IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Northam Distributor Ltd. v. Roman Hardware Inc.,* 2025 BCSC 238

Date: 20250214
Docket: S249622
Registry: New Westminster

Between:

Northam Distributor Ltd. and 1057079 B.C. Ltd.

Plaintiffs

And

Roman Hardware Inc., Dilpreet Singh Joura and Jasbir Singh Kochar

Defendants

Before: The Honourable Madam Justice Sukstorf

Reasons for Judgment

Counsel for the Plaintiffs:	Deepak Gautam
Counsel for the Defendant:	Daniel L.R. Yaverbaum
Place and Date of Hearing:	Port Coquitlam, B.C. October 4, 2024
Place and Date of Judgment:	New Westminster, B.C. February 14, 2025

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I. INTRODUCTION

[1] This is an application for an interlocutory injunction brought by the plaintiffs, Northam Distributor Ltd. (“Northam”) and 1057079 B.C. Ltd. (“105 Ltd.”). They seek an order that will restrain the defendants, Mr. Dilpreet Singh Joura and Mr. Jasbir Singh Kochar, from engaging in activities that, they allege, violate the restrictive covenant in a Share Purchase Agreement (the “SPA”).

[2] The SPA was executed on March 24, 2021, and in the underlying matter, the plaintiffs claim that the restrictive covenant prohibited Mr. Joura and Mr. Kochar from engaging, directly or indirectly, in competitive activities within British Columbia, Alberta, and Saskatchewan for five years.

[3] The plaintiffs allege that Mr. Joura and Mr. Kochar are in breach of this covenant by acting in concert with Roman Hardware Inc. ("Roman") to circumvent their obligations under the SPA.

[4] For the reasons that follow, the application for an interlocutory injunction is dismissed.

II. THE PARTIES

[5] The plaintiff, Northam, is a British Columbia company with a registered and records office at Suite 207 - 5577 153A Street, Surrey, BC, V3S 5K7. It is a distributor of kitchen cabinet and shower door hardware, operating in British Columbia and other provinces.

[6] The plaintiff, 105 Ltd., is also a British Columbia company with a registered and records office at the same address above. 105 Ltd. is a holding company for Northam.

[7] The defendant, Roman, is a British Columbia company with a registered and records office at 8205 151 Street, Surrey, BC V3S 8K1. Like Northam, Roman is engaged in the sale of cabinet hardware products, and is alleged by the plaintiffs to

have been aware of, and aided in, Mr. Joura and Mr. Kochar's breach of the restrictive covenant in the SPA.

[8] At the heart of the issues in these proceedings is the alleged conduct of, ownership and control of different corporate entities by, the defendants, Mr. Joura and Mr. Kochar.

[9] At all material times, they were the directors of Wipro Management Ltd. ("Wipro"). Wipro and 105 Ltd. were, at one point, equal shareholders of the plaintiff company, Northam. That was until Wipro sold all of its Northam shares to 105 Ltd., pursuant to the SPA dated March 24, 2021.

[10] Mr. Joura also runs and operates the company, Onex Enterprises Inc. ("Onex"), which is in the business of selling hood fans and kitchen sinks. The other defendant, Mr. Kochar, used to be a shareholder of Onex until, as Mr. Joura deposed, him and his wife purchased Mr. Kochar's shares in January 2024.

III. THE PARTIES' POSITIONS

[11] The plaintiffs allege, essentially, that Roman is a front for Mr. Joura and Mr. Kochar to continue to engage in competitive activities that are prohibited by the restrictive covenant in the SPA. The plaintiffs cite instances of sales and operational overlap between Roman and Onex, such as their evidence from a "mystery shopper" who went to a store belonging to Onex, and found products being sold under the name of Roman, that were allegedly restricted under the SPA.

[12] Roman denies knowledge of the SPA and maintains that it is not a party to the covenant.

[13] Mr. Joura and Mr. Kochar also deny any involvement in Roman's operations, and they challenge the enforceability of the restrictive covenant in the SPA. They argue that the covenant is ambiguous and unenforceable due to its excessive geographical scope and lack of clarity regarding the prohibited activities.

[14] Regarding Roman, the defendants plead the following:

a) they believe that Roman currently has no active business;

b) neither Mr. Joura nor Mr. Kochar is involved in Roman's operations, nor have they profited from any contributions to Roman;

c) Roman was not aware of the SPA or any non-competition clause therein, and did not aid in any alleged breach of such clauses by the defendants; and

d) Roman has never had any agreement, including any non-competition clause, with Northam.

[15] The defendants further argue that Roman has not been unjustly enriched because of any breach of the restrictive covenant by the defendants and that the plaintiffs have not been deprived or suffered a corresponding loss as alleged.

[16] Roman denies acting in concert or by agreement with the other defendants, or with a common design or intention to breach the SPA. It denies any knowledge or foreseeability of harm to the plaintiffs and contends that no injury or damage was suffered as a result of its conduct.

IV. RELEVANT FACTS

[17] Mr. Joura co-founded Northam in 2015 with Mr. Davinder Singh Ahuja. Northam imported and distributed kitchen cabinetry primarily to manufacturers in British Columbia. Only 1% of its business occurred in Alberta and Saskatchewan. As mentioned above, Northam shares were held by Wipro and 105 Ltd., with Mr. Joura and Mr. Kochar being the shareholders of Wipro, and Mr. Ahuja being the shareholder of 105 Ltd.

