

# Court of King's Bench of Alberta

**Citation: Lynx Integrated Solutions Corp v 2031783 Alberta Ltd, 2023 ABKB 220**

**Date:** 20230414  
**Docket:** 2003 19365  
**Registry:** Edmonton

Between:

**Lynx Integrated Solutions Corp., 1212399 Alberta Ltd. and Jerrod Savage**

Plaintiffs/Applicants

- and -

**2031783 Alberta Ltd., 2156290 Alberta Ltd., Varo Industries Corp., Varo Holdings Corp.,  
Christopher Roscher and Tyrel Vandermark**

Defendants/Respondents

---

## **Reasons for Decision of the Honourable Justice Douglas R. Mah**

---

### **A. Background**

[1] Lynx Integrated Solutions Corp, its 100% shareholder 1212399 Alberta Ltd (121) and the principal of both, Jerrod Savage, seek an interim injunction against Varo Holdings Corp, its respective shareholders 2031783 Alberta Ltd (203) and 2156290 Alberta Ltd (215) and the respective principals Christopher Roscher and Tyrel Vandemark.

[2] Lynx was and continues to be in the business of providing oilfield diagnostic services, relying on a liquid gas ratio or LGR separator, which it says is of its own design and has unique functionality.

[3] Lynx says the design of its LGR separator is Lynx's confidential information.

[4] Lynx says that Varo has misappropriated that confidential information, has made copies of the Lynx LGR separator using the Lynx design and deploys those copies in competition with Lynx, all of which Lynx says is unlawful.

[5] Lynx seeks to enjoin Varo and the other defendants from using what it says are the copied separators, until there is a trial of this action.

[6] Varo defends this application primarily on the basis that the so-called Lynx design is not confidential information, or is not confidential information that belongs to Lynx, and that its separators are based on the know-how of Varo's principals, not design information stolen from Lynx.

[7] I delivered this decision as an oral decision on April 11, 2023. However, during the course of giving these reasons orally, I was advised by the court clerk that the recording system had failed. Consequently, I was not confident that the oral record captured everything that I said. I have therefore issued this written version of my decision, which is a more-or-less *verbatim* rendition of the oral reasons. I have only made minor wording changes for readability, eliminated some redundancies and added headings and better citations. This written version will function as the official reasons for decision.

### **B. Parties**

[8] Jerrod Savage is the sole director and officer of the applicant Lynx. Chris Roscher is the 100% shareholder of 203. 203 purchased Lynx shares on December 1, 2017. Thus, Chris became a co-owner through 203 and co-director of Lynx with Jerrod.

[9] Tyrel Vandemark is the 100% shareholder of 215. On June 1, 2019 215 purchased Lynx shares. Thereafter Jerrod, Chris and Tyrel were co-directors of Lynx and each one-third co-owners through their respective corporations.

[10] For ease, I refer to the individuals by their first names.

[11] Under a unanimous shareholders agreement (USA) each covenanted and agreed that for a period of 5 years after their departure as shareholders, they would not disclose any of Lynx's confidential information. Moreover, as Lynx and Jerrod say, as former directors of Lynx, Chris and Tyrel both had fiduciary duties not to disclose confidential information.

[12] In 2019 or 2020, all three became employees versus independent contractors of Lynx, for tax reasons; as employees, Chris and Tyrel were in management positions and signed confidentiality agreements.

[13] Later in 2020, there was an estrangement, resulting in Jerrod stepping away from the business for a period of 2.5 months. During that time, Lynx says that Chris and Tyrel had unrestricted access to Lynx's information, including the separator design, proprietary databases, and the company server.

[14] By August 2020, the relationship between Jerrod on the one hand and Chris and Tyrel on the other ruptured for good. Lynx bought back 203 & 215's shares and Chris & Tyrel left Lynx.

### **C. Varo's Separators**

[15] Almost immediately, Chris and Tyrel started up Varo to compete with Lynx. On December 18, 2020, Lynx became aware that Varo had acquired a test trailer to provide the same

services that Lynx test trailers provide, which was advertised on Facebook. On April 1, 2021 a Lynx employee looked inside Varo's trailer and saw a nearly identical separator to that of Lynx.

