CITATION: Morgan Canada Corporation v. MacDonald, 2023 ONSC 5217
COURT FILE NO.: CV-23-00696765-0000
DATE: 2023-09-15

ONTARIO SUPERIOR COURT OF JUSTICE

RE: Morgan Canada Corporation, Plaintiff

-and-

Kristopher MacDonald, Francesco DiNardo, Reefer Sales and Service (Toronto) Incorporated, and Caroline Bettger, Defendants

BEFORE: Robert Centa J.

COUNSEL: Damien Buntsma and Ben Markusoff, for the plaintiff

Jason Beitchman and Jadeney Wong, for the defendants

HEARD: August 24, 2023

ENDORSEMENT

Overview

[1] Morgan Canada Corporation has sued Kristopher MacDonald and Francisco Di Nardo, two of its former employees.[1] Morgan Canada pleads that Mr. MacDonald and Mr. Di Nardo have breached their fiduciary duties, their employment contracts and company policies, committed the torts of breach of confidence and spoliation. Morgan Canada has also sued Reefer Sales and Service (Toronto), the company where Mr. MacDonald and Mr. Di Nardo now work, and Caroline Bettger, Mr. Macdonald's wife.

[2] Mr. MacDonald and Mr. Di Nardo left Morgan Canada to work for Reefer Sales at different times in 2022, which was the same year that Reefer Sales started distributing truck bodies in direct competition with Morgan Canada. In January 2023, Morgan Canada discovered that Mr. MacDonald had forwarded some work emails to his wife's e-mail account and that Mr. Di Nardo had sent some emails to his personal email account. Morgan Canada concluded that it had been the victim of an elaborate conspiracy to steal its confidential information and customers, and to undermine unfairly its place in the market.

[3] On this motion, Morgan Canada seeks injunctive relief including orders that would bar Mr. MacDonald and Mr. Di Nardo from working in any capacity for Reefer Sales or any of its

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[1] Mr. Di Nardo is incorrectly named "DiNardo" in the title of proceedings.

competitors until trial. Morgan Canada also seeks the appointment of an independent inspector, a preservation order, and a sealing order.

[4] Stepping back from the details, Morgan Canada has presented almost no evidence in support of its theory of the case. Mr. MacDonald's unchallenged evidence is that he forwarded the emails to Ms. Bettger so that she could print the documents for him to work on. Ms. Bettger's computer was the one attached to their personal printer as they worked from different floors of their home during the pandemic. Mr. Di Nardo's unchallenged evidence is that he copied his home account on email messages he sent to coworkers before he left on vacation so that he could help them while he was away. Reefer Sales' unchallenged evidence is that no one at the company received any Morgan Canada confidential information and never competed unfairly. There is no evidence from any of Morgan Canada's customers to suggest that Reefer Sales competed unfairly or in reliance on Morgan Canada's confidential information. Morgan Canada has not presented the evidence necessary to obtain the relief it seeks on this motion.

[5] First, I would not issue the order preventing Mr. MacDonald or Mr. Di Nardo from working for Reefer Sales, or any other competitor in any capacity, until trial. Morgan Canada has not met the test for such extraordinary injunctive relief.

[6] Morgan Canada has not demonstrated a strong *prima facie* case with respect to any of its pleaded causes of action. Morgan Canada has not demonstrated a strong likelihood that it will establish at trial that Mr. MacDonald or Mr. Di Nardo:

a. owed it fiduciary duties or that they breached any such duties;

b. misused any of its confidential information to compete unfairly with the company; or

c. committed the tort of spoliation, if such a tort exists under Ontario law.

[7] Morgan Canada has also not demonstrated that it will suffer irreparable harm if the injunction is not granted. Although it has been well over a year since Mr. MacDonald and Mr. Di Nardo left the company, Morgan Canada's evidence of irreparable harm is speculative, and it is unable to point to any harm attributable to the alleged misuse of confidential information.

[8] Perhaps most importantly, the balance of convenience strongly favours the defendants. Mr. MacDonald has worked at Reefer Sales since April 14, 2022. Mr. Di Nardo has worked there since September 26, 2022. The inconvenience to the defendants of losing their jobs until trial far outweighs the inconvenience to Morgan Canada. This is particularly so given the weakness of Morgan Canada's case on the first two branches.

[9] Second, I would not order the appointment of an inspector or make any special preservation or production orders. The defendants are expected to comply with their obligations under

the *Rules of Civil Procedure* to search for, preserve, and produce all relevant documents.[2] The defendants are not permitted to make use of any Morgan Canada confidential information for any purpose other than this litigation. I see no reason to impose any further obligations at this time.

[10] Third, I would not exercise my discretion to grant Morgan Canada a sealing order. Morgan Canada breached a court order and the Practice Direction of the Superior Court of Justice when it failed to put the media on notice of its request. Putting the media on notice when one seeks a publication ban is not optional. In addition, I do not think Morgan Canada has met the test for departing from the open court principle.

Key individuals and background facts

[11] Morgan Truck Body LLC is a corporation based in the United States of America. In 2018, it acquired a company called Multivans Inc. It renamed its new subsidiary Morgan Canada. Morgan Canada manufactures and distributes box truck and straight truck bodies that are used in the dry freight and refrigerated commercial truck business.

[12] Mr. MacDonald started working for Multivans in 2011 as a regional sales manager. He stayed with the company after Morgan Truck Body LLC acquired it. In March 2020, Mr. MacDonald was promoted to Director (Selling), national accounts. On June 1, 2021, Mr. MacDonald was promoted to Acting Sales Director of Canada. He was required to sign a new employment contract that contained an entire agreement clause. Although this contract contemplated that he would subsequently sign a non-competition agreement, there is no evidence before me that he did. Morgan Canada required him to serve a 90-day probationary period, and, on October 1, 2021, Mr. MacDonald became the permanent Sales Director of Canada. Mr. MacDonald became dissatisfied with the changes Morgan Truck Body LLC imposed on Morgan Canada and its employees. He felt micro-managed and discouraged by what he saw as a constant stream of customer complaints about delays, unfulfilled orders and price increases.

[13] Mr. MacDonald is married to Ms. Bettger. They live together in the home they moved into in November 2021. She works for a pharmaceutical company and has no connection to the truck body distribution industry other than through her marriage to Mr. MacDonald.

[14] Mr. Di Nardo began working with Multivans in 2004. He was promoted to Technical Sales Manager in 2015 and stayed in that role when Morgan Truck Body LLC acquired Multivans. In this role, Mr. Di Nardo assisted Morgan Canada's outside sales department by generating pricing quotes, processing orders, preparing sales invoices for fulfilled orders, and, after 2020, verifying pricing prior to invoices being sent out to the customers. Mr. Di Nardo also described dissatisfaction with working at Morgan Canada resulting from the integration of the business with Morgan Truck Body LLC.

[15] A reefer is a cooling hardware unit that is installed directly onto truck bodies and trailers for refrigerated transportation. Reefer Sales and Service (Toronto) Incorporated, not

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[2] R.R.O. 1990, Reg. 194.

surprisingly, distributes and services reefers. Since 1989, Reefer Sales has been the exclusive distributor of reefer units manufactured by Carrier.

[16] Reefer Sales and Morgan Canada have a longstanding business relationship. Reefer is a customer of Morgan Canada. Reefer Sales also supplied and installed reefers on truck bodies both for Morgan Canada and directly for the end users that purchased truck bodies from Morgan Canada.

[17] On March 23, 2022, Reefer Sales signed an agreement with CIMC Vanguard under which Reefer Sales would begin to distribute Vanguard's truck bodies in Canada. Reefer does not manufacture truck bodies. It distributes truck bodies manufactured by Vanguard. In April 2022, Reefer Sales announced this agreement at the TruckWorld conference, which Morgan Canada representatives attended.

[18] In early 2022, as the opportunity with Vanguard firmed up, Reefer Sales approached Mr. MacDonald about a sales role. After the Vanguard deal was finalized, Reefer Sales interviewed Mr. MacDonald and, on April 4, 2022, offered him a position as the Sales and Operations Manager of the Truck Body Division. Mr. MacDonald accepted the offer of employment and his last day at Morgan Canada was April 14, 2022. Mr. MacDonald told his employer that he was going to work for Reefer Sales and, at his own initiative, dropped off his company electronic devices before he left.

