

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Epiroc Rock Drills AB v. Zimmerman*,  
2025 BCSC 1757

Date: 20250909  
Docket: S253080  
Registry: Vancouver

Between:

**Epiroc Rock Drills AB and Epiroc Canada Inc.**

Plaintiffs

And

**Brad Zimmerman, Michael Barnhill, Alan Tweedie, BKS Consulting,  
Battery Powertrain Solutions Corp., Joy Global (Canada) Ltd. and  
Komatsu International (Canada) Inc.**

Defendants

Before: The Honourable Justice Blake

## Reasons for Judgment

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Place and Date of Hearing:

Vancouver, B.C.  
July 21, 22,  
August 21, 22, 2025

Place and Date of Judgment:

Vancouver, B.C.  
September 9, 2025

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**I. INTRODUCTION**

[1] The plaintiffs seek broad injunctive relief, which they say is necessary to uphold the contractual obligations of three of its former employees and to protect their business. They seek to broadly enjoin not only these three former employees, but also several companies, from using what it alleges is its confidential information.

[2] The appropriate scope and definition of “confidential information” was the subject of much discussion during this application. In the plaintiffs’ notice of application, “confidential information” was defined as:

All confidential information concerning the present and contemplated financial status and activities of Epiroc Rock Drills AB and Epiroc Canada Inc. (together, “**Epiroc**”), as well as all information relating to business process, know-how, industrial processes, trade secrets, inventions, plans, intellectual property, developments, equipment and products used, developed or sold by Epiroc or any of its customers or any person, firm or corporation with whom Epiroc has a business relationship.

As that was the definition used by the plaintiffs, that is the definition I will use for “Confidential Information”, while acknowledging the defendants all say this definition is so vague and overbroad that the application must be dismissed on that basis alone.

[3] Broadly summarized, the plaintiffs seek injunctive relief against the personal defendants Bradley Zimmerman, Michael Barnhill and Alan Tweedie (collectively the “Individual Defendants”), and BKS Consulting, Battery Powertrain Solutions Corp. (“BPS Corp.”), Joy Global (Canada) Ltd. (“Joy Global”) and Komatsu International (Canada) Inc. (“KICI”) (together with Joy Global the “Komatsu Entities”) as follows:

- a) an interlocutory injunction which prohibits all defendants from using any of Epiroc’s Confidential Information;
- b) an interlocutory injunction restraining Mr. Zimmerman from competing with the plaintiffs until the earlier of November 1, 2026, or the conclusion of the trial of this action;

- c) an interlocutory injunction restraining Mr. Zimmerman from being employed in any manner by the Komatsu Entities for the same period; and
- d) an interlocutory injunction prohibiting Mr. Zimmerman from soliciting Epiroc's employees for the same period.

The plaintiffs also seek orders addressing the preservation and return of Epiroc's Confidential Information, and an affidavit from the Individual Defendants attesting they have done so. All defendants oppose the relief sought on numerous grounds.

## **II. BRIEF BACKGROUND**

[4] The Epiroc Group is a manufacturer of mining and infrastructure equipment with operations globally. Within the Epiroc Group, Epiroc Rock Drills AB is a company incorporated pursuant to the laws of Sweden. One of the wholly owned subsidiaries of Epiroc Rock Drills AB is Epiroc Canada Holding Inc. (not named as a plaintiff in this proceeding); the plaintiff Epiroc Canada Inc. is a wholly owned subsidiary of Epiroc Canada Holding Inc. I will define Epiroc Rock Drills AB ("Epiroc Rock Drills") and Epiroc Canada Inc. ("Epiroc Canada") together as "Epiroc". Epiroc operates in the manufacturing industry for mining and infrastructure equipment.

[5] Epiroc Canada develops and provides innovative and safe equipment — such as drill rigs, rock excavation and construction equipment, and tools for surface and underground application — for mining and construction customers.

[6] Epiroc says one of its most significant competitors is Komatsu, whom it describes as a "Japanese multinational corporation that is also in the business of manufacturing mining and infrastructure equipment". It also alleges that KICI is a competitor of Epiroc (which KICI denies), and that Joy Global is a competitor (which on the evidence it appears to be).

[7] Epiroc’s position is that mining, especially underground mining, is a niche industry. It says there are a small number of key competitors within the underground mining industry that develop and manufacture mining equipment.

[8] In 2021, Epiroc acquired FVT Research Inc. (“FVT Research”), a company focused on research and development of vehicle electrification. FVT Research had approximately 25 employees at the time, and was in the business of designing, producing, selling and supporting power, electronic, battery electric vehicles and charging equipment. Mr. Zimmerman was president of FVT Research, and an owner and principal of the business.

[9] On September 10, 2021, several parties, including Epiroc and Mr. Zimmerman, entered into an asset purchase agreement (the “Asset Purchase Agreement”) by which FVT Research sold its assets to Epiroc FVT Inc. (the “Transaction”). Mr. Zimmerman received \$2,200,000 pursuant to the terms of the Asset Purchase Agreement. On January 1, 2025, Epiroc Canada and Epiroc FVT Inc. (“Epiroc FVT”) amalgamated, and now carry on business as Epiroc Canada.

[10] The plaintiffs take the position that Mr. Zimmerman was represented by counsel throughout the negotiations and the signing of all Transaction documents. Mr. Zimmerman disagrees and takes the position that FVT Research was represented by counsel, but he was not.

[11] Through the Asset Purchase Agreement, Epiroc FVT acquired the right, title and interest in the assets of FVT Research which relate to or are used in the “Business”, which was defined as:

...the business of designing, producing, selling and supporting power, electronic, battery electric vehicle, and charging equipment and related consulting solutions for businesses operating in transportation, energy storage, natural resources and extractive industries, such as mining, civil and construction, forestry and associated governmental markets.

[12] The Asset Purchase Agreement required certain “key” employees, including Mr. Zimmerman, remain employed with Epiroc FVT following the sale. Further, it required that FVT Research, together with each of the principals (of which

Mr. Zimmerman was one) duly execute a Non-Competition Agreement, which was defined to mean:

...the non-competition and non-solicitation agreement to be entered into at the Closing by the Vendor, each of the Principals and the Purchaser, in form and substance satisfactory to the Parties, acting reasonably.

[13] On or about November 1, 2021, Epiroc FVT acquired all outstanding shares of FVT Research as part of the closing of the Transaction.

[14] In connection with the Transaction, on either November 1 or 2 of 2021, Mr. Zimmerman allegedly entered into the contemplated Non-Competition Agreement (the “Non-Competition Agreement”). Mr. Zimmerman emphatically denies agreeing to, or executing, the Non-Competition Agreement, which I will address further below.

[15] Article 2 of the Non-Competition Agreement prohibited Mr. Zimmerman from engaging in activities that are substantially similar to, or competitive with, the Business (as defined above) for a period of five years (until November 1, 2026). Specifically, it provided:

2.1 Brad shall not, during the period beginning on the date of this Agreement and ending on the fifth anniversary of the date of this Agreement, within the Territory, directly or indirectly, in any manner whatsoever including either individually, in partnership, jointly or in conjunction with any other Person, or as employee, consultant, advisor, independent contractor, principal, agent, director, officer, owner or shareholder:

- (a) be engaged in any undertaking or business;
- (b) have any financial or other interest (including an interest by way of royalty or other compensation arrangements) in or in respect of the business of any Person which carries on, directly or indirectly, an undertaking or business;
- (c) advise, lend money to, guarantee the debts or obligations of or give security on behalf of any Person which carries on, directly or indirectly, an undertaking or business; or
- (d) permit his name to be used or employed by any Person, directly or indirectly, engaged in, concerned with or interested in any aspect of an undertaking or business;

that is in whole or in part the same as or substantially similar to or competitive with the Business.

Article 3.2 provided Mr. Zimmerman was not to solicit employees of Epiroc for the same period.

[16] Article 4 of the Non-Competition Agreement contained the following express acknowledgments by Mr. Zimmerman:

Brad acknowledges that:

(a) all restrictions contained in this Agreement are reasonable, necessary and valid, including, without limitation, the time and geographic limitations specified in this Agreement;

(b) the Business is carried on throughout the Territory and the Company is involved in, solicits or canvasses opportunities throughout the Territory;

(c) to the extent permitted by law, Brad hereby waives all defences to the strict enforcement by the Company of its covenants contained in this Agreement;

and Brad represents and warrants to the Company that the observance of the terms of this Agreement will not deprive Brad of the ability to earn a livelihood.