[16] Lynx says the design of Varo separators and test units was copied in whole or substantial part from the Lynx design and that Varo could not have designed and fabricated its separators so quickly unless Chris and Tyrel had taken the Lynx separator design to their new business venture Varo. Lynx says the visual appearance of the liquid separator in the Varo separator is nearly identical and that the Varo separator is a reproduction of the Lynx separator design.

[17] Lynx says that Varo appears to have at least 5 separators working in the field, which by estimate would have cost between \$250,000 and \$300,000 and that it would not have been possible for Varo to have 5 separators made on a trial basis unless they are using a tried-and-true design.

[18] Lynx submits that it has sustained an unquantifiable loss of market share, estimates that Lynx has lost \$6.5 million in testing business since Varo began using its separator, representing some 60% decline in Lynx's testing work.

[19] Jerrod deposes the Lynx has suffered financially as a result and that the viability of Lynx as a business is threatened if Varo is permitted to carry on in this manner.

#### **D. Litigation History**

[20] On July 27, 2021 Justice Neilson granted an interim interim injunction in this matter prohibiting the defendants from using or disclosing Lynx's confidential information and trade secrets. He further ordered the defendants to deliver over to Lynx all records and copies relating to Lynx's confidential information and trade secrets; in consequence of this direction, no records were delivered.

[21] On December 8, 2021 Justice Little confirmed the interim interim injunction order granted by Justice Neilson and directed an inspection of the Varo separator by an engineering expert, to allow each side to obtain an expert opinion on the comparison of the 2 separator designs.

[22] The inspection was carried out and each side retained an expert to provide an opinion.

[23] Lynx's expert is Alvin Hausauer, who opined that:

- the Varo design is a near copy of the Lynx design, with only small non-process related changes; the overall packaging of the Varo separator uses the same size trailers, buildings and type of separator as Lynx separator;
- the Varo separator, like the Lynx separator, features the distinguishing and unique design feature of the dual cyclone separator vessel supplied by JCI;
- given its size and weight, the Lynx separator design has greater functionality by allowing pick-up versus heavy-duty truck transport and improved access to remote gas wells located on poor quality roads, while maintaining efficient separator performance and having a lower peripheral equipment cost.

[24] Varo retained Garry Smith who stated:

- neither Varo nor Lynx designed the main components which are common to the industry in this region;

- the similarities between the 2 units are due to similar instructions, regulatory code and directives as well as the reservoir conditions of the region;
- the cyclonic technology is the confidential information of JCI; Varo obtained its design legitimately from the JCI Group, a third-party who manufactures and design separators for any industry participant willing to purchase one;
- the Varo design could have been created by another knowledgeable party in the well-test industry provided they use the JCI dual cyclonic design and a qualified fabricator.

[25] With the evidentiary record now supplemented by these reports, Lynx brought its further application before me on March 24, 2023.

### **E. Application before me**

[26] Before Justice Little, Lynx had not sought to enjoin Varo from using its own separators. With the enhanced evidentiary record, that is what Lynx now seeks from me. It is characterized as an enforcement application with respect to the previous interim injunctions granted in this action. Whether it is an enforcement application or a re-application with a more fulsome record amounts to the same thing: an application to enjoin Varo from using its separators.

[27] In its brief, Varo initially argued that Lynx was in effect asking for a permanent injunction or summary judgment in whole or part in the application before me. After some discussion, Varo's counsel stepped back from that position and conceded that Lynx was really seeking an interim injunction pending a trial outcome.

[28] Both sides agreed that the appropriate legal test for an interlocutory injunction is found in the so often cited Supreme Court of Canada decision in *RJR-MacDonald v Canada (AG)*, [1994] 1 SCR 311, consisting of these three steps:

- Whether there is a serious issue to be tried or in some cases, a *prima facie* case;
- Irreparable harm to the plaintiff if the injunction is not granted; and
- Wherein lies the balance of convenience.