[19] In July 2022, Reefer Sales was looking for a maternity leave replacement for one of its inside sales representatives. Mr. MacDonald told his co-workers about Mr. Di Nardo, whom he described as a hard worker looking for a change. Mr. MacDonald facilitated communication between Reefer Sales and Mr. Di Nardo, but he was not involved in the interview or hiring process. Reefer Sales offered Mr. Di Nardo an internal sales job in its reefer division, which he accepted. At Reefer Sales, Mr. Di Nardo would not be involved in the sale of truck bodies, which was Morgan Canada's line of business. Mr. Di Nardo started work at Reefer Sales on September 26, 2022.

[20] On September 22 and 23, 2023, Morgan Canada wrote cease and desist letters to Reefer Sales and Mr. MacDonald. Morgan Canada alleged that Mr. MacDonald and Mr. Di Nardo had committed breaches of confidence, contractual, and fiduciary duties. Morgan Canada insisted that Reefer Sales terminate its two former employees. Reefer Sales responded on October 12, 2023, confirming that no Morgan Canada confidential information had been disclosed to it and that Morgan Canada had provided no evidence to support its claims of unfair competition. In the circumstances, Reefer Sales declined to terminate the employment of either Mr. MacDonald or Mr. Di Nardo.

[21] Three months later, Morgan Canada retained Kroll, a forensic IT consultant, to search the emails and electronic devices of Mr. MacDonald and Mr. Di Nardo for suspicious activity. On February 13, 2023, Kroll delivered a report indicating that Mr. MacDonald had sent approximately 32 emails to what appeared to be Ms. Bettger's work email account and that Mr. Di Nardo had copied his personal email account or received a total of four emails from Morgan Canada to his email account. Kroll also reported that additional documents may have been downloaded from each employee's laptop to USB keys.

[22] Six weeks later, on March 23, 2023, Morgan Canada served motion materials for an injunction returnable on March 28, 2023. The parties appeared before Akbarali J., who adjourned the motion to August 24, 2023, on interim terms that included an interim confidentiality and sealing order, a preservation order, a no use or misuse of confidential information clause, a timetable for the exchange of pleadings and motion materials.

[23] I heard Morgan Canada's motion for an interlocutory injunction on August 24, 2023.

Test for an injunction

[24] A party may seek an interlocutory injunction or mandatory order pursuant to s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, and Rule 40 of the *Rules of Civil Procedure*. In general, a party seeking an interlocutory injunction must meet the test set out in *RJR — MacDonald Inc.* and demonstrate that:

a. the action raises a serious question to be tried, in the sense that the claim is neither frivolous nor vexatious;

b. the moving party would suffer irreparable harm if the court does not grant the injunction until the completion of the trial; and

c. that the balance of convenience favoured granting the injunction because the moving party would suffer greater harm than the responding party if the injunction is not granted.[3]

[25] Here, however, the parties agree that Morgan Canada must meet a higher standard on the first branch of the test to obtain an injunction that prohibits Mr. MacDonald and Mr. Di Nardo from working with Reefer Sales and any other competitor of Morgan Canada.[4] The parties agree that Morgan Canada must meet the more onerous test of a strong *prima facie* case on the first branch of the test.[5] To meet the strong *prima facie* case standard, Morgan Canada must satisfy me that there is a strong likelihood on the law and the evidence to be presented at trial that it will prove the allegations set out in the statement of claim.[6]

[26] While strength in one part of the *RJR-MacDonald* test can make up for weakness in another, an injunction will not be issued if the moving party does not meet each prong in the test.[7]

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[3] *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, at p.334.
[4] I note that in its reply factum, Morgan Canada changes its mind and says that it must only meet the lower "serious issue to be tried" test. A reply factum, if one is to be filed at all, is not the place to change course and suggest that one needs to meet a lower standard. In any event, I disagree with this submission.
[5] *RJR-MacDonald*, at p. 335; *Precision Fine Papers Inc. v. Durkin*, 2008 CanLII 6871 (Ont. S.C.), at para. 17; *Aware Ads Inc. v. Walker*, 2022 ONSC 5543, at para. 48.
[6] *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5, [2018] 1 S.C.R. 196, at paras. 17-18.
[7] *Haudenosaunee Development Institute v. Metrolinx*, 2023 ONCA 122, at para. 5.

[27] As explained below, I find that Morgan Canada has not met the test for an injunction. The evidence it has presented on this motion falls short of meeting the test to obtain the extraordinary relief it seeks.

Morgan Canada has not made out a strong *prima facie* case on any of its causes of action

[28] Morgan Canada has pleaded several causes of action against Mr. Di Nardo and Mr. MacDonald. Morgan Canada seeks relief for breach of fiduciary duties, breach of confidence, breach of contract, and spoliation.[8]

[29] Morgan Canada has not satisfied me that there is a strong likelihood that it will establish any of these causes of action at trial. While it is possible that Morgan Canada could see success at trial, I find that Morgan Canada has not made out a strong *prima facie* case in respect of any of the causes of action it has pleaded.

Breach of fiduciary duties

[30] Morgan Canada claims that Mr. Di Nardo and Mr. MacDonald breached fiduciary duties owed to the company. On the record before me, Morgan Canada has not established a strong *prima facie* case that it will succeed at trial. Morgan Canada has not satisfied me that there is a strong likelihood that it will prove at trial that Mr. Di Nardo or Mr. MacDonald owed fiduciary duties to Morgan Canada. Moreover, Morgan Canada has not satisfied me that there is a strong likelihood that it will be able to demonstrate that the actions of its former employees breached any fiduciary duties that they might have owed to the company.

[31] Mr. Di Nardo and Mr. MacDonald were employees of Morgan Canada and, therefore, they both owed contractual and common law duties to their employer. However, not every employee owes fiduciary duties to her or his employer. The relationship between employers and employees is not a category of relationship that gives rise to fiduciary obligations because of its inherent purpose or presumed factual or legal characteristics.[9] In some cases, the particular circumstances of the relationship between an employer and an employee may give rise to an *ad hoc* fiduciary duty. Fiduciary obligations may arise as a matter of fact out of the specific circumstances of a particular relationship.[10]

[32] Fiduciary law focusses in particular on relationships where one party is given a discretionary power to affect the legal or vital practical interests of the other.[11] In addition, there must be an undertaking by the fiduciary, express or implied, to act solely in furtherance of the duty of loyalty reposed in the fiduciary. For an *ad hoc* fiduciary duty to

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[8] Morgan Canada mentions the torts of tortious interference and conversion in passing but did not develop those arguments in any depth. Morgan Canada is no more likely to make out these torts than any of the other ones on which they placed much more reliance.

[9] *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574 at p. 646; *Galambos v. Perez*, 2009 SCC 48, [2009] 3 S.C.R. 247, at para. 36.

[10] *Lac Minerals*, at p. 648.

[11] *Galambos*, at para. 70.

arise, the claimant must demonstrate a peculiar vulnerability arising from the relationship and:

a. an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries;

b. a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and

c. a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.[12]

Claim against Mr. Di Nardo

[33] In its statement of claim, Morgan Canada pleads that Mr. Di Nardo is "a fiduciary and top Morgan Canada employee." Mr. Di Nardo was, in fact, a Technical Sales Manager at Morgan Canada. On the evidence before me, Morgan Canada has not demonstrated a strong likelihood that it will establish at trial that Mr. Di Nardo owed it fiduciary duties.

