Court of King's Bench of Alberta

Citation: AGI SureTrack, LLC v OPISystems Inc, 2026 ABKB 58

Date: 20260127
Docket: 2401 07191
Registry: Calgary

Between:

AGI SureTrack, LLC

Plaintiff

- and -

OPISystems Inc

Defendant

Reasons for Decision
of the
Honourable Justice L.K. Harris

I. Introduction

[1] The Plaintiff AGI SureTrack, LLC ("AGI") applies for an interlocutory injunction against the Defendant, OPISystems Inc ("OPI").

[2] AGI is a Missouri Limited Company with its principal place of business in Lenexa, Kansas. It is a subsidiary of Ag Growth International Inc., a publicly traded Canadian company with headquarters in Winnipeg.

[3] OPI is an Alberta company that conducts business in Canada, the United States of America and elsewhere.

[4] AGI and OPI are competitors. Both sell grain management systems. AGI sells the BinManager grain management system. OPI sells the OPI Blue grain management system and has recently launched a new generation of grain management system called EPIQ. These systems are intended for use in the agricultural sector. The hardware for these systems is installed in grain bins and through their software and algorithms, the systems monitor parameters including temperature and moisture so that farmers and growers can ensure the conditions within the grain bins are optimal for the grains being stored. The software on which these systems operate is complex, based on "source code", written by software developers employed by each company.

[5] Beginning in around 2022, several AGI personnel, some with knowledge of the AGI software and source code, left AGI and ultimately were hired by OPI. One of these employees is Timothy Penrod ("Penrod"). Penrod is a software engineer who was employed with AGI or its predecessors since 2013. He left AGI in 2022 and became employed by OPI in 2023 after doing some contract work for them.

[6] AGI has now commenced actions in Missouri, Kansas and Alberta alleging that OPI, and various former AGI personnel now employed by OPI, have used AGI's highly confidential trade secrets, including the AGI source code, to benefit OPI. AGI alleges these people, and the information they took, are being used by OPI to advance OPI Blue and EPIQ, and to move into AGI's market in the US as well as expand in Canada. Each of the three Actions name somewhat different Defendants, and include somewhat different causes of action, but they all arise from the same general factual matrix.

[7] AGI commenced the Alberta Action against OPI in May 2024. Before filing a Statement of Defence, OPI brought an application to strike or stay the Alberta Action on the basis that it was an unnecessary duplication of the Actions in Kansas and Missouri. The application was heard by Reed, J, who dismissed the application to strike, but directed that the Alberta Action be stayed pending the resolution of the Kansas Action: ***AGI SureTrack, LLC v OPISystems Inc***, 2025 ABKB 609 (***AGI #1***). The sole exception to the stay was that AGI was permitted to bring an application for an interlocutory injunction.

[8] It is that application which is before me now.

[9] AGI seeks an order restraining OPI from:

(a) further copying, permitting access to, disclosing to any individual or entity, or otherwise failing to properly secure the confidentiality of all, or any part of, AGI's source code, or any source code created by Timothy Penrod, Adam Weiss, or other OPI employees that had access to AGI's source code;

(b) allowing any individual or entity to review, study, copy, or otherwise access the AGI source code in any way; and

(c) selling products or services, or providing access to software, that use or are based upon the AGI source code, and which compete with BinManager, including at least OPI EPIQ.

[10] AGI also requests an order directing OPI to permit AGI to make forensic digital copies of certain digital records (the "Preservation Application").

[11] The application is hotly contested. Both parties filed numerous affidavits which contain some conflicting information. There are transcripts from cross examinations on those affidavits, and briefs of argument.

II. The Parties' Positions

a. The General Chronology of Events

[12] The Affidavits dovetail on certain key events in the overall chronology. The main points of dispute involve the inferences that AGI asks the Court to make arising from those facts. The parties argue that the facts are evidence of very different things. OPI says that the inferences put forward by AGI are incorrect and disproven by direct evidence from Penrod and Adam Weiss, a former AGI executive who is currently the Chief Executive Officer of OPI ("Weiss").

[13] In his role with AGI, Penrod was responsible for the development of specialized firmware code for BinManager, and he had detailed personal knowledge of the entire BinManager system, including the work done to develop it. Penrod resigned from AGI on February 21, 2022.

[14] On February 28, 2022, just prior to his last day, Penrod saved a copy of the AGI BinManager source code (the "Source Code") to a USB drive and took the USB drive home.

