Court of King's Bench of Alberta

Citation: Badger Infrastructure v Parent-Walker, 2024 ABKB 550

Date: 20240918
Docket: 2401 08762
Registry: Calgary

Between:

Badger Infrastructure Solutions Ltd.

Plaintiff

- and -

Jason Parent-Walker, Ontario Excavac Inc., COB, OE Utility Services

Defendants

Reasons for Decision
of the
Honourable Justice C.D. Simard

I. Introduction

[1] Jason Parent-Walker worked for Badger Infrastructure Solutions Ltd (**Badger** or the **Plaintiff**) as the Area Manager at its Bradford, Ontario location from January 2016 until Badger terminated him for cause on September 12, 2023. On November 6, 2023, he began working for Ontario Excavac Inc. (**OE**), a competitor of Badger. Badger started this action in July 2024, alleging that Mr. Parent-Walker breached his obligations to Badger by soliciting Badger's employees and customers. Badger claims that OE conspired with Mr. Parent-Walker and participated in these breaches. Mr. Parent-Walker says that in November 2023 Badger waived most of the obligations it now seeks to enforce, and that in any event he has not breached any of

these obligations. OE also denies any wrongdoing, and additionally says that Badger should not have sued it in Alberta, since all the events occurred in Ontario.

[2] On August 23, 2024, I heard Badger's application for an interim injunction, to prevent the Defendants from soliciting its employees and customers and from using its confidential information, pending trial. For the reasons that follow, I dismiss Badger's application.

II. Issues

[3] The issue for determination is whether I should grant an interim injunction, pending the trial of this action. The parties agree that the tripartite test for injunctions from ***RJR-MacDonald v Canada (Attorney General),*** [1994] 1 SCR 311 applies here. Therefore, to determine whether I should grant Badger's application, I have to answer the following questions:

(a) has Badger established a strong *prima facie* case or a serious issue to be tried against the Defendants;

(b) has Badger established that it will suffer irreparable harm if no injunction is granted; and

(c) does the balance of convenience favor Badger or the Defendants?

[4] I also have to answer the following preliminary question:

(a) does this Court have jurisdiction to hear this application?

III. Analysis

A. The Status of My Findings in this Decision

[5] All the findings that I make in this decision are "without prejudice", meaning that they cannot be taken as determining any of the factual or legal issues that will be decided at the trial of this action. This is for two reasons.

[6] First, this is an urgent application, for which the parties have submitted a limited evidential record: affidavits from seven witnesses, the transcripts of those witnesses' cross-examinations, and the witnesses' undertaking responses. The parties have not yet produced records or conducted any oral discovery. The evidential record at trial will potentially be much more voluminous and complete than the limited record before me.

[7] Second, during Badger's cross-examination of the Defendants' witnesses, counsel for the Defendants made numerous improper objections, which obstructed Badger's ability to effectively elicit evidence on a number of issues. Because Badger did not make an application to compel answers to the objected-to questions, I am deciding this application on the basis of the record that the parties put before me. I do not know what answers the witnesses would have given to the questions that they were improperly prevented from answering, and I will not speculate about that. However, I have no doubt that if they are asked those same questions at trial, they will be required to answer.

B. Does this Court Have Jurisdiction to Hear this Application?

[8] The Defendants object to the Plaintiff having commenced this action in Alberta and say that they are not attorning to the jurisdiction of this Court. However, they have not taken the

formal step that would be necessary to challenge the Court's jurisdiction over them in this action: applying under Rule 11.31 of the *Rules of Court* to set aside service of the commencement documents. Rather, the Defendants have fully participated in this application by questioning the Plaintiff's witness, filing their own evidence, attending questioning and providing written and oral submissions to the Court.

[9] Mr. Parent-Walker acknowledges that on April 24, 2020, he signed a Confidentiality, Non-Solicitation and Non-Competition Agreement with Badger (the **Restrictive Covenant Agreement**). This is the main agreement that Badger seeks to enforce against him in this action. Article 13 of the Restrictive Covenant Agreement states that the Courts of Alberta have the "sole and exclusive jurisdiction to entertain any dispute, action, cause of action or any other matters arising out of this Agreement".