[34] Gary Lalonde, the Regional Sales Director of Morgan Canada filed an affidavit on this motion. He described Mr. Di Nardo's role at Morgan Canada as follows:

> 26. The proposed defendant, Frank DiNardo ("DiNardo") [*sic*], commenced employment with Multivans in or around November 2004, until he resigned from his position as Morgan Canada's Technical Sales Manager, effective on or around September 12, 2022. Soon after his resignation, Mr. DiNardo [*sic*] commenced employment with Reefer Sales.
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> 27. Mr. DiNardo's [*sic*] duties as Technical Sales Manager included, but were not limited to:
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> (a) Dealing with all client complaints in relation to quality and production matters;
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> (b) Maintaining relationships with clients and addressing client complaints, dissatisfaction and quality issues, in conjunction with the Sales Director - Canada and Sales Team;
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> (c) Managing Morgan Canada's inside sales team; and

[12] *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 SCR 261, at para. 36.

> (d) Having in-depth knowledge of Morgan Canada's products, including confidential and proprietary information not known to the market.
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> 28. As Morgan Canada's Technical Sales Manager, Mr. DiNardo [*sic*] had intimate knowledge of any quality issues raised by clients. Mr. DiNardo [*sic*] would not only know which clients raised quality issues, but also exactly what those quality issues were, in addition to any continuing client grievances. Accordingly, Mr. DiNardo [*sic*] would have intimate knowledge who were Morgan Canada's disaffected clients, and exactly how to target them.

[35] Mr. Di Nardo's evidence, in contrast, was that he rarely had direct interactions with Morgan Canada's customers. In his role, he supported the sales representatives who dealt directly with the customers. His evidence was as follows:

> 65. During my time working at Morgan, I did not have the power to bind Morgan or its affiliates to any agreements or in any way.
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> 66. I had limited interactions with Morgan customers regarding their quotes and order status but that was the extent of my client relationships. I more often provided support to other Morgan employees, who then dealt with the clients.
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> 67. While I was working for Multivans, I had limited discretion in pricing while preparing quotes, such as providing discounts or special pricing options for liftgates.
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> 68. However, when Morgan began implementing its policies in 2020, I had zero discretion in terms of pricing. As described above, by the spring of 2021, all pricing was set by Morgan's corporate head offices in the U.S. I recall both Mr. MacDonald and I were both not permitted to override pricing without Morgan's senior management's approval.

[36] Mr. Di Nardo was not an officer or director of Morgan Canada. He did not have signing authority for the company. There is nothing about his job title or duties that suggest he owed fiduciary duties to Morgan Canada. I find that Morgan Canada has not made out a strong *prima facie* case that Mr. Di Nardo owed fiduciary duties to the company.

Claim against Mr. MacDonald

[37] Morgan Canada also pleads that Mr. MacDonald is "a fiduciary and top Morgan Canada employee." Mr. MacDonald's job titles changed from "Director (Selling), National Accounts" to "Acting Sales Director of Canada" and, after a 90-day probationary period, "Sales Director of Canada." On the evidence before me, Morgan Canada has not demonstrated a strong likelihood that it will succeed on this claim.

[38] Mr. Lalonde stated that, in his view, Mr. MacDonald was a fiduciary of Morgan Canada because he was "an integral and indispensable component of the management team." Without more, that would not be sufficient to impose fiduciary duties on Mr. MacDonald. The evidence is undisputed that Mr. MacDonald was not an officer or director of Morgan Canada. He did not have signing authority for the corporation. These facts are all strong indicators that Mr. MacDonald may have been an important and trusted employee, but not that he owed *ad hoc* fiduciary duties to Morgan Canada.

[39] Mr. Lalonde listed Mr. MacDonald's duties as including the following:

a. Determining pricing within the parameters of a budget set by Morgan's Senior Vice-President, Sales Marketing;

b. Managing and determining budgets, including budgets for events, travel, and entertainment;

c. Managing client relationships, and dealing closely with key clients and client contacts;

d. Being the outward face of Morgan Canada and its predecessor, to all clients and their end users;

e. Developing and maintaining close relations, to the exclusion of others within Morgan and Morgan Canada, with key clients, distributors and end users, establishing new business, developing current and prospective business relationships, and ensuring client satisfaction;

f. Maintaining and using confidential client information, to the exclusion of all others, including in relation to sales and marketing statistics, Client preferences and buying habits, complaints and service issues (e.g. quality issues), in addition to adjudicating same;

g. Forecasting and analyzing data against budget figures on a monthly, quarterly and prospective basis, including in relation to key strategic initiatives and expansion within Canada;

h. Designing and delivering presentations, highlighting the products and services of Morgan Canada, and its predecessor, negotiating terms of contracts with clients and distributors and taking necessary steps, marketing initiatives to successfully close and/or increase sales;

i. Assisting in growing new business and developing strong customer relationships within Canada, through the creation and use of valuable client, sales and proprietary, confidential information, to the exclusion of all others;

j. Managing the Morgan Canada Sales Team, to maintain its valuable and confidential goodwill, established through years of valuable sales intelligence;

k. Marketing and managing all client concerns regarding sales, pricing, quality and manufacturing issues, while maintaining same confidential, proprietary information, to the exclusion of all competitors; and

l. Managing all aspects of Morgan Canada's sales strategy in Canada.

[40] In sharp contrast to Mr. Diez's evidence, Mr. MacDonald's evidence is that he had only a very limited scope of discretion. Mr. MacDonald states that he had no authority to bind Morgan or the U.S. parent company without Mr. Diez's explicit approval. Mr. MacDonald's detailed evidence regarding his job duties and scope of authority stands in contrast to Mr. Lalonde's more general description of his work. Mr. MacDonald responded to Mr. Lalonde's evidence as follows:

> (a) Determining budgets and pricing (20(a)) - at all points, Mr. Diez and Morgan's corporate head office in the USA set and approved of budgets and pricing. Sales representatives were given prices by Morgan's head office, especially for key accounts that it dealt with itself. I did not have any authority over budgets or pricing. Even with respect to re-pricing deals, up until my last few months at Morgan, I was not permitted to approve of a two-percent difference in pricing without Mr. Diez's approval;
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> (b) Forecasting and managing budgets (20(b) and (g)) - I forecasted budget figures and had some leeway presenting proposed budgets for products on weekly sales calls, but Morgan's head office would approve or change as they saw fit. I would always work within the parameters set by Morgan's head office with respect to its events, travel, and entertainment budget;
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> (c) Managing Morgan sales directors (20(j)) - I managed a team of six sales representatives (regional sales managers and the National Accounts Director). However, contrary to the roles set out at paragraph 14 of the Lalonde Affidavit, it was not 10 reports because there was no sales representative in Montreal at the time and the inside sales team did not report to me. I am not sure what is meant by "confidential goodwill", but it was commonplace knowledge that Morgan, through its own bureaucratic processes and production issues, caused damage to the goodwill of the Morgan name on its own;
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> (d) Managing customer relationships (20(c) and (e)) - the sales representatives were the key points of contact with Morgan customers responsible for managing their relationships. I was no longer a selling director. In critical times, when sales representatives needed help to close or salvage a deal, I would occasionally support them and discuss with customers, but never did so at the "exclusion" of others as Mr. Lalonde asserts. I do not know who Mr. Lalonde is

> referring to when he said I excluded Morgan from establishing relationships. I welcomed Mr. Diez' and Morgan's opinions when offered and either way, always required their approval;
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> (e) Outward face of Morgan (20(d)) - I had limited client interaction as I was usually in the office dealing with internal matters such as weekly sales calls, weekly reports, or coordinating with the internal sales team. The sales representatives who were on the field and soliciting new business were the outward face of Morgan;
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> (f) Using customer information to provide customer support (20(f) and (k)) - I am not sure what Morgan considered "confidential" customer information, particularly the type that I would allegedly "exclude" from others. I would also not be capable of managing "all" client complaints. The majority of complaints were handled by Morgan's sales representatives, its warranty department, and sometimes its operations teams. However, I agree that I had developed strong customer service know-how and would be familiar with client "preferences' through my 11 years' experience in the industry to address complaints about Morgan's pricing, quality issues, and manufacturing defects;
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> (g) Growing new business (20(h) and (i)) - during the "Morganization" process, I recall I was not focused on business development but trying to maintain our customers in the face of increasing complaints. I would give internal presentations on Morgan products, but I do not recall an instance where I presented directly to customers as that would be the regional sales managers' role. I would help negotiate some terms alongside the sales representatives, but this ultimately required approval from Morgan's head office. Morgan also had an independent Marketing team which I was not a part of so would not be engaged in marketing strategies; and
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> (h) Morgan's sales strategies (20(1)) - I worked with the National Accounts Director to lead and manage initiatives to increase sales in Canada with the direction always being driven out of Morgan's head office to ensure the businesses were in line with one another.

