CITATION: Boaden Catering Limited v Earl Haig Community Day Care, 2024 ONSC 5349
COURT FILE NO.: CV-18-2439-00
DATE: 2024 09 26

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	
BOADEN CATERING LIMITED Plaintiff	Adam Jarvis, for the Plaintiff
– and –	
EARL HAIG COMMUNITY DAY CARE and CHRISTOPHER GREEN Defendants	Geoff Ryans and Clifton Yiu, for the Defendants
	HEARD: May 13, 14, 15, 16, 17, 21, 22, 23, and 24, 2024

THE HONOURABLE JUSTICE RANJAN K. AGARWAL

I. OVERVIEW

[1] Christopher Green quit his job as Executive Chef at Boaden Catering Limited so he could work for Boaden's customer, Earl Haig Community Day Care. Boaden alleges that Chris misused its confidential information for Earl Haig's benefit. Boaden also claims that Chris unfairly competed against Boaden for Earl Haig's benefit.

[2] In May 2016, Boaden sued Chris and Earl Haig. Through the discovery process, Boaden says it learned that the defendants destroyed evidence that proves its case. Its theory is that Earl Haig's Executive Director, Kimberly Smith, conspired with Chris to use Boaden's confidential information to set up Earl Haig's onsite meal program. Boaden alleges that when Chris and Kim's plan was about to be discovered, they destroyed electronic documents.

[3] Boaden seeks $350,000 in general damages and $100,000 in punitive damages for breach of contract, inducing breach of contract, the unlawful means tort, conversion, and unjust enrichment.

[4] I order that Boaden's claim is dismissed. Boaden has introduced no admissible evidence that Chris breached his legal obligations to Boaden or that Earl Haig caused Boaden a loss.

[5] This case is really about Boaden's anger at Chris for helping move Earl Haig's meal program onsite. But Chris and Earl Haig's actions weren't personal—they were just (lawful) business.

II. BACKGROUND FACTS

[6] The plaintiff Boaden Catering Limited provides professional catering services. Boaden has three different business lines: social catering (i.e., banquets and outdoor events), schools and daycares (which it markets through Organic Kids Catering), and social initiatives (i.e., homeless shelters).

[7] Louis Tassone is the General Manager and Director of Boaden. He also has a minority ownership interest in the company.

[8] The defendant Christopher Green started working for Boaden as a sous chef in March 2007. Before that, he worked as a chef at a hotel, golf clubs, and a banquet hall for 15 years. At first, Chris didn't have a written employment agreement with Boaden.

[9] Chris was promoted to Executive Chef in June 2008. In that role, Chris oversaw the operation of Boaden's kitchen for all three business lines. He ordered food and supplies, managed the other chefs and kitchen employees, cooked food, and met banquet clients. He also filled in as a delivery driver.

[10] When Chris was promoted, he signed an "offer of employment/promotion" with Boaden. The offer attached an agreement, titled "NON-DISCLOSURE OF CONFIDENTIAL INFORMATION AND RESTRICTIONS ON COMPETITION BY THE EMPLOYEE AGREEMENT WITH BOADEN CATERING LTD."

[11] The defendant Earl Haig Community Day Care is a non-profit, licensed childcare centre. It operates daycares at Earl Haig Public School and Bowmore Road Junior and Senior Public School in Toronto.

[12] Earl Haig engaged Boaden in June 2014 to provide meal catering services. There was no written contract between them.

[13] In Spring 2015, Earl Haig decided to hire Chris to do meal preparation onsite. Chris resigned from Boaden on August 28, 2015. He started working for Earl Haig as Daycare Chef on September 14, 2015. In December 2015, Earl Haig stopped ordering meals from Boaden.

[14] Boaden's revenue from Earl Haig was around $175,000 annually.

[15] During the trial, the parties introduced evidence about three laptops. First, Boaden provided Chris an Acer laptop so that he could work from home and to make it easier for him to do orders, send and receive emails, and review menus (the **Boaden Laptop**). Second, Earl Haig bought an Acer laptop for Chris to use for work (the **Earl Haig Laptop**). Finally, Louis introduced into evidence a Dell laptop that contained an image of the Earl Haig Laptop (the **Imaged Laptop**).

III. ANALYSIS AND DISPOSITION

A. Issue #1: did Chris unlawfully disclose Boaden's confidential information to Earl Haig?

[16] Employees are barred from appropriating their employer's confidential information for their own benefit, both during and after the employment relationship has ended. Though an employee can compete with their former employer after their employment has ended, they can't compete unfairly by, for example, misusing their former employer's confidential information. See *RBC Dominion Securities Inc. v Merrill*

Lynch Canada Inc., 2008 SCC 54, at paras 18-19; *GasTOPS Ltd. v Forsyth*, 2009 CanLII 66153, at paras 77, 95, aff'd 2012 ONCA 134.

[17] Chris's employment agreement reflects this common law duty—he's expressly prohibited from disclosing Boaden's confidential information and using it either for his or some other business's benefit "either during or after the termination" of his employment.

[18] Boaden alleges that Chris did just that—he misappropriated Boaden's confidential information for Earl Haig's benefit, specifically the "Boaden method" (which is the totality of its menus, meal structure, recipes, and delivery process), "change-it sheets", menu pricing, and kitchen design. Its theory surmises a complex conspiracy between Chris and Kim:

- Chris solicited Kim in Spring 2015 to move Earl Haig's meal program onsite
- Kim agreed to hire Chris
- Chris started developing Earl Haig's menus and costing while he was still working for Boaden, using Boaden's menus and price lists
- Chris disclosed confidential information about Boaden's kitchen to Earl Haig so Earl Haig could retrofit its kitchen

- after he quit, Chris used the Boaden Laptop until 2016, which contained Boaden's menus, to develop and finalize Earl Haig's menus

[19] Boaden's initial suspicions were heightened by the defendants' conduct during the litigation. Boaden believes that the defendants intentionally destroyed documents and hid evidence after they were sued, all of which it says is further evidence of the defendants' culpability.

[20] Boaden submits that it doesn't know what else Chris took because the defendants destroyed evidence. It asks me to infer that Chris took other confidential information. As I explain below, I find that the defendants didn't destroy evidence. Further, I find it hard to believe that Boaden didn't have a backup for the Boaden Laptop's contents. Boaden is effectively submitting that all of its confidential information, going back 30 years, was stored on the Boaden Laptop (which it didn't ask Chris to return when he quit). Boaden should've been able to produce, from its own records, evidence of the confidential information that it says Chris misappropriated. As a result, my analysis can only focus on the confidential information that Boaden knows about.

[21] As an overview, I find that Boaden's documents and information aren't confidential. Alternatively, I find that even though Chris misappropriated Boaden's menus, Boaden didn't suffer a loss. As a result, in either case, I dismiss Boaden's claim that Chris breached his confidentiality obligations.