[15] Penrod began doing contract work for an unrelated entity. It was not until November 2022 that he began working with OPI as a contractor. By March 2023, Penrod became an employee of OPI as a software engineer and began working on the OPI grain management system.

[16] In late 2022, Penrod purchased a personal laptop and copied the Source Code to that laptop. He says that within days he noticed that the Source Code appeared in his OneDrive account, and so he deleted it from OneDrive. It is not clear whether he left a copy on his laptop, or whether the only copy he maintained was on the USB Drive.

[17] In the summer of 2023, Penrod accessed the Source Code. He says it was to review information relating to a server configuration issue.

[18] Penrod was first given notice of AGI's complaint through service in the Kansas Action on August 31, 2023. He advised his lawyers that he had the Source Code. On November 15, 2023, Penrod was served with AGI's request to produce documents.

[19] On December 4-5, 2023, Penrod accessed the USB drive to copy non-AGI files to his laptop before sending the USB drive to his US attorneys.

[20] On February 1, 2024, Penrod replied to AGI's request for production and advised that he possessed the Source Code, and that he would produce it once a protocol had been agreed to.

[21] On December 31, 2024, Penrod's US attorney accessed the USB drive. That attorney then responded to AGI's discovery request by providing various records electronically. AGI's US attorney could not access the records provided, and so on February 21, 2025, Penrod's attorney sent a new version of the same records.

[22] AGI has produced a report authored by Nicholas Herfordt, a digital forensic expert, on October 17, 2025. Mr. Herfordt examined the USB drive used by Penrod to store the Source Code as well as Penrod's laptop. Most of the data that Mr. Herfordt located on those devices is

consistent with what Penrod has described in terms of the dates and times he and his attorney accessed the USB drive and the laptop (although Penrod disagrees with some of the inferences Mr. Herfordt reaches). Mr. Herfordt does reach the conclusion that certain relevant data had been deleted from the laptop prior to his analysis, although he could not determine when this occurred or the manner in which it occurred (i.e., either a manual deletion or one that occurred automatically over time).

b. AGI's Allegations

[23] AGI argues that since Penrod began his employment with OPI, OPI has "embarked on a scheme" to use the Source Code, the know-how of Penrod and other former AGI employees, and other confidential information belonging to AGI to build, market, and offer products competitive to BinManager. OPI used AGI's confidential information to overcome difficulties they encountered when reverse engineering BinManager, allowing them to design a competing product with features like those of BinManager, which could read data from and integrate with BinManager hardware. OPI also was able to develop business strategies to more effectively compete with AGI. All of this was accomplished within a period of months, for less cost, when it took AGI much longer and cost AGI much more to develop, market and sell BinManager. This put AGI at a distinct competitive disadvantage and at risk of losing clients to OPI.

[24] AGI says that Penrod took the Source Code when he left AGI even though he had signed a confidentiality agreement promising to return all information to AGI upon termination of his employment. AGI points to Penrod's admissions that he took the Source Code and saved it to his personal laptop which he used in connection with his work at OPI and accessed that Source Code in April 2023. This is evidence that Penrod likely used the Source Code in connection with his work for OPI, and that OPI not only knew Penrod had the Source Code, but hired him because of it, with the understanding that Penrod's knowledge would enable OPI to develop competing products.

[25] AGI alleges that Penrod and OPI delayed document production in the Kansas Action to obscure the fact that Penrod and OPI had the Source Code. It was not until March of 2025 that it learned through finally being able to review the records sent by Penrod's US attorney that Penrod in fact had the Source Code all along (despite OPI's denial that neither it nor any employees had the Source Code), and even later, that he had accessed it in connection with his employment with OPI. Further, AGI alleges that OPI's delay in disclosure resulted in the destruction of "critical relevant evidence" because certain information on Penrod's laptop could no longer be accessed, pointing to a decision from the Court in Kansas which is heavily critical of OPI for causing delay in that Action. Even after disclosure, it became apparent during Penrod's deposition in the Missouri Action that the entire Source Code had not been disclosed as there were files missing in the disclosure which were originally on the USB drive.

[26] AGI argues that the Actions taken by and on behalf of Penrod and OPI must be understood as an overall pattern of conduct designed to obfuscate the fact that they not only had the Source Code but that they used AGI's confidential information to OPI's benefit. Even though AGI does not have direct evidence that this was done, the circumstantial evidence is significant and should lead the Court to conclude that the test for an interlocutory injunction has been met.

c. OPI's Response

[27] OPI and Penrod dispute these inferences. Penrod swore an affidavit filed December 23, 2025, in which he explains exactly what he did (and did not) do with the Source Code. OPI argues that this direct evidence shows that the inferences that AGI asks the Court to draw are incorrect.