[41] Mr. MacDonald exercised important managerial functions at Morgan Canada, but not every manager owes fiduciary duties to her or his employer. Mr. MacDonald’s fairly typical managerial duties must be assessed in the context of his relationship to the U.S. head office of Morgan Truck Body LLC. He was not a member of the senior executive team of the parent company. As noted, Mr. MacDonald reported to Tom Diez, the Senior Vice-President of Sales and Marketing at Morgan Truck Body LLC. Mr. Diez confirmed that it was the senior executive team in the U.S. who made the “key investment, sales, and

marketing decisions and strategies." It was Mr. Diez who provided instructions and directions to Mr. MacDonald regarding how to carry out his work.

[42] Morgan Canada's evidence is particularly weak regarding Mr. MacDonald's ability to exercise discretion or control to affect its legal interests. On the evidence before me, it seems more likely that Mr. MacDonald would be found to be a middle manager operating under strict control of executives located in the U.S. than an employee owing fiduciary duties to Morgan Canada.

[43] There is a significant dispute in the evidence regarding the nature of Mr. MacDonald's duties. The trial will decide these issues, but I observe that Mr. MacDonald's evidence seems more consistent with the tight control exercised by the U.S. head office of Morgan Truck Body LLC over the Morgan Canada workplace than is Mr. Lalonde's evidence.

[44] In any event, however, Morgan Canada has certainly not demonstrated a strong *prima facie* case that Mr. MacDonald owed it fiduciary duties.

The actions of Mr. Di Nardo and Mr. MacDonald would not have breached a fiduciary duty

[45] As noted, Morgan Canada has not made out a strong *prima facie* case that either Mr. Di Nardo or Mr. MacDonald owed it fiduciary duties. Even if they did owe fiduciary duties to Morgan Canada, the company has not made out a strong *prima facie* case that they breached those duties.

[46] Neither Mr. Di Nardo nor Mr. MacDonald worked under a valid non-competition clause at the time they left Morgan Canada. In the absence of such agreements, former employees may use their own skills and experience to compete with their former employers and solicit their former employer's customers or employees.[13] Former employees may not compete unfairly, including by using their former employer's confidential information.[14] However, courts must carefully scrutinize an employer's attempt to obtain through the imposition of fiduciary duties what it did not obtain from its employees during contract negotiations.

[47] Meeting with a future employer that it a competitor is not, on its own, a breach of fiduciary duties.[15] In the absence of a binding non-competition agreement, there is nothing wrong with Mr. Di Nardo or Mr. MacDonald interviewing with Reefer Sales, negotiating their terms of employment, or choosing to go to work at Reefer Sales, even if it is a competitor. I find that Mr. MacDonald's text messages with individuals at Reefer Sales do not provide clear evidence any misconduct in that process.

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[13] *Nativelands Specific Claims Group v. Justice Risk Solutions*, 2023 ONSC 4305 at para 14; *King v. Merrill Lynch Canada*, 2005 O.T.C. 994 (S.C.J.); *South Side Manufacturing Ltd. v. SS Decking Ltd.*, 2022 ABCA 103; *Palumbo v. Quercia*, 2018 ONSC 5034, at para. 61; *Middleton v. Direct Broadcast Satellite Communications Corp*., 2022 ONSC 7345, at para. 81; *Aquafor Beech Ltd. v. Whyte, Dainty and Calder*, 2010 ONSC 2733, at para. 47.
[14] *C.H.S. Air Conditioning Ltd. (c.o.b. Dial One Temp Control) v. Environmental Air Systems Inc.* (1996), 20 C.C.E.L. (2d) 123 (Gen. Div.).
[15] *EF Institute for Cultural Exchange v. WorldStrides Canada Inc.,* 2023 ONCA 566, at para. 18; *Guzzo v. Randazzo*, 2015 ONSC 6936.

[48] Equally, Morgan Canada has not provided evidence to satisfy me that they have a strong *prima facie* case that any of the defendants violated the "illicit springboard" doctrine.[16] The key to establishing that an employee benefitted from an illicit springboard is evidence that the employee commenced the competing business while still working for the employee's first employer. Morgan Canada has not provided sufficient evidence to make out such a clam. Mr. MacDonald and Mr. Di Nardo both joined an existing enterprise, Reefer Sales. They did not build that business while working at Morgan Canada.

[49] Even if Mr. MacDonald were a fiduciary, I would not find that Morgan Canada has made out a strong *prima facie* case that Mr. MacDonald solicited Mr. Di Nardo to go to work for Reefer Sales. Mr. MacDonald did not interview Mr. Di Nardo for the job and did not make the decision to hire him. Mr. Di Nardo is not working for Mr. MacDonald and works in a business unit, sales of reefer units, that Morgan Canada does not even have. Morgan Canada relies on the fact that Reefer Sales asked Mr. MacDonald to send emails to Mr. Di Nardo about the hiring process does not amount to improper solicitation. Those emails do not amount to an improper solicitation.

[50] To the extent that Morgan Canada relies on allegations that Mr. MacDonald did not perform his duties to the level of their expectations while he was an employee, this motion is not an appropriate forum for an after-the-fact performance review. Such failings, even if established, would not properly ground the injunctive relief Morgan Canada seeks.

[51] Finally, I will address how Mr. MacDonald and Mr. Di Nardo used email in detail in the section below. Morgan Canada has not demonstrated a strong *prima facie* case that they would be found to have breached fiduciary duties in that way.

Breach of confidence

[52] Morgan Canada claims that Mr. Di Nardo and Mr. MacDonald have committed the tort of breach of confidence. There is no doubt that both defendants owed duties under the policies of Morgan Canada and at common law to preserve Morgan Canada's confidential information. On the record before me, however, Morgan Canada has not established a strong *prima facie* case that either Mr. Di Nardo or Mr. MacDonald misused that confidential information.

[53] The elements of an action for breach of confidence are:

a. that the information conveyed was confidential;

b. that it was communicated in confidence; and

c. that it was misused by the party to whom it was communicated.[17]

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[16] *Nativelands*, at para. 39.
[17] *Lac Minerals*, at p.608; *Catalyst Capital Group Inc. v. Moyse*, 2016 ONSC 5271, 35 C.C.E.L. (4th) 242, at paras. 68 to 70, aff'd 2018 ONCA 283, 46 C.C.E.L. (4th) 35.

[54] Under the third part of the test, "misuse" is any use of the information that is not authorized by the party who originally communicated it.[18] A plaintiff must also demonstrate that the defendant's misuse of the information caused detriment to the plaintiff.[19]

Claim against Mr. Di Nardo

[55] Morgan Canada points to four email messages that Mr. Di Nardo forwarded to his personal email account. Mr. Di Nardo admits sending these messages but offers benign explanations for sending them. I note that Morgan Canada did not cross-examine Mr. Di Nardo on his explanations.

[56] First, on December 17, 2020, Mr. Di Nardo sent an email to two other Morgan Canada employees with the subject line "Liftgate Pricing Tools – While I am away". He cc'd the message to his personal email address. Mr. Di Nardo's evidence was that he sent this email to colleagues before he went on vacation just in case they would need the information in his absence. His evidence was that he copied his personal email address so that he could reference the email if his colleagues needed his assistance, as the subject line indicated, while he was away. Mr. Di Nardo points out that he sent this message almost two years before he resigned from Morgan Canada in September 2022. His unchallenged evidence is that he did not access this material at any time after December 2020, never misused this information, and forgot about the email entirely until he reviewed Morgan Canada's motion record.

[57] Second, on April 23, 2021, a Morgan Canada employee who received the December 17, 2020, "While I am away" email recirculated the email to Mr. Di Nardo's work email address in connection with a discussion about whether or not there was an updated version of the attachments. Mr. Di Nardo points out that the April 2021 email demonstrates that the earlier attachments are out of date.

