Court of King's Bench of Alberta

Citation: ARC Surveys Ltd v Ni, 2024 ABKB 629

Date: 20241029
Docket: 2101 08568
Registry: Calgary

Between:

ARC Surveys Ltd.

Plaintiff

- and -

Han Da Ni, DJ Drafting Consultants Ltd., and Zoom Surveys Ltd.

Defendants

Reasons for Judgement
of the
Honourable Justice K.M. Horner

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[1] This application was brought pursuant to relief claimed in an Originating Application (**Application**) filed by the Arc (**Applicant**) which included a request for a permanent injunction against the Defendants, Han Da Ni, DJ Drafting Consultant Ltd (**Ni Defendants**) and Zoom Surveys Ltd (**Zoom**) from conducting any municipal surveying using knowledge Han Da Ni (**Ni**) obtained while working for the Applicant. The Ni Defendants filed a cross-application for a declaration that the Non-Competition (**NCA**) signed as part of the Share Purchase Agreement (**SPA**) is of no force or effect.

Evidence

[2] Arc is an Alberta company that provides a range of surveying services to the public across the province. It was founded in 2012 with its head office in Calgary. Although it provides services province wide, a significant portion of the work Arc performs is in the Calgary area. The original founders of the company and their respective shareholdings were President Jerrad Gerein (**Gerein**) holding 51%, Vice President, Office Manager and Field Manager Ni holding 39%, and Draftsperson Yao Wang (**Wang**) holding10%.

[3] Ni is the sole shareholder and director of DJ Drafting Consultant Ltd (**DJ**) with DJ holding legal title to his shares in Arc. DJ was incorporated in 2008 in Alberta and is the vehicle through which Ni conducts his consulting business.

[4] Gerein is a registered land surveyor in Alberta (an "**ALS**"). Ni is not an ALS, but he has extensive experience as a draftsperson and managing field crews gained through a history of employment in the area since 1997.

[5] Gerein had exclusive responsibility for hiring and firing staff, setting compensation for employees, issuing group benefits and deduction levels for staff, determining whether a new project would be accepted by the company, making final decisions on job quotes and timelines, and dispersing dividends to the shareholders. In addition to a shareholder dividend, Gerein received a salary for his role as President.

[6] Ni's role at Arc involved many tasks including assigning work to Wang and other draftspersons, delegating jobs to different survey crews, managing and supervising the crews, and assisting with resolving customer complaints, queries and project issues. Ni reported to Gerein and was assigned tasks by Gerein. In addition to a shareholder dividend, Ni was paid a salary of $35 an hour based on a 40-hour week.

[7] Beginning in 2017, for a variety of reasons, Ni contemplated selling his Arc shares and switching employment to work in real estate. One factor as to why Ni considered leaving was the introduction of Rheal Bourgouin (**Bourgouin**), an ALS, as an Arc employee and shareholder in June 2017. Gerein decided that Bourgouin would be issued 1,111 nonvoting shares, equivalent to 4.5% of the outstanding shares, with compensation of $199,980 to be paid to Arc rather than the existing shareholders proportionately. This diluted Ni's and the other shareholder's existing stake in Arc.

[8] The amended and restated unanimous shareholders agreement (USA) executed between the shareholders including Bourgouin on June 1, 2017, directed that any share repurchase be paid by monthly instalments over a period of not more than two years with interest at 3% on the outstanding principal amount to be compounded semi-annually. The USA also directed that the party whose shares were purchased was not to compete with Arc in the City of Calgary for a period of two years after share disposition. In late 2018, Gerein and Ni began discussions about a share buyback by Arc.

[9] As negotiations dragged on, Ni's role within Arc became diminished as more work was being assigned to Bourgouin instead. Additionally, Gerein failed to include Ni in decisions regarding the company and failed to issue the traditional biannual dividend. In 2018, the biannual dividend for Ni totalled approximately $200,000. The withholding of this dividend increased the financial pressure on Ni to come to an agreement more quickly.

[10] Negotiations concluded in September 2019, with several agreements being signed between the parties consisting of the SPA and attached schedules, including the NCA, the Non-Solicitation Agreement (**NSA**) and an Escrow Agreement (**EA**) (collectively, the **Agreement**).