[17] Further, Article 5 contained the following confidentiality provision:

Brad acknowledges that the Confidential Information is the property of the Company and could be used or disclosed in a manner that would result in substantial harm to it or the Business. Accordingly, Brad agrees that he shall hold and maintain as confidential the Confidential Information, and shall not use the Confidential Information for any purpose and in no event shall use the Confidential Information in any manner that would be detrimental in any respect to the interests of the Business or the Company. Brad shall not disclose any Confidential Information to any Person, except: (i) as necessary to perform his obligations under this Agreement; (ii) as necessary to enforce rights or defend claims under the Asset Purchase Agreement or to enforce rights or defend claims in connection with liabilities retained by the Vendor under the Asset Purchase Agreement, in either case in connection with a legal proceeding; or (iii) as required by law, court order or similar proceeding. In all cases, Brad will make commercially reasonable efforts to ensure that confidential treatment will be accorded to the disclosed Confidential Information, notwithstanding its disclosure. In respect of disclosure required by law, court order or similar proceeding, Brad will: (i) provide the Company with immediate notice of the request or order; (ii) make every commercially reasonable effort to advance a confidentiality defense based on this Agreement in an effort to ensure that confidential treatment will be accorded to the Confidential Information, but at the sole cost and expense of the Company; and (iii) cooperate with the Company in any application, proceeding or other action undertaken by the Company to obtain a protective order or other means of protecting the confidentiality of the Confidential Information required to be disclosed, provided that Brad shall not be prevented from disclosing such Confidential Information prior to the hearing

of any such application, proceeding or other action by the Company in circumstances where failure to do so would result in penalties or fines or criminal or other charges against him.

[18] Article 6 included remedies available if there is a breach of Articles 2, 3 or 5:

Brad specifically acknowledges that a breach or threatened breach by Brad of any of the provisions of any of Sections 2, 3 and 5 would cause the Company irreparable harm not compensable in damages alone. Brad further acknowledges that it is essential to the effective enforcement of this Agreement that, in addition to any other remedies to which the Company may be entitled at law or in equity or otherwise under this Agreement, the Company be entitled to seek and obtain, in a summary manner, from any court having jurisdiction under Section 13, interim, interlocutory, and permanent injunctive relief, specific performance and other equitable remedies.

In addition to any other remedies to which the Company may be entitled at law or in equity or otherwise under this Agreement, in the event of a breach of any of the covenants or other obligations contained in this Agreement, the Company shall be entitled to an accounting and repayment of all profits, compensation, royalties, commissions remunerations, or benefits which Brad, directly or indirectly, shall have realized or may realize relating to, arising out of, or in connection with any such breach.

[19] Finally, Article 15 contained the following acknowledgements by Mr. Zimmerman:

Brad acknowledges that:

- (a) he has Confidential Information and that any utilization of the Confidential Information, subject to the exceptions provided for in this Agreement, may cause serious detriment to the Business and the Company;
- (b) he recognizes and understands that the employees and customers of the Business are an integral part of the Business acquired by the Company under the Asset Purchase Agreement which the Company is entitled to protect;
- (c) in agreeing to purchase the Purchased Interest, the Company has relied upon the execution and delivery of this Agreement by Brad;
- (d) having regard to all of the circumstances of the transactions contemplated under the Asset Purchase Agreement, it is necessary that this Agreement be executed and delivered in order for the Company to receive the full benefit of the Purchased Interest, and the terms of this Agreement are just and reasonable; and
- (e) Brad has been given an opportunity to obtain independent legal advice, or such other advice as Brad may desire, concerning the interpretation and effect of this Agreement.

[20] Following the completion of the Transaction, Mr. Zimmerman continued his employment with Epiroc FVT, in the role of Engineering Manager, and was subject to the terms and conditions of a written employment agreement dated October 29, 2021 (before the alleged Non-Competition Agreement was entered into) (the “2021 Employment Agreement”). That agreement contained clauses restricting Mr. Zimmerman’s ability, following termination of his employment, for a period of twelve months: to solicit employees of Epiroc; solicit customers or prospective customers of Epiroc; or compete with Epiroc. The 2021 Employment Agreement also contained an express acknowledgment of his duty of confidentiality to Epiroc FVT, both during his employment and following its termination. Specifically, Article 6 set out the non-competition terms:

6.0 Non-Competition

6.1 During the Executive’s employment with the Company and for a period of twelve (12) months following the termination of such employment for any reason the Executive agrees and undertakes not to, directly or indirectly, anywhere in British Columbia in any manner whatsoever, including, without limitation, either individually or in partnership or jointly in conjunction with any other person or entity and whether as principal, agent, shareholder, partner, lender, administrator, director, officer, employee, executive, consultant, advisor or in any other capacity or quality whatsoever, provide services that are similar or comparable to the services provided by the Executive to the Company during the course of her/his employment with the Company, to any other person or entity whose activities are the same as, or competitive with, the business activities of the Company at the time of the termination of the Executive’s employment with the Company. Notwithstanding the generality of the foregoing, for the purposes of the present paragraph, any other person or entity shall be deemed to have business activities which are the same as, or in competition with, the business activities of the Company if it is involved in the following business or commercial activities: consulting, design, manufacturing, installation, sales, marketing, training and supporting of any Epiroc & FVT within Mining and Construction.

[Emphasis added.]

[21] Mr. Zimmerman and Epiroc fundamentally disagree on his role at Epiroc, and in particular, whether he was a fiduciary. In any event, Mr. Zimmerman says he was dissatisfied with his ongoing employment at Epiroc. Mr. Zimmerman deposed to his frustrations with his lack of career advancement at Epiroc as follows:

14. I worked for Epiroc for two years and became increasingly dissatisfied with the position. I felt that I was not being given opportunities to use my skillset and that my expertise was underutilized. I entered into negotiations with Epiroc in the fall of 2023 to increase the scope of my role. Epiroc agreed to increase my level of responsibility and changed my position to Strategic Projects and Investigations.

15. On October 19, 2023, I signed a new employment agreement with Epiroc (the “2023 Employment Agreement”) that reflected the updated terms that arose from these negotiations. The 2023 Employment Agreement did not include a non-competition or non-solicitation clause but did include confidentiality and conflict of interest provisions at sections 4.1 and 4.2. It also included a clause terminating any [and] all previous agreements with Epiroc. Attached and marked as Exhibit “D” to my Affidavit is the employment agreement dated October 10, 2023, and signed by me on October 19, 2023.

[22] On October 10, 2023, he was promoted to the position of Strategic Projects and Investigations. In connection with this promotion, he signed an employment agreement on October 10, 2023 (the “2023 Employment Agreement”) in which he expressly acknowledges his duty of confidentiality and agrees to protect and not disclose Epiroc FVT’s Confidential Information, both during his employment and following its termination:

4.1 You acknowledge that, in the course of performing and fulfilling your duties hereunder, you may have access to and be entrusted with confidential information concerning the present and contemplated financial status and activities of the Company, as well as all information relating to business processes, know-how, industrial processes, trade secrets, inventions, plans, intellectual property, developments, equipment and products used, developed or sold by the Company or any of its customers or any person, firm or corporation with whom the Company has a business relationship (“Confidential Information”), the disclosure of any of which Confidential Information to competitors of the Company or the general public would be highly detrimental to the interests of the Company. You agree that all Confidential Information which you obtain in the course of your employment shall be held by you as a trustee for the Company. You further acknowledge and agree that the right to maintain the confidentiality of such Confidential Information constitutes a proprietary right which the Company is entitled to protect. Accordingly, you covenant and agree with the Company that you will not disclose any of such Confidential Information to any person, firm or corporation, nor shall you use same, except as required in the normal course of your engagement hereunder, and thereafter you shall not disclose or make use of the same. More particularly, upon leaving the employe of the Company, you shall promptly deliver to the Company any and all data, manuals, notes, records, devices, computers, media, correspondence and other documents held by you concerning the Confidential Information and you shall continue to keep same secret. You shall not disclose any secret or Confidential information, or information which, in good faith and good

conscience, ought to be treated as confidential, which you become aware of in the course of your employment relating to the Company, its employees or customers. The foregoing obligations regarding confidentiality shall continue beyond the termination of your employment with the Company to the fullest extent and for as long as permitted in accordance with applicable law.

[23] Further, the 2023 Employment Agreement provided:

9.0 Exclusion of Other Agreements

9.1 The terms and conditions set-out hereinbefore represent the entire agreement between the parties. Any and all previous agreements, written or oral, between the parties hereto or their predecessors are hereby terminated and cancelled and each party hereto hereby releases and forever discharges the other party from any and all claims whatsoever under or in respect of any such agreement. Further, it is agreed that any variation of this Agreement shall be made in writing with the agreement of the parties to be evidenced by their execution to this Agreement.

[Emphasis added.]

[24] Mr. Zimmerman’s position is Article 9 was an “entire agreement” clause which effectively extinguished all previous agreements between the parties, including, if the Non-Competition Agreement was executed by him (which he denies), that agreement. The plaintiffs argue this is an absurd position, which I will address further.