1. The "Boaden method" isn't confidential.

[22] Chris's employment agreement defines confidential information to mean:

- information designated by Boaden's management as confidential
- secrets or "know-how" that isn't "generally known to persons outside" Boaden
- any "information, process or idea" that isn't generally known outside Boaden, including improvements, processes, procedures, and cost and pricing information

[23] At common law, information is confidential if it's secret and the owner treats it as confidential or secret. See *GasTOPS Ltd.* (Ont Sup Ct), at para 119.

[24] That said, confidential information doesn't include the general skills and knowledge an employee has acquired while working for the employer. See *Mann Engineering Ltd. v Desai*, 2021 ONSC 7580, at para 114, citing *Imperial Sheet Metal Ltd v Landry and Gray Metal Products Inc.,* 2007 NBCA 51, at paras 33-34.

[25] First, Boaden asserts that its menus are confidential information because of their layout, the recipes, and Boaden's practices or processes reflected in the menus:

- before Fall/Winter 2014, Boaden's menus were divided into four columns and five rows—the day of the week, the lunch and snack menu (main, side, starch, vegetable, fruit), and a stock image showing some of the menu items
- Boaden bought stock images from Shutterstock, which provides photography and editing tools
- the menus are seasonal (Summer, Fall/Winter, and Spring/Summer) and presented in four-week rotations
- the menus don't repeat over a 52-week period
- Boaden says it's unique in offering frozen yogurt snacks because it innovated a process to do so—to prevent melting, it delivers them the day before, and drivers put them in the freezer for the next day
- Fridays are a "soup day"—because the catering staff often must prep for a social catering engagement on Fridays, Boaden made it an "easy day", including items such as soups, sandwiches, and pizza buns, and combining the prep for the daycare and social catering departments

[26] Louis created Boaden's menus. According to him, the process was difficult, cumbersome, and time-consuming:

- Louis has to decide the menu items, which requires a consideration of ingredients, price, and nutrition
- the menus must comply with the *Child Care and Early Years Act, 2014*, SO 2014, c 11, Sched 1, (or, formerly, the *Day Nurseries Act*, RSO 1990, c D.2), and Canada's Food Guide
- the menus must be balanced over the month, season, and year
- Louis used Microsoft Publisher, a publishing application, to create the menus and then covert them into PDF files for printing
- the Shutterstock files were large, so Louis needed to save them on a CD-ROM instead of a USB drive

[27] As a result of Louis's efforts, Boaden described the menus as an artistic work under the *Copyright Act*, RSC 1985, c C-42. I make no finding on this submission—Boaden didn't make a claim for any remedy arising from a finding that the menus are an artistic work.

[28] The menus weren't confidential or secret. There's no evidence that Boaden designated the menus to be confidential or treated them as secret. The menus were

delivered to its 200+ daycare customers on a weekly or monthly basis, with the meals. Boaden's customers, including Earl Haig, weren't bound by any confidentiality or non-disclosure agreement. Customers sometimes posted the menus in their kitchen or on bulletin boards. Nothing stopped Boaden's customers from sharing the menus with parents. Boaden also posted a sample menu online. Boaden didn't ask Chris to return the Boaden Laptop when he quit, even though it contained several years of menus and embedded Shutterstock images.

[29] Boaden's processes and recipes also aren't confidential. Serving soups and sandwiches on Fridays or delivering frozen yogurt the day before it's served isn't "secret" knowledge. There was no evidence that these practices were known only to Boaden, even if Boaden innovated them—the menus, which were distributed widely, show soup and sandwiches on Fridays and frozen yogurt as a snack. Boaden's customers would've amassed a library of Boaden's menus over time. It wouldn't have been hard to conclude that the menus were offered on a four-week rotation, seasonally, and didn't repeat for a year. As Justice Sproat observed in *Boaden Catering Limited v Real Food for Real Kids Inc.*, 2016 ONSC 4098, at para 48: "all menus share certain characteristics in that they list what items are offered on what day and at what time." The menus or a sample menu, and the ideas baked into them, were accessible to Boaden's customers or prospective customers, its competitors, parents, and its employees or former employees from any number of places. Finally, Chris, as

Executive Chef for seven years, would've acquired general knowledge about Boaden's processes and recipes.

[30] Second, Boaden asserts that its delivery method, which uses warming containers, steam tables, and checking the temperature on arrival, is confidential. Again, there's no evidence that Boaden bound its customers or its staff not to disclose this method for keeping food warm (if it even was a unique method). And it's reasonable that Chris, who also delivered food, would've acquired this general knowledge during his long employment with Boaden.

[31] Third, Boaden alleges that Chris copied its "change-it" sheets. There was almost no evidence about these types of documents. Chris wasn't even sure what they were. Boaden didn't introduce any evidence about them.

[32] Fourth, Boaden alleges that Chris used its confidential pricing information. In March 2015, Kim asked Chris to prepare a "mock" budget based on the number of lunches and snacks Earl Haig needed. Neither Chris nor Kim could recall if Chris actually did so. That said, Earl Haig's board was told that the daycare would save $50,000-$60,000 if it hired Chris.

[33] Though Boaden wants me to infer that Chris could've only prepared a mock budget by using Boaden's confidential pricing information, there's no evidence of what this information might've been. Boaden didn't introduce any admissible evidence that Chris had access to pricing information, or any documents that showed the pricing

information that Chris might've had access to. Though Louis adduced a copy of a Boaden invoice showing unit prices for lunches and snacks, this document doesn't show Boaden's costs. And, obviously, Boaden sent the document to Earl Haig, meaning it wasn't confidential. I can't find that Boaden's "pricing information" is confidential without the information itself being put into evidence. And it's also a reasonable inference that Chris prepared the mock budget using his knowledge of food prices from his many years working as a chef.

[34] Finally, Boaden argues that Chris shared confidential information about Boaden's kitchen, including a photo, with Earl Haig. Chris visited Earl Haig in June 2015 to see what Earl Haig had and what it would need for onsite meal preparation. Earl Haig's sinks were too small for washing pots and pans. Chris sent a picture of Boaden's sink to Kim after the site visit. Boaden hasn't proven that there's anything confidential about the picture of its sink. It's a generic industrial kitchen sink. It hasn't introduced evidence of any other information about the kitchen that Chris allegedly shared with Boaden.

[35] In sum, none of the information that Boaden asserts is secret or confidential is, in fact, confidential. So even if Chris used it, either during his employment with Boaden or after, he didn't breach his contractual or common law obligations.

2. Alternatively, Chris misappropriated Boaden's menus, but Boaden didn't suffer a loss.

[36] If I'm wrong, and some or all of the information above was confidential, I find that Chris only misappropriated Boaden's menus, and then only for his own benefit. He didn't compete unfairly against Boaden, or misuse any of the other allegedly confidential information. Because there's no evidence that Boaden suffered a loss because of Chris's actions, I would, in any event, dismiss this claim.

i. The defendants didn't spoil evidence.