[11] The SPA executed between Arc and DJ on September 30, 2019, indicated that the purchase price for DJ's shares was $912,600, payable in three annual instalments between September 30, 2019, and September 30, 2021. Interest on any overdue payment was to bear interest at the rate of 10%, compounded monthly from the date of default.

[12] The purchase price was derived from a valuation prepared by MNP LLP effective September 2018. It valued the company as a going concern of between approximately $2.3 and $2.6 million. MNP recommended a purchase price for DJ' shares at a 30% discount due to it minority stake at $604,000. The higher valuation when applied to DJ's shares (3,900) equaled the final purchase price of $912,600 or $234/share.

[13] The EA set out that DJ's shares would be held in escrow over the three-year payout term with one-third being released to Arc after each periodic payment. At the time of this motion, two payments (equivalent to two-thirds of the purchase price) had been released. Arc has withheld the final payment of $304,200, alleging this amount is equivalent to the damages owed for the alleged breach of the NCA/NSA by the Ni Defendants.

[14] After DJ's share sale, and the termination of Ni's employment with Arc in or about October 2019, Ni engaged in several corporate ventures and ideas. Specifically, on or about July 2020, Ni invested in and took on a role with a geotechnical business named PrairieGeo Engineering Ltd (**PrairieG**) as Vice President and Office Manager and a 49% shareholder. PrairieG is an Alberta based geotechnical and materials company incorporated in July 2020. The remaining 51% shares in PrairieG were held by Jason Ni (no relation) who exited the company in November 2021.

[15] Ni also started working with his brother-in-law, Alex Wang's home building company Gold Homes Ltd, on an unpaid ad hoc basis as a project manager on or about January 2022.

[16] Ni also corresponded with an ALS named Kevin Nemrava (**Nemrava**) among other ALS's over a few years after 2019. His discussions with Nemrava included a hypothetical surveying business venture although he explained that he was restricted by a non-competition agreement with Arc that he believed extended to the Calgary area only.

[17] Ni also communicated with Adam Barvir (**Barvir**), a surveyor in Alberta in 2021, and introduced him to investors including the then co-owner of PrairieG, Jason Ni. Barvir is an ALS and P.Eng.. In or about March 2021, Ni's wife, Amanda Wang, incorporated Zoom with Barvir as 51% shareholder, Jia Ping Ge (a friend of Ni's) as a 24.5% shareholder and Yang Zi (Jason Ni's wife) as a 24.5% shareholder.

[18] Barvir was the President and a director of Zoom at all relevant times. Neither Ni nor his wife Amanda Yang held shares or played an active role in Zoom, however PrairieG did loan $100,000 to Jason Ni to loan to Zoom. Arc alleges that the shareholdings of Jia Peng Ge and Yang Zi should be attributed to the Ni Defendants because the loan was funded by the Ni Defendant's but was actually reflective of a beneficial interest. PrairieG also allowed Zoom to use its office space when it was getting started. Arc further alleges that Ni's actions in finding Barvir investors, encouraging him to start a surveying company, and being an indirect shareholder or investor through PrairieG were all breaches of the NCA.

[19] Arc has presented no evidence of Ni personally soliciting any Arc clients after the NCA/NSA was entered into.

[20] Arc seeks a permanent injunction against Ni for the alleged breaches of the Agreement. Arc further alleges that as Zoom induced Ni into breaching his NCA, Zoom should be held accountable and subject to a permanent injunction as well. Both injunctions sought would prohibit the Ni Defendants from directly or indirectly using any information provided or obtained from Arc by the Ni Defendant's.

Law

[21] The Federal Court of Canada recently opined on the test for a permanent injunction. In ***Rogers Media Inc v John Doe 1***, 2024 FC 1082 at para 48 [***Rogers Media***], the Court set out the elements that must be established to warrant a permanent injunction:

1. an infringement of rights – that is, proof of each of the elements of the cause of action on a final adjudication of the claimed rights;
2. that damages or other alternative remedies are not sufficient or adequate to address the wrongful conduct; and
3. that there is no impediment to the Court's discretion to grant an injunction.

See also ***Google Inc v Equustek Solutions Inc***, 2017 SCC 34 at para 66; ***Alberta Health Services v Johnston***, 2023 ABKB 209 at para 124.

