of the test are interrelated and should not be considered as isolated hurdles (***Apotex Fermentation Inc. v. Novopharm Ltd.***, [1994] 95 Man.R. (2d) 241 (Man. C.A.)).

[26] While the parties are agreed upon the applicability of the test set out in ***RJR***, there is a significant difference between the position of the plaintiff and the defendants in respect of the threshold that needs to be established in respect of the “serious issue to

be tried” element. It is the plaintiff’s position that the threshold for a serious issue to be tried is very low, requiring only a preliminary and tentative assessment of the merits of the case. It stated that unless the case is frivolous and without merit, the court should proceed to consider the second and third elements of the test. This is in marked contrast to the position of the defendants who argued that in cases such as this one, where the plaintiff is seeking to enforce a restrictive covenant, establish an alleged breach of fiduciary duty, or establish an alleged breach of a duty of confidentiality, it must meet the higher threshold of a strong *prima facie* case as opposed to simply showing a serious issue to be tried. The defendants rely on the decision of ***People Corp. v. Mansbridge***, 2022 MBCA 37 (QL), where the court held at paras. 2-3:

**2** The plaintiff (People) sought an interlocutory injunction against the defendant, Steven Mansbridge (Mansbridge), its former employee, and his new employer, HUB International Limited and HUB International Manitoba Ltd. (collectively, the HUB defendants), to enforce restrictive covenants and a confidentiality clause in its employment contract with Mansbridge. The motion was dismissed.

**3** This appeal raises the issue of the standard that should be applied when considering the test set out in *RJR — MacDonald Inc v Canada (Attorney General)*, 1994 CanLII 117 (SCC), [1994] 1 SCR 311, to assess the availability of an injunction. More particularly, with respect to restrictive covenants in an employer/employee relationship, on the first branch of the test should the Court consider whether the applicant has shown a strong *prima facie* case (as adopted by the motion judge) or need merely show a serious issue to be tried? For the reasons set out below, we are of the view that, when seeking to enforce restrictive covenants in an employment contract not involving a commercial sale of property, a “strong *prima facie* case” standard should be applied (RJR at p 340).

[27] In light of this decision and the nature of the dispute involving the employment relationship between the plaintiff and the defendant Talal, it is the “strong *prima facie* case” that should be applied here when considering the first element of the ***RJR*** test. I note that while the other two defendants are not connected to the plaintiff by virtue of

an employment relationship, their potential liability, if any, arises out of allegations that they improperly collaborated with Talal utilizing skills, knowledge and other information which Talal allegedly obtained and improperly retained as a result of his employment relationship. In my opinion, the plaintiff's case is substantially, if not entirely dependent upon this employment relationship and without demonstrating wrongdoing by Talal in connection with that relationship, there is no basis to find the other two defendants liable to the plaintiff.

[28] In addressing the second and third elements of the **RJR** test, the court in ***Dentalcorp Health Services Ltd. v. Dr. Kenneth Hamin Dental Corp.***, 2024 MBCA 44 (CanLII) held:

Irreparable Harm and Balance of Convenience

[40] Before turning to the positions of the parties, I will briefly touch on the second and third elements in the RJR-MacDonald test.

[41] Irreparable harm and balance of convenience must always be considered on a motion for an interlocutory injunction. As RJR-MacDonald made clear, a judge has the discretion to assign weight to the different aspects of the test as they see fit. Examples of irreparable harm include "where one party will suffer permanent market loss or irrevocable damage to its business reputation" (ibid at 341).

[42] While pre-dating RJR-MacDonald, this Court's decision in Miller is not necessarily inconsistent with it on this point. Miller did not definitively say that irreparable harm and balance of convenience never need to be considered on a motion for an injunction to enforce a restrictive covenant in a commercial context. Although Twaddle JA found that the application judge erred in principle in finding that "proof of irreparable harm [was] an indispensable requirement" (ibid at 2), he ultimately concluded (ibid at 5):

That is not to say that either the absence of irreparable harm or the presence of a much greater inconvenience to the covenantor is totally irrelevant. It is a question of emphasis. What it means is that, when a negative covenant of this kind is reasonable on its face, the person who gave it will have a heavy burden to show that his escape from the bargain will not cause irreparable harm to the covenantee and that the balance of convenience so substantially favours him (the person who gave the covenant) that it would be unjust to restrain his activities until the trial.