[58] Third, on February 2, 2021, Mr. Di Nardo (to whom Morgan Canada did not issue a work phone) took a picture of a hard copy of three sales orders using his personal phone. He then used his personal email address to email the picture to his work email account and, from there, forwarded the picture to two colleagues and asked them to correct the mistakes in the sales orders. Mr. Di Nardo's unchallenged evidence is that until he received Morgan Canada's motion record, he had not seen this email since he sent it in February 2021.

[59] Fourth, on January 23, 2021, Mr. Di Nardo used his work email to forward an email to his personal email account. The email he forwarded came to him from Mr. MacDonald and contained quotes for faucets and plumbing fixtures. This email is irrelevant to this motion.

[60] Morgan Canada also points to evidence that on September 9, 2023, Mr. Di Nardo used a USB key to download items from his work computer. Mr. Di Nardo's unchallenged evidence is that almost all of the documents on the USB key are personal items related to,

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[18] *Lac Minerals*, at p.609; *Catalyst*, at para. 69.
[19] Lac Minerals, at p.613; *Lysko v. Braley* (2006), 79 O.R. (3d) 721 (C.A.) at para. 17; *Rodaro v. Royal Bank of Canada* (2002), 59 O.R. (3d) 74 (C.A.), at para. 48.

for example, the purchase and renovation of his home, the planning of Mr. Di Nardo's wedding, and tax, health, and insurance documents. Three of the documents that Mr. Di Nardo downloaded were related to Morgan Canada:

a. two documents related to a Morgan Canada job posting for a Technical Sales Manager; and

b. one document was a reference letter Mr. Di Nardo wrote for a colleague.

[61] Mr. Di Nardo stated in his affidavit that he took the job posting to update his resume and that he took the reference letter in case she ever needed him to write another one. Mr. Di Nardo stated that he put the USB key in a box and did not look at its contents until after he received Morgan Canada's motion record.

[62] I will assume for the purposes of this motion that the emails, their attachments, and the Morgan Canada documents downloaded to the USB were confidential information belonging to Morgan Canada. Nevertheless, that information appears to be at the very low level of confidential information. None of the information appears to be truly sensitive commercial information that could have any meaningful impact on fair competition.

[63] I will assume that by forwarding these messages and taking the job posting and reference letter, Mr. Di Nardo violated the letter of the Morgan Canada's policies and his common law obligations to Morgan Canada. Even so, these breaches are trivial and would not justify any interlocutory relief.

[64] Most importantly, Morgan Canada has not demonstrated a strong *prima facie* case that Mr. Di Nardo misused the information in the emails or on the USB key. Morgan Canada has not provided persuasive evidence to cast doubt on Mr. Di Nardo's evidence that he neither accessed this information after he left his position with Morgan Canada nor provided any of this confidential information to anyone else.

[65] These messages were sent to or by Mr. Di Nardo between December 2020 and April 2021, which was more than 16 months before Mr. Di Nardo resigned from Morgan Canada in September 2022. Given that gap in time, I would not draw the inference that forwarding the emails was part of any plan to steal Morgan Canada's confidential information. That conclusion would be impermissible speculation, not an inference drawn reasonably and logically drawn from the facts before me.[20]

[66] While there is evidence that Mr. Di Nardo had some confidential information in his email account and on the USB key, an essential element of the claim for misuse of confidential information is that it has actually been used.[21] Mr. Di Nardo's unchallenged evidence is that he did not misuse this information. Reefer Sales' evidence is that it never received this

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[20] *R. v. Morrissey* (1995), 22 O.R. (3d) 514 at p. 530 (C.A.).

[21] *Nativelands Specific Claims Group v. Justice Risk Solutions*, 2023 ONSC 4305, at para. 31.

information. Morgan Canada has not presented a strong *prima facie* case that Mr. Di Nardo used this information for the benefit of Reefer Sales.

[67] In conclusion, Morgan Canada has not demonstrated a strong *prima facie* case that Mr. Di Nardo committed the tort of breach of confidence. Mr. Di Nardo may have breached his employment obligations by forwarding the emails to his personal email account or by taking the job posting and reference letters with him. In my view, given the nature of the information and the absence of evidence that Mr. Di Nardo used the information after he left Morgan Canada, Mr. Di Nardo's actions would not support granting Morgan Canada the far-reaching relief it seeks to obtain on this motion.

<u>Claim against Mr. MacDonald</u>

[68] Morgan Canada alleges that Mr. MacDonald committed the tort of breach of confidence and breached his duties of confidence under his employment agreement and policies of Morgan Canada. In my view, Morgan Canada has not demonstrated a strong *prima facie* case that Mr. MacDonald committed the tort of breach of confidence. While he may have breached his duties at common law or under his employment agreement, such breaches are trivial and would not justify the relief sought by Morgan Canada on this injunction.

[69] Morgan Canada points to 32 emails Mr. MacDonald forwarded from his work e-mail account to his wife's work e-mail account between November 2021 and March 2022. Morgan Canada's theory is that Mr. MacDonald forwarded these messages to Ms. Bettger as a method of "exfiltrating", to use Morgan Canada's preferred and colourful verb, its confidential information out of the Morgan Canada environment, ultimately to be used by Mr. MacDonald to compete unfairly with it.

[70] Nine of the 32 emails are personal emails forwarding Bell Canada bills, 407 ETR bills, and information regarding Mr. MacDonald and Ms. Bettger's personal taxes. These emails are obviously of no concern and will not be discussed further.

[71] Morgan Canada also points to the fact that on January 25, 2022, three months before he resigned, Mr. MacDonald plugged a USB key into his work computer. Mr. MacDonald's evidence is that copied five documents relating to his home renovation onto his USB key. This evidence is uncontradicted. The documents downloaded to the USB key are of no concern and will not be discussed further.

[72] That leaves the 23 emails that Mr. MacDonald forwarded to Ms. Bettger between November 2021 and March 2022. Mr. MacDonald explained the content of the forwarded emails as follows:

a. 12 emails contained information that he used to prepared for weekly sales team calls with Morgan Canada's sales directors and Mr. Diez;

b. nine emails contained Mr. MacDonald's own notes of his discussions with sales representatives that Mr. MacDonald used to prepare weekly reports; and

c. two emails contained sales invoices about which the customers had complained.

[73] In his affidavit, Mr. MacDonald explained that between September 2020 and October 2021, he and Ms. Bettger lived with her parents while they were renovating their house. During this period of time, Mr. MacDonald worked remotely from his father-in-law's home office. The father-in-law's home office had a printer that Mr. MacDonald used to print Morgan Canada documents when he felt it necessary to do so.

[74] In November 2021, Mr. MacDonald and Ms. Bettger moved into their new house. I pause to note that Morgan Canada has not identified any emails sent by Mr. MacDonald to Ms. Bettger prior to November 2021. In their new home, they continued to work remotely due to the pandemic. Ms. Bettger worked on the home office on main floor of the house and Mr. MacDonald worked in a bedroom upstairs. They had only one printer, which was located in Ms. Bettger's office. Mr. MacDonald could not connect to that printer over their home Wi-Fi network because of security restrictions imposed by Ms. Bettger's employer.

[75] Mr. MacDonald's evidence is that while he could have taken his laptop downstairs and plugged it into the printer, instead he sent email messages and attachments to his wife at her work email account so that she could print the messages for him. He would then pick up the printed pages some time later, use them, and discard them. Mr. MacDonald admits that this was not a best practice, but it was more convenient for him at the time.

[76] Ms. Bettger confirms Mr. MacDonald's evidence. She admits receiving the messages, printing them, and never thinking about the messages again. She deleted some of the messages and left others in her inbox. She paid no attention to the messages. She never read the documents. There is no evidence that she ever forwarded these messages to anyone else. Ms. Bettger works in an entirely different industry and the Morgan Canada information was irrelevant to her and her employer.