[28] While Penrod admits that he downloaded some Source Code to a USB drive upon his departure from AGI, he says that he was under no obligation to either return it or delete it. He swears to the fact that it is common for software developers to keep samples of source code that they have worked on as a record of their work. He had no particular need for the Source Code, and in any event, it contained considerable non-proprietary code. He did not share the Source Code with anyone, including anyone at OPI, and OPI never asked him if he had it or asked him to use it.

[29] Penrod says that he copied the Source Code to his laptop in late 2022 but made no use of it. He noted that it appeared in his OneDrive account, and so he deleted it from OneDrive. He accessed the Source Code once, in the summer of 2023, for the sole purpose of viewing some server configuration information, which he says was non-proprietary information in any event.

[30] Both Penrod and Weiss deny that OPI used the Source Code in developing OPI products. Weiss says that he was not even aware Penrod had the Source Code until after the litigation had commenced and Penrod disclosed it to their lawyers.

[31] After receiving AGI's request for document production, Penrod advised his lawyers that he had the Source Code. They instructed him to copy non-AGI files onto a separate device without deleting anything from the USB drive and then to send to them the original USB drive. He says he did not keep a copy of the Source Code in any format and has not had possession of the Source Code since then. He disclosed his possession of the Source Code in his response to AGI's document production request in February 2024 which shows that AGI's allegation that they did not know he had it until March of 2025 is incorrect. Penrod's lawyers then accessed the USB drive in December 2024 for the purpose of preparing and providing the Source Code to AGI's lawyers on January 4, 2025. While there may or may not have been an issue with AGI's ability to access Penrod's disclosure, leading to a short delay, Penrod says that this speaks more to an IT issue and is not indicative of any deliberate attempt to delay the matter.

[32] Penrod says that during his deposition in the Missouri Action on April 30, 2025, he was shown the contents of the USB drive that had been provided to AGI's attorneys, and agrees that those contents were not a complete copy of all the AGI files and other information saved on the USB drive that he sent to his attorneys in December 2024.

[33] Overall, Penrod and OPI say that while Penrod did take a copy of the Source Code with him when he left AGI, it was for entirely innocent reasons. Penrod never disclosed to OPI that he had the Source Code, and the only time he accessed the Source Code while he was employed by OPI was in the summer of 2023.

[34] OPI says that with this direct evidence, AGI cannot meet the test for an interlocutory injunction.

III. Issues

[35] The issues before me are:

(a) When should an interlocutory injunction be granted to restrain a respondent from conducting its business in the context of allegations of misuse of trade secrets? This depends on whether AGI has satisfied the tripartite test set out in ***RJR-MacDonald Inc v Canada (Attorney General)***, 1994 CanLII 117, [1994] 1 SCR 311; and

(b) Should the Preservation Application be granted? This depends on first, whether this application is permissible considering the stay order granted in ***AGI #1***, and second, whether such an order is appropriate at this stage.

IV. Analysis

a. The Injunction Application

[36] The parties agree that the applicable test for whether an interlocutory injunction is granted in this case is the tripartite test established in ***RJR-MacDonald Inc v Canada (Attorney General)***, [1994] 1 SCR 311. That test requires AGI to demonstrate that: (1) there is a serious issue to be tried; (2) irreparable harm will result if the injunction is not granted; and (3) the balance of convenience favours granting the injunction.

[37] Even though the factual matrix of this case exists within the context of confidentiality agreements and an employer-employee relationship, the parties agree that the higher standard of a *prima facie* case that is sometimes applied in such cases as the first branch of the ***RJR*** test is not the applicable standard here; instead, the correct standard is that of a serious issue to be tried.

[38] An interlocutory injunction is a discretionary and extraordinary remedy and is typically sought before the Court can assess all the evidence that the parties may eventually rely upon at trial. Consequently, the Court should exercise "caution and restraint" when granting an interlocutory injunction: ***Griffiths McBurney & Partners v Ernst & Young YBM Inc***, 2000 ABCA 284 at paras 55-56; ***Allard v Shaw Communications Inc***, 2010 ABCA 316 at para 29.

(i) Is there a serious issue to be tried?