[10] I am satisfied that I have the jurisdiction to hear this application.

C. Step One: Has Badger Established a Strong *Prima Facie* Case or a Serious Issue to be Tried?

1. Which Standard Applies?

[11] The parties disagree about which standard applies against Mr. Parent-Walker in the first step in the tripartite test. Badger says it must only establish that there is a "serious issue to be tried" but the Defendants say Badger must prove a "strong *prima facie* case".

[12] I find that the "strong *prima facie* case" standard applies with respect to Mr. Parent-Walker, because the Restrictive Covenant Agreement is a restrictive covenant in restraint of his trade: ***City Wide Towing and Recovery Service Ltd v Poole,*** 2020 ABCA 305 at para 26. Badger, citing ***Foundation Capital Corporation v Saxon,*** 2011 ABQB 102, says that because it only seeks to enjoin Mr. Parent-Walker from soliciting customers and employees, the requested injunction would not prevent him from working in his field and is therefore not in restraint of trade. That is not the correct approach. As noted by our Court of Appeal, the more stringent strong *prima facie* case standard applies if the restrictive covenant **may** restrict an employee's employment in a particular field: ***Globex Foreign Exchange Corporation v Kelcher,*** 2005 ABA 419 at para 10. The restrictive covenants that Badger seeks to enforce **could** have that effect on Mr. Parent-Walker.

[13] However, Badger and OE are not in an employment relationship. The standard that applies at the first stage of the tripartite test as against OE is the lower "serious issue to be tried" standard.

2. Has Badger Established a Strong *Prima Facie* Case Against Mr. Parent-Walker?

[14] In its application, Badger claims that Mr. Parent-Walker has breached his duties not to:

(a) solicit Badger's employees;

(b) solicit Badger's customers; and

(c) misuse Badger's confidential information.

[15] Badger says that Mr. Parent-Walker owed these duties under the Restrictive Covenant Agreement, at common law and as a fiduciary of Badger.

[16] Badger and OE compete in the hydrovac excavation market in Ontario. The parties agree that this is a niche, competitive industry. Companies like Badger and OE maintain a series of regional offices, at which they base their fleets of specialized hydrovac equipment. Operators travel from these regional offices to customers' job sites where they provide the required hydrovac services.

[17] As Area Manager, Mr. Parent-Walker was the top manager at Badger's Bradford Ontario office. He supervised Badger's operators and other employees who worked out of that location. OE hired him as its Senior Operations Manager in Simcoe County. His work was similar to the work he had done at Badger. He was OE's top manager at the Simcoe County office, supervising OE's operators and assistants who worked there. The regions that Badger services from its Bradford office and the region that OE services from its Simcoe County office appear to overlap significantly.

[18] In April 2024, OE hired four individuals who had worked for Badger as operators or assistants at its Bradford location, under Mr. Parent-Walker's supervision: Erik Potter, Drew Robinson, Richard Goncalves and Curtis Sheppard. Mr. Parent-Walker now supervises them at OE, except for Mr. Robinson who had left OE and begun working at a different hydrovac company by late July or early August, 2024. The parties dispute whether Mr. Parent-Walker solicited these four individuals to leave Badger and apply to work at OE, or whether they left of their own volition.

[19] Badger also says that Mr. Parent-Walker has solicited a number of its customers (Divco Matheson, Technicore Underground, MGI Demolition, Summit Concrete & Drain, and Primrose). The Defendants deny this allegation.

[20] For the reasons that follow, I find that on the evidence before me, Badger has not established a strong *prima facie* case against Mr. Parent-Walker with respect to these allegations.

a. Has Badger Established a Strong *Prima* Face Case that Mr. Parent-Walker has Solicited its Employees and Customers?

i. Waiver

[21] The Defendants say that Badger has waived its rights to seek a remedy against Mr. Parent-Walker for soliciting its employees and customers. For the reasons that follow, I agree.