[43] Post-RJR-MacDonald jurisprudence supports the principle that irreparable harm and balance of convenience must be considered but can appropriately be given less emphasis (see *City Wide* at paras 27-28).

### **THE POSITON OF THE PLAINTIFF**

[29] In the preceding paragraphs I have determined that it is a strong *prima facie* case that the plaintiff must demonstrate here rather than simply: “Is there a serious issue to be tried?” Accordingly, I do not accept the position of the plaintiff to the extent it is advancing an argument for an interlocutory injunction based on the less stringent interpretation of the first element of the **RJR** test.

[30] Nevertheless, it is still incumbent upon the court to determine whether the evidence relied upon by the plaintiff meets the more stringent test of a “strong *prima facie*” case. In advancing its position that the first element of the **RJR** test has been met, the plaintiff attacks the affidavit evidence of the defendants as being “self-serving and largely unsupported by the evidence.” (para. 5 of the brief of the plaintiff)

[31] In support of its own position, the plaintiff relies on its agreements with Talal as establishing a fiduciary relationship between Talal and Matix. It stated that this relationship is enforced by *inter alia*, a “robust” confidentiality clause governing a broad range of information including business plans, pricing, costs, customer/client lists, strategies, plans, and any proposals. The plaintiff also relies on restrictive covenants in the form of confidentiality, non-solicitation and non-competition clauses, as well as an injunctive relief clause whereby the parties agree that any breach of the restrictive covenants by Talal entitles Matix to enforce its contractual rights by injunctive relief without proof of actual damage.

[32] Against the backdrop of the Agreements, Matix takes the position that Talal was not truthful about the status of various funding applications in which it was interested and that Talal had improperly diverted successful funding applications to Hura and to AKI. It disputes the defendants' position that Hura's principal, Bassel, obtained contracts with various communities independently of Talal. Matix argued that both Talal and Bassel acted in concert to obtain those contracts using Talal's position and the knowledge he acquired as a fiduciary. Furthermore, the plaintiff stated that the evidence demonstrates that Talal misled the First Nations communities and their leadership leading them to believe that he was acting on behalf of Matix while acquiring those contracts.

### **THE POSITION OF THE DEFENDANTS**

[33] Given the basis upon which the plaintiff is advancing its motion for an interlocutory injunction, all of the defendants are advancing a substantially similar position in respect of the employment relationship between Matix and Talal in opposing the motion. However, in addition to the arguments based upon that relationship, Hura and AKI are taking the position that they have no employment, contractual or other relationship with Matix which could form the basis for injunctive relief against them.

[34] All three defendants take the position that a moving party (the plaintiff here) must show a strong *prima facie* case when seeking to enforce a restrictive covenant against a departing employee. In this respect they rely on the decision of the court in ***People Corp.*** at para. 31 where the court held:

**31** ... We are satisfied that, taking into consideration the policy reasons and pronouncements of the Supreme Court, such as *Shafron*, with respect to the requirement that restrictive covenants, in the context of an employer/employee relationship and contract, be strictly reviewed, a strong *prima facie* test on the first

branch of the RJR test is to be preferred and should be used. The motion judge did not err in law in choosing to do so in this case.

[35] Similarly, the defendants take the position that the strong *prima facie* requirement also applies to claims such as alleged breach of fiduciary duty and duty of confidence allegations. The authorities relied on in this respect include **1731271 Albert Inc. v. Reimer**, 2024 ABKB 466 (QL) where the court held at paras. 21- 26:

**21** In terms of the law, counsel agreed that the modified RJR-MacDonald test applies. The first part of the test requires the Court to consider the strength of the plaintiff's case. In the modified test, the threshold of "serious issue to be tried" is replaced with "strong prima facie case".