[18] In late 2020, Wipro and 105 Ltd. began negotiations for the sale of Wipro's Northam shares. The defendants make allegations of improper business conduct on Mr. Ahuja's part during this period, which is largely irrelevant for the purpose of this interlocutory injunction.

[19] In any event, a verbal agreement was reached in December 2020 to sell Wipro's shares for $1.3 million. However, Mr. Ahuja later renegotiated the terms, adding restrictive covenant and reducing the purchase price to $1.2 million.

[20] The SPA was executed on March 24, 2021. Mr. Joura states that while he signed and initialed every page of the SPA, the copy provided in Mr. Ahuja's affidavit contains uninitialed pages that were not part of the executed agreement.

[21] The SPA included, *inter alia*, the following restrictive covenant at clauses 9 and 10:

> 9. [Wipro, Mr. Joura, and Mr. Kochar] acknowledge and agree that they shall not do or compete for a period of five (5) years with within the Provinces of British Columbia, Alberta and Saskatchewan by having any direct or indirect involvement in trading and distributing of kitchen cabinet hardware, shower door hardware and other items or products as listed in scheduled A distributed by [Northam], except the fasteners the Onex as the parties to the First Part are distributing to the plumbing, electrical and HVAC companies at present as listed in schedule B.
>
> 10. [Wipro] acknowledge and agree that they will not lease or sell the unit 113-7750 128 Street, Surrey, British Columbia to any individual or corporation who are in any meaner [*sic*] involved in the business of distributing including but not limited to the distribution the Company has been doing within Canada and will not compete the [105 Ltd.] in the business of kitchen cabinets hardware, shower door hardware and the other items or products distributed by [Northam] for the period of three (3) years.

[22] Schedule "A" to the SPA identified generic product categories, such as "Mask"; "Plywood"; "Glue"; "Staples"; "Plug" and "All Types of Roofing Screws".

[23] The defendants contest the above SPA. They argue, for example, that the seven-page table which shows an itemized list of products and sales descriptions was not a part of the SPA, as each page of the executed SPA was initialed by all the parties: Mr. Ahuja, Mr. Joura, and Mr. Kochar.

[24] Since the SPA's execution, Mr. Joura asserts that he has not been in breach of the restrictive covenant. He denies that he traded or distributed kitchen cabinet or shower door hardware in British Columbia, Alberta, or Saskatchewan. He also denies any financial interest in Roman or involvement in its operations.

[25] As to his alleged involvement with Roman, Mr. Joura offers an alternate explanation. First, that Roman is owned and operated by Mr. Amrik Singh Bhandal, who also owns Tricity Kitchen Cabinet Ltd. ("Tricity"). Tricity's store is located next to the Onex store, and it previously housed Roman's operations but has since ceased selling kitchen cabinet hardware. Second, Mr. Joura states that while he was listed as a signatory to Roman's bank account in September 2021, it was only related to a land sale involving Wipro and a holding company controlled by Mr. Bhandal. He states that he has since been removed as a signatory, and was not involved in Roman's financial matters.

[26] Mr. Joura also states that a display board for a planned business targeting contractors in Ontario, Quebec, and the United States was temporarily stored at the Onex store in 2023 before being shipped to a trade show in Quebec, and that they are in compliance with the SPA's terms. He denies any involvement in sales of products restricted by the SPA.

[27] Mr. Kochar states that he was not involved in the day-to-day operations of Onex, though he occasionally discussed inventory matters with Mr. Joura. He also states that he has not been engaged in the trading or distribution of kitchen cabinet hardware, shower door hardware, or any items listed in Schedule A of the SPA. He also states that he has no financial or operational interest in Roman. Mr. Kochar finally argues also that while he signed the SPA on March 24, 2021, the copy of the SPA provided by Mr. Ahuja includes additional pages that were not part of the original document, as he initialed every page when the agreement was executed.

A. Procedural History

[28] The plaintiffs commenced this action by filing a notice of civil claim on June 21, 2023, which was amended on June 30, 2023. The plaintiffs allege that the defendants breached the SPA in 2022 by becoming involved in the operations of Roman. They seek relief for breach of contract, unjust enrichment, and civil conspiracy, as well as injunctive relief to restrain the defendants from breaching the restrictive covenant in the SPA.

[29] On August 21, 2023, Mr. Kochar and Mr. Joura filed a response to civil claim and counterclaim. They allege that the restrictive covenant in the SPA is unenforceable and further contend that the SPA resulted from misrepresentations made by Mr. Ahuja.

[30] The plaintiffs filed the application for injunctive relief on April 10, 2024, approximately 10 months after commencing the action.

[31] On May 7, 2024, the plaintiffs produced a list of documents containing only 13 items. None of the listed documents provide evidence to establish or disprove whether the plaintiffs suffered any damages.

[32] Examinations for discovery have not occurred, and no trial date has been set.

[33] The plaintiffs have made efforts to obtain the information on the alleged connection Mr. Joura and Mr. Kochar may have had with Roman. They deposed that they hired a lawyer to request access to Roman's Register of Directors and Central Securities Register, which went unanswered by Roman. The lawyer sent a letter on or about July 15, 2022 that also went unanswered. The lawyer visited the registered and records office of Roman on August 17, 2022, but was unable to gain entry.