[37] Boaden's argument turns, in part, on its allegation that the defendants intentionally destroyed evidence. Spoliation is where a party has destroyed evidence to affect ongoing litigation. This rule of evidence gives rise to a rebuttable presumption that the evidence destroyed would have been unfavourable to the party who destroyed it. See *Trillium Power Wind Corporation v Ontario*, 2023 ONCA 412, at para 21. Boaden submits that I should find that the defendants destroyed evidence that would show that Chris misappropriated more than just the menus, and misused that information to compete unfairly.

[38] Boaden's argument requires a long discussion about the discovery process, which is how it says it discovered Chris's alleged misappropriation. As I elaborate on below, I find that the defendants didn't engage in spoliation.

(a) Boaden uncovered Earl Haig's alleged misuse through the discovery process.

[39] Boaden alleges that the defendants intentionally hid evidence from them, which it only obtained through repeated demands and court orders. It also alleges that when the defendants' misfeasance was about to be discovered, they "wiped" the computer that Chris was using to destroy evidence.

[40] Boaden started this proceeding in May 2016. The pleadings closed in July 2016. In June 2018, Boaden moved for an order compelling the defendants to serve an affidavit of documents. Associate Justice Graham ordered the defendants to do so, including ordering the defendants to produce "coloured copies of menus" used by them between August 2015 and September 2017.

[41] Kim and Chris were examined for discovery in October 2018. At the examination, there was some debate about whether Earl Haig had, in fact, produced all of the menus in its possession. It undertook to do so.

[42] Separately, Boaden asked to inspect the Earl Haig Laptop. The defendants refused. After discoveries, Boaden asked again—it wanted to inspect the Earl Haig Laptop's specifications and contents because it believed that Chris was, in fact, using the Boaden Laptop when he first started working at Earl Haig. In April 2019, Chris advised Boaden that he had disposed of the Boaden Laptop in 2016 because it had stopped working even before he quit.

[43] In January 2020, Boaden moved for rulings on the propriety of the defendants' objections at the examinations. On the issue of the menus, Justice Emery held that Earl Haig hadn't produced coloured menus for December 2015 and Winter/Spring 2016, and ordered it to do so. On the computer, Justice Emery ordered the defendants to disclose certain information to Boaden or produce the computer for inspection:

> *Question: Mr. Green to review the laptop that was provided by EHCD to him, and to advise of the following:*
>
> *a) dates of the preparation of the menus of Earl Haig;*
>
> *b) the font that was used to make menus;*
>
> *c) The programs used for making the menus;*
>
> *d) Serial number of the laptop;*
>
> *e) Serial number of the software used to create the menus;*
>
> *f) When the software used to create the menus were purchased;*
>
> *g) How old is the laptop;*
>
> *h) Whether any of Boaden's information is on the laptop (information that Christopher Green possessed and transferred to Earl Haig when he moved including emails or menus);*
>
> *i) The last modified date of the files requested.*
>
> …
>
> This question must be answered in its several parts. In the alternative, the laptop itself must be produced for a computer consultant engaged by Boaden to inspect the device, its directories and hard drive solely for the purposes of obtaining and retrieving information that would answer the several parts of Question 237.

[44] In March 2020, Earl Haig produced colour copies of its menus for December 2015 and Winter/Spring 2016. The defendants later advised Boaden that the Fall/Winter 2015 menu had a "created" and "last modified" date of April 16, 2019.

[45] This discovery led Boaden to renew its demand for inspection of the Earl Haig Laptop. Boaden believes that the created and last modified dates show that the defendants were interfering with the evidence somehow.

[46] Even though Earl Haig had produced the information ordered by Justice Emery, it agreed to produce the Earl Haig Laptop for inspection. Though Boaden argues that the defendants should've preserved the Earl Haig Laptop sooner, I disagree. Justice Emery ordered inspection of the computer only in the alternative.

[47] The computer was delivered to Carlo Monasterial, an IT specialist retained by Boaden. After Mr. Monasterial's review, Boaden alleged that there was "critical evidence" on the Earl Haig Laptop, which lead Earl Haig to engage its own forensic consultant to image the computer.

[48] Louis had the laptop for "a day, day and half" before it was sent to Earl Haig's consultant. Either Mr. Monasterial or Louis copied the Earl Haig Laptop's contents (including the operating system, applications, and documents) onto a Dell computer (the Imaged Laptop).

(b) Boaden believes that the defendants are lying about when Earl Haig bought the Earl Haig Laptop.

[49] Boaden's theory is that Chris was using the Boaden Laptop after he started working for Earl Haig. It believes that Earl Haig didn't buy the Earl Haig Laptop until 2020, and TCOMPUTERS, which sold the computer to Earl Haig, participated in this lie.

[50] In mid-September 2015, Kim contacted Tommy Causevski about buying a laptop. Mr. Causevski operates TCOMPUTERS, a small business that sells and services computers. He's known Kim for over 10 years. Mr. Causevski says he delivered an Acer laptop to Earl Haig on September 22nd. Mr. Causevski's invoice indicates that the laptop was an Aspire E5-571, with an i5 processor (the Earl Haig Laptop). Intel also makes an i3 and i7 processor. Laptop processors can't be changed.

[51] When Kim contacted Mr. Causevski, she specifically asked if the laptop had Publisher. According to Mr. Causevski, a trial version of Microsoft Office was pre-installed on the computer, which included Publisher. The trial version lasts for around 90 days.

[52] Mr. Causevski usually services his customers' computer every December—he updates Microsoft Windows and scans for viruses. Though he says he worked on the Earl Haig Laptop between December 2019 and December 2023, he doesn't recall what he did. The laptop was either running Windows 7 or Windows 10. For laptops with Windows 7, Microsoft automatically updated users to Windows 10 at some point.

[53] Earl Haig paid Mr. Causevski by cheque in September 2015. Kim wrote "Kitchen Laptop" on the cheque stub. In June 2020, Earl Haig produced an electronic copy of TCOMPUTERS's invoice. The metadata for the invoice, which Louis downloaded, shows that:

- the document title is "EARL HAIG INVOICE – ACER LAPTOP CHRIS GREEN.xslx"
- the author of the document is "TDB"
- the "location" of the electronic document is "Users/louie/Desktop/Boaden/Court/Earl Haig/June 9 documents/"
- the document was "created" on April 23, 2020
- it was "modified" on June 9, 2020.

[54] Mr. Causevski uses the initials TDB, which means "Tom Da Bomb" and is the nickname for his music hobby. He included Chris's name in the title because Kim told him the laptop was for Chris. He didn't recognize the location and doesn't know why the created or modified dates are from 2020. That said, he believes that the modified date can change if a document crashes or is saved with a new name. The location of the file shows that it's been saved to Louis's computer. The invoice was produced by email to Boaden on June 9, 2020, which may explain the created/modified dates.