**22** It is agreed that Alberta jurisprudence establishes that the "strong prima facie case" threshold applies where breach of fiduciary duty is alleged, a finding of which might lead to a prohibition equivalent to the enforcement of a restrictive covenant.

**23** The cases supporting this proposition include: • Orbis Engineering Field Services v Taifa Engineering Ltd, 2019 ABQB 510 at para 54; • GG & HH Inc v 2306084 Alberta Ltd, 2022 ABQB 58 at paras 90-92; and • SHAC Solutions v Guenther, 2024 ABKB 145 at para 46.

**24** Noteworthy for this case is that the elevated standard of "strong prima facie case" applies to both the existence of the fiduciary duty and its breach, as well as to the allegation of misappropriation of confidential information: GG & HH at para 92.

**25** The strong prima facie case standard requires the applicant to show it will "probably prevail at trial" or is "likely to succeed at trial": BrettYoung Seeds Limited Partnership v Dyck, 2013 ABQB 319 at para 84 and the cases cited therein.

**26** The remaining two parts of the RJR-MacDonald test for an injunction remain in place for cases of breach of fiduciary duty. They are:

- \* irreparable harm to the plaintiff; and
- \* whom the balance of convenience favors.

[36] In advancing his argument that Matix has failed to meet its burden in establishing a strong *prima facie* case in respect of the allegations against him, Talal argued that the

injunction motion is broader than the request for relief set out in its statement of claim. While the claim simply seeks a prohibition against solicitation, in its motion Matix requests an injunction against both solicitation and competition. Accordingly, Talal argued that the motion in respect of competition should be dismissed out of hand.

[37] As it relates to Matix's demand that Talal should be restrained from soliciting clients, suppliers, or contractors of Matix, Talal submits this claim is based on the position that he is bound by the non-solicitation provisions in his Employment Agreement. In this regard, Talal points out that section 6.7.1 of the Employment Agreement is the only provision that speaks to solicitation but does not include a section or any wording that Talal should not solicit. It simply states that:

6.7.1. "Solicit or perform work for any client of Matix for whom the Employee performed services in the two-year period immediately preceding the termination of this Agreement.

[38] Talal points out that while sections 6.6.1 and 6.6.2 of the Employment Agreement purports to provide Matix with injunctive relief, those provisions relate to the protection of Matix's intellectual property and not to any solicitation provisions.

[39] Talal argued that Matix's attempt to rely upon the non-solicitation provisions in section 10.1 of the Employee Handbook raises a problem for Matix in that the Employee Handbook contains a non-solicitation provision materially different from section 6.7.1 of the Employment Agreement. Section 10.1 provides:

#### 10.1 Non-Competition & Solicitation

During the course of employment at Matix and for one year following, within the province of Manitoba, refrain from either directly or indirectly soliciting or attempting to solicit the business of any customer of Matix for their own benefit or that of any third party or organization. Employees also shall refrain from either

directly or indirectly attempting to obtain withdrawal from Matix of any other employee of Matix having regard to the same geographic and temporal restrictions.

[40] Talal argued that the two provisions contain materially different terms as to the length of the non-solicitation period, the geographic scope of the restriction and the identification of the clients of Matix who cannot be solicited.

[41] Restrictive covenants contained in an employment agreement and given for the benefit of an employer are subject to a higher level of scrutiny by the courts given the presumed power imbalance between the parties and as a result restrictive covenants in employment relationships are presumed to be unreasonable unless demonstrated otherwise. It is the position of Talal that the inclusion of both of these provisions in the employment contract of Talal with Matix creates an ambiguity that is fatal to the enforceability of the restrictive covenant and consequently to the motion for injunctive relief.