[34] The plaintiffs then applied, on or about November 9, 2022, to the British Columbia Registrar of Companies (the "Registrar") for an order against Roman for the disclosure of the Register of Directors and the Central Securities Register. The Registrar issued an order to Roman, under s. 50 of the *Business Corporations Act*, S.B.C. 2002, c. 57 to provide the plaintiffs' lawyer with the requested material before February 24, 2023. On March 7, 2023, the Registrar issued another letter confirming that Roman had not complied with the order and advising the plaintiffs' lawyer of the remedies available through the court system to enforce it.

[35] Roman has still not provided any of the requisite material to the plaintiffs' lawyer to date, nor has Roman provided any explanation for the delay. Roman consistently maintains its position and denies involvement in any breach of the SPA, knowledge of the SPA, or the operation of any competing business. It claims to have

no active business operations and denies that Mr. Joura and Mr. Kochar are involved in its activities.

[36] The plaintiffs rely on circumstantial evidence, such as the findings of a mystery shopper and hearsay from Mr. Ahuja's affidavit, to suggest that Roman was acting as a vehicle for Mr. Joura and Mr. Kochar to breach the restrictive covenant in the SPA. Mr. Ahuja alleges that Roman's director, Mr. Bhandal, indicated that he was merely a "face" for the company, with the defendants running its operations. However, there is no direct evidence from Mr. Bhandal or other substantive proof of these claims.

B. Reliefs Sought

[37] Pursuant to Rule 10-4 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, the plaintiffs seek the following orders for:

a) an interlocutory injunction to be issued immediately restraining Roman from engaging in a business that competes with Northam; and

b) an interlocutory injunction to be issued immediately restraining Mr. Joura and Mr. Kochar from engaging in a business that competes with Northam.

[38] The plaintiffs also seek an order for costs in this application.

V. ISSUES

[39] The parties agreed that determining whether the above reliefs should be granted requires that I apply the test as set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 1994 CanLII 117 [*RJR-MacDonald*].

[40] It requires me to examine the following three issues:

a) Have the plaintiffs established the merits of the case at a standard of proof that is consistent with the nature of the restrictive covenant?

b) Have the plaintiffs demonstrated that they will suffer irreparable harm if the injunction is not granted?

c) Does the balance of convenience favour the granting of the injunction?

VI. LAW

A. Interlocutory Injunctions

[41] The three factors above should not be viewed as a rigid checklist, or as separate and isolated considerations. They are interrelated and must be assessed together, with the strength in one area potentially compensating for weakness in another. Further, it is not necessary for all factors to be satisfied before injunctive relief is granted, as the overall balance is what matters: *British Columbia (Attorney General) v. Wale*, 9 B.C.L.R. (2d) 333 at 346–47, aff'd [1991] 1 S.C.R. 62; *Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2019 BCCA 29 at para. 19.

[42] The *RJR-MacDonald* test is a framework of "general application" and applies even when an applicant demonstrates a strong *prima facie* case of breach of a negative covenant, such as a non-competition or restrictive covenant: *Belron Canada Inc. v. TCG International Inc.*, 2009 BCCA 577 at paras. 22. However, while irreparable harm remains a relevant factor when a breach of a negative covenant is alleged, its relative importance may be diminished in specific circumstances, including where a strong *prima facie* case of breach has been established: *Wizedemy Inc. v. Karras*, 2024 BCSC 630 at para. 43, rev'd on other grounds, 2024 BCCA 301; *Li v. Rao*, 2019 BCCA 264 at paras. 62–67.

[43] The fundamental question in granting injunctive relief is whether such relief is equitable in the circumstances: *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34 at para. 25. Courts are more inclined to enforce restrictive covenants in commercial contracts than in employment contracts, recognizing that the latter often involve an inequality of bargaining power between the parties.

B. Serious Question to be Tried, or Strong *Prima Facie* Case?

[44] The plaintiffs argued in their submissions that the threshold to be applied in the first stage of *RJR-MacDonald* analysis is whether there is a "serious issue to be tried", or "in a narrow band of cases" whether there is a strong *prima facie* case. The defendants, on the other hand, argue that the plaintiffs must establish a strong *prima facie* case, citing two decisions of this court in *Telus Communications Inc. v. Golberg*, 2018 BCSC 1825 at para. 27 [*Telus Communications*] and *Kwantlen Pizza Ltd. v. 1253928 BC Ltd*., 2022 BCSC 1252 at para. 25 [*Kwantlen Pizza*].

[45] The first stage of the *RJR-MacDonald* test requires an assessment of the merits of the claim. A covenant not to compete is a form of restraint of trade and is presumptively unenforceable unless it is reasonable both between the parties and with reference to the public interest. However, courts apply different standards of scrutiny depending on the context in which the restrictive covenant arises.

[46] Courts apply two different standards depending on the nature of the injunction sought:

a) Serious Question to Be Tried – This is a low threshold, requiring the applicant to show only that the claim is not frivolous or vexatious: *RJR-MacDonald* at 337-38. The court does not assess the strength of the claim at this stage: *Kwantlen Pizza* at para. 25.

b) Strong *Prima Facie* Case – This test requires that "upon a preliminary review of the case, the application judge must be satisfied that there is a strong likelihood on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice": *R. v. Canadian Broadcasting Corporation*, 2018 SCC 5 at para. 17 [*CBC*].