[77] I accept that the attachments to these emails contained Morgan Canada confidential business information. Mr. MacDonald has provided a very plausible and entirely innocent explanation for why he forwarded the messages to his wife and how he used that information in the performance of his duties. Mr. MacDonald states that he generally met with his sales teams on Fridays. He observes that many of the messages were forwarded on Thursdays and Fridays and that the content of these messages and attachments informed his meetings. He identified some of the emails as being printed to prepare for his reports on sales of truck bodies in his region to Mr. Diaz and other executives. He explained that some of the emails were printed in preparation for his one-on-one meetings with members of his sales teams or for his own meetings with Mr. Diaz. These emails were not sent in one large batch on one day and there is evidence before me that explains the timing of each of the emails that he forwarded. Given the coherence and cogency of this evidence, Morgan Canada has not persuaded me that there is a strong likelihood that it will prove at trial that Mr. MacDonald sent the emails to his wife for some other or improper purpose.

[78] Mr. MacDonald's evidence is that he never accessed this information after he left Morgan Canada and never shared any of this information with anyone at Reefer. Ms. Bettger's evidence is that she never forwarded the messages that she received from Mr. MacDonald to anyone else. The evidence of Mr. Vanneste, Reefer Sales' chief financial officer, is that he made inquiries of others at Reefer Sales and has been advised that no one at Reefer Sales

has received any Morgan Canada documents or received any Morgan Canada confidential information from Mr. MacDonald.

[79] Morgan Canada has led no evidence to contradict the evidence of Mr. MacDonald, Ms. Bettger, or Mr. Vanneste on these points.

[80] In conclusion, Morgan Canada has not demonstrated a strong *prima facie* case that Mr. MacDonald communicated that confidential Morgan Canada to anyone other than Ms. Bettger. Morgan Canada has not demonstrated a strong *prima facie* case that Ms. Bettger or Mr. MacDonald misused any Morgan Canada confidential information. Morgan Canada has not made out a strong *prima facie* case that Mr. MacDonald committed the tort of breach of confidence.

[81] Mr. MacDonald may well have breached his employment contract, common law duties of confidentiality, and Morgan Canada policies by forwarding the documents to Ms. Bettger and asking her to print them. Absent compelling evidence of misuse of that information, however, that alone would not justify any of injunctive relief claimed by Morgan Canada.

Conclusion

[82] Morgan Canada has not made out a strong *prima facie* case for breach of confidence.

[83] Mr. MacDonald, Ms. Bettger, and Mr. Di Nardo have admitted that they have some material belonging to Morgan Canada in their power, possession, or control. This information should be returned to Morgan Canada (if it has not been) and deleted from their computers, email accounts, and storage devices (if that is what Morgan Canada wants).

[84] I emphasize that none of the defendants may access or use an of Morgan Canada's confidential information for any purpose other than defending this litigation, should it continue.

The tort of spoliation

[85] Morgan Canada submits that it has made out a strong *prima facie* case for spoliation. I disagree.

[86] Courts in Ontario have never definitively resolved the question of whether there is a cause of action for spoliation.[22] Given that, I do not find that there is strong likelihood that Morgan Canada will be successful in making out the tort of spoliation at trial.

[87] Moreover, the facts that Morgan Canada relies on do not appear to meet the test for spoliation.

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[22] *Trillium Power Wind Corporation v. Ontario*, 2023 ONCA 412, 117 O.R. (3d) 721, at paras. 20-24.

[88] Spoliation arises out of the destruction of potentially relevant evidence. It "occurs where a party has intentionally destroyed evidence relevant to ongoing or contemplated litigation in circumstances where a reasonable inference can be drawn that the evidence was destroyed to affect the litigation”[23]

[89] Morgan Canada alleges that Mr. MacDonald and Ms. Bettger deleted certain email messages “leading up to his resignation.” At that time, there was no ongoing or contemplated litigation that could be affected by such actions. Even if Mr. MacDonald and Ms. Bettger took such steps, it would not give Morgan Canada a strong *prima facie* case on the tort of spoliation.

[90] Second, Morgan Canada alleges that Mr. MacDonald and Ms. Bettger “did not take any positive steps to protect” Morgan Canada’s confidential information. Even if this is true, it seems unlikely that this would meet the test of “intentional destruction of evidence.”

[91] Morgan Canada has not made out a strong *prima facie* case that it will make out the tort of spoliation at trial.

Morgan Canada has not demonstrated that it will suffer irreparable harm if the injunction is not granted

[92] At the second step of the test, Morgan Canada must demonstrate that it would suffer irreparable harm if the injunction is not granted.

[93] Irreparable harm is harm which either cannot be quantified in monetary terms or cannot be cured, usually because the moving party cannot collect damages. A party seeking to prove irreparable harm must provide clear, not speculative, evidence (including financial evidence) that it will suffer irreparable harm without the injunction. Irreparable harm cannot be founded on mere speculation. Absent clear evidence of irreparable harm, the court will not issue an injunction. There is no doubt that loss of customers or market share can be the type of harm described as irreparable harm, the moving party must prove that on clear evidence that such harm will be caused.[24]

[94] It is important to recall that this injunction was argued on August 24, 2023, well over one year after Mr. MacDonald’s last day at Morgan Canada (April 14, 2022). This is not a case, like many cases, where the injunction is argued mere days or weeks after the alleged fiduciaries left the old company to begin competition at the new company. In those cases, a moving party may have more difficulty demonstrating irreparable harm. This case is very

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[23] *Trillium* at para. 20, citing *McDougall v. Black & Decker Canada Inc*., 2008 ABCA 353, 440 A.R. 253, at para. 18.

[24] *U.S. Steel Canada Inc. (Re)*, 2023 ONCA 569, at para. 27; *2158124 Ontario Inc. v. Pitton*, 2017 ONSC 411, at paras. 48 to 51; *Ciba-Geigy Canada Ltd. v. Novopharm Ltd.* 1994, 83 F.T.R. 161, at para. 118; *754223 Ontario Ltd v. R-M Trust Co*, [1997] O.J. No. 282 (Ont. Gen. Div.) at para. 40; *Precision Fine Papers Inc. v. Durkin*, 2008 CanLII 6871 (Ont. S.C.J.) at para. 25; *Ontario Graphite Ltd. v. Janik*, 2016 ONSC 716, at paras. 62-63; *Messa Computing Inc. v. Phipps*, 1997 CarswellOnt 5596 (Ont. Gen. Div.) at para. 32.

different. Here, Morgan Canada has had a significant amount of time to collect and provide clear and compelling evidence of irreparable harm.

[95] Morgan Canada submits that it has suffered irreparable harm because Mr. MacDonald forwarded the 23 emails described above to Ms. Bettger. For the reasons set out above, I doubt this qualifies as harm. It certainly does not qualify as irreparable harm. It manifestly would not justify the relief sought by Morgan Canada on this injunction.

[96] Morgan Canada's principal submission on irreparable harm is as follows:

> 120. The Defendants' conduct risks permanent market loss and irreparable harm to Morgan Canada's business reputation, goodwill. With access to Morgan Canada's customer/end- user lists, customer/end-user orders with specific customizations, customer/end-user contact persons, customer/end-user complaints and specific quality issues, sales figures, pricing lists, quotes, regional sales data, past and future budgets, competitive intelligence, overarching business strategy, and internal analysis and commentary on all the preceding, Reefer Sales has unfairly undercut Morgan Canada and irrevocably impaired Morgan Canada's market share. The magnitude is a "red-herring" at this stage, given the level of concealment. The Defendants should not be permitted to improperly use and share Morgan Canada's customers' and/or partners private information, to gain any portion of the market; The Defendants should not be permitted to say, "too bad. So sad. See you at Trial". This would be manifestly unfair, inequitable and in allowing them to seek advantage from their unlawful behaviour….
>
> 122. It is irreparable because the Defendants' theft of confidential information and fiduciary and contractual breaches have allowed Reefer Sales, in partnership with Vanguard – a subsidiary of a powerhouse Chinese conglomerate - to strategically target Morgan Canada's customers with stolen confidential information. The straight-box market is tight, and an unfair advantage will result in Morgan Canada losing significant market share to Reefer Sales/Vanguard.