[22] The well-known test for an interlocutory injunction set out in ***RJR-MacDonald Inc v Canada (Attorney General)***, 1994 CanLII 117 (SCC) does not apply to permanent injunctions. The analysis of a permanent injunction does not consider the second and third elements of the ***RJR-MacDonald*** test, however there could be similar considerations with respect to whether monetary damages are appropriate and whether there are equitable considerations that apply: ***Rogers Media*** at para 50.

[23] Our Court of Appeal has also had occasion to consider the test for a permanent injunction in ***Lui v Hamptons Golf Course Ltd***, 2017 ABCA 303 [***Lui***]. The Court notes that "in principle, a permanent injunction can be granted summarily" if the test for summary dismissal is met: ***Liu*** at para 15. Summary dismissal can be granted when the process:

1. allows the judge to make the necessary findings of fact;
2. allows the judge to apply the law to the facts; and
3. is a proportionate, more expeditious and less expensive means to achieve a just result.

Liu at para 15 citing ***Hryniak v Mauldin***, 2014 SCC 7 at para 49.

[24] Before a permanent injunction can be granted, the claimant must fully prove its rights, demonstrating a serious issue to be tried is insufficient: ***Liu*** at para 17. Once the applicant's rights have been conclusively established, they must then demonstrate an entitlement to the equitable remedy of a permanent injunction: ***Liu*** at para 17.

[25] There can be a legitimate proprietary interest in client relationships even though there is no ownership over clients: ***IBM Canada Ltd v Almond***, 2015 ABQB 336 at para 54 [***IBM***].

However, whether customer relationships can ground a proprietary interest depends on the type of business in question. In a business involving a single transaction, or where customers frequently change providers, client relationships may not create substantial trade connections to constitute a legally recognizable proprietary interest: ***IBM*** at para 54.

[26] In ***Ruel v Rebonne***, this Court awarded damages to the claimant for a breach of a non-competition clause in an agreement for the sale of a business: 2022 ABQB 271 [***Ruel***] aff'd in part, 2023 ABCA 156. Armstrong J noted that restrictive covenants in non-competition clauses most often arise in two situations: employment contracts and contracts for the sale of a business: ***Ruel*** at para 52.

[27] Employment contracts, and contracts for sale of the business give rise to different considerations: ***Ruel*** at para 52 citing ***Payette v Guay inc***, 2013 SCC 45 at paras 35-37 [***Guay***]. In contracts for the sale of a business, the inclusion of a non-competition and non-solicitation clause usually functions to protect the purchaser's investment by limiting the vendor's ability to compete with the purchaser for a specific time: ***Ruel*** at para 52 citing ***Guay*** at para 36. Prescribing a time where competition is limited provides the purchaser with an opportunity to build relations with new customers without fear of competition from the vendor: ***Ruel*** at para 52 citing ***Guay*** at para 36.

[28] Justice Wagner (as he then was) set out the approach for assessing non-competition covenants in the commercial context in ***Guay*** at para 61:

> In a commercial context, a non-competition covenant will be found to be reasonable and lawful provided that it is limited, as to its term and to the territory and activities to which it applies, to whatever is necessary for the protection of the legitimate interests of the party in whose favour it was granted: ***Copiscope Inc. v TRM Copy Centres (Canada) Ltd.,*** 1998 CanlII12603 (Que. C.A.). Whether a non-competition clause is valid in such a context depends on the circumstances in which the contract containing it was entered into. The factors that can be taken into consideration include the sale price, the nature of the businesses activities, the parties' experience and expertise and the fact that the parties had access to the services of legal counsel and other professionals. Each case must be considered in light of its specific circumstances.

[29] Whether the clauses of a commercial contract are reasonable is assessed in relation to the rules that govern freedom of trade so as to favour the application of such restrictive covenants: ***Guay*** at para 58. Therefore, in the commercial context "a restrictive convenant is lawful unless it can be established on a balance of probabilities that its scope is unreasonable": ***Guay*** at para 58. The threshold for establishing that a restrictive covenant is reasonable in the commercial context will be less onerous than in the employment context. A restrictive covenant for the sale of assets will only be unreasonable where the scope of the covenant is not limited to what is necessary to protect the purchaser's interests.