[47] The distinction is important because injunctions can have varying impacts on the rights of the responding party.

[48] The standard of “a serious question to be tried” is not a rigorous test, and the threshold is not high. The standard is merely intended to exclude frivolous or vexatious claims: *Harm Reduction Nurses Association v. British Columbia (Attorney General)*, 2023 BCSC 2290 at paras. 35, 47. In short, the determination of whether there is “a serious question to be tried” is made based on common sense and an extremely limited view of the merits: *RJR-MacDonald* at 348.

[49] To expand further, the threshold of a strong *prima facie* test has been described in *CBC* as follows:

> [17] This brings me to just what is entailed by showing a “strong *prima facie* case”. Courts have employed various formulations, requiring the applicant to establish a “strong and clear chance of success”; a “strong and clear” or “unusually strong and clear” case; that he or she is “clearly right” or “clearly in the right”; that he or she enjoys a “high probability” or “great likelihood of success”; a “high degree of assurance” of success; a “significant prospect” of success; or “almost certain” success. Common to all these formulations is a burden on the applicant to show a case of such merit that it is very likely to succeed at trial…

[50] Courts generally apply the low threshold when the injunction seeks to preserve the *status quo*. However, where the injunction would significantly impact a party’s ability to earn a livelihood, such as enforcing a restrictive covenant or prohibiting competition, the applicant must meet the higher "strong *prima facie* case" standard: *Ipsos S.A. v. Angus Reid*, 2005 BCSC 1114 at para. 69; *Quizno’s Canada Restaurant Corporation v. 1450987 Ontario Corp.*, 2009 CanLII 20708 (O.N.S.C.) at para. 38. In such cases, courts recognize that granting an injunction may effectively determine the dispute before trial, warranting a more rigorous assessment of the merits.

[51] In *RJR-Macdonald* at 338, the Supreme Court of Canada outlined the following justifications for departing from the general rule that a judge should not engage in an extensive review of the merits:

> [One exception] arises when the result of the interlocutory motion will in effect amount to a final determination of the action. This will be the case either when the right which the applicant seeks to protect can only be exercised immediately or not at all, or when the result of the application will impose

> such hardship on one party as to remove any potential benefit from proceeding to trial.

[52] I note that *Telus Communications,* relied upon by the defendants, concerned an interlocutory injunction to enforce a restrictive covenant in an employment contract, which requires closer scrutiny than those found in contracts for sale of a business between commercial parties: *Payette v. Guay inc*., 2013 SCC 45 at paras. 37-38.

[53] The case law is clear that the applicable standard depends on the context in which the restrictive covenant arises, particularly the nature of the contractual relationship. Employment relationships often involve an imbalance of bargaining power which may lead to oppressive restrictions that limit a person's ability to make a living: *Payette* at para. 5. In contrast, restrictive covenants in commercial contexts, such as for a sale of business, are presumed lawful: *Payette* at para. 58. Sale of a business involving a sale of a goodwill, for example, can only be protected by a restrictive covenant: *Shafron v. KRG Insurance Brokers (Western) Inc*., 2009 SCC 6 at para. 21. This rationale was underscored in *Elsley v. J.G. Collins Ins. Agencies*, [1978] 2 S.C.R. 916, 1978 CanLII 7, at 924:

> A person seeking to sell his business might find himself with an unsaleable commodity if denied the right to ensure the purchases that he, the vendor, would not later enter into competition.

[54] I find that the trend in case law indicates that the standard applied at the first stage of the *RJR-MacDonald* test depends on the nature of the restrictive covenant. Courts apply a higher "strong *prima facie* case" threshold when restrictive covenants arise in employment contracts or franchise agreements: *Garcha Bros Meat Shop Ltd*., 2022 BCCA 36 at paras. 87, 95-96 [*Garcha Bros*]. This stricter approach ensures that restrictive covenants in these contexts are strictly justified, preventing undue hardship on employees or franchisees who may be unfairly restricted from earning a livelihood.

[55] In contrast, restrictive covenants in the sale of a business are presumed reasonable, and potentially justifies applying the lower "serious question to be tried"

standard. The presumption of reasonability to restrictive covenants in commercial settings reflects the commercial reality that a seller may struggle to secure a buyer without assurances that they will not later compete with that business: *Shafron* at paras. 21-22.

[56] While *Garcha Bros* arose from a sale of a business, it involved a franchise agreement. I do not find that it stands for the principle that all commercial agreements require the higher standard. Franchise agreements are distinct from business sales because, although they involve commercial relationships, they can also contain elements of economic dependency similar to employment contracts. The Court of Appeal in *Garcha Bros* acknowledged the ongoing debate over whether franchise agreements should be treated like employment contracts or business sales: at para. 94, citing *MEDIchair LP v. DME Medequip Inc*., 2016 ONCA 168 at para. 38. However, the Court ultimately upheld the chambers judge's application of the higher "strong *prima facie* case" standard due to concerns about power imbalances and fairness in enforcing the restrictive covenant.