[29] There was discussion as to the first part of the test and which threshold needed to be demonstrated by Lynx with regard to the strength of its case, merely a serious issue to be tried or a *prima facie* case. Varo's counsel at first suggested it should be the latter, a strong *prima facie* case, being one that is likely to succeed at trial, since this is a case where an interim injunction would likely put Varo out of business. While the respective degree of harm suffered by the parties speaks more to the issue of the balance of convenience, Varo's counsel, at least in her brief, likened the within case to that of the Court of Appeal decision in *City Wide Towing and Recovery Service v Poole*, 2020 ABCA 305 at para 26.

[30] *City Wide Towing* is a restraint of trade case in which the plaintiff relied on a restrictive covenant. While it is true that both Chris and Tyrel had been employees of Lynx at one time, as well as directors and shareholders, Lynx does not rely on a restrictive covenant. In fact, the restrictive covenant found in the USA was expressly waived in the share repurchase agreement. It was therefore contemplated that Chris and Tyrel would, in some form, compete directly with Jerrod and Lynx.

[31] As the Court of Appeal commented in *City Wide*, the issue of whether a strong *prima facie* case test is also warranted in the context of a restrictive covenant, arising from the sale of the business tied to an employment agreement, has not been decided. In *City Wide*, it was a sale of assets and here it is a sale of shares. Whether that distinction matters, however, is not relevant here because no restrictive covenant is being invoked.

[32] As Justice Little noted in his endorsement, the employment context here, as in *Enviro Trace Ltd v Sheichuk*, 2014 ABQB 381 (Veit J), is beside the point. What Lynx seeks to restrain is neither competition by Varo or even solicitation in and of itself, but rather the use by Varo of what Lynx says is its confidential information.

[33] I conclude therefore that for the purposes of the first branch of the *RJR MacDonald* test, the threshold that must be met is the less stringent one of “serious issue to be tried”.

#### F. Serious issue to be tried

[34] A serious issue to be tried means that the claim is not frivolous or vexatious: *Modry v Alberta Health Services*, 2015 ABCA 265 at para 40.

[35] In order for a claim to be frivolous or vexatious, it must be “a claim that is baseless, hopeless or not arguable”: *AB v College of Physicians and Surgeons of Alberta*, 2021 ABCA 320 at para 47; *Knelsen Sand & Gravel Ltd v Harco Enterprises Ltd*, 2021 ABCA 362 at para 7.

[36] Further, as the Supreme Court of Canada admonished in *RJR-MacDonald*, at para 78, the serious-issue-to-be-tried part of the test should be determined “on the basis of common sense and an extremely limited review of the case on the merits”.

[37] Lynx argues that its separator design is a novel design, the product of ingenuity or an assembly of parts in an innovative way. Citing *Pharand Ski Corp v Alberta*, 80 Alta LR (2d) 216, 1991 CanLII 5869 (Mason J) at para 144, Lynx says that:

Novelty depends on the thing itself, and not upon the quality of its constituent parts. Indeed, often the more striking the novelty, the more commonplace its components...

[38] Lynx says that the unique configuration and assembly of its separator gives Lynx a definite competitive advantage in allowing the separator to be conveyed by a smaller vehicle, over more difficult terrain and to more remote areas, allowing the testing to be done more quickly and at a lower cost. Lynx says that it expended a significant amount of money (some \$500,000) and effort to develop the separator design, which was completed by Jerrod before Chris and Tyrel signed on.

[39] What is unique about the Lynx separator is the dual cyclonic inlet plus the distinct siphon drain and siphon gas outlet.

[40] Lynx says that the separator’s design itself is confidential information, known only to a select number of Lynx employees or former employees, including Chris and Tyrel, and would not be known to anyone else other than the manufacturer. The manufacturer, React Fabrication Ltd, received the design information from Lynx under conditions of confidentiality that acknowledge the secret and proprietary nature of the design, and this acknowledgment of confidentiality is now contained in an agreement, albeit after-the-fact.

[41] Multiple clients have asked Lynx to share its design and Lynx has always declined.

[42] Chris and Tyrel provided 61 photographs of the Lynx design to JCI, Varo's manufacturer, as the basis for the creation of the Varo separators, after which there was a continuing dialogue between JCI and Varo's principals with respect to interpretation of the photos.