[30] Restrictive covenants in employment contracts require a higher level of scrutiny than restrictive covenants for the sale of a business given the absence of payment for goodwill, and the power imbalance between an employee and employer: ***Shafron v KRG Insurance Brokers (Western) Inc***, 2009 SCC 6 at para 23 [***Shafron***].

[31] Terms in a contract can be found to be void for uncertainty: ***Ko v Hillview Homes Ltd***, 2012 ABCA 245 para 80 [***Ko***], leave to appeal to SCC refused, 2013 CanLII 1188. Uncertainty can be used as either a defence, or to establish a lack of agreement: ***Ko*** at para 80. Whether terms of a contract are certain is assessed on an objective basis: ***Ko*** at para 27.

[32] Although the Agreement is to be analyzed as a commercial agreement, the caselaw regarding non-competition clauses in an employment context can still provide helpful guidelines especially where, as here, there is only a partial sale of the business and by a minority shareholder who is also an employee. For instance, ***Ceridian Dayforce Corporation v Daniel Wright***, 2017 ONSC 6763, held a noncompetition clause in an employment context to be overbroad and unreasonable because it prohibited the respondent from providing any services to any of the applicant's, their affiliates', or subsidiaries' competitors. The non-competition clause was so broad it would have prohibited the respondent, who was trained as an engineer, from obtaining employment with any of its competitors even as a janitor. This went beyond what was reasonably necessary to protect the applicant's claimed proprietary interest.

[33] Temporal scope, or the stated term of the prohibition must be considered as part of assessing the reasonableness of the clause. For example, in ***Dent Wizard v Castrophe Solutions,*** 2011 ONSC 1456, a senior executive signed a termination agreement with the applicant which included a six-year restraint on becoming involved in any automotive reconditioning activity, for which the contract provided no definition. This restricted the respondent's involvement in an industry broader than that of the applicant, and to an unlimited geographic area. In the circumstances, the Court found the applicant had overreached in its language regarding temporal restrictions as there was no basis to require such extreme restrictions to protect its trade connections. The related clauses were found to be unreasonable and therefore unenforceable.

Issues

[34] The issues on this motion are:

1. Are the restrictive covenants in the Agreement vague, uncertain or ambiguous such that the Agreement is not reasonable and therefore unenforceable;
2. If not, are the terms of the Agreement reasonable in their terms as to the activity prohibited or its duration or geographic territory;
3. If so, did the Ni defendants breach their terms;
4. If so, what is the appropriate measure of damages.

[35] As to the question of whether these issues can be determined summarily, the materials filed in this matter are voluminous consisting of: the Application; the cross-application; the usual and somewhat prolix briefs and authorities that have been filed by each of the three parties including a lengthy reply brief by Arc; the comprehensive affidavits of Gerein, Ni, and Barvir; the cross-examination transcripts of each affiant; the undertaking responses arising from each cross-examination; the transcripts of each cross-examination on the responses to undertakings including any undertaking responses on the further cross-examination of prior answers to undertakings.

[36] I estimate that the ordinary length of a trial in this matter, had the parties opted for that, would have been five days on the civil docket. Instead, the parties booked a half day hearing on the commercial docket.

[37] The Court has all the evidence and relevant documents required to determine this matter summarily with respect to the first and second issues. With respect to issues three and four, this Court is not satisfied that these issues can be determined summarily. Although the credibility of each Affiant has been tested to a certain extent by way of cross-examination, this is insufficient to fully determine whether the actions of the Ni Defendants and Zoom are breaches of the NCA/NSA or not.

[38] Typically, the onus would be on the Applicant to establish a conclusive right, and then that the right had been breached. However, as the parties here have agreed this is a motion to enforce a restrictive covenant arising from a commercial agreement, the onus is therefore on the respondent covenantor to show that the clauses are unreasonable and therefore unenforceable: ***Guay*** at para 57.