[57] One of the other cases relied upon by the defendants is that of *Kwantlen Pizza*. It involved a restrictive covenant through a sale of a business, between commercial parties that makes it somewhat analogous to the facts in this matter. In the facts of that case, the restrictive covenant related to the opening of a restaurant which was referred to within the agreement as a franchise. In Riley J.'s view (as he then was), the underlying facts justified the higher threshold, considering that the defendant was restrained in their ability to make a living: *Kwantlen Pizza* at para. 25.

[58] There is no definitive ruling establishing whether the enforcement of a restrictive covenant in a business sale should be assessed under the "serious question to be tried" standard or the "strong *prima facie* case" standard.

[59] I find that the general rule remains that the "serious question to be tried" standard applies by default. The higher "strong *prima facie* case" threshold applies only where the factors outlined in *RJR-MacDonald* are shown—whether granting or denying the injunction would effectively determine the outcome of the case.

[60] In most business sale cases, an interlocutory injunction will have the effect of deciding the dispute, making it more likely that the strong *prima facie* case standard will apply. Nonetheless, the appropriate standard must be determined on a case-by-case basis, considering the specific contractual terms and their practical impact on the parties.

[61] The following summary provided by the Manitoba Court of Appeal in *Dentalcorp Health Services Ltd v. Dr. Kenneth Hamin Dental Corporation*, 2024 MBCA 44 is instructive as it provides the history and describes the nuances in the application of the test at the first step:

> [18] In its reasons for decision in *RJR-MacDonald*, the Supreme Court reviewed the evolution of the first part of the test for an interim injunction. Prior to the House of Lords decision in *American Cyanamid Co (No 1) v Ethicon Ltd*, [1975] UKHL 1 (BAILII) [*American Cyanamid*], plaintiffs were required to establish "a strong *prima facie* case" to satisfy the first part of the test (*RJR-MacDonald* at 335). However, the lower threshold set out in *American Cyanamid* of "a serious question to be tried" was adopted in *RJR-MacDonald*, subject to certain exceptions, when the higher threshold would still apply (*RJR-MacDonald* at 335). The exception that is relevant to the present case is where circumstances are such that "the result of the interlocutory motion will in effect amount to a final determination of the action" (*ibid* at 338).
>
> [19] The nature of a strong prima facie case has been described as "showing a *strong likelihood* on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice" (*R v Canadian Broadcasting Corp*, 2018 SCC 5 at para 18) (emphasis in original). However, it must be noted that a plaintiff is not required to actually prove their case at this stage.
>
> [20] The serious question to be tried standard is less onerous. In *RJR-MacDonald*, it was stated that "[a] prolonged examination of the merits is generally neither necessary nor desirable" in determining whether there is a serious question to be tried (at 338).
>
> [21] There are no recent decisions from this Court addressing whether the first element of the test for an interlocutory injunction to enforce a restrictive covenant in the context of the sale of a business is properly a serious question to be tried or a strong prima facie case. In the employment context, it is clearly the latter (see *People Corporation*).
>
> [22] A review of jurisprudence from Manitoba and from other provinces provides some insight. In *Valley Technologies Ltd v Mattes*, 2022 MBKB 220, the Court used the serious question to be tried standard on the agreement of the parties. On the other hand, in *Parekh v Schecter*, 2022 ONSC 302, the plaintiff conceded that the strong prima facie case standard applied (see para 31). In *City Wide Towing and Recovery Service Ltd v Poole*, 2020 ABCA

> 305 [*City Wide*], the Court accepted, without deciding, that the strong prima facie case standard applied in the context of a restrictive covenant arising from the sale of a business (see para 26). However, the Court applied that stricter standard because the issue was not raised or argued before it. In *Belron Canada Inc v TCG International Inc*, 2009 BCCA 577, the lower court applied the strong prima facie case threshold and this finding was not challenged on appeal (see para 16). To a similar effect is *Diamond Delivery Inc v Calder*, 2023 BCSC 194 at para 73.
>
> [23] At the appeal hearing, the parties addressed *Miller v Toews*, 1990 CanLII 2615 (MBCA) [*Miller*], in which this Court held that where a plaintiff seeks to enforce a restrictive covenant that "is *prima facie reasonable* and was given by the vendor of a business to protect the purchaser's interest", proof of irreparable harm is not an "indispensable requirement" (at 2) (emphasis added). The parties' argument focussed on whether, and to what extent, *Miller* is inconsistent with the three-part test later set out in *RJR-MacDonald*. In my view, it is not necessary to resolve this, other than to say that *Miller* no longer reflects the current state of the law to the extent that it is inconsistent with *RJR-MacDonald*.
>
> [24] The applicable standard for the first element of the test has long been resolved by *RJR-MacDonald*. As I have explained, a plaintiff must establish a serious question to be tried—unless the granting or denial of the interlocutory injunction will effectively amount to a final determination of the action, in which case the plaintiff must establish a strong prima facie case.
>
> [25] Whether or not the outcome of a motion for an interlocutory injunction will effectively determine the action is a matter for the judge hearing the motion to determine based on all of the circumstances. It strikes me that, in most cases, the granting or denial of an interlocutory injunction to enforce a restrictive covenant in the context of the sale of a business will indeed effectively determine the action and the higher threshold of a strong prima facie case will apply. However, I accept that circumstances may arise where that will not be so and, therefore, this question should be left for determination on a case-by-case basis.