[42] Furthermore, it is the position of Talal that where the wording of a restrictive covenant does not allow an employee to identify what customers to avoid, the clause is too ambiguous to be enforceable. He argued that even if he could determine what is meant by a "customer of Matix" he has no way of knowing who becomes a customer of Matix in a future one or two-year period.

[43] In addition, Talal argued that the evidence does not establish a strong *prima facie* case he engaged in the solicitation of any customers or clients of Matix during his employment with Matix or afterwards. He stated that it was as a result of the initiative

of the leadership in the various communities contacting him to assist them with their work rather than any solicitation on his part.

[44] Talal also disputes that the evidence establishes a strong *prima facie* case that he owed a fiduciary duty to Matix. He argued that his actual authority or control over Matix's operation is not such that gives rise to any fiduciary obligations and simply stating that it does in the Agreements is not sufficient to establish that relationship without the appropriate evidence. Talal also argued that Matix has failed to demonstrate that the components for the test for the tort of passing off have been met or that there has been any breach of confidentiality on his part.

[45] Talal takes the position that Matix is not entitled to the freezing orders it seeks, including a *Mareva* injunction as Matix has not provided sufficient evidence that there is any intention on his part of frustrating any judgment which Matix might ultimately obtain in this case.

[46] Generally, the position of Talal is that the injunctive relief being sought is overly broad in respect of what he be prohibited from carrying out and without appropriate evidence in respect of requesting orders freezing his assets.

[47] In advancing its position, Hura stated that the civil fraud claim of Matix against it fails in that Matix has not pleaded any of the essential elements of fraud identified by the Supreme Court of Canada in ***Bruno Appliance and Furniture Inc. v. Hryniak***, 2014 SCC 8 (QL) in its statement of claim. Those elements are identified by the court in ***Bruno*** as follows:

**21** From this jurisprudential history, I summarize the following four elements of the tort of civil fraud: (1) a false representation made by the defendant; (2)

some level of knowledge of the falsehood of the representation on the part of the defendant (whether through knowledge or recklessness); (3) the false representation caused the plaintiff to act; and (4) the plaintiff's actions resulted in a loss.

[48] Similarly, in respect of the allegation of conspiracy against Hura by Matix, Hura stated that Matix's pleadings do not set out the essential elements of the tort against Hura, nor does the evidence establish the requisite elements of a civil conspiracy claim. It relies on the decision of the court in **Gomes v. Laporte**, 2020 MBQB 152 (QL), where the court set out the essential elements of this claim as follows:

**33** In **Driskell v. Dangerfield**, 2007 MBQB 142, 217 Man.R. (2d) 124 (QL), the court held:

**28** In *Hunt v. Carey*, Wilson J. adopted Professor Fridman's explanation of the tort of conspiracy as a correct statement of the law. She said (*supra*, at pages 985-986):

As Fridman has noted in *The Law of Torts in Canada*, vol. 2, at ...

...

Fridman goes on to observe at pp. 265-66:

In modern Canada, therefore, conspiracy as a tort comprehends three distinct situations. In the first place there will be an actionable conspiracy if two or more persons agree and combine to act unlawfully with the predominating purpose of injuring the plaintiff. Second, there will be an actionable conspiracy if the defendants combine to act lawfully with the predominating purpose of injuring the plaintiff. Third, an actionable conspiracy will exist if defendants combine to act unlawfully, their conduct is directed towards the plaintiff (or the plaintiff and others), and the likelihood of injury to the plaintiff is known to the defendants or should have been known to them in the circumstances.  
[emphasis added]

**29** While Fridman describes three situations, one can divide the tort of conspiracy into two categories, distinguished by the defendants' intent. There will be a conspiracy where:

- (1) the defendants agree to act, by lawful or unlawful means, with the predominant purpose of injuring the plaintiff, or
- (2) the defendants agree to commit unlawful acts directed at the plaintiff which they knew or should have known would injure the plaintiff.