[22] As noted above, Badger terminated Mr. Parent-Walker for cause on September 12, 2023. By late October, Badger and Mr. Parent-Walker had both retained counsel. On October 20, 2023, Badger's lawyer Correna Jones (a partner and the Co-Chair of the Canada Labour and Employment Group at DLA Piper (Canada) LLP) sent a letter to Mr. Parent-Walker's lawyer Alexander Sinclair (a partner at Hudson Sinclair LLP). That letter was not entered into evidence, but Mr. Sinclair's October 31, 2023 reply email was. In that email, he wrote:

> Thanks. I will seek instructions and advise if my client will be commencing a claim. Your correspondence completely ignores the restrictive covenant issue and the obvious impact on my client's mitigation efforts. Please confirm on a with prejudice basis what restrictive covenants the company says apply to my client and provide copies of same. I can only assume based on your correspondence that your client is willing to unilaterally waive any such restrictive covenants to assist with my client's mitigation efforts but please confirm.

[23] Ms. Jones replied in a November 6, 2023 email (the **November 6 Email**), stating:

> Good morning Mr. Sinclair,
>
> We have confirmed with our client that your client is not bound by any restrictive covenants, and to the extent that he was, they would not be enforcing same against him. He is free to mitigate in the normal course subject to any confidentiality obligations that he may continue to owe to our client.

[24] Mr. Sinclair received this email at 10:43 a.m. and two minutes later, he forwarded it to Mr. Parent-Walker, adding this commentary:

> FYI – see below. They will not be enforcing any non-competition or non-solicit against you. This is good news and can be shared with your new employer.

[25] While Mr. Parent-Walker's email forwarding this email chain to OE was not put in evidence, it is clear that he did this promptly, because George Chung, the "Director of Sales, General Manager – Regional Business Units" of OE forwarded the email chain from Mr. Parent-Walker's lawyer to another person at OE on the morning of November 7, 2023.

[26] OE had concerns about hiring Mr. Parent-Walker because it knew that restrictive covenants were common in the Ontario hydrovac industry for manager-level employees like him. OE hired him on November 6, 2023, after he advised them about Badger's lawyer's communication in the November 6 Email.

[27] On November 13, 2023, Mr. Sinclair told Ms. Jones that Mr. Parent-Walker had mitigated and that he would be commencing an action against Badger in small claims court. Mr. Parent-Walker subsequently did so, and in that action he seeks $35,000 for wrongful dismissal. That small claims action is still ongoing.

[28] The Defendants argue that Badger waived its right to enforce all non-competition and non-solicitation obligations against Mr. Parent-Walker in the November 6 Email, or alternatively that it is estopped from doing so as a result of the November 6 Email. Badger says that it only waived Mr. Parent-Walker's obligation not to compete with Badger, but not his non-solicitation obligations. I will explain Badger's argument in more detail below.

[29] For a party to waive its rights, it must have: (1) full knowledge of its rights; and (2) an unequivocal and conscious intention to abandon them. This test is said to be "stringent" because "no consideration moves from the party in whose favour a waiver operates" and "an overly broad interpretation of waiver would undermine the requirement of contractual consideration": ***Saskatchewan River Bungalows Ltd v Maritime Life Assurance Co,*** [1994] 2 SCR 490 at 500.

[30] For the reasons that follow, I find that both elements of this test are proven.

[31] Badger had full knowledge of its rights. The Restrictive Covenant Agreement contained non-competition, non-solicitation and confidentiality covenants. Badger does not argue that it was unaware of what was in the agreement.

[32] Badger also unequivocally waived the non-competition and the non-solicitation covenants. Badger, a large and sophisticated corporation, was communicating via its knowledgeable and experienced counsel, on a "with prejudice" basis: a context in which it knew that Mr. Parent-Walker would be relying on its communication to affect legal rights and obligations. It would have known that the precise wording of this communication was important.

Badger also had time to consider its response. The November 6 Email was sent six days after Mr. Sinclair requested Badger's "with prejudice" position. There is no suggestion that Badger did not authorize its lawyer to send the November 6 Email.