[43] Lynx also points to the timing of Varo's instructions to JCI, noting that Varo received its initial quote from JCI on August 20, 2020, one day before the closing of the share repurchase transaction, indicating that Christ & Tyrel had set the wheels in motion for acquisition of Varo's equipment while still employed at Lynx and having access to whatever design information was available then.

[44] Varo responds by saying the following:

- the information used to create the Varo separators is public information, not confidential information;
- in any event, if there is any proprietary information, it belongs to React Fabrication;
- Chris and Tyrel are entitled to use their individual skill and knowledge acquired in the industry to set up their own business and compete with Lynx, citing my decision in *Jetco Heavy Duty Lighting v Fonteyne*, 2018 ABQB 345 at para 147;
- They say that not only is the information not confidential information, but Lynx must prove it was misappropriated, citing *Dreco Energy Services v Wenzel*, 2002 ABQB 110 at para 71 and not merely held in one's head but also misused, relying on *Questor Technology v Stagg*, 2020 ABQB 3 at para 32.
- Varo says that Lynx's accusation is too vague and broad and cannot point to anything specific that was misappropriated, and in any event the IP in dual cyclonic technology that is central to the separator is owned by JCI Group, not Lynx.
- Chris and Tyrel submitted to JCI the same thing that Jerrod submitted to React, namely some hand-drawn sketches and photographs, although in Varo's case, it was considerably more photographs.

[45] The two issues identified by Justice Little in his endorsement, namely whether the Lynx separator design comprises confidential information, and whether that confidential information has been misappropriated by the defendants remain as issues in this litigation.

[46] I conclude that both issues, based on my limited review of the merits, are serious issues to be tried.

[47] My conclusion on the issue of the confidential nature of the design is based on the facts recited above but also on the reaction of JCI to the request by counsel for Lynx for the information that had been provided by Varo for the design of the Varo separators. JCI through its counsel took the position that the information was confidential. All of this suggests there is in the very least a triable issue with regard to the confidentiality of the design information.

[48] On the issue of whether misappropriation of the confidential information is a serious issue to be tried, I take note of the fact that 61 somewhat detailed photographs of the Lynx separator were taken by Varo and submitted to JCI for use in design of the Varo separators. It is open to the court to find, at trial, that it is the idea or concept of the Lynx separator that is

proprietary and confidential. I also take note of the superior functionality of the Lynx separator and how that has been replicated with the Varo separator.

[49] I accept, or more accurately I do not reject, for the time being, the notion that the layout and configuration of a product is distinguishable from the technology of its constituent parts, where that technology is the IP of another party. The validity of that proposition when applied to the facts of this case remains a trial issue.

[50] It is also open to a court at trial to infer from the above facts that the design was misappropriated. I say that inference is available, and it is up to the trial court to draw it or not.

[51] There is expert evidence before the court from Mr. Hausauer attesting to the Varo separator being a near-copy of the Lynx separator. At this stage, I do not need to definitively prefer one expert over the other on the subject of whether the Varo separator is a mere copy of Lynx's, but only acknowledge there is a difference of opinion between apparently qualified experts that must be resolved at trial as part of a genuinely litigable question.

[52] Overall, both questions posed by Lynx, on a cursory review of the merits, are not 'frivolous or vexatious or clearly without merit' and so I conclude that the first branch of the test is met.

### **G. Irreparable harm**

[53] Lynx says its irreparable harm, if no interim injunction is granted, takes two forms:

- First, Lynx will lose control over its confidential separator design because Varo has put it out into the world; and
- Second, its losses are unquantifiable in the sense that damages would be difficult or impossible to calculate.

[54] Varo responds that the court has the means to fashion a monetary remedy in the circumstances and therefore there is no irreparable harm.

[55] On Lynx's first point, I can understand why Lynx would say it has lost control over its design, if indeed that design is confidential information. It is true that Varo's separator is visible to the world in the same way that Lynx's separator is. But seeing something from the outside is different than inspecting its inner workings, design and configuration and taking 61 photographs. Further, the design information imparted by Varo to JCI is subject to a relationship of confidentiality between those two entities. But that confidentiality requirement binds JCI, not Varo. Varo could sell the design or permit a close inspection of its separator so as to facilitate further copying. If the design is a trade secret, there is a danger it could truly become public domain.