[49] I would note the brief of Hura addresses a number of other causes of action which form the basis of Matix's request for an interlocutory injunction. However, given my findings in this case, it is not necessary to summarize each of the causes of action pled other than to state I have considered the submissions of the parties in respect of those causes of action including:

- a) whether the claim of unlawful interference with economic relations includes the essential element of economic injury to a third party by Hura;
- b) Whether Matix's claim for conversion states precisely what "confidential information" or "property" that Hura allegedly converted; and
- c) Whether there is a failure by Matix to plead the essential elements of a passing off action.

[50] Aside from the failure evident in Matix's pleadings, Hura stated that there is a failure to present evidence to meet the evidentiary burden in respect of the first element of the **RJR** test. It is the position of AKI that there is no evidence that could amount to a strong *prima facie* case it was engaged in an unlawful scheme with the other co-defendants, and there is no evidence that AKI received or diverted opportunities intended for Matix.

[51] AKI stated that Matix is improperly attempting to assert a monopoly over the federal government's Rapid Housing Initiative (RHI) and it has put forward no authority which would support such a broad restriction against competition, or any form of restriction, on a competitor. AKI points out that it has performed work of various scopes and scales for First Nations, primarily working as a subcontractor on First Nations projects

since 2021. The principal of AKI, Seymour, advised he has never been employed by Matix, has never held himself out as such, nor has he held himself or AKI out as being part of or related to Matix in any way.

## **DECISION**

[52] After a review of the voluminous material filed by the parties, in support of or opposing the granting of an interlocutory injunction, I have concluded that in order to be successful in its motion for an interlocutory injunction, requires that the moving party Matix must first establish that it has a strong *prima facie* case against all or any of the defendants. In applying that test, I have concluded that Matix has not established that there is a strong *prima facie* case.

[53] There are apparent, indeed some might suggest, somewhat remarkable coincidences and coordination in and of the work performed by the defendants, and in particular between Talal and Hura, that may give rise to adverse speculations and suspicions concerning their conduct. However, in my opinion, these suspicions and speculations do not rise to the level of a strong *prima facie* case at this point. Those speculations and suspicions may be fleshed out and substantiated by evidence presented during a trial where *viva voce* evidence will be presented. However, at this point, I am not prepared to rely on any of the evidence here as being sufficiently reliable to the extent that would allow me to conclude that the first element of the **RJR** test has been met by the plaintiff. This includes evidence related to the extent to which Matix and its principal agreed to allow Talal to work on projects outside the scope of his employment, or for reasons related to the shared ownership structure of Matix with a third party, that Matix's

principal participated with Talal on projects in order to directly compete with Matix's business.

[54] However, it is not simply the nature of the evidence here that leads me to the conclusion that a strong *prima facie* case has not been made out. In particular, I have grave concerns concerning various provisions in the agreements which purport to set out the terms of the employment relationship between Matix and Talal.

[55] My first area of concern is the confidentiality clauses found at sections 6.3 and 6.4 of the Employment Agreement and section 10.3 of the Employee Handbook, all of which form part of the terms of Talal's employment with Matix. Section 6.3 of the employment agreement provides:

The Employee shall not, either during the course of their employment with Matix or at any time thereafter, for any reason whatsoever, directly or indirectly, disclose the private affairs, secrets or confidential information of Matix (which shall include the private affairs, secrets or confidential information of any corporate or other organization affiliated with Matix) to any person, firm or corporation other than for the purposes of Matix.

[56] Section 6.4 of the employment agreement is lengthy, but it is instructive to reproduce it in full in order to get a flavour of the breadth of this provision:

In the course of performing your duties, you may have access to, and may be entrusted with trade secrets, trademarks or other proprietary and confidential information and knowledge belonging to Matix Lumber Inc. or the Matrix Group of Companies, including but not limited to: employment compensation information, business plans, pricing, costs, customer/client lists and related information, strategies, plans, proposals, policies, confidential techniques, processes, ideas, trade secrets, know-how, private or internal business discussions concerning present and contemplated business activities of, and all other information of a confidential nature relating to the business of, or to be used by, Matix Lumber Inc. and/or the Matix Group of companies or its subsidiaries and affiliated corporations (collectively the "Confidential Information"). You agree that the unauthorized disclosure of any Confidential Information in any manner would be highly detrimental to the interests of Matix Lumber Inc. and/or the Matix Group of Companies. You agree that the Matix Group of Companies and/or Matix Lumber