[55] Boaden's theory is that:

- Chris was using the Boaden Laptop when he first started working for Earl Haig
- Earl Haig bought the Earl Haig Laptop in 2020
- Mr. Causevski created the invoice (even though it's dated September 22, 2015) sometime in 2020
- either Mr. Causevski participated in the fraud, or the cheque is for a different computer

[56] As I discuss below, I reject this theory.

(c) The directors' evidence.

[57] At trial, there was a lot of time devoted to questioning Kim and several of Earl Haig's directors about the decision to do meal preparation onsite and terminate Boaden's services. Boaden relies on this evidence to argue that Kim and Chris aren't credible. I found most of this evidence irrelevant or not probative.

[58] Given the passage of time and that the directors performed their role on a volunteer, part-time basis, their recollections of specific discussions were justifiably incomplete. My findings, from the totality of there evidence, is summarized as follows:

- like most non-profit organizations, Kim was responsible for Earl Haig's day-to-day operations, while the directors provided advice on the daycare's broader mission

- Kim's compensation wasn't tied to Earl Haig's financial performance

- there were constant discussions at the board and among parents about the food at Earl Haig, including how to manage allergies and dietary restrictions, expand offerings, and control the quality of the ingredients

- in January 2015, Kim reported that "things are going well so far" with Boaden

- Earl Haig did have complaints about food quality, pests, and incorrect orders but it decided to stop using an external caterer altogether, not just Boaden, to save money and have more control over meal preparation

- in March 2015, the board supported the idea of onsite meal preparation but raised concerns about the logistics

- at the AGM in May 2015, Kim reported that Earl Haig was considering moving to onsite meal preparation using a full-time chef

- by June 2015, Kim reported that she was in discussions with a proposed chef, who would start in September

- though the board had a hiring committee and policy, Kim hired Chris without engaging the policy or interviewing other candidates

- that said, no board member questioned her decision to do so, either then or now

[59] Boaden argued that the defendants intentionally destroyed Kim's reports to the board and directors' notes. I reject this submission. First, there was inconsistent evidence that Kim provided the board or the AGM with a written report. In any event, there's no evidence that she destroyed copies of the reports to avoid producing them to Boaden. Second, Aubray Boyd, Earl Haig's former president and a director, did take notes at meetings and subsequently destroyed them, but there's no evidence she did so to avoid Earl Haig's discovery obligations in this lawsuit.

[60] Boaden also argues that Kim's decision to hire Chris without a candidate search or interview leads to an inference that she and Chris were conspiring to steal Boaden's confidential information. I disagree. Earl Haig is a non-profit organization. Though Kim should've followed the board's hiring policy, there's no evidence that the board challenged her approach, and none of the five board members who testified raised any hindsight concerns.

(d) The evidence about the Imaged Laptop is inadmissible because it's unreliable.

[61] Much of Boaden's evidence about the defendants' alleged unlawful conduct comes from Louis's review of the Imaged Laptop. At trial, Boaden introduced the Imaged Laptop as an exhibit. Louis's evidence consisted of him showing various tabs and settings to try to prove Boaden's case.

[62] I find that the Imaged Laptop and Louis's evidence about it are unreliable and give this evidence no weight. The "qualities of reliability and authenticity" are to be considered as part of the relevance inquiry. Unless the party introducing electronic information can show "threshold reliability", the information can't be considered to be a reliable source of information. The role of the trial judge at the admissibility stage is limited to examining the circumstances in which the information was captured, stored, copied, and presented, to determine whether the information can provide reliable information about a material issue. See Graham Underwood & Jonathan Penner, *Electronic Evidence in Canada* (Toronto: Thomson Reuters Canada Limited, 2010) (loose-leaf updated 2023), at §11.4, 11.7. If the trial judge finds that the information is admissible, they must still decide its "ultimate reliability", and the weight to give the evidence, based on a consideration of the specific evidence in the context of all the evidence. See *R v Khelawon*, 2006 SCC 57, 274 DLR (4th) 385 at para 50.

[63] The defendants didn't challenge the admissibility of the Imaged Laptop. But, for the reasons I discuss below, I give the evidence about the Imaged Laptop no weight because it wasn't properly preserved by Boaden.

[64] Changes to an electronic document can happen "without the knowledge of the document's creator or user." See Bryan Finlay, Marie-Andrée Vermette & Michael Statham, *Electronic Documents: Record Management, E-Discovery and Trial* (Toronto: Thomson Reuters, 2010) (Loose-leaf updated 2024), at §2:21. Changes to electronic documents can happen "not only when content is edited by a user, but also when any of the document's metadata is changed in the system." See Finlay et al., at §2:21.

[65] Louis connected the Imaged Laptop to the internet. He logged into Earl Haig's Gmail account. He monitored incoming and outgoing emails, including emails between the defendants and their lawyers. During the trial, Louis was constantly fiddling with the Imaged Laptop at counsel table before it was introduced into evidence. I have no confidence that the Imaged Laptop is a true "copy" of the Earl Haig Laptop—perhaps Boaden inadvertently deleted files or changed the metadata through Louis's action.

[66] The best example happened in court, during the trial. Louis showed the Windows Settings App. The Apps & features screen showed that several applications, including Mozilla Firefox, Google Earth Pro, Google Chrome, and CCleaner had been installed between May 12, 2024, and May 15, 2024—the day before and during the first three

days of the trial. Either Boaden or Louis was using the Imaged Laptop or updates were automatically downloaded and installed, both of which may have affected the documents on the computer.

[67] I also don't understand why Boaden took this approach. Boaden could've engaged a forensic expert to give evidence on the Earl Haig Laptop's contents. It's a well-known practice in departing employee litigation for the plaintiff to engage a forensic expert to search an imaged copy of former employee's devices and provide a report, in part to avoid the problems disclosed here.

[68] Four examples illustrate the problem with Boaden's approach. First, Louis insisted that the Earl Haig Laptop had an i5 processor but the Imaged Laptop showed it had an i7 processor. Boaden wants me to infer that the defendants sent it some other computer to be imaged. But the Dell computer that Boaden put into evidence has an i7 processor. It's common sense that if a computer is imaged onto a fresh device, the contents are copied but the processor, which is part of the hardware, isn't. That seems to be what happened here. A forensic expert might've clarified this issue.

[69] Second, Louis asserted that the icon of a tree found on the Earl Haig Laptop was designed for Boaden in the 1990s, and it's used on all Boaden's computers to access the daycare and social catering programs menus. In other words, the Imaged Laptop was either the Boaden Laptop or Chris copied the contents of the Boaden Laptop, including the icon, onto the Earl Haig Laptop. Anyone who used a computer in the

1990s would immediately recognize the icon—it's one of several preloaded icons in Windows 95. In cross-examination, Louis admitted that the icon came from Windows 95, but then questioned why it was on a computer using Windows 10. One common sense explanation is that the icon was still being used in Windows 10. Again, a forensic expert might've cleared up this issue.