[97] If Morgan Canada had clear and compelling evidence to prove this theory, it might have succeeded on this injunction. Morgan Canada has not provided clear evidence that Reefer Sales or any of its employees:

a. reviewed or used any of Morgan Canada's information;

b. unfairly undercut Morgan Canada's pricing;

c. unfairly impaired Morgan Canada's market share;

d. sought to take advantage, in any way, of Morgan Canada's information;

e. strategically targeted any of Morgan Canada's customers using its confidential information.

[98] For example, Morgan Canada could have filed affidavits from its customers setting out when and how Reefer Sales approached them and used Morgan Canada confidential information to undermine Morgan Canada's competitive position. Such evidence is frequently filed in unfair competition cases. While such evidence is not essential, it is often compelling evidence of irreparable harm.

[99] Instead, paragraphs 120 to 122 of Morgan Canada's factum cite to paragraphs 66 to 73 of the affidavit of Mr. Lalonde, sworn March 20, 2023. In paragraph 65, Mr. Lalonde describes the information that Mr. MacDonald forwarded to Ms. Bettger. In the following paragraphs, Mr. Lalonde states that, among other things:

a. it is "deeply concerning" that Mr. MacDonald and Mr. Di Nardo took the information;

b. "if [the information was] used to unfairly compete, this would irreparably harm Morgan Canada;

c. he is "beyond concerned" that the defendants are using this information;

d. "in [his] experience" Morgan Canada could not lose a portion of its market share to a new competitor without the misuse of Morgan Canada's confidential information;

[100] This is precisely the type of speculative evidence that is insufficient to demonstrate irreparable harm.

[101] In my view, Morgan Canada's best evidence of irreparable harm is as follows: in December 2023, ATS Healthcare bought four units from Reefer Sales.

[102] In assessing whether or not this is evidence of irreparable harm, it is important to keep in mind the evidence that Reefer Sales services many of the same customers as Morgan Canada. Each time that Reefer Sales installed or serviced a Carrier reefer unit on a Morgan truck body, it would know the name of the end customer. In addition, before this dispute, Reefer Sales had previously sold reefer units directly to ATS and was familiar with that company, and its needs. This does not appear to be an industry where there are exclusive customer relationships.

[103] Morgan Canada admits that despite Reefer Sales selling four units to ATS Healthcare it received orders from ATS Healthcare for its truck bodies in 2023. The defendants, understandably, asked during cross-examinations, "if there have been ATS Healthcare truck purchases from [Morgan Canada], provide the dates of the orders and the number of truck bodies purchased." Morgan Canada refused to answer this question stating,

> The information sought ATS Healthcare truck is refused, in part;

> Morgan's confidential and proprietary information exfiltrated by Mr. MacDonald contains highly sensitive and confidential sales information related to ATS healthcare's historical sales. Mr. MacDonald is aware of this and can easily identify said information.
>
> As noted in Mr. Lalonde's affidavit ATS Healthcare has reduced its sales from Morgan. This information has not been refuted, and Reefer has also refused to identify the full quantum of ATS Healthcare purchases, which Morgan claims are as a result of unfair solicitation and competition, by a Fiduciary, Reefer also using same confidential and proprietary information/documents, to capture market share.
>
> Morgan has, as noted by Mr. Lalonde, noticed a marked reduction in expected sales, which ultimately led to uncovering the unlawful activities of Mr. MacDonald, during his employment and continuing, as identified under the Claim.

[104] This is, obviously, not a proper refusal. The burden is squarely on Morgan Canada to prove that it will suffer irreparable harm. The defendants are entitled to test the plaintiff's theory and assertions against the actual sales data.

[105] I find that the defendants' question was relevant and should have been answered. I draw an adverse inference from Morgan Canada's failure to answer a proper question. I infer that the answer to this question would have shown that it continued to sell the same or an increased number of truck bodies to ATS Healthcare. I infer that the answer to the defendants' question would have undermined Morgan Canada's claims of irreparable harm.

[106] Morgan Canada has presented very little evidence of harm, much less irreparable harm. In my view, Morgan Canada has not demonstrated to me on clear, not speculative, evidence that it will suffer irreparable harm without the injunction.

Balance of convenience favours the defendants

[107] At the final stage of the injunction test, I must consider whether the balance of convenience favours Morgan Canada. I find that it does not.

[108] Recall the primary relief that Morgan Canada seeks on this injunction:

> Pending trial, or further order of this Court, Mr. MacDonald and Mr. Di Nardo shall not continue in their employment with the Defendant, Reefer Sales, or any of its affiliates, subsidiaries, agents, contractors, or partners, or commence employment with any competitor of the Plaintiff, engaged in the box truck/straight box truck manufacturing, sales, distribution or marketing industry (collectively referred to as "Competitors"").

[109] This relief sought is sweeping in its scope. If I grant this order, neither Mr. MacDonald nor Mr. Di Nardo can work for Reefer or any other competitor of Morgan Canada in any capacity until the trial of this action. Morgan Canada describes this as "necessary relief." It is plainly not that. Prohibiting Mr. MacDonald from running the social media account for a competitor of Morgan Canada is unnecessary to protect any legitimate interest of Morgan Canada.

[110] It has been well over a year since Mr. MacDonald and Mr. Di Nardo left Morgan Canada. It has had plenty of time to rehabilitate, repair, and reinforce its customer relationships.

[111] On the other hand, preventing Mr. MacDonald and Mr. Di Nardo from working at any competitor, in any capacity, would cause profound economic and personal harm to them and their families.

[112] The balance of convenience strongly favours the defendants, particularly given the weakness of the plaintiff's case on the merits and the limited evidence of irreparable harm.

No case for an independent inspection

[113] Morgan Canada seeks the appointment of an "Independent Third-Party Forensic Examiner" and make a special preservation order. I decline to appoint such an examiner and to make a preservation order. The requests of Morgan Canada are disproportionate in the circumstances of this case.

[114] The defendants are represented by counsel. They are bound by their obligations under the *Rules of Civil Procedure* to preserve and produce documents in this litigation. I have no reason to expect that the defendants will not comply with their obligations and, if the plaintiff is of the view that the defendants have not complied, they may bring a motion on evidence after exploring the issues on examination for discovery.

[115] I would not exercise my discretion to appoint an examiner or to make a preservation order beyond the obligations under the *Rules*. The orders Morgan Canada seeks are unnecessary, disproportionate, overly intrusive, and premature.

No case for a sealing order

[116] On the first return of its motion, Morgan Canada obtained a temporary sealing order. Justice Akbarali ordered that:

> The Motion Record of the Proposed Plaintiff, Morgan Canada Corporation ("Morgan"), which includes the Affidavit of Gary Lalonde, sworn March 20, 2023 and the exhibits thereto, and the Affidavit of Johan Dorado, sworn March 16, 2023 and the Exhibits thereto, shall be served and filed in unredacted form (the "Unredacted Motion Record") on or before April 4, 2023.

> The Unredacted Motion Record, shall be sealed on an interim interim basis and treated as confidential ("Confidential Material"), until August 24, 2023, the date of the return of the plaintiff's motion;
>
> Any party who wishes to seek a further sealing order at the return of the motion must give notice to the media pursuant to Section F of Part V of the Court's Consolidated Provincial Practice Direction;

[117] On this motion, Morgan Canada seeks to extend the sealing order over certain exhibits because they contain "confidential information…relating to a commercial interest, namely Morgan Canada's pricing and customer/partner information." Morgan Canada also submits that the exhibits contain "proprietary information belonging to third parties." Morgan Canada's factum, however, does not specify to what third party information it refers or describe Morgan's alleged contractual obligations not to reveal this information.

[118] For the reasons that follow, I dismiss Morgan Canada's request for a sealing order and vacate the temporary sealing order imposed by Akbarali J.