[25] In any event, notwithstanding his promotion, Mr. Zimmerman remained frustrated in his employment at Epiroc. He says:

16. Despite these negotiations and resulting employment contract, I felt that Epiroc did not take its promises seriously. The scope of my position did not change following execution of the 2023 Employment Agreement. I was not awarded any more responsibility or opportunities to use my expertise as an employee of Epiroc. I resigned on November 15, 2023.

17. I was frustrated that my years of training and considerable expertise were not being put to use in meaningful work. As I was not able to contribute meaningfully, Epiroc’s battery technology stagnated. Epiroc’s battery systems have low reliability, and there is not much interest in the market for them.

18. On December 16, 2023, I worked my last day at Epiroc and surrendered all of my company assets, property, and data to Epiroc upon my resignation.

19. At the time of my resignation, I was well-aware of my obligations with regard to the protection of Epiroc’s confidential information and business interests, and I carefully considered how I might advance my career and earn an income while honouring these obligations.

[26] On November 15, 2023, Mr. Zimmerman resigned from his employment with Epiroc FVT, effective December 15, 2023. Through his sole proprietorship, BKS Consulting, he entered into an independent contractor agreement with Joy Global on November 23, 2023 (the “2023 Joy Global Agreement”). While the plaintiffs rely upon the date of the 2023 Joy Global Agreement, the evidence on behalf of Joy Global is that Mr. Zimmerman began to consult for them on January 15, 2024.

[27] In the 2023 Joy Global Agreement Mr. Zimmerman, through BKS Consulting, made several representations and warranties to Joy Global, including:

- a) that he was not bound by any restrictive covenant that would prevent or restrict him in fulfilling the full scope of his services;
- b) that he had no confidential or proprietary information from any former customer, employer or other party in his power, possession or control the disclosure of which could give rise to a legal claim against either him or Joy Global; and
- c) the work product he would produce will be entirely of his original development, and will not infringe upon or violate any patent, copyright, trade secret or other property right of any third party.

[28] The plaintiffs’ place significant weight on double hearsay statements that Mr. Zimmerman told other employees he was going to work at “Komatsu”. In their first affidavits filed in this matter Mr. Zimmerman, Mr. Barnhill and Mr. Tweedie both referred to “Komatsu”; however, each later clarified these were references to the brand name, rather than any specific corporate entity. Each also confirmed they had no knowledge of, and had never heard of, the corporate entity KICI.

[29] Both Mr. Barnhill and Mr. Tweedie had written employment agreements with Epiroc FVT in which they acknowledged their duty of loyalty to Epiroc FVT, committed to hold Epiroc FVT’s confidential and proprietary information in strict confidence, and acknowledged that any and all inventions, improvements, information and data during their employment were the sole and exclusive property

of Epiroc FVT. They also agreed to a non-solicitation clause for a period of six months following the termination of employment for any reason, including resignation. Their respective employment agreement did not contain a non-competition clause.

[30] Both Mr. Barnhill and Mr. Tweedie’s employment agreements contained the identical clauses with respect to confidentiality and intellectual property rights:

14. **Confidentiality** Your position will require you to have access to confidential and highly sensitive material. You may not use or disclose any confidential information relating to the Company or its customers, clients or suppliers to anyone during or after the cessation of your employment without the prior written permission of the Company. Such confidential information shall specifically include, but not be limited to, the following: pricing information, marketing strategies, financial information, staffing, research and development, information concerning the Company’s customers or potential customers (including but not limited to actual or potential markets or customer lists), service or product plans, negotiations of contracts as well as information which the Company receives from others under an obligation of confidentiality.

15. **Intellectual Property Rights**. All innovations, inventions, discoveries, improvements, devices, designs, practices, processes, methods, writing, drawings, text, diagrams, artwork, machines, databases, training materials, videos, reports, articles, products or services and other creations or work products that you make, develop, perfect, devise or reduce to practice during the Term that relate to the Company’s business, or result from any work performed by you for the Company (collectively, the “**Company Intellectual Property**”), are the Company’s sole property. You agree to promptly inform, and disclose to the Company all Company Intellectual Property that you create alone or in collaboration with others whether or not during normal business hours or on the premises of the Company, and whether or not reduced to permanent form and in any format. You hereby irrevocably and unconditionally transfer, assign and/or waive any and all of your rights, including moral rights, title and interest in and to any and all of the Company Intellectual Property, and any copyright, trademark, patent application or patents thereon, to the Company and its successors and assigns. The Company retains legal ownership of your work product and no Company Intellectual Property created by you while employed by the Company can be claimed, construed, or presented your property, even after termination of your employment. The Company Intellectual Property shall be considered the Company’s Confidential Information. On the Company’s request, you agree and undertake to provide all reasonable assistance with respect to the prosecution, maintenance, enforcement, and other enjoyment and exploitation of the Company Intellectual Property, including executing any document that the Company deems necessary to evidence the Company’s ownership of any of the Company Intellectual Property to apply for and obtain

intellectual property registrations in the Canadian intellectual Property Office, or any foreign equivalents, for any of the Company Intellectual Property.

[31] The plaintiffs say that while they do not know the exact date, they believe that at the end of 2024 Mr. Zimmerman began soliciting employees of Epiroc FVT to work for Komatsu, through Mr. Zimmerman’s consulting business. They say he solicited two of the Individual Defendants, Michael Barnhill and Alan Tweedie, to leave Epiroc FVT. Mr. Zimmerman, Mr. Barnhill and Mr. Tweedie all deny this allegation, and say that Mr. Barnhill and Mr. Tweedie responded to advertisements Mr. Zimmerman placed on Indeed, a website for employers to hire their necessary employees.

[32] The plaintiffs’ belief is based upon the following evidence of Andrew Hubele, the Global Research and Development Director for Epiroc Canada:

32. Mr. Zimmerman resigned his employment with Epiroc FVT on or about November 15, 2023, effective December 15, 2023. I am informed by Ashton Murch and Chris Weller, current employees of Epiroc Canada, and verily believe it to be true that Mr. Zimmerman had arranged to provide services to Komatsu International (Canada) Inc. (“**Komatsu**”) commencing immediately following his resignation through a consulting company.

33. I am informed by Ashton Murch and Chris Weller and verily believe that Mr. Zimmerman was offering shares in his consulting company to employees willing to depart Epiroc Canada to work with Mr. Zimmerman.

34. Mr. Zimmerman worked with the Defendants, Michael Barnhill and Alan Tweedie, while at FVT Research and subsequently at Epiroc Canada. He acted as a direct or indirect manager of both Mr. Barnhill and Mr. Tweedie.

35. I am informed by Mr. Zimmerman and Mr. Tweedie and verily believe it to be true that Mr. Zimmerman had regular contact with Mr. Tweedie, as Mr. Tweedie was involved with Mr. Zimmerman’s racing team.

36. I am informed by Nicholas Dobi, another former Epiroc Canada employee, and verily believe it to be true that Mr. Zimmerman also asked Mr. Dobi to join Mr. Zimmerman while Mr. Dobi was still employed by Epiroc Canada.

Much of this evidence is hearsay and double hearsay, and I will address this below.

[33] The evidence is clear that on December 6, 2024, Mr. Zimmerman incorporated a company, the defendant BPS Corp., whose directors included Mr. Barnhill and Mr. Tweedie. Mr. Tweedie resigned from his employment with

Epiroc on January 6, 2025 (effective January 31, 2025) and Mr. Barnhill resigned on January 13, 2025 (effective January 23, 2025). Both went to work for BPS Corp., who entered into another independent contractor agreement with Joy Global on January 1, 2025 (the “2025 Joy Global Agreement”).

[34] In the 2025 Joy Global Agreement, BPS Corp. made several representations and warranties to Joy Global, including:

- a) that it was not bound by any restrictive covenant that would prevent or restrict it in fulfilling the full scope of its’ services;
- b) that it had no confidential or proprietary information from any former employer or other person; and
- c) the work product would not infringe upon or violate any patent, copyright, trade secret or other property right of any third party.

[35] Epiroc says that at some point after Mr. Barnhill and Mr. Tweedie resigned from Epiroc, they learned the three had incorporated BPS Corp. to provide consulting services to Joy Global.

[36] Following this discovery, Epiroc sent substantially identical cease-and-desist letters to Mr. Barnhill and Mr. Tweedie on February 6, 2025, in which they stated to each of them:

Our client has advised us that you are acting in breach of your confidentiality and non-solicitation obligations owed to Epiroc. **The purpose of this letter is to demand that you cease and desist from any further unlawful activity and to put you on notice that litigation may be commenced against you without further notice.**

Specifically, Epiroc has advised us that, following your resignation from Epiroc on January 23, 2024, either directly or together with Brad Zimmerman or his consulting company, you have begun developing substantially similar projects to those that you were involved with while working for Epiroc. Further, Epiroc has become aware that, either directly or together with Brad Zimmerman, you have sold, or are planning to sell, such projects to Komatsu International (Canada) Inc. (“**Komatsu**”) or a related entity.