[33] Badger argues that I should interpret the phrase "any restrictive covenants" in the November 6 Email to include only non-competition covenants, but not non-solicitation covenants. Badger says it intended to convey only this limited meaning, and that this limited intention was apparent in the November 6 Email because the context of the previous communications between the lawyers was whether Mr. Parent-Walker was free to mitigate his damages. Badger says that a reasonable person would read "any restrictive covenants" to mean only "non-competition covenants" but not "non-solicitation covenants". It argues that it is only the non-competition covenant, but not the non-solicitation covenant, that would have prevented Mr. Parent-Walker from obtaining employment in the industry. I disagree. The plain meaning of the term "any restrictive covenants" includes both non-competition and non-solicitation covenants. If Badger intended only to waive the non-competition covenant, it could have instructed its lawyer to say exactly that. Badger had no difficulty carving Mr. Parent-Walker's confidentiality obligations out of the waiver. Had it intended to also carve out his non-solicitation covenants, it could have done that.

[34] Another reason I reject Badger's argument that it intended to only waive the non-competition covenant is the evidence about the hydrovac industry in Ontario. This is a specialized, niche market. Competitors in this market know each other, and seem to interact often, including on single projects where they are both hired by the same client. Customers appear to commonly hire a number of different hydrovac companies. I find that Badger would have known that waiving only Mr. Parent-Walker's non-competition obligations, but not his non-solicitation obligations, could have negatively impacted his employability in the industry. Badger chose to waive both, because that was the expedient solution to the short-term problem it faced: allowing him to mitigate his damages and thereby reduce its own exposure in the anticipated wrongful dismissal action.

ii. Promissory Estoppel

[35] In addition to finding that Badger waived its rights, I also find that promissory estoppel is made out, preventing Badger from enforcing Mr. Parent-Walker's non-competition and non-solicitation obligations. Promissory estoppel is an equitable defence that applies where: (1) the parties are in a legal relationship when a promise is made; (2) the promise is intended to affect that relationship and to be acted on; and (3) the recipient of the promise acted on the promise, to their detriment: ***Trial Lawyers Association of British Columbia v Royal & Sun Alliance Insurance Company of Canada,*** 2021 SCC 47 at para 15.

[36] In November 2023, Mr. Parent-Walker was threatening to sue Badger for wrongful dismissal. He and Badger were parties to the Restrictive Covenant Agreement and other agreements. This was a legal relationship.

[37] Badger promised not to enforce any restrictive covenants applying to Mr. Parent-Walker, except for any confidentiality obligations. This promise was made in the context of Mr. Parent-Walker's inquiries about his ability to seek employment. This promise made it much easier for him to get a new job in the industry in which he had experience. Getting a new job in the industry would in turn have the effect of mitigating his damages and reducing the size of his damages claim against Badger. Badger intended Mr. Parent-Walker to act upon this promise.

[38] Mr. Parent-Walker acted upon this promise. He obtained new employment, after which his lawyer confirmed to Badger that he had mitigated his damages. This mitigation no doubt contributed to him subsequently claiming a smaller sum against Badger than he would have otherwise claimed, if he was not able to get a new job in the industry.

[39] All the requirements for promissory estoppel have been proven.

iii. The Scope of Badger's Waiver and Promissory Estoppel

[40] I have concluded that because of the November 6 Email, Badger is precluded from pursuing Mr. Parent-Walker for the breach of "any restrictive covenants". Badger's waiver clearly covered the contractual non-competition and non-solicitation covenants that were contained in the Restrictive Covenant Agreement.

[41] I find that Badger also waived any fiduciary duties that Mr. Parent-Walker may have owed to Badger not to compete, or not to solicit customers or employees. The beneficiary of a fiduciary duty can waive it: *e.g.* ***Stoodley v Ferguson,*** 2001 ABQB 227 at para 33; ***Apotex Inc v Kalinka,*** 2016 ONSC 7290 at para 2. The Restrictive Covenant Agreement contains a statement that Mr. Parent-Walker is a fiduciary of Badger and its affiliates. Therefore, Badger's waiver of Mr. Parent-Walker's restrictive covenants was a waiver of all restrictive covenants expressly agreed in the Restrictive Covenant Agreement, and any that he owed to Badger as a fiduciary.