Are the Restrictive Covenants Void for Uncertainty

[39] The relevant terms of the NCA are:

> 2.1 Term of Agreement.
>
> > The term of this Agreement shall commence on the Effective Date and shall expire on the fifth anniversary following final instalment payment of the Redemption Amount(“the Term”).
>
> 2.2 Non-Competition.
>
> > During the Term, Covenanters shall not, on its, his or their own behalf or on behalf of or in connection with any Person, directly or indirectly, in any capacity whatsoever(including as an employer, employee, principal, agent, joint venturer, partner, shareholder, or other equity holder, investor, lender, independent contractor, licensor, licensee, franchisor, franchisee, distributor, consultant, supplier or trustee, or by or through any corporation, cooperative, partnership, trust, unincorporated association, syndicate or other Person or otherwise) carry on, be engaged in, have any financial or other interest in or be otherwise commercially involved in any endeavour, activity or business in all or any part of the Territory which is in competition with the Business.
>
> 2.3 Non-Solicitation of Customers.
>
> > During the Term, Covenanters shall not, on its, his or their own behalf of or in connection with any Person, directly or indirectly , in any capacity whatsoever (including as an employer, employee, principal, agent, joint venturer, partner, shareholder or other equity holder, investor, lender, independent contractor, licensor, licensee, franchisor, franchisee, distributor, consultant, supplier or trustee, or by or through any corporation, cooperative, partnership, trust,

unincorporated association, syndicate or other Person or otherwise):

a) canvass or solicit the business which is competitive with the Business of (or procure or assist the canvassing or soliciting of such business of) any current customers of the Corporation; or

b) accept (or procure or assist the acceptance of) any business which is competitive with the Business from any current customers of the Corporation.

3.1 Reasonableness.

The Covenantors expressly acknowledge that this Agreement is reasonable and valid in all respects and the Covenantors acknowledge that the Corporation requires the restrictive covenant granted herein by the Covenantor to protect the investment by the Corporation by enabling the Corporation to build strong ties with the customers, suppliers and employees of the Corporation after completing the Repurchase Agreement but who are, and will continue to be, known to the Covenantors and the Covenantors irrevocably waive (and irrevocably agree not to raise) as a defence any issue of reasonableness (including the reasonableness of the Territory or the duration and scope of this Agreement) in any proceeding to enforce any provision of this Agreement, the mutual intention of the Parties being to provide for the legitimate and reasonable protection of the interests of the Corporation and its Subsidiaries by providing, without limitation, for the broadest scope, the longest duration and the widest territory allowable by Law.

[40] A couple of preliminary comments about these clauses is warranted. The terms “Effective Date” and “Redemption Amount” are not defined terms in the Agreement but have been accepted by the parties to mean September 30, 2019, and the purchase price respectively. The “Term” is understood to be a total of seven years from the Effective Date or September 30, 2026. Additionally, “Territory” in Clause 2.2 is a defined term in the Agreement meaning Alberta.

[41] ***Sattva Capital Corp. v Creston Moly Corp***, 2014 SCC 53 [***Sattva***] remains the leading authority on contract interpretation. The overriding principle is to determine the intent of the parties at the time the contract was signed: ***Sattva*** at para 47. The contract must be read as a whole, with words given their ordinary meaning consistent with the surrounding circumstances known to the parties at the time of contract formation: ***Sattva*** at para 47.

[42] Surrounding circumstances can be used to aide in contract interpretation but cannot be used to overwhelm the words of the contract effectively creating a new agreement: ***Sattva*** at para 57. The purpose of considering the surrounding circumstances is to enrich the Court's understanding of the parties' mutual and objective intentions as expressed through the words of the contract: ***Sattva*** at para 57. The resultant interpretation of the contract must "be grounded in the text and read in light of the entire contract": ***Sattva*** at para 57.

[43] Surrounding circumstances include the commercial purpose of the contract, its aims and objectives, and evidence of the nature or custom of the market or industry in which the contract was executed: ***Sattva*** at para 47.

[44] In Clause 3.1 the Agreement sets out that Arc required the restrictive covenant to protect its investment by enabling it to build strong ties with customers, suppliers and employees. This is the proprietary interest that Arc was seeking to protect.

[45] Clause 3.1 further purports to have the Ni Defendants waive their right to defend any enforcement proceedings by claiming the terms are unreasonable. Non-competition clauses are *prima facie* unenforceable because they are considered a restraint on trade that is contrary to public policy: ***IBM*** at para 27. However, if the restraint on trade is reasonable, the Court may uphold the restrictive covenant to not interfere with the parties' freedom to contract: ***IBM*** at para 27; ***Shafron*** at para 16-17.