[39] A serious issue is not one which is frivolous or vexatious. This is a low threshold: ***GG & HH Inc v 2306084 Alberta Ltd***, 2022 ABQB 58 at para 80, citing ***RJR***. This standard only requires me to make a preliminary assessment of the merits of the case and does not require an extensive review: ***RJR*** at pp 337 – 338.

[40] The Alberta Statement of Claim names only OPI as a Defendant, and advances three causes of action. First, that OPI has engaged in a breach of confidence by accessing and using proprietary and confidential information belonging to AGI, including the Source Code and the know-how of several former AGI employees in the development, marketing and sale of OPI Blue and EPIQ. Second, that OPI conspired with those employees to use that confidential information and harm AGI's interests. Third, that OPI induced those employees to breach their duty of confidentiality and their confidentiality agreements with AGI. AGI argues that as a result, OPI has been unjustly enriched, to AGI's detriment.

[41] AGI focuses its submissions on the issue of breach of confidence, and as they have not, for the purposes of this application, delved into the issues of conspiracy or inducing breach of contract, my Reasons will also focus solely on the issue of breach of confidence.

[42] Determining whether there is a serious issue to be tried requires me to conduct a preliminary assessment of that cause of action.

[43] AGI relies upon ***Lac Minerals Ltd. v International Corona Resources Ltd***, 1989 CanLII 34 (SCC), [1989] 2 SCR 574 as authority for their claim of breach of confidence. ***Lac Minerals*** sets the test for whether there has been a breach of confidence, requiring proof of three elements: (1) that the information conveyed was confidential; (2) that it was communicated in confidence; and (3) that it was misused by the party to whom it was communicated.

[44] I am satisfied that the information in question here, primarily the Source Code, was confidential. This is sworn to by David Postill, a Senior Vice President of AGI, who says that the BinManager grain management system is proprietary and highly valuable information. AGI treats the BinManager software, algorithms and the Source Code as highly confidential. This is supported by the evidence including the following:

- AGI required certain employees, including Penrod and Weiss, to sign nondisclosure agreements or confidentiality, noncompetition and nonsolicitation agreements to protect this type of information from disclosure;
- the Source Code was not publicly available information, and OPI and the former AGI employees were required to "reverse engineer" components of the BinManager system in order to develop the competing OPI product;
- Neither Penrod nor Weiss deny that at least some components of the Source Code were confidential information. While Penrod does say that certain components, such as the BinManager server configuration was publicly available, the inference can be drawn that other components, including components of the Source Code, were confidential;
- the Source Code and know-how is highly valuable information, illustrated by the time and money spent by AGI to develop that knowledge, and the lengths taken by OPI to duplicate it, including through reverse engineering. I note Weiss' evidence that he was aware that OPI considered Penrod's knowledge of the AGI BinManager system as being "worth its weight in gold".

[45] All these considerations are strong indicia that this was confidential information: ***Manson Insulation Products Ltd v Crossroads C & I Distributors***, 2019 ABQB 684 at para 378.

[46] Next is the question of whether that information was communicated in confidence. The facts in ***Lac Minerals*** are somewhat different from this case in that in ***Lac Minerals***, the breach of confidence was caused by the recipient of the confidential information, who had directly received it from the confider; Corona had advised Lac Minerals of its interest in a particular parcel of land, and it was Lac Minerals, the recipient of that information, who misused it. Here, it was Penrod who was the recipient of the confidential information, but according to AGI's claim (keeping in mind that Penrod is not named as a Defendant), it was ultimately OPI, a third party having no direct relationship with AGI, who misused it.

[47] The absence of a direct relationship between AGI and OPI does not prevent a breach of confidence claim from being made out. A confidant may include any third party who uses or discloses information that is actually or constructively known to have been used or disclosed by someone in breach of confidence or that is subsequently discovered to have been so used or disclosed. Any use of confidential information other than for a permitted use is a breach of confidence: ***Fontaine v Canada (Attorney General)***, 2014 ONSC 4585 at para 358, citing ***Cadbury Schweppes Inc v FBI Foods Ltd.***, 1999 CanLII 705 (SCC), [1999] 1 SCR 142 at para 19.

[48] In this case, there is reliable evidence that the information was communicated in confidence. AGI treated this information as confidential, and from the agreements signed by Penrod and others, there is evidence that they were aware that the information was confidential.

[49] As an example, the agreement between Penrod and AGI includes the following under the heading "Confidential Information":

> Employee will, during the course of Employees employment and at all times subsequent to employment, hold in strictest and total confidence all Confidential Information..."Confidential Information" will mean any information relating to or dealing with the IntelliFarms Business, including Work Product...trade secrets, know-how and other intellectual property...