[62] This case concerns the sale of a business, and the plaintiffs seek an order enforcing the restrictive covenant, preventing the defendants from selling competing products. The relief sought does not determine the underlying civil action, as the defendants vigorously dispute being in breach of the covenant and maintain that they have never violated its terms. Rather, in their respective submissions, both parties admitted to this court that the plaintiffs are seeking interlocutory enforcement of the agreed-upon restrictions, or in other words, the enforcement of what is in essence the *status quo*.

[63] Accordingly, I find that the lower 'serious question to be tried' standard applies, as this case arises from the sale of a business, not an employment relationship. Consistent with *Payette*, the plaintiffs must first establish that the covenant is reasonable as between the parties. If they do, the burden shifts to the defendants to show that the restriction is unreasonable in the public interest.

C. Irreparable Harm

[64] Irreparable harm refers to harm that cannot be adequately compensated by damages or remedied through monetary compensation. It must be harm that is either impossible or impractical to quantify, making it irreversible. In *RJR-MacDonald* at page 348, the Supreme Court of Canada explained this concept as follows:

> At the second stage the applicant must convince the court that it will suffer irreparable harm if the relief is not granted. 'Irreparable' refers to the nature of the harm rather than its magnitude….

D. Balance of Convenience

[65] The third step in the test is the "balance of convenience", which is described in *RJR-MacDonald* at pages 348–49 as:

> The third branch of the test, … will often determine the result in applications involving *Charter* rights. In addition to the damage each party alleges it will suffer, the interest of the public must be taken into account. The effect a decision on the application will have upon the public interest may be relied upon by either party.

VII. ANALYSIS

A. ISSUE 1: Is there a serious question to be tried?

[66] The enforceability of the restrictive covenant lies at the heart of the serious question to be tried in this case. At this stage, the Court does not determine whether the covenant is ultimately valid and binding, but rather, assesses whether there are serious issues requiring resolution at trial, including reasonableness in terms of geographical scope, duration, and prohibited activities.

[67] The plaintiffs assert that the covenant was mutually agreed upon, reflects the parties' reasonable expectations, and is necessary to protect Northam's market

share and goodwill. Conversely, the defendants challenge the covenant as ambiguous and excessive, arguing that it fails to clearly define prohibited activities and imposes undue restrictions given Northam's limited operations in Alberta and Saskatchewan. These competing arguments highlight the genuine and significant questions surrounding the covenant's enforceability, warranting judicial examination at trial.

[68] In the commercial context, a restrictive covenant will be deemed reasonable and lawful if it is appropriately limited in its duration, territorial scope, and the activities it restricts: *Payette* at para. 61. The defendants have argued that Roman is neither involved in, nor bound by the SPA, as it is not a party to the agreement. However, in *Garcha Brothers*, Grauer J.A. observed that a restrictive covenant may, in certain circumstances, be enforced against non-signatories if those non-signatories are found to be alter egos of the signatories: at para. 62.

[69] At this stage, the Court does not make findings on whether Roman is a front or vehicle for the defendants, as this is a factual issue requiring trial. While the plaintiffs allege a connection between Roman and the defendants, these claims remain contested and are subject to further evidentiary development.

[70] The defendants challenge the enforceability of the restrictive covenant and the sufficiency of the plaintiffs' evidence. Their key arguments include:

a. **Ambiguity in Schedule A**:

    i. The covenant broadly describes prohibited items in Schedule A, making it unclear what activities or products are restricted.

    ii. The items listed, such as "Plywood" and "Glue," are generic and could apply to businesses outside of Northam's industry.

b. **Excessive Scope**:

    i. The geographical scope, covering British Columbia, Alberta, and Saskatchewan, is overly broad. Northam's business outside

British Columbia accounted for less than 1% of its operations at the time of the SPA.

c. **Lack of Proprietary Interest**:

i. The defendants assert that the plaintiffs have not demonstrated any proprietary interest or confidential information justifying the non-competition clause's protections.

d. **Roman's Involvement**:

i. The defendants argue that Roman is not bound by the SPA, as it is not a signatory to the agreement.

ii. They deny involvement in Roman's operations and assert that Roman's activities are unrelated to the restrictive covenant.

e. **Absence of Breach**:

i. The defendants emphasize that there is no strong *prima facie* evidence that they have breached the restrictive covenant

a) Legal Framework

[71] To determine whether the restrictive covenant is enforceable, the Court must assess its reasonableness in terms of:

a) Activity: What is prohibited?

b) Geography: Where does the restriction apply?

c) Duration: How long does the restriction last?

[72] Restrictive covenants in commercial agreements are presumed enforceable, as commercial parties are presumed to have equal bargaining power. However, the onus is on the plaintiffs to demonstrate that the covenant is reasonable and enforceable: *TMI Turf Management Ltd. v. R. De Noble Enterprises Ltd.*, (1994), 5

C.C.E.L. (2d) 165, 1994 CanLII 146 (B.C.S.C.); *Canadian American Financial Corp (Canada) Ltd. v. King et al.*, (1989), 36 B.C.L.R. (2d) 257, 1989 CanLII 252 (B.C.C.A.).

b) Analysis and Conclusion on Issue 1

[73] The plaintiffs have presented circumstantial evidence, including product sales, proximity of operations, and a mystery shopper's findings, which suggest possible breaches of the restrictive covenant. However, the connection between Roman's activities and the defendants' alleged violations remains inconclusive.