[46] The waiver provision in Clause 3.1 cannot oust the Court's jurisdiction to test the Agreement for certainty and reasonableness.

[47] The Ni Defendants assert that the restrictive paragraphs in the Agreement are vague and uncertain. They point to such terms as "have any interest, financial or otherwise" in the NCA and "assist and current customers" for the NSA as having no definitive meaning capable of being understood. The Ni Defendants claim they are left guessing about how to comply with the terms of the Agreement.

[48] The Ni Defendant's point to the breaches alleged by Arc to exemplify the uncertainty of the scope of the Agreement. For example, despite having no provable financial interest in Zoom, Arc alleges that the Ni Defendants breached the Agreement by:

a) including a customer of Arc in a group e-mail sent by Zoom;

b) Ni asking an acquaintance how to place an advertisement for Zoom in a Chinese language newspaper as well as;

c) Ni's communications with Nemrava and discussing future plans; and

d) a competitor, Horizon Surveys, who had no affiliation of any kind with Ni but was interested in renting office space from PrairieG was told by Arc that such an arrangement might be in potential violation of the Agreement.

[49] Arc takes the position that the terms are narrow and unambiguous. They rely on the fact that the Ni Defendants had counsel, as did Arc, in the preparation of the Agreement. They state that even if the said terms are vague or uncertain, any uncertainty is trivial and that the terms of the Agreement can still be properly understood.

[50] I agree with Arc's submissions that the vagueness or uncertainty found in the paragraphs containing the restrictions are minor in nature. The paragraphs can be interpreted as restricting

the Ni Defendants from having any interest of any kind in any type of project that would compete with Arc in the municipal surveying business, and from soliciting or accepting any type of business that would compete with Arc in the municipal surveying business, in Alberta for a period of seven years commencing on September 30, 2019.

Are the Restrictions Reasonable

[51] As a starting point, Arc repeatedly insists that the parties had equal bargaining power. To support this assertion, they point to the representation of the Ni Defendants during negotiations. The negotiations started in late 2018 and culminated in the Agreement on September 30, 2019. The Ni Defendants hired counsel sometime in the spring of 2019. Prior to, or around the time of hiring counsel and after protracted negotiations between Ni and Gerein, Ni set out the terms he wanted in the SPA by way of an e-mail dated June 11, 2019, and Gerein responded to that by way of an e-mail dated June 19, 2019.

[52] Ni outlined in his proposal:

1. The purchase price would be the market value as assessed by MNP of $912,600 payable over three years;
2. He would resign effective end of October, 2019;
3. He would waive his right to dividends for the year 2018/2019 and over the repayment period; and
4. The shares would be disposed of immediately with Arc providing security for the unpaid portions of the purchase price.

[53] Gerein responded that he and the other shareholders agreed with the proposal but additionally they wanted:

a) Ni to continue to work as a consultant until December of 2019 on an ad hoc basis; and

b) The noncompetition clause was to be for extended for two years after the final payment or for a total of five years.

[54] The parties' counsel then drafted the documents resulting in the Agreement being signed on September 30, 2019.

[55] There was a critical e-mail between counsel for the Ni Defendants and counsel for Arc in August 2019. Arc's counsel sent a revised form of the Agreement to the Ni Defendant's counsel noting in the covering e-mail "while most of the changes are minor, perhaps the most significant changes are that payments will not be issued as dividends, and the payments terms will be three instalments paid yearly instead of quarterly." The note did not mention, although it was redlined, that the term of the non-competition paragraph had been changed to end on the second anniversary after the final installment payment, to the fifth anniversary. This effectively changed the term of the NCA from five years to seven years.

[56] The USA which the parties had signed just two years prior in June 2017, outlined that in the event of a share buyback the vendor would be paid out over no more than a two-year period and that the vendor would be restricted from competing with Arc for a period of two years after the disposition of shares. If the share purchase price was paid over the full two years, then the

restriction on competition would be a maximum of four years. The territory of the non-competition clause was stated to be Calgary.