[56] Lynx's second point regarding the adequacy of damages is more problematic. The court should not grant an injunction only because it would be difficult to quantify damages. Courts embark on quantifying financial loss in tort, contract and commercial cases all the time, no matter how difficult, often with the assistance of financial experts.

[57] The real question is whether Lynx would lose something intangible to which no dollar value may be attached. One aspect of intangible loss is closely tied to the loss of control over design that I just discussed. What Lynx stands to lose is exclusivity of the design and not only the ability to use that design as a competitive advantage but also the benefit that goes with

exclusive ownership, including the ability to market the design. The evidence before me is that third parties have approached Lynx to share the design and that Lynx has so far declined. The essence of what Lynx is trying to protect is the trade secret, the right to sell the design, not just its market share of the testing work.

[58] Lynx’s counsel cited Justice Veit’s decision in *Enviro Trace* where she says at para 5, in a case similar factually to this one: “The applicant has proved irreparable harm: if a secret is divulged, money cannot make it a secret again.” And again, at paragraph 35: “The loss of a trade secret is harm which cannot be cured by money: no green poultice can never make it a secret again.” In quoting from that case, I do recognize that the defendants had not denied stealing confidential information at the point Justice Veit said those words, and here Chris and Tyrel not only say that the design information is not stolen but also that it is not even confidential information. Nonetheless, if Lynx is right, then as Justice Veit said, information once disclosed cannot become secret again.

[59] I note that the USA restricted use of Lynx’s confidential information by any of the shareholders for a period of five years after ceasing to be a shareholder. If Lynx is correct about its confidential information and the injunction is not granted, then Varo will have had a 5-year head-start it was not entitled to and Lynx concurrently will have lost its exclusivity to the separator for a 5-year period.

[60] Further, Jerrod has deposed to the business losses which he attributes to the misappropriation of the separator design and his fear that Lynx may go under due to loss of business.

[61] In all of the circumstances above, I am satisfied that Lynx has established irreparable harm for the purposes of the second stage of the *RJR-Macdonald* test.

[62] I do also note that Justice Little in his endorsement previously came to the conclusion that irreparable harm would befall Lynx if an interim injunction is not granted, although for slightly different reasons. The expansion of the evidentiary record before me, consisting of the inspection report and two experts’ reports, related primarily to the question of whether the design was confidential information and the first branch of the test.

#### **H. Balance of Convenience**

[63] Lynx must meet all three branches of the test. The third branch, whom the balance of convenience favours, is the most difficult and problematic issue in this case. It is a matter of choosing between the lesser of two evils.

[64] The Honourable Robert J. Sharpe in his famed 2008 text, *Injunctions and Specific Performance*, provided this guidance on the third branch at page 2.530:

Apart from, and in addition to, the risks of monetary loss and gain, what will be the relative impact upon the parties of granting or withholding the injunction? Does the benefit the plaintiff will gain from the preliminary relief outweigh the convenience to the defendant of withholding relief? Is the inconvenience to the defendant, should the injunction be granted, more substantial than the inconvenience the plaintiff will suffer if relief is withheld?... Will the injunction prejudice the public interest or the rights of parties not before the court? Would withholding the injunction result in an injustice?



[65] For Varo's part, what is in evidence is Chris' statement that LGR testing comprises somewhere between 60 to 75% of Varo's business but that it is also involved in gas meter calibration and liquid meter proving.

[66] Varo's counsel also makes the statement that taking the Varo separators off-line would effectively shut down Varo's business, interfere with contracts with third parties, and result in employment loss for Varo employees.

[67] I further understand that the separators are expensive to acquire. I was provided no information about Varo's capitalization or financing, whether the separators in question are financed or leased, or whether Varo has access to the more traditional type of separator. If this evidence had been presented, I would have considered it in this part of the analysis.

[68] I was not told about which third parties would be affected, or how they would be affected. Presumably Varo has ongoing contracts, although I was not advised of particulars. I was not advised of which employees are involved in LGR testing, or whether they could be deployed elsewhere in Varo's operations or on a different separator.