The open court principle

[119] All court proceedings are presumptively open to the public. This is a central feature of a liberal democracy and court openness is essential to the proper functioning of our democracy.[25] Open judicial proceedings are crucial to maintaining the independence and impartiality of the courts, public confidence and understanding of their work and ultimately the legitimacy of the process.[26] Open courts provide a guarantee that justice is administered in a non-arbitrary manner, according to the rule of law . . . thereby fostering public confidence in the integrity of the court system and understanding of the administration of justice.[27]

[120] The guarantee of freedom of expression in the *Charter* protects court openness, which is essential to the proper functioning of Canadian democracy. The ability of the press to report on court proceedings is inseparable from the principle of open justice.[28]

[121] The public interest in open trials is rooted in the need to maintain an effective evidentiary process, to ensure a judiciary that behaves fairly and is sensitive to the societal values, to promote the shared sense that our courts operate with integrity and dispense justice, and to provide an ongoing opportunity for citizens to learn how the justice system operates and how the law affects them.[29] These principles apply with no less force in a commercial dispute like this one than in any other case.

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[25] *Sherman Estate v. Donovan*, 2021 SCC 254, 458 D.L.R. (4th) 361, at paras. 1 and 30.
[26] *Vancouver Sun (Re)*, 2004 SCC 43, [2004] 2 S.C.R. 332, at paras. 23 to 26.
[27] *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 SCR 480, at para. 22.
[28] *Sherman Estate v. Donovan*, 2021 SCC 254, 458 D.L.R. (4th) 361, at para. 30; *New Brunswick*, at para. 23.
[29] *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at p. 1361 (per Wilson J.).

[122] Litigating in an open court can be a source of inconvenience and embarrassment for litigants and others mentioned in the case, but this discomfort is generally not enough to overturn the strong presumption of an open court.[30]

Application to this case

[123] I dismiss Morgan Canada's request for a sealing order for three reasons.

[124] First, Morgan Canada breached the order of Akbarali J. because it did not provide notice to the media that it was seeking a further sealing order. Although Akbarali J. issued her order on March 28, 2023, Morgan Canada did not put the media on notice that it intended to seek a sealing order. Morgan Canada had five months to comply with a clear order of the court.

[125] Second, Morgan Canada failed to comply with the Superior Court of Justice's Practice Direction on publication bans. The Practice Direction provides as follows:

> 153. This part applies to all applications or motions for discretionary publication bans. It does not apply to publication bans that are mandated by statute (i.e., those that either operate automatically by virtue of statute or that a statute provides are mandatory on request). …
>
> 155. Unless otherwise directed by the court, the person seeking the publication ban (the requesting party) must provide notice to the media of the motion using the procedure set out in this section.
>
> 156. The requesting party must complete and submit the "Notice of Request for Publication Ban" form available on the Superior Court of Justice website. …
>
> 158. The information on the Notice of Request for Publication Ban will be distributed electronically to members of the media who have subscribed to receive notice of all publication ban applications/motions in the Superior Court. …
>
> 160. The requesting party may be required to produce a copy of the Notice of Request for Publication Ban to the Court at the hearing of the application/motion in order to establish that notice was provided in accordance with this section.[31]

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[30] *A.G. (Nova Scotia) v. MacIntyre*, [1982] 1 SCR 175; *Gazette Printing Co. v. Shallow*, [1909] 41 S.C.R. 339.
[31] Consolidated Civil Provincial Practice Direction, Part VI, Provisions Applicable to all Superior Court of Justice Proceedings, Section H – Publication Bans. This practice direction came into effect on June 15, 2022, replacing the earlier version of the practice direction cited by Akbarali J. on March 28, 2023, but making no substantive changes to this provision.

[126] Parties seeking a sealing order must put the media on notice. It is an important safeguard to the constitutional imperative to maintain open courts. Putting the media on notice of a request for a sealing order is never optional.

[127] Morgan Canada did not comply with the order of Akbarali J. or the requirements of the Practice Direction. The court can neither permit the erosion of the open court principle through casual disregard of its Practice Direction, nor countenance the breach of its orders. In these circumstances I would not exercise my discretion to grant a sealing order.

[128] Third, and for completeness, Morgan Canada has also not demonstrated the exceptional circumstances necessary to justify a restriction on the open court principle.

[129] Subsection 137(2) of the *Courts of Justice Act* provides that the court may order that any document filed in a civil proceeding be treated as confidential, sealed, and not form part of the public record.[32] In order to succeed, the person asking a court to exercise its discretion in a way that limits the open court presumption must establish that:

a. court openness poses a serious risk to an important public interest;

b. the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and

c. as a matter of proportionality, the benefits of the order outweigh its negative effects.[33]

[130] I accept that the commercial interest in preserving confidential information can be an important interest because of its public character.[34] However, it is also true that harm to a particular business interest will not normally be sufficient to rise to the level of an important public interest.[35]

[131] In almost every case, litigants are required to disclose information that they consider to be otherwise confidential. While many would prefer to obtain sealing orders over such information, that would not be consistent with the open court principle. Here, Morgan Canada takes a broad view of what information is confidential. In its “Business Confidentiality” policy, Morgan defines confidential information as follows:

> "Confidential Information" means the Company's non-public, confidential, secret, or proprietary information, including but not limited to the Company's know-how, copyrightable work inventory, data, specifications, drawings, written descriptions, instructions, processes, manufacturing methods, procedures, models, prototypes,

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[32] R.S.O. 1990, c. C.43.
[33] *Sherman Estate*, at para. 38; *Royal Bank of Canada v. Distinct Infrastructure Group Inc.*, 2022 ONSC 5878, at para. 19.
[34] *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522, at para. 53; *Sherman* at para. 41.
[35] *Sierra Club* at para. 55; *Sherman Estate*, at para. 41.

> products, business plans, communications, Team Member names and lists, customer or vendor names and lists, prices, costs, financial information, manufacturing processes, uses and applications of products, and results of investigations, tests or experiments. The Company's Confidential Information includes, but is not limited to, any information on strategic objectives, market, operational, and competitive analyses and reports, commercial and contractual arrangements, acquisition programs, information on the Company's plans to acquire new properties or businesses, information regarding relocations of existing facilities, new developments or techniques, major changes in the organization, competitive bid information, prices paid or received for goods or services, or any other information or data that the Company has not made widely available to the public.

[132] Given the breadth of this definition, the mere fact that Morgan submits that information is confidential is insufficient to demonstrate that court openness poses a serious threat to an important public interest. For example, a sealing order would certainly not be justified to prevent public access to "Team member names and lists."

[133] The material filed by Morgan Canada on this motion does not contain trade secrets, confidential manufacturing methods, or even business plans. The material is not the truck body manufacturing equivalent of the complete formula for Coca-Cola.[36] In this case, Morgan seeks to seal information that the defendants fairly describe as "outdated pricing information and customer complaints from 2021."

[134] In this case, I do not see that court openness poses a serious threat to an important public interest. The order sought by Morgan Canada is not necessary to protect an important public interest. As a matter of proportionality, the negative effects of such an order would outweigh its benefits.

[135] For all of these reasons, I dismiss Morgan Canada's request to extend the confidentiality and sealing order granted by Akbarali J. on March 28, 2023. Justice Akbarali ordered that the "confidentiality provisions of this order shall expire on August 24, 2023…subject to further order of the court." As I have not extended the confidentiality provisions of that order, I declare that paragraphs 2, 4, 5, 6, 7, and 8 of that order have expired.

<u>Conclusion and costs</u>

[136] For the reasons set out above, Morgan Canada's motion is dismissed in its entirety.

[137] As indicated above, even without the injunction, the defendants are all prohibited from using Morgan Canada's confidential information for any purpose other than defending this litigation. To the extent Morgan Canada wishes that information to be returned or to be

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[36] *Coca-Cola Bottling Co. of Shreveport, Inc. v. Coca-Cola Co*., 563 F.Supp. 1122, pp. 1130-1132 (DC Del 1983).

deleted from email servers, USB keys, or other storage media, that should be arranged voluntarily and without the need for injunctive relief.

[138] If the parties are not able to resolve costs of this motion, the defendants may email their costs submission of no more than three double-spaced pages to my judicial assistant on or before September 22, 2023. Morgan Canada may deliver its responding submission of no more than three double-spaced pages on or before September 29, 2023. No reply submissions are to be delivered without leave.

Robert Centa J.

Date: September 15, 2023