Such actions are in breach of your obligations to Epiroc, as detailed below.

...

**Your conduct, including soliciting Epiroc’s employees, and sharing, use, or disclosure of Epiroc’s confidential and proprietary information has the potential to cause irreparable harm to Epiroc. You are required to immediately cease and desist your unlawful conduct.**

[Emphasis in original.]

Each cease-and-desist letter demanded Mr. Barnhill and Mr. Tweedie immediately refrain from soliciting any of Epiroc’s employees; immediately delete all of Epiroc’s Confidential Information (as defined in their respective employment agreements) without keeping copies of the information in any form; confirm they will not share, use or disclose any of Epiroc’s Confidential Information in the future, and in perpetuity; and confirm they will not make use of any of Epiroc’s Company Intellectual Property (as defined in their respective employment agreements) in the future, and in perpetuity. Both Mr. Barnhill and Mr. Tweedie immediately complied with these demands and confirmed their intention to comply with the terms of the cease-and-desist letters.

[37] Also on February 6, 2025, Epiroc’s counsel sent a cease-and-desist letter to Mr. Zimmerman, outlining his fiduciary, confidentiality, non-solicitation and non-competition obligations and requested his written confirmation he intended to comply with his contractual and common law obligations. Through counsel, on March 6, 2025, Mr. Zimmerman denied he owed or had breached any such obligations.

[38] Following the departure of Mr. Barnhill and Mr. Tweedie, at some unspecified date, Epiroc Canada engaged FTI Consulting Inc. (“FTI”) to conduct a forensic IT investigation into the laptops of Mr. Barnhill and Mr. Tweedie to assess the possible exfiltration of Epiroc’s Confidential Information.

[39] FTI undertook this forensic analysis and determined that two USB storage devices were connected to Mr. Barnhill’s laptop in January 2025, shortly before Mr. Barnhill’s departure, and documents were copied to both USB device 1B74592A and USB device 5ADF2514. The documents accessed by Mr. Barnhill included:

- a) the subpack, Prototype B and top-level assembly CAD models for a top-secret next-generation battery platform;

- b) other critical files related to a top-secret next-generation battery platform; and
- c) internal next-generation TMS development documents and datasheets, including the CAD model for a TMS, the refrigeration loop, prototype and layout for the next-generation TMS.

[40] Mr. Barnhill implicitly admits he downloaded these documents in his affidavit but denies he did so for any nefarious reasons. He deposes that he complied with all the demands set out in the February 6, 2025 cease-and-desist letter; destroyed and properly disposed of the USB drive; did not provide any of Epiroc's Confidential Information to any non-party; and, specifically, did not disclose either the downloaded files, nor any of Epiroc's Confidential Information, to either BPS Corp., Komatsu or Mr. Zimmerman.

[41] FTI also determined Mr. Tweedie accessed files from a USB storage device in the weeks prior to his departure from Epiroc on January 31, 2025. FTI notes that the files were likely copied to a USB device in 2023 and last accessed in January 2025. The documents accessed by Mr. Tweedie include:

- a) numerous .zip files downloaded from Sharepoint and Teams containing highly confidential information, such as information relating to TMS and Brightloop;
- b) several manuals, guides, textbooks and other documents that are unrelated to his regular employment duties; and
- c) Mr. Tweedie's OneNote information.

While Epiroc acknowledges it is possible that Mr. Tweedie did not download these particular documents to a USB, it says it cannot verify whether he may have printed the documents or transmitted them to himself via personal email, Google Drive, Dropbox, or another cloud-based storage platform.

[42] FTI notes that 37 files from Mr. Tweedie’s E:\ drive were accessed from this USB device on January 10, 2025. Mr. Tweedie does not admit to copying the documents listed above in para. [41] in January 2025. Rather, he deposes:

7. I do not possess physical items, electronic records, electronic devices, removeable storage devices, laptops, printed documents and records, or any devices that are the property of Epiroc or comprised of Epiroc’s Confidential Information.

8. I have not provided any of Epiroc’s confidential information as defined in the notice of application to a non-party.

9. I do not have any relevant materials or records to preserve. If I did have any relevant materials, they were disposed of as instructed in the cease-and-desist letter sent by Epiroc.

[43] With respect to the 37 files Mr. Tweedie accessed from this USB device on January 10, 2025, Mr. Tweedie does admit to accessing and copying these files on that date but says there was no Epiroc Confidential Information on that specific USB. Rather, Mr. Tweedie claims these files relate solely to “personal projects and 3D printed gifts” and says he destroyed them in accordance with the demands in the cease-and-desist letter. Mr. Tweedie deposes that he does not possess physical items, electronic records, electronic devices, removeable storage devices, laptops, printed documents and records, or any devices that are the property of Epiroc, or comprised of Epiroc’s Confidential Information; has not provided any of Epiroc’s Confidential Information to a non-party; and does not have any relevant materials or records to preserve. Like Mr. Tweedie, Mr. Barnhill specifically deposes he did not share any of Epiroc’s Confidential Information with BPS Corp., Komatsu, or Mr. Zimmerman.

[44] Fundamentally, Epiroc argues that the circumstantial evidence of the timing of the above events supports a reasonable inference that the defendants exploited confidential information acquired by the Individual Defendants during their employment at Epiroc to enable Joy Global and KICI to develop, manufacture and market competing electrification products without incurring the time, effort, and expense that Epiroc did.

[45] For their part, the defendants deny acquiring any confidential information from Epiroc. Mr. Barnhill and Mr. Tweedie both denied sharing the information FTI showed they accessed with anyone, and say all confidential information they may have had was immediately deleted in accordance with the demands set out in the cease-and-desist letter. Mr. Zimmerman also denies using any of Epiroc’s confidential information or intellectual property in his current position. Further, the defendants all assert that Epiroc’s confidential information is of no value to their work with Joy Global. Epiroc denies this position.

**IV. APPLICABLE LEGAL PRINCIPLES**

[46] The court has the discretion to grant an interlocutory injunction pursuant to Rule 10-4 of the *Supreme Court Civil Rules*, s. 39 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253, and the court’s inherent jurisdiction.

[47] An injunction is often described as an “extraordinary” or “drastic” remedy. That is because an interlocutory injunction is, in effect, an exercise of the court’s power to restrain the activities of its citizens: *JTT Electronics Ltd. v. Farmer*, 2014 BCSC 2413 [*JTT Electronics*] at paras. 63–64.

[48] The well-established three-part framework for granting an interlocutory injunction requires the applicant establish that:

- a) there is a serious question to be tried;
- b) the applicant will suffer irreparable harm if the relief is not granted; and
- c) the balance of convenience favours granting the injunction.

*RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 1994 CanLII 117 (S.C.C.).

[49] In British Columbia, this test is often expressed as a two-part test, with irreparable harm and balance of convenience considered as the second part. However, there is no difference in substance between the two formulations of the test: *British Columbia (Attorney General) v. Wale*, 1986 CanLII 171 (B.C.C.A.),

[1986] 9 B.C.L.R. (2d) 333 (B.C.C.A.) at 346, aff'd [1991] 1 S.C.R. 62, 1991 CanLII 109 (S.C.C.) at 4.

[50] The precise factors to be evaluated are not a series of independent hurdles that an applicant must meet but are rather a guide to determining a just and equitable result. Rather, as an injunction is an equitable remedy, the fundamental question is whether the granting of an injunction is just and equitable in all the circumstances: *Air Passenger Rights v. WestJet Airlines Ltd.*, 2025 BCSC 155 at paras. 40–41; *EnWave Corporation v. Dehydration Research, LLC*, 2022 BCSC 637 [*EnWave*] at para. 42.

[51] At the first part of the test, the applicant must establish there is a serious question to be tried. The burden with respect to this first requirement is relatively low, and the applicant must simply satisfy the court that its claim is not frivolous or vexatious. The court should not embark on a prolonged or extensive examination of the merits of the underlying case: *EnWave* at para. 43, citing *Vancouver Aquarium Marine Science Centre v. Charbonneau*, 2017 BCCA 395 [*Vancouver Aquarium*] at paras. 39–40.

[52] However, if the applicant is seeking a mandatory interlocutory injunction — one that directs a defendant to undertake a positive course of action rather than requiring a defendant refrain from an action — the applicant must establish a strong *prima facie* case: *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5 [*CBC*] at para. 13; see also *EnWave* at paras. 44–45. Similarly, if an applicant seeks an interlocutory injunction based on a restrictive covenant in an employment agreement, and the injunction would inhibit the respondent's ability to earn a living, the applicant must establish a strong *prima facie* case: *NSD Disposal Limited v. Ruppel*, 2025 BCSC 690 [*NSD Disposal*] at para. 38.