[70] Third, Louis pointed to a Dymo icon seen in the service tray of the Imaged Laptop and in a photo of another laptop computer found on the Imaged Laptop as evidence that the defendants didn't produce the Earl Haig Laptop. To begin, the maker of the photo wasn't called to testify, making the photo inadmissible. See Sidney Lederman, Michelle K Fuerst & Hamish Stewart, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 6th ed (LexisNexis Canada, 2022), at §18.131. And, perhaps, Dymo was preloaded on the computer, or automatically installed when someone connected a Dymo labelmaker. Chris's wife testified that she used a Dymo labelmaker for her work and she sometimes used Chris's work computers. A forensic expert might've clarified this issue.

[71] Finally, Boaden submitted that his review of the Imaged Laptop shows that the defendants intentionally deleted documents or failed to disclose and produce relevant documents. Louis found emails from Chris to Leah Shainhouse, Earl Haig's dietitian, and the defendants' law firm with attachments (including menus), but the same attachments weren't saved anywhere on the laptop. Boaden also argues that the defendants deleted Shutterstock images that Chris took from Boaden—they are

embedded in the menus that Chris emailed but aren't found elsewhere on the computer. He also says he found emails and menus that should've been disclosed and produced.

[72] Boaden wants me to infer that the defendants destroyed evidence. That's an unreasonable stretch. Because Boaden didn't forensically preserve the Imaged Laptop, perhaps the files are somewhere on the computer but Louis doesn't have the expertise to find them. Or Louis or someone else with access to the device deleted the files, either intentionally or inadvertently. A forensic expert could've told us whether these documents were ever on the computer and, if so, whether they were deleted.

[73] Boaden wasn't obligated to introduce evidence from someone with special knowledge of computers or digital forensics. But it hasn't proven its case based on Louis's evidence alone. He's providing opinion evidence on technical issues that he wasn't qualified to testify about. And I'm not prepared to make inferences from the facts he introduced into evidence because they're too unreliable.

[74] As an aside, I find Louis's conduct here to be highly problematic. Justice Emery's order allowed Boaden's IT consultant to inspect the laptop for specific information. Instead, Louis used the Imaged Laptop to search for information outside the scope of the order and surveil the defendants, including their privileged communications with their lawyers.

[75] In sum, I don't give the Imaged Computer and Louis's evidence about it any weight because it's all unreliable.

(e) In sum, the defendants didn't commit spoliation.

[76] I find that the defendants didn't intentionally destroy evidence. I believe Mr. Causevski's evidence that he sold the Earl Haig Laptop to Earl Haig in September 2015. There's no reason for Mr. Causevski to participate in this alleged conspiracy. The invoice and cheque are from around the same time.

[77] I agree with Boaden that the defendants' conduct of the discoveries was frustrating—they were doing the bare minimum required of them, and then only when ordered by the court. But I can't go further and find that they intentionally destroyed evidence in Fall 2015 or Spring 2016 like Boaden wants me to. There's just no evidence to support that inference.

[78] Part of the reason, as I've already intimated, is that Boaden's "smoking gun"—the Imaged Laptop—is totally unreliable. Absent evidence from and about that computer, there's no other evidence for me to draw this inference. Again, the defendants' conduct was unnecessarily adversarial and "on the line", but I'm not prepared to conclude that they committed spoliation.

ii. Chris misappropriated Boaden's menus.

[79] Boaden's argument that Chris misused or misappropriated its menus and other confidential information is based on three pieces of evidence: (a) at trial, Chris admitted using a Boaden menu as a template; (b) Earl Haig's menus are much like Boaden's menus; and (c) Earl Haig managed to produce a draft menu within days of Chris starting his employment, which could've only been possible if he was misusing Boaden's menus.

(a) Chris admitted using the Boaden menus.

[80] Chris's evidence is that when he worked at Boaden, he backed up the contents of the Boaden Laptop to a USB drive because he didn't want to lose anything. After he started working at Earl Haig, he used a template menu from the USB drive to create Earl Haig's menus. He has since lost the USB drive.

[81] Boaden argues that the menus and images were too big to save on a USB drive, meaning that Chris must've been using the Boaden Laptop and is lying about the USB drive. I didn't hear any evidence to support this thesis. I don't know how big the files were, and I don't know the storage capacities for USB drives in 2015. That said, it's common sense that people back up their computers to USB drives, so it's reasonable that Chris might've had a large enough drive to do so. It's also reasonable that he lost or discarded the USB drive once he had no more use for it—USB drives are cheap and found everywhere. There's also no admissible evidence that Chris was

using the Boaden Laptop when he started working at Earl Haig. I believe Chris's and his wife's evidence that the laptop stopped working before Chris quit, and he threw it out when he found it sometime later.

(b) Earl Haig's menus are similar to Boaden's menus.

[82] Boaden introduced several copies of Earl Haig's menus that it argues are identical or similar to its menus. I agree that Earl Haig's Fall/Winter 2015 menu is similar to some of Boaden's pre-2014 menus:

- it has columns for the days of the week, lunch, and snacks
- it uses images that appear to come from Shutterstock
- it's a seasonal menu presented in a four-week rotation
- the menu has a soup and sandwich for three of the four Friday offerings
- in Week 3, the Thursday snack is a yogurt tube

(c) Chris used Boaden's menus as a template.

[83] Chris sent Ms. Shainhouse a copy of the 2015 Fall/Winter menu for her review less than three weeks after he started working at Earl Haig. Ms. Shainhouse approved the last version of the menu in early November. But Earl Haig didn't start onsite meal preparation until mid-December.

[84] To begin, I find that Chris didn't use Boaden's menus to compete against Boaden, either when he worked for Boaden or after. As I detail below, Boaden and Earl Haig aren't competitors. There's no evidence that Earl Haig or anyone who worked there knew that Chris was using Boaden's menus as a template (in part because Earl Haig only ever received the newer version of Boaden's menus, which didn't have images and were laid out differently).

[85] Boaden argues that Chris got a "head start" on Earl Haig's menus by using its confidential information. I disagree. First, the "springboard doctrine" is intended to prevent unfair competition: it's harmful to an employer for an employee with confidential information "to get a 'head start' on the employer's competitors by exploiting it" as soon as it enters the public domain. See Geoffrey England, Peter Barnacle, & Innis Christie, *Employment Law in Canada*, 4th ed (Toronto: LexisNexis Canada, 2005) (loose-leaf updated 2024), at §11.149. Again, Chris wasn't using Boaden's menus to solicit Boaden's customers for a competitive catering business. There's no evidence that Earl Haig hired Chris because he had access to Boaden's menus.