Inc. has the proprietary right to protect the confidentiality of the Confidential Information. Accordingly, you agree that you will not disclose or permit to be disclosed, either during the continuance of your employment or at any time thereafter, for any reason, the disclosure of such Confidential Information to any person, nor will you use or permit the use of Confidential Information for any purposes other than those of Matix Lumber Inc. and/or the Matix Group of Companies. All files, records, recordings, documents, customer names, pricing, customer – related information, equipment or other items and Confidential Information relating to the business of Matix Lumber Inc. and/or the Matix Group of Companies, whether prepared by you or otherwise coming in your possession, shall remain the exclusive property of Matix Lumber Inc. and/or the Matix Group of Companies and shall not be removed from the premises of Matix Group of Companies and/or Matix Lumber Inc. without Matix Lumber Inc. and/or the Matix Group of Companies consent, and shall be returned by you immediately to Matix Lumber Inc. and/or the Matix Group of Companies upon request, and within one business day of termination of your employment, for any reason.

[57] It is difficult to imagine what piece of corporate information or scrap of paper, with the possible exception of the toilet paper in the company washrooms, would not be covered as confidential information by this provision.

[58] Section 10.3 of the Employee Handbook addresses the issue of confidentiality in this manner:

As an employee of Matix, you agree to regard the activities and the development of the business and interest of Matix and/or its customers, as confidential information and will make every effort to ensure that such information is not divulged, either directly or indirectly, to any individual or organization other than Matix, its employees or customers concerned. This agreement shall continue in effect for the benefit of Matix, throughout your employment with Matix and for a period of 24 months after termination of employment.

[59] It is unnecessary for me to attempt to specify each of my concerns with these provisions, other than to say these provisions, and in particular section 6.4 of the Employment Agreement, are when considered in their totality, incomprehensible. I agree with the submission of Talal that these provisions when considered as a whole in the

context of the Agreements purporting to bind Talal are decidedly ambiguous and overbroad and therefore unreasonable and unenforceable.

[60] I am also concerned about the ambiguity created by separate provisions regarding non-solicitation found in both the Employment Agreement and the Employee Handbook, both of which are part of the employment relationship between Talal and Matix. Aside from the apparent oversight on the part of the drafter at section 6.7.1 of the Employment Agreement in failing to specify who is not to solicit, it is clear that the non-solicitation clauses in the Employment Agreement and the Employee Handbook are at odds with each other in material respects.

[61] First, the two provisions are materially different as it relates to the length of the non-solicitation period (no limitation in the Employment Agreement as opposed to one year in the Employee Handbook). Second, there is no restriction in terms of geography in the Employment Agreement while the Employee Handbook specifies Manitoba only. Of note, two of the First Nations communities in respect of which Matix raises concerns in respect of Talal's conduct are located in Ontario and not Manitoba. Third, the definitions of the customers whose services cannot be solicited are not consistent. One provision specifies it is customers for whom the employee performed services while the other refers to "any" customer of Matix. Given the nature of the industry in which Matix is involved, the language of "any customer of Matix" is impossible to determine with any certainty.

[62] In my opinion, the contradictions between the non-solicitation provisions in both documents, the Employee Handbook having been specifically and expressly incorporated into the employment contract, create an ambiguity that makes them unenforceable when

considering them in the context of this motion for injunctive relief. In light of my finding that the non-solicitation clauses are ambiguous and therefore unenforceable it is not necessary for me to determine whether Talal in fact breached the non-solicitation clauses; indeed, given the extent of the ambiguity it would not be possible for me to do so.