[74] While the restrictive covenant's geographical scope and duration appear consistent with the parties' expectations at the time of contracting, its application to Roman's activities and the defendants' alleged involvement requires further judicial scrutiny. The defendants have raised credible arguments regarding the ambiguity of Schedule A, the lack of proprietary interest, and the absence of direct involvement in Roman's operations. These issues necessitate a full examination at trial.

[75] I am satisfied that the claims of unjust enrichment and civil conspiracy are properly pleaded against the individual defendants, Mr. Joura and Mr. Kochar, as well as Roman. While the defendants deny these allegations, the facts as pleaded raise a serious question to be tried concerning these civil causes of action.

[76] I further find that the plaintiffs have established a serious question to be tried regarding whether Mr. Joura and Mr. Kochar breached the SPA and violated its terms.

[77] Given these unresolved issues, including the enforceability of the restrictive covenant and the alleged breaches, I find there is a serious issue to be tried. However, I make no findings on the merits of the claims or defenses, as a full assessment of the covenant's reasonableness and enforceability is reserved for trial, where evidence can be fully developed and tested.

B. ISSUE 2: Will irreparable harm result if the interlocutory injunction is not granted?

[78] The plaintiffs rely on the definition of irreparable harm provided in *Oneka Interactive Ltd. v. Smith*, 2006 BCCA 521 at para. 18, which identifies two types of irreparable harm:

a) harm that cannot be quantified in monetary terms, such as permanent market loss or irrevocable damage to business reputation; and

b) harm that cannot be compensated, for example, because an award of damages will not be collectible.

[79] The plaintiffs contend that if the injunction is not granted, they will suffer both quantifiable and unquantifiable harm, including the loss of market share in the Greater Vancouver Area; and ongoing harm to the Northam brand name and reputation.

[80] They argue that their reputation and market position, built over years of effort, would be irreparably damaged by the defendants' alleged breach of the restrictive covenant. The plaintiffs submit that monetary damages would be insufficient to compensate for the loss of goodwill and market confidence.

[81] The defendants assert that irreparable harm requires a solid evidentiary foundation beyond mere speculation, and argue that the plaintiffs have failed to meet this standard. They emphasize the following points:

a. **Lack of Evidence**:

    i. The plaintiffs have provided no concrete evidence of market share loss, reputational damage, or harm to the Northam brand.

    ii. No financial data or supporting documents were tendered to substantiate the claim of irreparable harm.

b. **Quantifiable Harm**:

i. The alleged harm, including market share loss, can be adequately compensated through monetary damages, rendering it non-irreparable.

c. **Delay**:

i. The plaintiffs delayed bringing the application for over two years after the alleged breaches became known, undermining the urgency of their claim.

ii. Such delay weakens the plaintiffs' assertion of irreparable harm, relying on *Canada Snow Mountain Investments Co. Ltd. v. Miller Springs Ltd.*, 2015 BCSC 1117 at paras. 109–110.

d. **No Proven Harm to Brand**:

i. The plaintiffs' claim that the Northam brand has been harmed is speculative and unsupported by evidence. The defendants note that there is no indication the defendants have used the Northam brand or benefited from its reputation.

a) Analysis

[82] As previously stated, the plaintiffs bear the burden of demonstrating irreparable harm. Harm that is speculative or lacks evidentiary support cannot meet this threshold.

[83] In this case, the plaintiffs have not provided sufficient evidence to substantiate their claims of irreparable harm at this stage. The plaintiffs allege harm to their market share, goodwill, and reputation, but they have not provided sufficient financial or customer data to support these claims. More importantly, they have not demonstrated that monetary damages would be inadequate to remedy any potential loss. As a result, they have failed to establish irreparable harm.

[84] The plaintiffs' two-year delay in seeking relief undercuts their claim of urgency. If the harm were truly irreparable, they would have acted sooner. This delay weakens their argument for the necessity of immediate injunctive relief.

[85] The Court also notes that the harm described by the plaintiffs appears to be quantifiable, as it involves alleged market share loss and reputational damage that could potentially be addressed through an award of damages. No evidence was provided to suggest that damages would be inadequate or uncollectible.

b) Conclusion

[86] Based on the evidence presented, the Court concludes that the plaintiffs have not met the burden of proving irreparable harm. The harm described by the plaintiffs is speculative, lacks evidentiary support, and appears to be compensable through monetary damages.

C. ISSUE 3: Does the balance of convenience, taking into account the public interest, favour granting injunctive relief?

[87] The balance of convenience considers which party would suffer greater harm from the granting or refusal of the injunction. This factor requires the Court to weigh the relative hardships to the parties and consider any broader public interest implications. As established in *RJR-MacDonald*, the balance of convenience is often decisive in interlocutory injunction applications, requiring a critical assessment of the harms alleged by each party.

[88] The relevant factors to be considered in assessing the balance of convenience in this matter include: (i) the adequacy of damages as a remedy for the plaintiffs if the injunction is not granted and for the respondent if an injunction is granted; (ii) the likelihood that damages, if awarded, will be paid; (iii) which party has acted to alter the balance of their relationship and affect the *status quo*; (iv) the strength of the plaintiffs' case; (v) any factors affecting the public interest; and (vi) any other considerations relevant to the balance of justice and convenience: *Canadian Broadcasting Corp. v. CKPG Television Ltd.* (1992), 64 B.C.L.R. (2d) 96, 1992 CanLII 560 (B.C.C.A.),.