[53] A strong *prima facie* case is one where the applicant judge is satisfied that there is a strong likelihood on the law and the evidence presented that the applicant will ultimately succeed at trial in proving their case: *CBC* at para. 17; *EnWave* at para. 44.

[54] Turning to the second branch of the test, and specifically irreparable harm, the analysis requires assessment of the nature of the harm rather than its magnitude. In *EnWave*, the Court notes irreparable harm “is harm that either cannot be quantified in monetary terms or cannot be cured, usually because one party cannot collect damages from the other”: at para. 46.

### III. THE EVIDENTIARY OBJECTIONS

[55] Epiroc acknowledges it relies “to a very limited extent on hearsay and double hearsay”. However, this belies the reality that it relies upon both to a significant degree. Epiroc argues that the use of hearsay is allowed in interlocutory applications, and where double hearsay is included, they argue it should be permitted as narrative.

[56] Epiroc relies upon the decision of Justice Verhoeven in *Heler v. Kelt Exploration Ltd.*, 2024 BCSC 1498 in which he noted the following, relying upon *Premium Weatherstripping Inc. v. Ghassemi*, 2016 BCCA 20:

[45] Hearsay evidence is admissible on an application, as long as the application does not seek a final order. However, given the nature of an interlocutory or interim injunction order and its consequences, assiduous care in preparation of the application is the standard, including strict compliance with the requirements for all hearsay evidence that would not be permitted to be stated at trial to be on information and belief, with the source identified; there is no room in interlocutory injunction practice for relaxation of that requirement: *Premium Weatherstripping* at para. 7.

[57] While hearsay evidence may be admissible under Rule 22-2(13) of the *Supreme Court Civil Rules*, it is always a matter of judicial discretion whether an interlocutory order ought to be granted based on hearsay evidence: *Le Soleil Restaurant Inc. et al v. Nomani et al*, 2005 BCSC 1804 [*Le Soleil*] at para. 47. Double hearsay should never be admitted: *Le Soleil* at para. 47, citing *Johnson v. Couture*, 2002 BCSC 1804.

[58] Epiroc relies not only upon hearsay, but also upon double hearsay evidence in support of some of their more serious allegations. Specifically, the first affidavit of Mr. Hubele contains statements that are clearly double hearsay, including:

- a) “I am informed by Ashton Murch and Chris Weller, current employees of Epiroc Canada, and verily believe it to be true that Mr. Zimmerman had arranged to provide services to Komatsu International (Canada) Inc. commencing immediately following through a consulting company” (para. 32); and
- b) “I am informed by Ashton Murch and Chris Weller and verily believe that Mr. Zimmerman was offering shares in his consulting company to employees willing to depart Epiroc Canada to work with Mr. Zimmerman” (para. 33).

Mr. Hubele fails to set out when and how he was informed of these facts by Mr. Murch and Mr. Weller, and fails to set out when and how they learned of these facts. This is a clear illustration of the dangers of admitting this type of evidence. Further, Mr. Zimmerman expressly denies both claims in his second affidavit. Epiroc asks the court to infer from these statements that Mr. Zimmerman had pre-arranged business dealings and was poaching Epiroc’s employees before and during his new consulting venture.

[59] Mr. Hubele also deposes to the following double hearsay:

- a) “I am informed by Mr. Nicholas Dobi, another former Epiroc Canada employee, and verily believe it to be true that Mr. Zimmerman also asked Mr. Dobi to join Mr. Zimmerman while Mr. Dobi was still employed by Epiroc Canada” (para. 36); and
- b) “I am informed by Chris Weller and verily believe it to be true that Mr. Barnhill was working in Komatsu’s Sudbury office within one week of his resignation from Epiroc Canada” (para. 43).

[60] Epiroc also relies upon the first affidavit of Aliasgar Ghadyali, which contains the following double hearsay statement: “I am informed by Ashton Murch, an employee of Epiroc Canada, and verily believe it to be true that Komatsu was having thermal issues with their batteries and needed assistance with developing a thermal

management system (a “TMS”)” (para. 30). Again, Mr. Zimmerman expressly denies this claim in his second affidavit. Epiroc is asking the court to make an inference from this statement that Mr. Zimmerman required an electrical engineer and attempted to poach one from Epiroc.

[61] Mr. Ghadyali also deposes, “I am informed by Nicholas Dobi, a former Epiroc Canada employee, and verily believe it to be true that Mr. Zimmerman also attempted to solicit Mr. Dobi to join Mr. Zimmerman while Mr. Dobi was still employed by Epiroc Canada” (para. 32).

[62] There is no evidence tendered by Epiroc as to why Mr. Murch or Mr. Weller (both current employees of Epiroc Canada) were not able to provide evidence; nor why Mr. Dobi (a former employee) was unable to do so. Rather, in response, Epiroc argues that to the extent it relies upon hearsay, such evidence is admissible on an interlocutory application, and to the extent it relies upon double hearsay, such evidence is admissible as “narrative”. However, such an argument ignores what qualifies under the narrow “narrative” exception to the inadmissibility of hearsay evidence. In *R. v Taweel*, 2015 NSCA 107 at paras. 103–133, the Nova Scotia Court of Appeal endorsed and adopted Christopher Nowlin’s analysis in *Narrative Evidence: A Wolf in Sheep’s Clothing*, Part I, 2006 51 C.L.Q. 238; and Part II, 2006 51 C.L.Q. 271. The Court addressed the important difference between narrative evidence and circumstantial evidence. It noted and agreed with Mr. Nowlin’s description of the two different types: narrative evidence should be restricted to evidence that fills in chronological gaps and should have explanatory value without having probative value. However, circumstantial evidence is probative of a material fact.

[63] I cannot accept Epiroc’s argument that the double hearsay statements in the affidavits it tendered are “narrative evidence”. The evidence is not tendered merely to address chronological gaps; rather, they are clearly tendered as circumstantial evidence from which they ask this Court to draw reasonable inferences. As such, I cannot accept the double hearsay into evidence. Given this determination, I need

not consider the alternative position of the defendants, in that they argue if the evidence were allowed, then they seek an adverse inference that neither Mr. Murch nor Mr. Weller would have supported the evidence of Mr. Hubele.

[64] Further, with respect to the hearsay evidence being tendered by Epiroc, I endorse the comments of Justice Ballance in *Le Soleil*. As injunctive relief is a drastic and extraordinary remedy, the court ought to receive direct evidence on the material facts in dispute on the application whenever it is reasonably practicable and obtainable and in the absence of urgency: at para. 55. See also *Litchfield v. Darwin*, 1997 CanLII 3830 (B.C.S.C.), 29 B.C.L.R. (3d) 203 at paras. 4–5. To apply a less rigid evidentiary threshold “could well run the danger of compromising a meaningful consideration of the actual test for granting an interlocutory injunction”: *Le Soleil* at para. 55.

## V. ANALYSIS

### A. Komatsu International (Canada) Inc.

[65] Epiroc seeks injunctive relief against KICI, relying upon the double hearsay evidence of Mr. Hubele, saying he was advised by Mr. Murch and Mr. Weller that Mr. Zimmerman had arranged to provide services to KICI through a consulting company. I have addressed the inadmissibility of this evidence above.

[66] Further, they rely upon the first affidavits of Mr. Zimmerman, Mr. Barnhill, and Mr. Tweedie, in which they referred to “Komatsu”. However, each then clarified in a subsequent affidavit that the reference to “Komatsu” were a reference to the brand name, and not to the defendant KICI.

[67] Judy Langlais, the Director, Finance Canada for KICI, has provided affidavit evidence that KICI operates as a retail finance business, providing financing to end purchasers or lessees of equipment bearing the “Komatsu” brand, which is sold or leased through third-party dealers and distributors. Ms. Langlais makes clear KICI has no relationship with any of the other defendants, and at no time have any of the other defendants provided services, including any research and development

services, to KICI. In fact, KICI does not carry out any research and development activities. She notes that “KICI does not design, develop, manufacture, or sell any equipment at all”, and “does not design, develop, manufacture, or sell any underground mining or electrified equipment”. She gives direct evidence that KICI does not compete with Epiroc “in respect of the design, development, manufacture, or sale of underground mining or electrified equipment”. She goes so far as to make clear that “KICI has never received or used any information from the other Defendants which belonged to the Plaintiffs or could be considered confidential”. Notwithstanding Epiroc asserts in their written submissions that “KICI is a competitor of Epiroc”, that is entirely inconsistent with the direct evidence from KICI.

[68] Each of the Individual Defendants have likewise clarified they have no pre-existing knowledge of KICI, nor any contractual relationship with it, either personally or through BKS Consulting or BPS Corp. Each also clarified that their references to “Komatsu” in their first affidavits were references to the “Komatsu” brand, not to KICI.