[50] The final question is whether the confidential information was misused by OPI.

[51] AGI does not have, at this stage, much in the way of direct evidence that OPI used AGI's confidential information in developing and marketing its bin management systems. Instead, AGI argues that the inferences which arise from the facts support their case.

[52] OPI points out that AGI cannot show that either OPI Blue or EPIQ contain the Source Code. OPI says that the inference that it misused the information and then took steps to obfuscate the fact that it had and used the information is incorrect, and that the circumstances surrounding Penrod's possession of and access to the Source Code after his departure from AGI, and their disclosure of those facts, have been explained and do not give rise to the inference that there was anything nefarious.

[53] I find there are certain gaps in Penrod's evidence. For example, it is not clear exactly what happened when he discovered the Source Code saved to his OneDrive account. He says that he deleted it from his OneDrive account but does not say that he kept the Source Code on his laptop. Further, he does not explain why he felt the need to save the Source Code to his laptop around the time he started working for OPI, or at all; if it was only a memento, as he says, then this would not have been necessary. Further, he says that he sent the USB Drive with the Source Code to his lawyers and did not keep a copy, and yet he does not say that he also deleted it from his laptop, if in fact he kept a copy there after deleting it from his OneDrive account.

[54] There may be explanations for these questions, but not in the evidence before me.

[55] Accepting OPI's argument on this point would require me to find that the evidence given by Penrod and Weiss in their affidavits is credible and reliable and that I accept their explanation over the inferences argued by AGI. In my view, this would require me to overstep my role in adjudicating this application. I am to conduct a preliminary assessment only, and making such a finding at this stage is akin to, in my view, making a final determination – something which requires hearing witnesses testify in person and which I cannot do on this application. The gaps

in Penrod's evidence which I have described above show why such a detailed assessment is not advisable at this stage. While I might be able to find that OPI has an arguable position based on the evidence, I am not able to say that it would ultimately be successful at trial.

[56] I can however assess the evidence that is before me and determine if AGI's position is at least arguable on the facts. Having considered the evidence, I conclude that it is.

[57] The chronology of events, which includes Penrod's admission that he took the Source Code on his departure from AGI, and at least on once instance during his employment with OPI viewed the Source Code for some server information, lends some support to AGI's arguments.

[58] I also note that despite Penrod's assertion that he was not required to return the Source Code to AGI upon his departure does not appear to be supported by the Confidentiality, Noncompetition and Nonsolicitation Agreement he signed upon the commencement of his employment in 2013. Within that agreement is a provision titled, "Return of Confidential Information and Other Property" which includes the following:

> Upon termination of the Employee's employment with Company or at any other time upon Company's request, Employee will deliver promptly to Company all originals and all copies (including...computer or other means of electronic storage) of all records and materials constituting or containing Confidential Information...

[59] While Penrod says that he was under no obligation to return the Source Code upon his departure, this provision arguably suggests otherwise.

[60] In my view, AGI's arguments are not frivolous and vexatious and have some support in the evidence before me. While I recognize that OPI has an explanation, that explanation does not completely overcome the fact that Penrod took the Source Code and accessed it during his employment with OPI.

[61] I am therefore satisfied that there is a serious issue in relation to whether there was a breach of confidence.

(ii) Irreparable Harm

[62] The term "irreparable harm" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms, or which cannot be cured through a monetary award. It has also been described as "harm for which no fair and reasonable redress would be available after trial": ***RJR*** at 341; ***Embedia Technologies Corporation v Blumell***, 2018 ABQB 222 at para 26.

[63] Unlike the standard used to establish whether there is a serious issue to be tried, the standard to be met to establish irreparable harm is a high one; the harm must be established through clear and compelling evidence: ***Graham Infrastructure LP v Whitefish Lake First Nation #459***, 2018 ABQB 66 at para 55. Alleged harm that is speculative, hypothetical or only arguable does not qualify as irreparable: ***Saina v Shepansky***, 2025 ABCA 74 at para 27.

[64] AGI argues that OPI has been able to place itself in an advantageous position because it was not required to spend years and millions of dollars to develop a product which competed with BinManager. Its ability to develop a product which can use BinManager hardware removes a significant barrier to AGI customers purchasing OPI software. Further, AGI says that OPI can use the marketing information which Weiss was privy to its advantage. AGI argues that the loss

of competitive advantage gives rise to a presumption of irreparable harm because it is impossible to know the extent to which the opposing party is using such information.