[89] The plaintiffs argue that the balance of convenience strongly favours granting the injunction. They assert that:

a) **Harm to Northam**: Without the injunction, the restrictive covenant will be undermined, causing irreparable harm to Northam's market share, reputation, and goodwill.

b) **Contractual Obligations**: The defendants voluntarily agreed to the restrictive covenant under the SPA, which prohibits them from competing with Northam for five years. The plaintiffs contend that the defendants' actions breach this solemn agreement.

c) **Defendants' Incorporation of Roman**: Roman was incorporated within five months of the SPA's execution, allegedly to circumvent the restrictive covenant. The plaintiffs liken this case to *Ontario Duct Cleaning Ltd. v. Wiles*, 2001 CarswellOnt 6190, where the court found that a corporate entity was used as a "cloak" to enable a party to breach a non-compete obligation.

d) **Harm from the *Status Quo***: The plaintiffs submit that the defendants have altered the *status quo* by operating a competing business in violation of the SPA. They argue that the balance of convenience favours granting the injunction to restore the *status quo* and prevent further harm.

[90] In summary, the plaintiffs claim that the harm Northam would suffer if the injunction is denied far outweighs any inconvenience to the defendants if the injunction is granted.

[91] The defendants argue that the balance of convenience strongly favours refusing the injunction. They make the following points:

a) **Compliance with Ambiguous Terms**: The restrictive covenant in the SPA is ambiguous and overly broad, creating uncertainty about what activities are restricted. Compliance with such terms, they argue, would

impair Mr. Joura's lawful business operations, even outside the specified geographic scope.

b) **Limited Benefit to the Plaintiff**: The restrictive covenant expires on March 24, 2026, meaning any benefit to the plaintiffs would be temporary, while the defendants would face undue restrictions on their business activities.

c) **Inadequate Undertaking as to Damages**: The plaintiffs have not provided the usual undertaking to abide by any order for damages that may result from the injunction, as required under R. 10-4(5) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009. Without such an undertaking, the defendants argue, the injunction should not be granted: *Accurate Material Testing Ltd. v. Keshavarzi*, 2023 BCSC 1302 at para. 38.

d) **Clean Hands Doctrine**: The defendants assert that the plaintiffs have come to court with "unclean hands," submitting inaccurate evidence regarding the SPA's terms and the scope of its restrictive covenant: *Royal Bank of Canada v. Boussoulas*, 2010 ONSC 4650 at para. 22.

e) **Significant Harm to the Defendants**: Granting the injunction would impose a "sword of contempt" over the defendants and disrupt their lawful business operations, including reputational harm and financial consequences.

a) Analysis

[92] The balance of convenience favours the defendants. While the plaintiffs allege harm to its market share and goodwill, it has not demonstrated why damages would be an inadequate remedy. The harm described by the plaintiffs appears speculative, as it lacks supporting evidence of specific financial or reputational damage. Additionally, the plaintiffs' delay in bringing this application—more than two

years after the alleged breaches—undermines its claims of urgency and irreparable harm.

[93] Conversely, the defendants would face significant harm if the injunction were granted. The ambiguous terms of the restrictive covenant create uncertainty, and enforcing these restrictions could impede the defendants' lawful business activities outside the geographic scope of the SPA. The injunction would impose unnecessary hardship on the defendants while providing only limited and temporary benefit to the plaintiff, given the covenant's expiration in March 2026.

[94] The plaintiffs have also failed to provide an undertaking as to damages, a well-established prerequisite for injunctive relief. Without this assurance, granting the injunction would impose an unwarranted burden on the defendants.

b) Conclusion

[95] The Court finds that the balance of convenience weighs in favour of the defendants. The plaintiffs have not established that the harm it would suffer outweighs the significant and undue hardship the defendants would face if the injunction were granted.

VIII. CONCLUSION

[96] The plaintiffs have failed to meet the burden of satisfying the three-part test for granting an interlocutory injunction as set out in *RJR-MacDonald*.

[97] While the court finds that there is a serious question to be tried regarding the enforceability of the restrictive covenant and the defendants' compliance with its terms, the plaintiffs have not demonstrated irreparable harm if the injunction is not granted. The plaintiffs allege harm to their market share, goodwill, and reputation, but they have not provided sufficient financial or customer data to support these claims. More importantly, they have not established that any harm suffered could not be adequately compensated through monetary damages, which remains a viable remedy in this case.

[98] Ultimately, I find that the balance of convenience weighs in favour of the defendants. Granting the injunction would impose significant restrictions on the defendants, including impairing their lawful business activities and creating uncertainty due to the ambiguous terms of the restrictive covenant. The plaintiffs' significant delay in seeking relief undermines its assertion of urgency and irreparable harm, and the plaintiffs' failure to provide an undertaking as to damages further tips the balance against granting injunctive relief.

[99] For these reasons, the plaintiffs' application for an interlocutory injunction is dismissed. This decision does not resolve the ultimate merits of the plaintiffs' claim, which will be determined at trial.

[100] Costs of this application are awarded to the defendants on Scale B.

"Sukstorf J."