[69] While Epiroc relies on the fact KICI amended its response to civil claim, such an assertion is irrelevant. It is not nefarious that after filing its’ initial response to civil claim, and providing Ms. Langlais’ affidavit, KICI filed an amended response to civil claim.

[70] Epiroc has tendered no admissible evidence to support its argument that KICI is involved in the subject matter of the action. In the absence of any such evidence Epiroc cannot demonstrate the existence of a serious issue to be determined in respect of KICI, and there is no basis for such an injunction to be granted. Further, any such injunction would serve no purpose. Epiroc’s application for an interlocutory injunction as against KICI is dismissed.

**B. The Remaining Defendants**

[71] While in its’ notice of application Epiroc noted it focused its claims, for the purpose of the injunction application, on its breach of confidence and breach of contract claims, in written submissions Epiroc argues it has established that:

- a) the Individual Defendants breached both equitable and contractual duties of confidence by misappropriating Epiroc's Confidential Information;
- b) the Individual Defendants, and in particular Mr. Zimmerman, owed, and continue to owe, fiduciary duties to Epiroc;
- c) the Individual Defendants breached their duties of good faith and fidelity;
- d) Mr. Zimmerman breached his express contractual obligations in respect of non-solicitation and non-competition; and
- e) Mr. Barnhill and Mr. Tweedie breached their express contractual obligations in respect of non-solicitation.

[72] Epiroc says it has established its legal claims against BKS Consulting which include inducing the breach of Mr. Zimmerman's express and implied contractual employment terms, and his duties of good faith and fidelity; inducing a breach of confidence on the part of Mr. Zimmerman; and knowing assistance in the breaches of fiduciary and other duties. It also argues the Individual Defendants breached their obligations to Epiroc either through, or in concert with, BPS Corp. and so say BPS Corp. is jointly and severally liable for the resulting damage to Epiroc.

[73] Epiroc also argues it has established its legal claim against Joy Global for also inducing the breach of Mr. Zimmerman, Mr. Barnhill and Mr. Tweedie's express and implied contractual employment terms and duties of good faith and fidelity; inducing the breach of Mr. Zimmerman's express contractual terms; inducing a breach of confidence on the part of all three men; and knowing assistance in the breaches of fiduciary and other duties.

[74] Finally, Epiroc also says that Mr. Zimmerman, BKS Consulting and Joy Global acted together in a civil conspiracy to have Mr. Zimmerman breach his common law and contractual duties owed to Epiroc.

[75] Broadly speaking, Epiroc seeks three categories of injunctive relief:

- a) an interlocutory injunction which prohibits all defendants from using Epiroc’s Confidential Information;
- b) an interlocutory injunction restraining Mr. Zimmerman from competing in any way with the plaintiffs, from being employed in any manner by the Komatsu Entities and from soliciting any of Epiroc’s employees, until the earlier of November 1, 2026, or the conclusion of the trial of this action; and
- c) orders addressing the preservation and return of Epiroc’s Confidential Information.

[76] I will address each in turn.

**1. No Basis for an Injunction Prohibiting the Use of Confidential Information**

[77] I heard lengthy arguments from all parties about whether the appropriate test to apply — when considering whether Epiroc had establish it was entitled to an injunction restraining all the defendants from using its’ Confidential Information — was a serious question to be tried or a strong *prima facie* case. I also heard submissions from all parties with respect to whether Epiroc had established, on either test, each (or any) of the alleged causes of action.

[78] However, it is not necessary that I address these arguments. Even assuming the plaintiffs had satisfied the first step of the analysis, their application inevitably fails at the second step for the same reasons the application failed in *JTT*

*Electronics*:

- a) Epiroc has failed to identify, with the requisite degree of precision, what they say the confidential information is; and
- b) Epiroc has failed to demonstrate that they would suffer irreparable harm in the event the interlocutory injunction is not granted.

[79] I will first address Epiroc’s inability to properly define what they say the confidential information is. Justice Voith, as he then was, grappled with a very similar problem in *JTT Electronics*, and noted that the plaintiffs had to do more than establish a “serious question” that they possess some form of confidential information, and that the conduct of the Individual Defendants indicates this information may be misused: at para. 30. Even if they can do so, they must also “identify, with some reasonable degree of precision, what they say the confidential information is”: at para. 30. He noted:

[39] The need to identify with some reasonable degree of specificity what a plaintiff asserts is confidential or proprietary serves three important and related functions. First, it enables a defendant to respond to an application and the relief sought in the application, and to bring into question whether the purported confidential information is in fact confidential or whether it is information that is in the public domain. Certainly that is a relevant issue in this case. Mr. Potter deposes that much of JTT’s information or processes are broadly used in the battery industry. That assertion is not really questioned by JTT.

[40] Second, if a plaintiff can establish that specific information in its possession is confidential, and the remaining elements of an injunction are made out, the defendant is put on notice, in the form of an order, of what it is that he or she can or cannot do.

[41] Third, in the event that there is an allegation that a defendant has not complied with the terms of an order restraining the use of specific confidential information, the court is in a position to address the alleged breach. Absent some reasonable level of precision or definition, the issue of enforcement is rendered either more difficult or impossible.

[80] In crafting an injunction order, the court should avoid vague or ambiguous language and must ensure that the terms are clear and specific: *JTT Electronics* at paras. 42–45. Whether a lack of clarity in the proposed terms of injunctive relief is a matter which goes to the balance of convenience or gives rise to a stand-alone issue is not clear: *JTT Electronics* at para. 49. However, in either case, it is a bar to the granting of the interlocutory relief sought.

[81] As already noted, in its’ notice of application, Epiroc defines “Confidential Information” as:

In this order, "**Epiroc’s Confidential Information**" is defined as: all confidential information concerning the present and contemplated

financial status and activities of Epiroc Rock Drills AB and Epiroc Canada Inc. (together, "**Epiroc**"), as well as all information relating to business processes, know-how, industrial processes, trade secrets, inventions, plans, intellectual property, developments, equipment and products used, developed or sold by Epiroc or any of its customers or any person, firm or corporation with whom Epiroc has a business relationship.

[82] In response to arguments by the defendants that this definition was impermissibly vague and overbroad (which the plaintiffs explicitly deny), Epiroc says if I were to find the proposed definition was not suitable then it proposes the following alternative language:

"**Epiroc's Confidential Information**" refers to any information or practices relating to the legitimate business interests of Epiroc and known to any of the Individual Defendants as a consequence of their employment by Epiroc, or developed or contributed by an Individual Defendant for the benefit of Epiroc during the course of their employment, and which is not publicly available; and, without restricting the generality of the foregoing, includes:

(a) customer lists, lists of prospective customers and information obtained on any such lists;

(b) plans, formulae and specification of any project that Epiroc FVT was engaged in or planning to be engaged in during the course of any of the Individual Defendants' employment with Epiroc;

(c) production forecasts and business plans relating to Epiroc FVT's current or planned future projects;

(d) information concerning Epiroc's operations, dealings, organization, business or finances; and

(e) trade secrets, confidential and proprietary information relating to any project Epiroc FVT was engaged in or planning to be engaged in during the course of any of the Individual Defendants' employment with Epiroc.

[83] While Epiroc stresses that this wording mimics the wording ordered in *NSD Disposal*, I must note that in that case the defendant consented to the wording proposed, as it did little more than enforce agreements already in place: at para. 42.

[84] Rather, it is Epiroc's responsibility to provide an adequate description of what the plaintiffs say is confidential to Epiroc and to its' business, and to draft a clear and specific proposed injunction order: *JTT Electronics* at para. 37. An injunction order must be crafted as narrowly as possible, while still achieving the purpose of preserving the *status quo*: *BC College of Optics Inc. v. Private Career Training*

*Institutions Agency of British Columbia*, 2009 BCSC 1226 [*BC College*] at para. 15. It is not the role of the court “to negotiate on the terms of an injunction order that should always be crafted as narrowly as possible, while still achieving its purpose of preserving the *status quo*”: *BC College* at para. 15. Rather, Epiroc bears the burden of providing sufficient details to support the finding they seek and to enable the court to craft, if appropriate, “an injunction that goes no further than is reasonably necessary to protect the interest at risk”: *Future Shop Ltd. v. Northwest-Atlantic (B.C.) Broker Inc. et al*, 2000 BCSC 1797 at para. 56.