[86] And Chris was an experienced chef, with a lot of knowledge, skill, expertise, and experience in cooking generally, and in daycare meal preparation specifically. My finding might've been different if Earl Haig hired away a new chef, who needed the menus because they didn't know where to start. But that's not what happened here.

[87] Chris wasn't designing a menu for a Michelin-star restaurant or food critics. Boaden's menus consisted of pasta, fishsticks, meatloaf, burgers, soups, and sandwiches, and snacks like cheese and crackers, veggie sticks, and muffins. It's common sense that the options for a kid's menu are limited: there have to be choices for a wide range of ages, the foods have to be accessible and inexpensive, and the items have to address allergy and dietary restrictions. To the extent that Earl Haig's menu and Boaden's menu were similar, it wasn't because Chris stole Boaden's menus or ideas—it's because Chris, as an experienced chef catering to a selective group of diners, had only so many choices.

[88] Second, Chris didn't get much of a head start. Earl Haig continued using Boaden's catering for almost three months after Chris started working there. There was no evidence that, for example, if Chris hadn't used Boaden's menus as a template, Earl Haig would've continued ordering meals from Boaden for some time longer.

[89] That said, Chris's employment agreement bars him from using Boaden's confidential information for his own benefit. I find that Chris used at least one of Boaden's menus as a template for Earl Haig's menus. It was a shortcut. Rather than draft the menu from scratch (as he probably should've done), Chris used the menu as a template, layering on his own knowledge, skills, and experience to develop Earl Haig's menus. Because he did so, many of Earl Haig's later menus showed Louis as the "author" and have the embedded Shutterstock images (which may also explain why there are no Shutterstock image files on the computer).

[90] As a result, I find that Chris did misappropriate Boaden's menus, but solely to save himself a few hours of labour.

[91] I find that Chris didn't misuse any of Boaden's other allegedly confidential information. Chris didn't need to copy Boaden's processes or recipes. There's no need for an "easy day" at Earl Haig because it doesn't do social catering. And there's no need to employ a unique delivery method for frozen yogurt because Earl Haig is making and storing its food onsite. There's also no evidence that Chris used the change-it sheets or Boaden's pricing information for his or Earl Haig's benefit. Finally, if Boaden's kitchen design is confidential, there's no evidence that Chris misused this information. To prove this claim, Boaden would have to introduce evidence that Earl Haig designed its kitchen using this confidential information, and Earl Haig benefitted in some way. There were no submissions, never mind evidence, about any benefit that accrued to Earl Haig.

iii. Boaden didn't suffer a loss.

[92] In breach of contract cases, the plaintiff must show that a monetary award would restore it to the position it would've been but for the breach. See *McCormick Delisle & Thompson Inc. v Ballantyne*, 2001 CanLII 8528, at para 25 (Ont CA); *Cadbury Schweppes Inc. v FBI Foods Ltd.*, 1999 CanLII 705, at para 90 (SCC). The caselaw recognizes two ways of calculating this loss in departing employee cases: (a) an accounting of profits made by the party who breached the duty; or (b) lost profits arising from the employee's breach. See *McCormick Delisle & Thompson Inc.*, at para 26. That said, the

court won't order the defendant to disgorge the full amount of any profit if doing so would lead to the employer being over-compensated. See *e.g.*, *Gottcon Contractors Ltd. v Manzo*, [1992] OJ no 24, aff'd 1996 CanLII 709 (Ont CA).

[93] To begin, it's unclear to me whether this approach applies when the defendant's misconduct is limited to misuse of confidential information, as compared to unfair competition. In any event, Boaden only introduced evidence of its lost profits.

[94] There's no evidence that Chris's use of Boaden's menu caused these lost profits. Though Boaden asserts that Earl Haig stopped ordering meals in December 2015, there's no evidence that Chris's misappropriation accelerated Earl Haig doing so. And Boaden didn't seek to recover, for example, the commercial value of its menus.

[95] As a result, I would've dismissed Boaden's claim for breach of confidence even if the menus were confidential.

[96] My reasons shouldn't be taken as countenancing the misappropriation of workplace templates. I expect that employees often take these kinds of documents when they quit. The prevalence of electronic documents, how easily they can be copied, and the generic nature of a template may lead employees to believe that there's nothing unlawful about taking such documents. As here, the documents may not be confidential. But, if they are, the employee runs the risk of being found liable for misappropriating the documents and, if they have commercial value, damages.

B. Issue #2: is the noncompete agreement enforceable?

[97] Chris's employment agreement with Boaden includes a multi-part non-competition and non-solicitation clause. Restrictive covenants are prima facie unenforceable unless the restriction is reasonable. See *Shafron v KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6, at para 17. Generally, courts won't enforce a non-competition clause if a non-solicitation clause would adequately protect an employer's interests. See *Lyons v Multari* (2000), 50 OR (3d) 526, at para 33 (CA), leave to appeal dismissed, [2000] SCCA no 567. The party seeking to enforce the restrictive covenant has the onus of demonstrating that it's reasonable as between the parties. See *Martin v ConCreate USL Limited Partnership*, 2013 ONCA 72, at para 50.

[98] Boaden argues that: (a) this case is exceptional, thus justifying a noncompete clause; and (b) the clause itself is reasonable. I disagree: (a) there's no evidence that Boaden has a proprietary interest in its client base; and (b) the geographic coverage and duration are unreasonable. See *Shafron*, at para 23.

[99] The non-competition clause in Chris's agreement is from a template that Louis found on the internet:

> 2. The Employee agrees that for the duration of this Agreement and for a period of twenty-four (24) months following the termination of his employment, however and for whatever reasons such termination occurs:
>
> (a) the employee shall not, within the geographical boundaries of 100-miles of any unit or regional office of the Company, either directly or indirectly, either as principal or agent, or as director, manager,

> employee or otherwise, provide services to or in respect of any customer of the Employer for or in respect of which the Employee was responsible or provided services on behalf of the Employer;
>
> …
>
> (c) the employee shall not, either directly or indirectly, accept on his own behalf or on behalf of any other person, firm, or business entity, business in the prescribed area from customers of the Employer;
>
> …
>
> (h) provided, however, that these provisions shall not in any way restrict the Employee's right to accept employment with, or to engage in, any business not competitive with that of the Employer.

[100] First, Boaden hasn't proven that it has a proprietary interest in its clients or customers that needs to be protected by a non-competition agreement. Chris wasn't the "personification" of Boaden's business. See *Lyons*, at paras 25, 44. Louis runs Boaden's "total operations", including finances, operations, and human resources. He made all the strategic business decisions. He had exclusive authority to choose Boaden's suppliers and to negotiate prices and services from those suppliers. Chris rarely talked to Boaden's customers. If a driver was sick, Chris would fill in, which is how he met Kim. But Kim thought Chris was only Boaden's daycare chef because she dealt with Louis, Kelly Hudson, and other administrative staff.