[57] The bargain Ni thought he had struck in June was quite different by the time the execution date of the documents arrived, particularly insofar as the restrictive covenants were concerned. The purchase price would be paid over three annual instalments bearing interest only if in default, the non-competition term was extended to seven years from four years, and the territory it encompassed had changed from Calgary to all of Alberta. Despite these changes, the purchase price stayed the same from Ni's original offer.

[58] These changes were to the detriment of the Ni Defendants for no consideration and serve to support Ni's evidence that by August 2019 he was desperate to sell his shares and that Arc had all the bargaining power. Ni felt that Gerein would not release the dividend which Ni had projected to be at least as much as the year before, and that his income would continue to decline as Bourgouin assumed more of his work.

[59] Although Gerein's Affidavit states that the increase in the purchase price from the minority discount of $604,000. Additionally, the purchase price of $912,600 had been agreed to by Gerein and the other shareholders back in June, 2019. He originally offered Ni was to support the enhanced terms in the Agreement, on cross-examination he said the increase was to ensure that Arc and Ni parted on good terms.

[60] The stated purpose of the Agreement was to protect Arc's investment by enabling it to build strong ties with customers, suppliers and employees of Arc. There is no evidence that the municipal surveying business conducted by Arc was any different than any other similarly situated company. Clients hired Arc on a project-by-project basis. After completion, each job was invoiced and paid. Arc did not have long-term retainers with clients, and Arc's clients were free to engage other survey companies with similar services as they wished. The primary factors influencing client choice was speed of performance and pricing.

[61] The evidence indicates that the municipal surveying market is not unique, and the characteristics of this market are widely known relating to pricing, business model, business development and client retention. The types of clients requiring municipal surveying services were well known in the industry.

[62] Arc's operational trade practises were well known and not unique. Arc appears to be mainly concerned that Ni would use his relationships with client's who had used Arc to invest and build a competing business by obtaining work from Arc customers using Arc's suppliers and engagement of former Arc employees. A review of the reasonableness of the restrictions should be made in light of this evidence.

[63] The prohibited activities under the Agreement are overly broad to achieve the desired protection of Arc's interests. However, the terms as they pertain to a restriction on activity are not so broad as to render them unreasonable. Despite the prohibited activities themselves being reasonable, the length of time these restrictions are active is not.

[64] A period of seven years is unreasonable under all the circumstances present here.

[65] Ni was an employee and founder of Arc. There was no evidence led that he was essential to running the business, that he had exceptional business talent or experience, or that he was an exceptional draftsperson such that Arc needed to be protected from his talents and connections for a period of over five years.

[66] Further, using the USA as a starting point, there was no consideration offered for the extension of the term of the Agreement.

[67] This was not a purchaser buying the entirety of a business and starting afresh with concern about client retention. There was no transition period required for Arc either corporately or in its operations. Ni's work could be taken over by Bourgouin, and others could be hired if necessary. Rather than protect its legitimate business interests for a reasonable period of time, the Agreement's broad wording serves to remove the Ni Defendants from the whole of the municipal surveying business in all of Alberta for a period of seven years. This is punitive personally to Ni, and not a genuine protection required for the continued building of Arc's business.

[68] The Defendant has made out that the Agreement is unreasonable in that its term is too long. Given that the Agreement is found to be unreasonable, it is unenforceable. It follows that Arc has not made out the first part of the test for a permanent injunction – a legal right, and its application must fail.

[69] The cross-motion of the Ni Defendants is granted. The NCA/NSA is declared to be of no force or effect, and the Ni Defendants are free to participate in the municipal surveying business in Alberta. The application against Zoom is dismissed.

[70] If this had been a civil trial this Court would go on to consider whether, if the NCA/NSA was valid, then had the alleged breaches been made out and what the appropriate remedy would be. Since these issues cannot be determined summarily on the record here, this is not possible.

[71] The parties are invited to speak to costs and further performance by Arc related to the SPA.

Heard on the 8th day of February, 2023.
Dated at the City of Calgary, Alberta this 29th day of October, 2024.

K.M. Horner
J.C.K.B.A.

Appearances:

David Tupper and Sophie Mansfield
for ARC Surveys Ltd.

Edward Gale
for Zoom Surveys Ltd.

Ram Sankaran
for DJ Drafting Consultants Ltd.