[85] The necessity to clearly describe the information it says is confidential, particularly when addressing the situation of former employees, was clearly laid out in *Faccenda Chicken Ltd. v. Fowler* [1985], 1 All E.R. 724, aff'd [1986], 1 All E.R. 617 (C.A.). At page 731, the trial judge noted that information acquired by an employee in the course of his employment, and not covered by an express agreement, could fall into one of three potential classes:

- a) information which, because of its trivial character or easy accessibility from public sources of information, could not be regarded at law as confidential;
- b) information which the employee must treat as confidential, but which once learned necessarily remains in the employees' head and becomes part of his or her own skill and knowledge, such that when he is no longer employed, the law allows the employee to use his or her full skill and knowledge for the employee's own benefit, even in competition with the former employer; and
- c) specific trade secrets so confidential, even though they may have been learned by heart and even though the employee may have left their employment, they cannot lawfully be used for anyone else's benefit.

The Court of Appeal went even further than the trial judge and concluded that a “restrictive covenant will not be enforced unless the protection sought is reasonably

necessary to protect a trade secret or to prevent some personal influence over customers being abused in order to entice them away”: at 626.

[86] At my request, the defendants put forward an example of wording they say would be properly specific, notwithstanding their clear position that it would not be appropriate to order any injunction in these circumstances. Their proposed wording was:

“Confidential Information” means all non-publicly available, confidential and proprietary information belonging to Epiroc Rock Drills AB and Epiroc Canada Inc. (together “Epiroc”), comprising confidential Epiroc inventions, designs, writings, drawings, text, diagrams, or schematics of Epiroc’s products or components, including products or components in development, which are in the possession of, or have been provided by, the defendants, Brad Zimmerman, Michael Barnhill, or Alan Tweedie. For greater certainty, Confidential Information does not include information that was, is, or becomes publicly available through no breach of a duty by the Defendants.

On September 3, 2025, counsel for KICI wrote to edit their definition of Confidential Information, replacing “including” with “comprising” (the updated definition is set out above). Epiroc maintains that its’ proposed wording is appropriate in all the circumstances, and said I should not consider the revised definition put forward by KICI. In any event, Epiroc made clear it did not agree that KICI’s definition was appropriate.

[87] I find that Epiroc has failed to provide an adequate description of the specific information it says is confidential to Epiroc. Rather, it appears to argue that the Individual Defendants, by virtue of their employment, received confidential information which they, together with BKS Consulting, BPS Corp. and Joy Global, are now using to compete. In their written submissions they characterize their argument in the following manner:

Further, the circumstantial evidence supports a reasonable inference that the defendants exploited the confidential information acquired by the individual defendants during their employment to enable Joy Global and KICI to develop, manufacture and market competing electrification products without incurring the time, effort, and expense that Epiroc bore. Such conduct constitutes misuse of confidential information.

[88] However, Epiroc has failed to clearly identify what specific confidential information it says was taken by any of the Individual Defendants, how it meets the legal test for confidentiality, or how it was used in a manner that would support a finding of misuse and so ground any of the alleged causes of action. This is most surprising given the expert evidence of FTI, which identifies exactly which documents Mr. Barnhill and Mr. Tweedie accessed, and which documents they copied, before their last day of employment. Rather, under both attempted descriptions of what the confidential information is, Epiroc defines Confidential Information as broadly as possible. Even in its alternative definition, Epiroc seeks to define it broadly, as being that information known to the Individual Defendants “as a consequence of their employment”. This is vague and overbroad, and neither specific nor precise, as is required at law.

[89] At most, the evidence before me indicates that Mr. Barnhill and Mr. Tweedie accessed certain documents, without any clear evidence these documents contained confidential information. In his second affidavit, Mr. Hubele does not depose that any of these specific documents contained confidential information but merely states there was no reason for either man to access and download those files in the ordinary course of his employment.

[90] Epiroc, rather, has chosen to rely on the language of their employment agreements, and vague references to the accessed files, to meet their evidentiary burden. That is not sufficient. I am not persuaded by Epiroc’s argument the Individual Defendants are fully aware of the research, inventions, trade secrets, intellectual property and know-how they had access to while employed by Epiroc, and so the proposed definition of “confidential information” is appropriate in the circumstances. Rather, Epiroc has drafted vague and generic language, untethered to the evidence, of what it says is “confidential information”. The affidavit of Mr. Hubele likewise defines “confidential information” in broad and speculative terms, attempting to include all of Epiroc’s electrification research and development endeavours “into electrification of mining equipment and the conversion of diesel engines to battery technology”.

[91] In similar circumstances Justice Voith rejected a broad definition of “confidential information” as being overly generic. He noted:

[37] Nowhere in the pleadings, the notice of application, the draft order, either of the foregoing agreements, or any other agreement signed by the Personal Defendants is there an adequate description of what the plaintiffs say is confidential to JTT or to its business. Mr. Pui’s lengthy affidavit similarly does not assist. He too, overwhelmingly, uses generic language on an ongoing basis to describe JTT’s “confidential and proprietary” information. To the extent that there are some limited expressions of what is ostensibly confidential to JTT, such as its pricing information, those descriptions are lost in the morass of other generic language. Still further, it is not this Court’s role or function to try to construct a sensible order from the breadth of language it has been given.

[38] The language I have identified in the plaintiffs’ notice of application, in the draft order, and in either of the agreements I referred to is language that could pertain to virtually any business that made virtually any product. The fact that further or more numerous generic descriptions of confidential information are added does not render either precision or detail. Some parts of these agreements do little more than define, at law, what may constitute confidential information. Thus, subparagraphs (a) to (d) of the Shareholders’ Agreement roughly align with what a plaintiff must prove in order to establish that information is confidential. Furthermore, aspects of these agreements, as well as of the notice of application, and the proposed draft order are meaningless. Thus, for example, it is conceded that JTT has no trademarks or patents or any other type of information that is protected through some form of registration or filing.

[Emphasis added.]

[92] The defendants argue that the decision of *JTT Electronics* is binding on this court. I agree it is determinative of this issue: *Hansard Spruce Mills Ltd. (Re)*, 1954 CanLII 253 (B.C.S.C.), [1954] 4 D.L.R. 590 at 592. Epiroc bore the burden of clearly and specifically identifying the information it says is confidential to Epiroc and to its’ business, and to draft a clear and precise interlocutory injunction, as narrowly as possible. It has failed to do so.

[93] Further, and in any event, I am not satisfied that Epiroc has established it would suffer irreparable harm should the injunction it seeks not be granted. This is relevant both to the injunction Epiroc seeks restraining the use of its Confidential Information, and also for the additional injunctions it seeks restraining Mr. Zimmerman (addressed further below).

[94] Epiroc must establish it would suffer irreparable harm if the injunction it seeks is not granted. To establish this Epiroc relies upon the evidence of Mr. Hubele:

60. Knowledge of Epiroc's strategy and processes could allow its competitors to skip expensive and time-consuming research and development steps and leap forward in their own developments. Epiroc's competitors could also replicate machinery and other technologies that are in direct competition with Epiroc.

61. Should its competitors utilize Epiroc's Confidential Information to develop machinery and other technologies in direct competition with Epiroc, it would substantially impact Epiroc's market share and reputation. Epiroc invests considerable resources to develop innovative solutions which are undermined if Epiroc is not first to market with such technologies.

62. The mere knowledge of the specific projects Epiroc is developing could allow a competitor such as Komatsu to focus their resources to undermine Epiroc's reputation and market share.

63. Further, Mr. Zimmerman, Mr. Barnhill and Mr. Tweedie were aware of critical relationships with Epiroc's suppliers, which could be leveraged either directly or with Komatsu to undermine Epiroc's ability to effectively manufacture certain technologies.

[95] He then goes on to discuss the internal development costs of the projects Mr. Barnhill and Mr. Tweedie were involved with.

[96] At the "irreparable harm" stage of the inquiry, the court must determine whether there is doubt that damages would be an adequate remedy. The focus is not on the magnitude of the harm, but rather on whether such harm is incapable of being remedied by an award of damages. The issue to be decided is whether the refusal to grant the injunction could so adversely affect the applicant's interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application: *Vancouver Aquarium* at para. 57. There must be a foundation, beyond mere speculation, that irreparable harm will result: *Vancouver Aquarium* at para. 60.

[97] There are various methods by which an applicant can establish that the harm it will suffer will be irreparable: *SkyCope Technologies Inc. v. Jia*, 2018 BCSC 2204 [*SkyCope*, BCSC 2018] at para. 23. These factors may include:

- a) general use of the plaintiff's confidential information;

- b) permanent loss of a market share;
- c) loss of actual or potential customers; and
- d) a defendant's questionable ability to pay damages if an injunction is not granted.

See *SkyCope*, BCSC 2018 at para. 24; *Schluter-Systems KG v. Dollar Tile Distributors Ltd.*, 2013 BCSC 2508 at para. 13; *J-Tech Design v. Bosnjak*, 2009 CanLII 9469 (O.N.S.C.), [2009] O.J. No. 932 at para. 19; and *Global Internet Management v. McLeod et.al*, 2003 BCSC 652 at para. 60.