[101] Boaden also didn't lead any evidence of "goodwill" in its client basis—there's nothing to show that Boaden's clients would follow Chris to his new workplace (if, for example, he started working for another catering company) even if he didn't actively solicit them (like with a dentist or veterinarian). See *Lyons*, at paras 25-28. In fact,

Louis doesn't believe in written contracts with his clients—if clients are unhappy with Boaden's services, they can cancel without notice. Boaden didn't have any expectation that it would be Earl Haig's exclusive caterer.

[102] And the clause is unreasonable both because it's ambiguous and because of its geographic restrictions. Boaden didn't have a "unit or regional office". At the time Chris left Boaden, it had two locations: its head office and a banquet facility. Boaden led no evidence that either of these locations were a "unit" or a "regional office". It's unclear what these words mean. The use of "any" adds to this ambiguity—it's unclear whether the restriction applies to Boaden's locations at the time Chris signed the agreement, or any new "unit or regional office" opened during Chris's employment or during the temporal period of the covenant. Under Boaden's interpretation, Chris would need to be constantly alert to Boaden expanding its offices to avoid being offside the covenant. Also, even though Canada is officially a metric country and distances are usually measured in kilometers, this clause uses miles, which further adds to its ambiguity. Finally, it's difficult to know how to read clauses 2(a) and 2(h) together—Chris can't provide services to Earl Haig's customers but he can work for a non-competitor, which is ambiguous if Earl Haig's customer isn't a competitor (as here). Boaden didn't lead any evidence of its customers that aren't competitors (indeed, the thesis of its case seems to be that all of its customers are potential competitors).

[103] The geographic restriction means that Chris can't work anywhere from London to Peterborough, or Owen Sound to upstate New York. Boaden hasn't show that it carries on business that far outside the GTA. Chris would have to move outside the GTA and Southwestern Ontario for him to work as an executive chef, which makes it overly broad. See *Payette v Guay inc.*, 2013 SCC 45, at para 65.

[104] As a result, I find that the non-competition clause is void and unenforceable as a restraint on trade.

C. Issue #3: is Earl Haig competitive with Boaden?

[105] If I'm wrong and the clause is enforceable, I find that Chris didn't breach the agreement. Section 2(h) of Chris's agreement provides that he can work for "any business not competitive" with Boaden.

[106] Boaden and Earl Haig aren't competitors. Boaden provides catering services to the public through its three business lines. Earl Haig is a daycare. As part of its services, it provides food to children enrolled at its two sites. But it has no banquet facilities and doesn't provide food services to other daycares or the public. It's self-evident that no one would assume that Earl Haig could cater their banquet, provide catering for homeless shelters, or even offer catering for other daycares. That both businesses serve food to children or use warming boxes to deliver food between locations doesn't make them competitors. Earl Haig isn't a caterer. It's a daycare.

D. Issue #4: is the non-solicitation clause enforceable?

[107] Boaden submits that the non-solicit agreement is enforceable. It argues that even if I find the noncompete agreement to be void and unenforceable, I can sever it from the rest of the clause.

[108] Like with the non-competition agreement, the non-solicitation agreement must be reasonable between the parties. The non-solicitation clause in Chris's contract defines its geographic scope as the "prescribed area":

> 2. The Employee agrees that for the duration of this Agreement and for a period of twenty-four (24) months following the termination of his employment, however and for whatever reasons such termination occurs:
>
> …
>
> (b) the employee shall not, either directly or indirectly, solicit on his own behalf or on behalf of any other person, firm, or business entity, business in the prescribed area from customers of the Employer….

[109] The "prescribed area" appears to refer to the 100-mile radius referred to in the non-competition clause, which I have found void and unenforceable.

[110] Though blue-pencil severance "may be resorted to sparingly" to remove the "illegal features" of a restrictive covenant in an employment agreement, that doesn't help Boaden. See *Shafron*, at paras 29, 36. Running a "blue pencil" through clause 2(a) means that the non-solicitation agreement is ambiguous—the words "prescribed area" have no meaning.

[111] As a result, I find that the non-solicitation clause is void and unenforceable because it's unreasonable between the parties.

E. Issue #5: did Chris solicit from Earl Haig?

[112] If I'm wrong and the non-solicitation clause is enforceable, I find that Chris didn't breach the covenant.

[113] In February 2015, Earl Haig explored the option of moving its foods services inhouse. Kim met Chris when he sometimes delivered food from Boaden. She thought he was the daycare chef. She gave Boaden's regular driver her business card to give to Chris. Chris phoned Kim. She asked if he was interested in working at Earl Haig.

[114] Kim solicited Chris, not the other way around. Boaden didn't provide me any precedent where an employee is solicited by their new employer but is still found in breach of a non-solicitation clause. That would be a noncompete clause dressed up as a non-solicitation clause.

F. Issue #6: did Chris breach any fiduciary duties to Boaden?

[115] Boaden alleges that Chris breached his fiduciary duties to it by unfairly competing against Boaden both during his employment and after. Fiduciary employees must: (a) avoid all conflict of interest; (b) act only in the best interest of the trust of beneficiary; and (c) not profit because of their position. Fiduciary duties also survive the

termination of employment. Fiduciaries can't compete with their former employer and can't exploit a corporate opportunity that "ripened" during their employment. See *GasTOPS Ltd.* (Ont Sup Ct), at paras 78-89.

[116] I find that Chris wasn't Boaden's fiduciary. The "hallmarks" of a fiduciary duty are:

- the fiduciary has scope for the exercise of some discretion or power
- the fiduciary can unilaterally exercise that power or discretion to affect the beneficiary's legal or practical interests
- the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power

See *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24, at para 27.

[117] As I discussed in paragraph 100 above, Chris didn't have this discretion or power. He couldn't fire employees or hire or fire suppliers. If he had authority to hire anyone, there was no evidence of him doing so. He didn't have control over the menu content, though he provided input to Louis. He knew nothing about Boaden's financial information, and had no power on pricing either with customers or suppliers.

[118] As a result, I find that Chris wasn't a fiduciary and thus didn't owe Boaden any fiduciary duties either during his employment or after. If I am wrong and Chris was fiduciary, I don't find he breached his duties. As I discussed above, Earl Haig doesn't

compete with Boaden. And, as I discuss below, Chris didn't misappropriate a corporate opportunity before he quit.

G. Issue #7: did Chris unfairly compete against Boaden while working there?

[119] It's an implied term in all employment contracts that the employee won't, during their employment, compete against their employer. See *GasTOPS* (Ont Sup Ct), at para 77. Chris's employment agreement also bars him from attempting to "take advantage of an emerging corporate opportunity of which he became aware during the course of his employment or with which he was involved directly or indirectly…."