[63] The recent decision of Greenberg J. in *TopTierBenefits Inc. v. Flaten et al.*, 2025 MBKB 53, is instructive here and I have applied her reasoning to the facts of this motion. At para. 51 of that decision Greenberg J. held:

[51] The non-solicitation clause prohibits shareholders from soliciting business similar to the business of TTB from “a customer of the Corporation or an associate of affiliate of any such customer.” The problem with this clause is that it continues in effect for 24 months after Flaten ceases to be a shareholder. While Flaten would know who TTB’s customers are while he works for the company, he would have no way of knowing who becomes customers after he leaves (see *dB Noise Reduction Inc. v. Letkeman et al.*, 2022 MBKB 208, at para. 59). The wording of the clause does not allow Flaten to identify what customers to avoid and for that reason is too ambiguous to be enforceable.

[64] It appears to me that the ambiguity in the non-solicitation provisions in the case at bar is even more egregious than the provision considered in *TopTierBenefits*. As a result of my findings in the preceding paragraphs, it may not be necessary to determine whether Talal breached a fiduciary duty not to solicit Matix’s customers. However, on the assumption that a fiduciary duty may be enforced independently of the specific wording of the Agreements, given the inherent inequality in the employer/employee relationship in setting the terms of an agreement, and the specific evidence here, I am not satisfied that Talal’s employment relationship with Matix amounts to a fiduciary relationship even if he specifically acknowledged being a fiduciary in the Employment Agreement. While Talal may have been a valuable employee of Matix and held an

impressive title, I am not satisfied with the evidence that he is in a fiduciary relationship with Matix.

[65] In determining that Talal is not a fiduciary on the facts before me, I have again considered the reasons of the court in ***TopTierBenefits***. Although there is some dispute in the case law in respect of the test to be applied in order to determine whether an employee is a fiduciary, I am satisfied on the basis of the facts here that whatever test is applied – the “key employee” test or the “ad hoc fiduciary relationship” (see ***TopTierBenefits*** at paras. 32-35), the evidence does not establish a strong *prima facie* case that Talal owed Matix a fiduciary duty. Specifically, the evidence does not establish that Talal was an integral and indispensable component of the management team responsible for guiding the business affairs of Matix, that he was necessarily involved in the decision-making processes of the company, or that he had broad access to confidential information that, if disclosed, would significantly impair the competitive advantages that Matix enjoyed. Matix has failed to show that Talal exercised sufficient power, discretion, or control, or that Matix was sufficiently dependent on or vulnerable to Talal to establish a fiduciary duty to Matix.

[66] I note that Matix has also advanced what I would loosely term as secondary grounds to obtain an interlocutory injunction or a freezing order against the assets of the defendants. This would include an allegation that the defendants, and in particular Talal has engaged in the tort of passing off or that the defendants should be enjoined on the basis that they may engage in conduct harmful to the plaintiff in the future. In my opinion, these allegations suffer from the same lack of evidentiary support that has led

me to the conclusion that the plaintiff has not established a strong *prima facie* case. The plaintiff's request for a *Mareva* injunction or a freezing of the defendants' assets, as well as the request for an attaching order pursuant to ***The Court of King's Bench Act***, C.C.S.M. c. C280, and the applicable King's Bench Rule, also fall short of the evidence required in forming the basis for what are quite exceptional remedies requiring the clearest of grounds.

[67] Although I have often dealt jointly with all three defendants in the preceding paragraphs, I will add a few comments to make it clear that not only does the evidence here not establish a strong *prima facie* case in respect of Talal, but that the strength of the evidence in respect of Bassel is much thinner. All of the facts here, including that these two brothers, Talal and Bassel, are operating in the same industry pursuing many of the same clients and are seeking funding under the same government programs, may raise an eyebrow at the suggestion that this is simply coincidence. Nevertheless, my suspicions and speculations based on the evidence before me is not sufficient to allow me to arrive at any other conclusions than the ones I have arrived at in finding there is no strong *prima facie* case established in respect of Bassel, especially considering he has never been an employee of Matix nor is he bound by contract to any of the restrictive covenants that Matix is advancing in its arguments in respect of Talal.