[98] Epiroc argues that if it is not granted the injunction, and if it is successful at trial, then “it will be virtually impossible to unscramble the egg” to quantify its’ losses: *AllWest Insurance Services Ltd. v. Meredith Phendler*, 2009 BCSC 2 at para. 58; *Jardine Lloyd Thompson v. Fogal et al.*, 2007 BCSC 271 at para. 36. Epiroc argues it will suffer irreparable harm if an interlocutory injunction is not granted because the harm to Epiroc’s reputation, market position, current and future research and development activities, and loss in future revenues caused by the solicitation of employees and misuse of confidential information cannot easily be calculated as damages; and further, damages will not be an adequate remedy.

[99] However, the evidence of Mr. Hubele in support of this argument is speculative. He provides no evidence whatsoever of any of these alleged harms; rather, he merely speculates as to potential future events if Epiroc’s Confidential Information is misused by the defendants.

[100] Perhaps because of this, Epiroc argues that I should presume that Mr. Zimmerman’s alleged breaches are highly prejudicial and create irreparable harm, such that damages will be an inadequate remedy, relying on his acknowledgment in Article 6.1 of the Non-Compete Agreement: *EnWave* at paras. 104–105. However, for the reasons set out below at para. [111], I do not accept that Epiroc has established, either on the test of a serious question to be tried or a strong *prima facie* case, that this clause survived the 2023 Employment Agreement. Accordingly, it would be inappropriate in these circumstances to assume

that Mr. Zimmerman’s alleged breaches are highly prejudicial and create irreparable harm.

[101] Further, Epiroc argues that the circumstances and timing of Mr. Tweedie and Mr. Barnhill taking of Epiroc’s Confidential Information prior to resigning from Epiroc demonstrates their intention to misuse that information for their own benefit, and for that of Joy Global. However, as already noted, Epiroc has not established that either took the Confidential Information with the intention to misuse it, nor that they have retained any such information.

[102] Epiroc has not met its burden to demonstrate irreparable harm; rather, they have only advanced speculative concerns. They have provided no admissible evidence that the alleged harm cannot be compensated with damages. Even their speculative concerns do not identify a specific permanent loss of a market share, specific actual or potential customers they may lose, or any measurable impact on the market share of Epiroc. While the case law on whether broad assertions constitute irreparable harm is not entirely consistent, the evidence of Epiroc does not even meet the low bar of broad assertions of loss, as the evidence merely advances speculative potential concerns: *JTT Electronics* at paras. 25–27.

**2. *No Basis for an Injunction Restraining Mr. Zimmerman***

[103] Epiroc also seeks an interlocutory injunction restraining Mr. Zimmerman from competing with the plaintiff; from being employed in any manner by the “Komatsu Entities” (which includes Joy Global); and from soliciting Epiroc’s employees until the earlier of November 1, 2026, or the conclusion of the trial of this action.

[104] Epiroc acknowledges that it must establish a strong *prima facie* case to establish the basis for this relief. To do so, they must establish a strong *prima facie* case that Mr. Zimmerman executed the Non-Competition Agreement, and it was not extinguished by the 2023 Employment Agreement. I am not persuaded they have done so for the following reasons.

[105] Mr. Zimmerman denies ever signing the Non-Competition Agreement. His evidence is that:

- a) he was not represented by legal counsel in his personal capacity for the Transaction;
- b) he did not agree to the five-year non-competition term within the Non-Competition Agreement;
- c) he did not sign the Non-Competition Agreement and he does not know how the five-year term came to have his signature;
- d) if he had known that Epiroc would take the position that he was restricted from practicing his vocation for a period of five years he would not have agreed to the Transaction; and
- e) he would no longer be able to practice his vocation, if he was not permitted to participate in it for several years.

[106] Further, he argues in any event that his 2023 Employment Agreement, which contains the “entire agreement” provision, providing that “[a]ny and all previous agreements, written or oral, between the parties hereto or their predecessors are hereby terminated and cancelled and each party hereto hereby releases and forever discharges the other party from any and all claims whatsoever under or in respect of any such agreement” effectively extinguished all previous agreements between the parties, including, if he in fact executed the Non-Competition Agreement, that agreement.

[107] Finally, and in any event, he says the territorial scope of the Non-Competition Agreement, extending for five-years across all of Canada, rather than being tailored to any particular market or region in which Epiroc actually operates, is overbroad and unreasonable: *SkyCope Technologies Inc. v. Jia*, 2023 BCSC 1288 [*SkyCope*, BCSC 2023] at paras. 221–224.

[108] While a non-competition clause is a restrictive covenant and is presumptively unenforceable in an employment contract, a restrictive covenant arising in an agreement for the sale of a business will usually be enforceable as “it is in the best interests of the seller to be able to provide a reliable assurance to the purchaser that the promise not to compete in the same business can be enforced”: *SkyCope, BCSC 2023* at paras. 217–218; *IRIS The Visual Group Western Canada Inc. v. Park*, 2017 BCCA 301 at para. 21. In the commercial context, courts presume non-competition and non-solicitation covenants to be lawful, unless they are proven to be unreasonable: *Payette v. Guay inc.*, 2013 SCC 45 [*Payette*] at paras. 2–9, 58.

[109] The factors to be considered in assessing the enforceability of a restrictive covenant agreed to in the sale of a business includes the length of time, territorial scope, nature of the activities prohibited, and overall fairness. The restrictive covenant must also be clear and unambiguous. Each case must be considered in light of its specific circumstances. See *Payette* at paras. 35–39, 58; see also *Dentalcorp Health Services Ltd. v. Dr. J.S. Minhas Dental Corp.*, 2024 BCSC 2006 at para. 71; *Diamond Delivery Inc. v. Calder*, 2023 BCSC 194 at paras. 64–72.

[110] I find it difficult to accept Mr. Zimmerman’s argument that he was not aware of the term set out in the Non-Competition Agreement, and he did not sign it. His suggestion that it was somehow executed without his consent or awareness seems implausible in the context of the circumstances surrounding the Transaction.

[111] However, I need not decide this as I do accept his argument that the 2023 Employment Agreement may have operated to extinguish any restrictive covenant found in the Non-Competition Agreement. Mr. Zimmerman’s 2021 Employment Agreement had non-compete and non-solicitation clauses, for a one-year (not a five-year) term. The fact that Epiroc, in their capacity as Mr. Zimmerman’s employer, agreed to a subsequent employment agreement in 2023, without any such terms, and with an “entire agreement” clause, may have operated to extinguish the five-year term as set out in the Non-Competition Agreement. That, ultimately, will be an issue for trial; however, on this application Epiroc has failed to establish there is a

strong likelihood on the evidence and the law that it will ultimately be successful in proving the clauses they rely upon in the Non-Competition Agreement survived the 2023 Employment Agreement.

[112] Accordingly, I am not satisfied Epiroc has fulfilled the test for the granting of the interlocutory injunction they seek against Mr. Zimmerman based on the non-competition and non-solicitation clauses in the Non-Competition Agreement, and the relief they seek on that basis is dismissed.

**3. No Basis for the Orders Addressing Return and Preservation**

[113] Epiroc seeks an injunction ordering the defendants to deliver to it all Epiroc documents and property that are in their possession.

[114] It says this relief is necessary and appropriate because the evidence demonstrates that the Individual Defendants have retained and used Epiroc's confidential information for their own purposes in breach of their employment agreements.

[115] However, Mr. Barnhill and Mr. Tweedie have deposed:

- a) they accessed certain documents prior to the end of their employment at Epiroc (although they do not say it was confidential information);
- b) they have not shared or made use of Epiroc's Confidential Information;  
and
- c) they each destroyed all Epiroc property, including but not limited to all documentation and records, in accordance with the cease-and-desist letters Epiroc sent.

In response, Epiroc has adduced no evidence to support their claim that any of the Individual Defendants remain in possession of, or have misused or shared, Epiroc's Confidential Information. Likewise, it has adduced no evidence whatsoever to support their allegation that either Mr. Barnhill or Mr. Tweedie gave any of Epiroc's

information, confidential or otherwise, to Mr. Zimmerman. Similarly, it has adduced no evidence that any of the corporate defendants have any of Epiroc's Confidential Information. In those circumstances, I find such an order is not appropriate.

[116] Finally, Epiroc seeks an order pursuant to Rule 10-1 of the *Supreme Court Civil Rules*, s. 57 of the *Law and Equity Act* and this Court's inherent jurisdiction, for the preservation of all of Epiroc's documents and Confidential Information in the possession or control of the defendants. However, for the reasons set out above, such an order would not be appropriate.

**VI. CONCLUSION**

[117] The application of Epiroc is dismissed, and the defendants are entitled to their ordinary costs at Scale B.

“Blake J.”