[120] I find that Chris didn't violate his good faith duties. Kim asked Chris if he was interested in working for Earl Haig in February 2015. He sent her his resume in March 2015. In May 2015, Chris and Kim communicated about an "action plan" for bringing Earl Haig's meal preparation onsite. Earl Haig sent Chris an offer of employment in August 2015. The delay was because Earl Haig's board doesn't meet in July or August, and it needed to approve Chris's salary. Chris quit Boaden on August 28th. He provided two weeks' notice. Boaden ended Chris's employment one week later. He started working at Earl Haig on September 14th.

[121] There's no dispute that Chris was working with Earl Haig to get the kitchen ready for onsite meal preparation before he quit Boaden. He wasn't paid for his time. He hadn't accepted employment with Earl Haig. There's no evidence that he engaged in "time theft" by doing these tasks while "on the clock" at Boaden. If Earl Haig

changed its mind and decided not to hire Chris, he would have no recourse for the time and effort he spent readying a plan for onsite meal preparation.

[122] Neither party found a precedent where an employee quitting to work for a client or customer was considered a breach of the duty of loyalty. Further, "merely planning to establish a competing business" doesn't violate the duty, unless the departing employee is planning to abuse the employer's confidential information or solicit employees or customers. See England et al., at §11.137. There's no evidence that Chris sent Boaden's menus to Earl Haig or used Boaden's menus for Earl Haig's benefit before he quit (as discussed above, I find he used the menus as a shortcut to save himself some time). The outcome here might've been different if Chris was preparing meals for Earl Haig while he worked for Boaden and, as a result, Earl Haig terminated Boaden's catering services. But that's not these facts.

[123] Finally, Chris didn't misappropriate Boaden's corporate opportunity by either accepting Earl Haig's employment offer or putting together a plan to retrofit the kitchen. There's no evidence that Boaden would've helped Earl Haig move its meal program onsite, even if paid to do so. Indeed, doing so necessarily led to the end of Earl Haig's business relationship with Boaden.

[124] As a result, I find that Chris didn't breach his common law duties of fidelity and good faith to Boaden during his employment.

H. Issue #8: did Earl Haig induce Chris to breach his employment contract?

[125] Boaden alleges that Earl Haig induced Chris to breach his restrictive covenants and confidentiality obligations to it. To succeed on this claim, Boaden has to prove: (a) Chris had a valid and enforceable contract with Boaden; (b) Earl Haig knew about this contract; (c) Earl Haig intended to and did procure the breach of the contract; and (d) because of the breach, Boaden suffered damages. See *Chaba v Khan*, 2020 ONCA 643, at para 17.

[126] There's no evidence that Kim or anyone else at Earl Haig knew about Chris's contract with Boaden before he quit. Kim first learned of Chris's noncompete agreement on October 22, 2015. She and Louis were emailing about an alleged pest issue. As part of his reply, Louis mentioned Chris's "non compete agreement as well several other agreements".

[127] And, in any event, Chris didn't breach his employment agreement. As a result, I find that Earl Haig didn't induce Chris to breach the agreement.

I. Issue #9: did Earl Haig commit an unlawful act against a third party?

[128] Boaden claims that Earl Haig is liable for the unlawful means tort. Specifically, it alleges that Earl Haig wrongfully interfered in the contractual relationship between Boaden and Chris.

[129] The unlawful means tort is an intentional tort which creates a type of "parasitic" liability in a three-party situation: it allows a plaintiff (here, Boaden) to sue a defendant (here, Earl Haig) for economic loss resulting from the defendant's unlawful act against a third party (here, Chris). Liability to the plaintiff is based on (or parasitic upon) the defendant's unlawful act against the third party. The two core components of the unlawful means tort are that: (a) the defendant must use unlawful means and; (b) the defendant must intend to harm the plaintiff by the unlawful means. See *A.I. Enterprises Ltd. v Bram Enterprises Ltd.*, 2014 SCC 12, at para 23.

[130] The "unlawful means" must be an actionable civil wrong. See *A.I. Enterprises*, at para 26. The only actionable wrong that Boaden points to is inducing breach of contract. As I've found that Earl Haig didn't commit that tort, Boaden's claim for the unlawful means tort must also fail. I'm also unsure whether inducing breach of contract is an unlawful act *against* Chris.

J. Issue #10: is Chris liable for taking the Boaden Laptop?

[131] Boaden alleges that Chris took the Boaden Laptop when he quit. A claim for conversion involves a wrongful interference with the goods of another, such as taking, using, or destroying these goods in a manner inconsistent with the owner's right of possession. See *Del Giudice v Thompson*, 2024 ONCA 70, at para 38.

[132] There's no dispute that Chris took the Boaden Laptop when he quit. He never returned it. I accept that he trashed it sometime later. But Boaden led no evidence

about the value of the Boaden Laptop to prove damages. As a result, Boaden's claim for conversion of the Boaden Laptop is dismissed.

K. Issue #11: was Earl Haig unjustly enriched?

[133] Unjust enrichment is about the restoration of a benefit that justice doesn't permit one to retain. For recovery, something must have been given by the plaintiff and received and retained by the defendant without juristic reason. See *Kerr v Baranow*, 2011 SCC 10, at para 31. The enrichment and detriment elements are the "same thing from different perspectives"—there must be a transfer of wealth from the plaintiff to the defendant. See *Professional Institute of the Public Service of Canada v Canada (AG)*, 2012 SCC 71, at paras 151-152.

[134] Boaden asserts that Chris received his salary, and Boaden lost its customer. First, Boaden's deprivation isn't "corresponding". Chris's annual salary ($65,000) wasn't commensurate to Boaden's lost revenues or profits. Earl Haig pays his salary regardless of any savings from cancelling Boaden's services.

[135] Second, Earl Haig hasn't been enriched. It's the client. It didn't retain a benefit that should now be disgorged. As a result, Boaden's claim for unjust enrichment is dismissed.

IV. CONCLUSION

[136] Boaden is mad that Chris quit to work for its customer. It's mad that Earl Haig's menus are similar to its old menus. It's mad that it lost Earl Haig as a customer. But the law doesn't compensate anger. Boaden has failed to prove that Chris's departure or his use of Boaden's menus breached any legal obligation that Chris or Earl Haig had.

[137] As a result, Boaden's claim is dismissed. The parties will engage in meaningful discussions and negotiations respecting the costs of this trial. If they can't resolve costs, any party seeking costs will serve, file, and upload to Case Centre costs submissions (2500 words maximum), any relevant offers to settle, and their bill of costs by October 11, 2024, 4pm. The other party's responding submissions (2500 words maximum) will be served, filed, and uploaded to Case Centre by November 1, 2024, 4pm.

Agarwal J

Released: September 26, 2024