[69] I do not know whether it is possible, as Lynx's counsel suggests, that Varo could pivot into its other operational areas and continue to survive.

[70] I think I have to assume, or can infer, that since 60 to 75% of Varo's business is based on the deployment of these separators, the granting of the injunction will have a detrimental effect on Varo's business. The extent of that detrimental effect, or Varo's ability to carry-on with different separators or in other areas of business, is not known.

[71] Varo is still entitled to compete as the restrictive covenant was waived as a result of negotiations during the share-repurchase, but Chris and Tyrel were not released from the separate covenant in the USA to not appropriate Lynx's trade secrets. If there has been misappropriation, the fact they have enjoyed the use of their separators for more than two-and-a-half years does not mean this is a case of closing the barn door after the horses are out. There is still something of Lynx's to be protected, that is, Lynx's exclusivity for the remainder of the five-year period.

[72] For Lynx, there is the type of loss that I have already described, namely:

- loss of exclusivity in the design, and the inherent value in that exclusivity; that is, the inability to make something secret again once it ceases to be a secret, as adverted to by Justice Veit in the *Enviro Trace* case;
- as yet unquantified and possibly unquantifiable loss of market share and business; the unknown and unknowable extent to which the running start of two-and-a-half years that Varo has enjoyed has distorted the market, if indeed the design information is confidential information; and
- Jerrod has deposed to \$6.5 million in lost testing business thus far attributable to Varo's use of the separator design, and his statement in evidence that Lynx is on the precipice and might not survive if Varo is permitted to continue.

[73] In the result, I reluctantly conclude that the balance of convenience favours Lynx. I only say 'reluctantly' because it is a choice between two undesirable options as I know my decision of necessity will have some kind of adverse economic effect on Varo.

[74] Finally, I have regard to the fact that Lynx is sticking its neck out by giving an undertaking as to damages in the event the court's ultimate decision is that this interim injunction was not justified.

### **I. Ruling**

[75] Effective immediately, Varo will cease to use its separators which were manufactured by JCI using the photographs of Lynx's separator, subject to the following:

- Counsel for the parties will, within 30 days, discuss which third party contracts of Varo should be reasonably completed by Varo, in light of the interim injunction just granted, that is, how the interests of these third parties can be reasonably accommodated, in a way that my decision does not unfairly interfere with the rights of third-parties;
- If counsel or the parties are unable to agree on how third-party interests can be accommodated, then counsel may approach me to assist in resolution.

[76] Varo is further enjoined from sharing with any other person any design information concerning the separators in question, whether in digital or documentary form or by way of physical inspection.

[77] I do not make an order directing Varo to account for and sequester its revenues resulting from the use of its separators. I decline to do so because there is strong whiff of prejudgment attachment or Mareva injunction, the elements of which were not canvassed during the hearing before me; however, upon development of further evidence, Lynx is at liberty to bring such a further application.

[78] Further:

- Within 30 days of the date hereof, counsel will agree to and submit a litigation plan to me that expedites the trial of this matter;
- Counsel may, but are not directed to, approach ACJ Nielsen with my recommendation for the appointment of a case manager to deal with any further interlocutory matters and to ensure a timely trial;
- If costs of this application cannot be agreed to, then counsel may make a written submission to me within two weeks, in letter form consisting of no more than 2 single-spaced pages, excluding exhibits and authorities and supported by a Bill of Costs.

[79] Counsel for Lynx will prepare the Order and it will be approved by Ms. King.

Heard on the 24<sup>th</sup> day of March, 2023.

Oral reasons delivered on the 11<sup>th</sup> day of April, 2023.

**Dated** at the City of Edmonton, Alberta this 14<sup>th</sup> day of April, 2023.

---

**Douglas R. Mah**  
**J.C.K.B.A.**

**Appearances:**

Anthony R. Purgas and Ben Thronson,  
Reynolds Mirth Richards & Farmer LLP,  
for the Plaintiffs/Applicants

Narnia King, KMSC Law LLP  
for the Defendants/Respondents