[65] AGI's evidence on this point is provided by David Postill, a Senior Vice President of AGI ("Postill"). He describes the industry as "sticky" in that grain management systems are designed so that customers invest in the hardware to install in their grain bins and then pay a monthly subscription fee for the software that allows them to monitor the conditions within the bins. Changing to a competitor's bin management system is expensive after making such an investment and thus is less likely. The fact that OPI has developed EPIQ as a direct competitor to BinManager, which apparently can use BinManager hardware, overcomes this issue from OPI's perspective. This will likely result in damage to AGI's customer relationships and goodwill and constitutes irreparable harm. Each customer, says AGI, that chooses to move to the OPI system, may never return to AGI.

[66] OPI argues that the "harm" alleged by AGI is hypothetical and speculative, pointing to the evidence of Postill as failing to establish harm with any certainty.

[67] At this stage it is important to consider exactly what AGI relies upon in support of its claim for irreparable harm. The following evidence is set out within the Postill Affidavit:

- At the time Weiss and Penrod joined OPI, OPI did not have a product which competed with BinManager;
- BinManager is offered for sale to farmers and growers in Canada and the US and the BinManager product and its related subscription revenue represents a "significant portion" of AGI's revenue;
- If a competitor gained access to the Source Code there could be very significant consequences for AGI in that the competitor would gain a "huge advantage" in competing with AGI;
- That advantage could include copying the Source Code to create a product which has the same features as BinManager, and AGI would lose its unique market position;
- If a competitor publicly disclosed the Source Code, any other competitors could take similar steps; and
- The harm to AGI would be "immense".

[68] I have some concerns about the quality of the evidence presented on this issue.

[69] Both sides have alleged that the other did not have the degree of market share in Canada which they attest to. OPI says that while BinManager is sold in the US, is not actively sold or promoted in Canada, and AGI is not a competitor for grain management systems in Canada. OPI says that it has been offering grain management systems in Canada, the US and elsewhere since 1984, in the form of OPI Integris, a predecessor to OPI Blue, and then OPI Blue and subsequently EPIQ.

[70] AGI says that at the time Weiss and Penrod joined OPI, OPI did not have a product which competed directly with BinManager. EPIQ, launched in around June 2025 appears to now directly compete with BinManager. Further, AGI says that BinManager is offered for sale in Canada and the US.

[71] Accordingly, there is a conflict in the evidence about whether AGI is truly a competitor to OPI in Canada, and if so, to what degree.

[72] AGI has not provided any evidence about its exact market share in Canada or how much of that market share is the result of sales of BinManager. While OPI explains that approximately 35% of its global business relates to Canadian sales, and of that portion, approximately 50% of those sales is derived from OPI Blue and EPIQ, there is no similar information from AGI.

[73] The success of an interlocutory injunction application is based on the strength of its affidavit evidence: ***Mosaic Potash Esterhazy Limited Partnership v Potash Corporation of Saskatchewan Inc.***, 2011 SKCA 120, 341 DLR (4th) 407 at para 37.

[74] ***Embedia Technologies Corporation v Blumell***, 2018 ABQB 222 considers an application for an interlocutory injunction following the departure of a key employee to a former client of the Plaintiff. That client then developed a product in competition to the Plaintiff. In considering whether there was irreparable harm, the Court found there was, stating:

> Draper's nascent product that Embedia fears will sideline one of its main products is soon to be released to the market, Embedia believes solely or largely because of Blumell's involvement. It is doubtful that adequate redress for this harm would be available if left until after Embedia succeeds at trial. Unlike the customer relationship effect, for which an injunction would likely not mitigate, this is a harm that might be expected to retard if the requested injunction is granted. An injunction may not avoid that evolution of Draper from customer to competition forever, but it should slow it (again, assuming Embedia is correct on the role Blumell is performing for Draper in that regard).
>
> ***Embedia*** at para 30.

[75] However, the Court does not clearly state in ***Embedia*** exactly what evidence the applicant had presented to establish irreparable harm. I therefore find that ***Embedia*** is not entirely persuasive on the issue of what evidence of harm to market share is required.

[76] On the other hand, in ***Gold In the Net Hockey School Inc. v Netpower Inc***, 2007 ABQB 520, the Court found that irreparable harm was not established where the applicant did not present clear evidence on the loss of market share and loss of goodwill: ***Netpower*** at para 49.