[42] For the purposes of this decision, I do not need to determine whether Mr. Parent-Walker was a fiduciary of Badger, and I am not doing so.

[43] Additionally, promissory estoppel also prevents Badger from enforcing any fiduciary duty that Mr. Parent-Walker may owe it not to compete, not to solicit customers or employees. Fiduciary obligations and remedies are equitable in nature. Promissory estoppel also has its origins in equity, and has been described by the Supreme Court of Canada as an "equitable defence": ***Brar v Brar,*** 2017 ABQB 792 at para 91 (citing ***John Burrows Ltd v Subsurface Surveys Ltd,*** [1968] SCR 607). It would be extremely inequitable to permit Badger, who knowingly and intentionally waived its right to enforce the non-competition and non-solicitation covenants in the Restrictive Covenant Agreement, to do an "end-run" around that waiver, by allowing it to enforce the same obligations as fiduciary duties. Equity looks to the intent, rather than the form.

[44] Because it waived its rights and is estopped from pursuing them, Badger has failed to establish a strong *prima facie* case against Mr. Parent-Walker related to its allegations that he solicited Badger's employees and customers.

b. Has Badger Established a Strong *Prima* Face Case that Mr. Parent-Walker Misused Badger's Confidential Information?

[45] Because Badger expressly excluded any confidentiality obligations binding Mr. Parent-Walker from its waiver in the November 6 Email, it is not prevented from pursuing these alleged wrongs.

[46] To establish that Mr. Parent-Walker has breached duties of confidentiality, Badger must prove that:

(a) Badger conveyed confidential information to him;

(b) the information was conveyed in confidence; and

(c) Mr. Parent-Walker misused that information;

(Lac Minerals v International Corona Resources Ltd, [1989] 2 SCR 574 at para 129.)

[47] For the reasons that follow, I find that Badger has failed to establish a strong *prima facie* case that Mr. Parent-Walker misused its confidential information. In other words, it has failed to prove the third element of the test set out in the previous paragraph.

[48] Badger says that Mr. Parent-Walker's confidentiality obligations arise from a number of sources. I will summarize each of them briefly.

[49] When Mr. Parent-Walker was hired by Badger in January 2016, he signed its Code of Business Conduct and Ethics, in which he agreed to:

> ...maintain the confidentiality of information entrusted to [him] by Badger, its customer, and its vendors and suppliers, except when disclosure is authorized or legally mandated. Confidential information includes all non-public information.

[50] On March 14, 2016, Mr. Parent-Walker signed a Confidential Matters Certification, in which he agreed that, during his employment with Badger, he would not copy, or secure for himself or others, Badger's confidential information.

[51] In the Restrictive Covenant Agreement, Mr. Parent-Walker agreed that, both during and after his employment with Badger, he would not disclose, use or allow to be used any of Badger's "Confidential Information". That term was defined broadly in the agreement.

[52] In November 2020, Mr. Parent-Walker signed Badger's updated Code of Conduct. This document acknowledged that employees were required to treat as proprietary to the company and confidential various different types of information, including "pricing, orders, customers, and client lists...".

[53] Badger also says that Mr. Parent-Walker owed a common-law duty and a fiduciary duty to Badger not to misuse its confidential information.

[54] Because I have concluded that Badger has failed to establish a strong *prima facie* case that Mr. Parent-Walker misused its confidential information, I do not need to decide, and I am not deciding, precisely what confidentiality obligations bound Mr. Parent-Walker. I am also not deciding any of the issues raised by the Defendants regarding these agreements and documents: *e.g.*, did Mr. Parent-Walker receive consideration when he signed those agreements and documents, and are they unenforceable because they are vague, ambiguous, overly broad, unreasonable, or as a consequence of Badger's termination of Mr. Parent-Walker for cause?