[68] Furthermore, I must say that the material attempting to tie AKI into a conspiracy or other untoward conduct involving Talal and Bassel is simply nonexistent. Based on the evidence here, I am puzzled why this subcontractor was singled out by the plaintiff from among any others performing similar work for similar clients on contracts of a similar

nature with similar sources of funding. Even if I were to apply the least stringent test in considering the plaintiff's motion for injunctive relief, finding the evidence to support it would be akin to trying to identify shadows at midnight without the benefit of any light. Should the plaintiff elect to pursue the claim against AKI to trial, I trust that the evidence presented at that time will provide the trial judge with the benefit of some greater evidentiary insight into the basis of the action against AKI.

[69] The plaintiff has not met the evidentiary requirement for establishing the first element of the **RJR** test in respect of any of the three defendants. However, it is unclear from the case law whether the plaintiff can still succeed if on a balancing of all three elements, interlocutory injunctive relief should nevertheless be granted. Accordingly, in view of this uncertainty I will also provide brief reasons in respect of the second and third elements of the **RJR** test and ultimately balance all three elements in considering whether interlocutory injunctive relief should be granted.

[70] In respect of the second element, that of irreparable harm, it is trite law to state that on a motion for an interlocutory injunction that the harm has to be of such a nature that it cannot be addressed by damages. While there may be some difficulty in quantifying some aspects of the alleged damages suffered by Matix, in my opinion these are not sufficient to prevent the greater part of the damages from being identified and quantified. I note that in respect of whether the harm here is irreparable, counsel for Hura has submitted at para. 254 of its brief that:

254. To start it is plain that damages are an adequate remedy; there is no irreparable harm. Indeed, Matix purports to quantify its loss, alleging "\$4 million in lost profits", albeit, absent any evidence of lost profit beyond a bald assertion. One may assume, given Matix's assertion of lost profit, that it is capable of quantifying whatever losses it allegedly sustained.

[71] In *Parrish & Heimbecker, Ltd. v. Delmar Commodities Ltd.*, 2012 MBQB 48 (QL), and as subsequently confirmed in *People Corp.*, the court held the plaintiff has the onus of establishing with evidence that is clear and not speculative, that it will suffer irreparable harm. In *Parrish & Heimbecker*, Simonsen J. held at para. 48:

**48** On an application for an interlocutory injunction, the evidence of irreparable harm must be clear and not speculative (*Bank of Montreal v. Superior Management Ltd.*, 2010 MBQB 244, [2010] M.J. No. 337 at para. 48, and *J-Sons Inc. v. N.M. Paterson & Sons Ltd.* [1999] M.J. No. 147 (Q.B.) at para. 7, aff'd. [1999] M.J. No. 217 (C.A.). The strength of the plaintiff's case on irreparable harm should be considered along with an assessment of balance of convenience (*Apotex*, and *Imperial Sheet Metal, Ltd.* at paras. 25-30).

[72] The onus is on the plaintiff to present clear and not speculative evidence of irreparable harm, and in my opinion, Matix has not met this evidentiary onus to establish irreparable harm and consequently the plaintiff has not met its onus in respect of the second element of *RJR*.

[73] In respect of the final element, whether the balance of convenience favours the granting of an injunction, I have concluded that it does not. The weakness of Matix's evidence at this point and the impact that an injunction would have on the defendants' ability to continue working outweighs Matix's assertion of irreparable harm.

## **CONCLUSION**

[74] While being mindful not to consider each element of the *RJR* test as an individual hurdle, I am nevertheless satisfied that upon considering all three elements in an interrelated fashion, the plaintiff has failed to meet the requisite onus to allow the court

to issue the requested interlocutory injunction against any of the defendants.  
Accordingly, the plaintiff's motion is dismissed with costs in the cause.

\_\_\_\_\_ J.