[77] Given the dispute between the parties here about the degree to which AGI's revenue arises from Canadian sales of BinManager, I would have expected to see some evidence establishing that fact, but I do not. All I have is a bald assertion that BinManager is sold in Canada and that subscription revenue is significant.

[78] The jurisprudence in Canada is not clear as to whether irreparable harm can be inferred. In ***Graham Infrastructure***, the applicant alleged irreparable harm to market share and reputational damage but provided no supporting evidence in support of those allegations. The Court notes that there is no guarantee of market success, and that the allegations of irreparable harm were speculative: at para 63. The Court held that irreparable harm could not be inferred.

[79] On the other hand, in ***Chatters Limited Partnership v Chatters Deerfoot Meadows Limited***, 2025 ABKB 536 at para 117 the Court found:

> An applicant for an interlocutory injunction may not need to have "full economic evidence" at this stage: [citation omitted]. However, there must be a sufficient

> evidentiary foundation for the Court to draw reasonable inferences, rather than mere speculation: [citations omitted].

[80] Nonetheless, the Court found that there was insufficient evidence of irreparable harm arising from lost business or market share in circumstances where there was no evidence that the respondent had actually drawn business away from the applicant, or that any specific customers had left the applicant, noting at para 90:

> Without any evidence or information about this stylist's book of business (if any), or industry evidence about hair stylist books of business generally, I am not prepared to simply infer that this stylist has brought DM Salon customers with her. Inferences must be drawn from the positive proven (i.e. accepted) facts which are reasonably supported by the record, because otherwise they are speculation or conjecture: [citations omitted]. Drawing inferences when there is an evidentiary gap, based on an "educated guess" is speculation: [citation omitted]. [emphasis added]

[81] AGI relies on ***Arc Compute v. Anton Allen, Michael Buchel et al***, 2025 ONSC 1745 for the proposition that "irreparable harm is presumed in cases involving the misuse of confidential information" because "the true owner of the confidential information has no way of knowing the extent to which the breaching party is using confidential information to compete and therefore cannot easily quantify its damages". Having reviewed that case carefully, I choose to instead rely upon Alberta cases which clearly require at least some evidence to establish irreparable harm.

[82] In my view, I do not need to resolve the issue of whether I can infer irreparable harm or not because the evidence before me in this case is insufficient in any event. The assertions made by AGI about the loss of market share are mere assertions. I have no financial data or other information which shows AGI's market share for BinManager in Canada at various stages leading up to the introduction of EPIQ in Canada, how that compares to OPI's market share, and to what extent AGI expects to lose customers since the introduction of EPIQ through, for example, a failure to renew monthly subscriptions, and the trending market share thereafter.

[83] Given the conflict in the evidence about whether AGI even has a market share in Canada, something more is required to show that it would suffer damage.

[84] I therefore conclude that AGI has not established irreparable harm and has not satisfied the second branch of the ***RJR*** test.

(iii) Balance of Convenience

[85] Notwithstanding the fact that AGI's application will fail for not establishing irreparable harm I will go on to briefly consider where the balance of convenience lies. In my view, I would have found that it lies with OPI in this case.

[86] As AGI points out, in addressing this branch of the ***RJR*** test, the Court must consider both the harm that an applicant claims it will suffer if the injunction is not granted and any countervailing harm that a respondent will suffer if the applicant is granted the injunctive relief they seek. They point to several factors to consider as a guide in considering where the balance lies: ***GG & HH*** at paras 179 and 185.

[87] AGI argues that the only inconvenience that OPI will suffer is that it will be restrained from using confidential information it had no lawful right to possess in the first place. Conversely, AGI will suffer irreparable harm.

[88] OPI has provided some information to demonstrate that it has an established foothold in Canada for grain management systems, and that it has had a presence in the industry in Canada for many years. OPI argues that what AGI seeks is to prohibit OPI's sales of OPI EPIQ, and presumably also OPI Blue, which is the focus of its Statement of Claim. Such an order would "cripple" OPI's business in Canada when those products combine for approximately 50% of OPI's sales and the effect of an injunction would be to erase 90% of OPI's Canadian sales in total when one considers the cumulative effects.