[55] For the purpose of this decision I have assumed, without deciding, that Mr. Parent-Walker is bound by all the confidentiality obligations alleged by Badger.

i. Did Mr. Parent-Walker Have Confidential Information of Badger and Was it Conveyed to Him in Confidence?

[56] Mr. Parent-Walker's evidence was that his only access to Badger's confidential information was through his corporate phone and laptop, which were returned to Badger when he was terminated. Badger does not dispute that the devices were returned at that time.

[57] Badger's evidence about the confidential information that it alleges was in the possession of Mr. Parent-Walker was described at a relatively high level, without much detail. Badger says that Mr. Parent-Walker had:

(a) customer lists and contact details, customer pricing and "knowledge of Badger's billing practices";

(b) information about some Badger customers' preferred operators and "specific financial details" about customers;

(c) contact details and compensation details regarding Badger's employees; and

(d) Badger's budgeted revenue goals and the strategies planned to reach those goals.

[58] Blair Dunlop, Badger's General Manager for Ontario, also swore that two months after his termination, Mr. Parent-Walker contacted Danette Downey, a dispatcher at Badger, and "requested that Downey provide Badger's customer contact information" but that Ms. Downey refused to do so. This evidence was hearsay, as Ms. Downey did not give evidence. Mr. Parent-Walker says that he only contacted Ms. Downey to ask if she knew any industry participants who were hiring, as part of his job search.

[59] It is possible that the information Mr. Parent-Walker possessed about Badger's customers, including what Badger charged them and which Badger operators they preferred, may be confidential. I do not need to decide this issue, and am not deciding it, because my finding that Mr. Parent-Walker did not misuse any of Badger's confidential information makes it unnecessary for me to do so.

ii. Did Mr. Parent-Walker Misuse Badger's Confidential Information?

[60] Badger's evidence about Mr. Parent-Walker's misuse of its confidential information is comprised of allegations regarding two Badger customers, MGI and Technicore.

MGI

[61] Badger says that Mr. Parent-Walker induced MGI to hire OE by showing representatives of MGI a picture of MGI's preferred operator (who used to work for Badger) working for OE.[1] Mr. Dunlop says he received this information from Justin Gauthier at MGI. I am entitled to accept hearsay evidence like this in this interlocutory application, but the hearsay nature of such evidence may affect its relative weight when I balance it with all the other evidence. The alleged picture was not put in evidence. The inference that Badger seems to ask the Court to draw from this evidence is that Mr. Parent-Walker knew that MGI preferred Mr. Potter as a hydrovac operator, that this knowledge was confidential, and that he misused this confidential information by sending the picture to MGI.

[62] Mr. Parent-Walker denies that this happened, and says that he did not even know that MGI was a customer of Badger while he worked for Badger, nor did he know that Erik Potter was MGI's preferred operator. He says that his only communication with MGI after leaving Badger was on July 4, 2024, when Mr. Potter, who had joined OE in April, 2024, advised him that MGI was asking for OE's rates for services. Mr. Parent-Walker then provided MGI with

[1] This operator is not named in Badger's evidence, but I infer from the cross-examination of Mr. Parent-Walker that the referenced operator was Erik Potter.

OE's rate sheet. Mr. Parent-Walker produced a July 4, 2024 email that he had sent to Mr. Gauthier at MGI, attaching OE's rate sheet and a credit application. OE had not done any work for MGI by the time Mr. Parent-Walker answered his undertakings, on August 19, 2024.

[63] Mr. Potter swore an affidavit and was cross-examined. He acknowledged that he had done work for MGI while he was employed at Badger, but denied that MGI was a customer who specifically requested him as an operator. He confirmed that a representative of MGI had asked him to provide OE's rate for services. He produced a text message that he sent to Mr. Parent-Walker, asking him to send OE's rate sheet to MGI. Mr. Potter also confirmed that he had done no work for MGI while he was employed at OE.