[89] Again, AGI's position suffers from the quality (or lack thereof) of the evidence it has presented on the issue of what, exactly, its sales in Canada are, and the degree to which they are affected by OPI's market position in Canada.

b. The Preservation Application

[90] AGI's application seeks more than simply injunctive relief. It also seeks an order compelling OPI to:

> allow AGI to create forensic copies of all digital records which are relevant to this proceeding, including at minimum:
>
> 1. the "F:" drive previously attached to Mr. Penrod's computer, as discussed in the expert report of Mr. Herfordt;
> 2. the computer to which the USB drive was attached in 2024, as discussed in the expert report of Mr. Herfordt;
> 3. the historical and current records from the OneDrive account on which Mr. Penrod placed AGI's Protected Code;
> 4. any other drives or cloud-based storage onto which OPI, Mr. Penrod, or any other employee or contractor of OPI placed all or a part of AGI's Protected Code; and
> 5. the source code repository or repositories for the OPI EPIQ product.

[91] Or, in the alternative, AGI seeks an order directing OPI to create the forensic copies and disclose copies of the same to AGI.

[92] OPI opposes this application, pointing to the decision of Reed J staying this Action, and also arguing that to the extent AGI seeks an Anton Pillar order, AGI has not established the conditions for such an order.

[93] Reed J.'s decision on the stay in ***AGI #1*** is as follows, beginning at para 90:

> The *Rules of Court*, the *Judicature Act*, and the Court's inherent jurisdiction grant the Court broad discretion to control its processes to ensure claims are fairly and justly adjudicated in a timely and cost-effective manner: ***Armstrong v Gula***, 2023 ABKB 270 at para 38. In the context of a multiplicity of proceedings, relevant

> considerations include the risk of inconsistent judgements and the promotion of judicial economy: see ***Waud*** at para 29; ***Wright v Air Canada***, 2021 ABPC 61 at para 32.
>
> ...
>
> ...as I have noted, there is a significant overlap in the facts that must be proven in Alberta and the facts that are in issue in the Kansas Action, and to a lesser extent, the Missouri Action. Those actions are significantly more advanced.
>
> I am concerned about the Alberta Action proceeding prior to the Kansas Action being determined, for the reasons outlined in this decision. The best way to alleviate the real risk of issues with duplicative discovery, and issues regarding findings of fact that may overlap in the two jurisdictions, given the fact that the agreements related to the employment and non-compete are being properly litigated in Kansas, is to stay this Action on conditions.
>
> Since there is alleged conduct and harm occurring in Canada that may continue if a full stay is granted, I find it is necessary to provide AGI access to the Court should it wish to advance an application for pre-trial injunctive relief. In that regard, there will be an exception to the stay of proceedings I have imposed, and AGI has leave, without further order of the Court, to file such an application to be heard in the normal course. I am not seized of any issues in this litigation.
>
> I believe this is the most appropriate way to acknowledge the substantially similar factual allegations at play, the comparative significant advancement of the Kansas Action, the requirement for certain issues solely within the jurisdiction of the Kansas Court to be determined which also underpin the Alberta Action (such as the contract claims advanced there)... (emphasis added)

[94] Reed J was clear as to the fact that the only exception to the stay of the Alberta Action was AGI's injunction application. There was no exception carved out for disclosure. This makes sense, especially given his concerns about duplicative discovery.

[95] I have concerns that the preservation application represents a collateral attack on ***AGI #1*** and particularly the stay of these proceedings. As far as I am aware, AGI has not appealed that decision. Nor did AGI appear to seek a further exception to the stay to permit a preservation application at the time the issue of the stay was argued.

[96] His concerns about the promotion of judicial economy and the risks of duplicative discovery and inconsistent findings of facts remain valid. Were I to consider AGI's application for disclosure at this stage, those risks only become more pronounced.

[97] The proper route for AGI to obtain a preservation order, given the state of advancement of the US Actions and the stay of the Alberta Action is to seek it within one of the US Actions.

[98] I therefore decline to order the disclosure sought by AGI in this case.

V. Conclusions

[99] AGI has failed to satisfy me that it would suffer irreparable harm or that the balance of convenience lies with it and not OPI. I also decline to grant a preservation order because this request for relief is barred as a result of the stay ordered in ***AGI #1***.

[100] AGI's application is dismissed. OPI, as the successful party, is entitled to costs of the application. Should the parties be unable to agree on costs, they may make submissions to me in writing within 30 days.

Heard on the 9th day of January, 2026.
Dated at the City of Calgary, Alberta this 27th day of January, 2026.

L.K. Harris
J.C.K.B.A.

Appearances:

Mat Brechtel, Kevin Bushell and Erin Bower
Osler, Hoskin & Harcourt LLP
for the Plaintiff

Tom Ross and Alex MacDonald
McLennan Ross LLP
for the Defendant