[64] In summary, Badger has tendered hearsay evidence alleging that Mr. Parent-Walker sent a picture of Mr. Potter working at OE, to MGI. Mr. Parent-Walker's evidence and Mr. Potter's evidence directly explain an actual communication that was initiated by a request from MGI for OE's rate sheet. Considering all the evidence, I find that Badger has failed to prove a strong *prima facie* case that Mr. Parent-Walker misused any of Badger's confidential information in his communications with MGI.

Technicore

[65] Mr. Dunlop swore that John Bielecki, another executive at Badger, told him that an unnamed person at Technicore told Mr. Bilecki that Mr. Parent-Walker had contacted Technicore and said something like "I know what you pay with Badger; we can beat that price." This evidence is triple hearsay.

[66] Mr. Parent-Walker denies this. He admits that he called Joe DiMillo, a representative of Technicore. He says that in this conversation, they discussed the fact that he now worked at OE, and that he sent Mr. Dimillo a copy of OE's rate sheet after the call. He says that Mr. Dimillo asked for the rate sheet, and that he did not solicit Technicore's business from Mr. Dimillo, or use any Badger confidential information. Mr. Parent-Walker produced the February 16, 2024 email that he sent to Mr. DiMillo, attaching OE's rate sheet and a credit application. OE had not done any work for Technicore by the time Mr. Parent-Walker answered his undertakings, on August 19, 2024.

[67] Again, Badger's evidence alleging the misuse of its confidential information is hearsay. Mr. Parent-Walker's evidence directly explains in detail the communication between him and Technicore's representative. Considering all the evidence, I find that Badger has failed to prove a strong *prima facie* case that Mr. Parent-Walker misused any of Badger's confidential information in his communications with Technicore.

3. Has Badger Established a Serious Issued to Be Tried Against OE?

[68] Badger alleges that OE has committed the following wrongs:

(a) knowingly assisted Mr. Parent-Walker's breach of his fiduciary duties;

(b) unlawfully interfered with Badger's economic relations;

(c) unlawfully conspired with Mr. Parent-Walker, resulting in harm to Badger; and

(d) unjustly enriched itself at Badger's expense.

[69] For the reasons that follow, I find that on the evidence before me, Badger has not established a serious issue to be tried against OE with respect to these allegations.

[70] Badger's evidence filed in support of this application focused mostly on the alleged wrongs committed by Mr. Parent-Walker. The relevant facts regarding OE that have been proven by evidence can be summarized as follows:

(a) OE is a competitor of Badger's and seeks to grow its business by, among other things, capturing market share from Badger;

(b) OE has advertised its services in the past by expressly comparing and contrasting itself with Badger;

(c) OE was concerned about hiring Mr. Parent-Walker because it knew that restrictive covenants were common in the industry for manager-level employees like him;

(d) OE hired him on November 6, 2023, only after he had confirmed his lawyer's information that Badger agreed not to enforce any restrictive covenants against him. OE did not consult a lawyer about these issues at that time, and only hired a lawyer after Badger started this lawsuit;

(e) OE did not conduct any additional due diligence regarding potential limitations on Mr. Parent-Walker's ability to carry out his work responsibilities for OE; and

(f) while the four employees who moved from Badger to OE in April 2024 seem to have submitted their applications through an ordinary OE hiring channel, they were each interviewed by Mr. Parent-Walker, with no other OE representative present.

[71] This factual record is insufficient to establish a serious issue to tried against OE with respect to any of the causes of action pleaded against it.

IV. Conclusion

[72] Given my findings that Badger has failed to establish a strong *prima facie* case against Mr. Parent-Walker or a serious issue to be tried against OE, I do not need to address stages two and three of the tripartite test. Badger's application for an interim injunction is dismissed.

[73] If the parties cannot agree on the issue of costs, they may address that issue in writing to me in the next 45 days.

Heard on the 23rd day of August, 2024.
Dated at the City of Calgary, Alberta this 18th day of September, 2024.

C.D. Simard
J.C.K.B.A.

Appearances:

Heather Treacy, K.C. and Jordan Deering
for the Plaintiff/Applicant

Alex Sinclair, Sarah Maude and Jarret Janis
for the Defendants/Respondents