SUPREME COURT OF NOVA SCOTIA
Citation: *Clarke Road Transport Inc. v. O'Toole*, 2017 NSSC 319

Date: 20171213
Docket: Hfx No. 468076
Registry: Halifax

Between:

Clarke Road Transport Inc.

Plaintiff

v.

Jeffrey Scott O'Toole, Glen Dinham and Day & Ross Inc.

Defendants

Motion for Interim Injunctive Relief

Judge:	The Honourable Justice Christa M. Brothers
Heard:	October 12, 2017, in Halifax, Nova Scotia
Decision:	December 13, 2017
Counsel:	Colin D. Bryson, Q.C. and Justin E. Adams, for the plaintiff
	Peter M. Rogers, Q.C. and Katie Roebothan, for the defendants

Brothers, J.:

Background

[1] Mr. Glen Dinham ("Dinham") and Mr. Jeffrey Scott O'Toole ("O'Toole") were employed at Clarke Road Transport Inc. ("Clarke") until July 2017. Both are now employed at Day & Ross Inc. ("Day & Ross"), a competitor of Clarke. Clarke seeks an interim injunction against Dinham, O'Toole and Day & Ross (the "defendants"), to prevent what Clarke alleges is use of confidential information and solicitation of customers, employees and independent contractors ("owner/operators").

[2] Clarke is a subsidiary of Clarke Inc., which, in turn, is an operating subsidiary of TFI International Inc. ("TFI"). TFI is a transport and logistics company based in Montreal. Clarke provides truckload services to clients across North America. Terminals are maintained in Halifax, Nova Scotia; St. John's, Newfoundland; and Milton, Ontario. Clarke has separate divisions including a Flatbed Division. The Flatbed Division is the subject of this proceeding and is said to produce $8,000,000 in gross annual sales in Atlantic Canada.

[3] Prior to their respective resignations of July 14, 2017, and July 21, 2017, Dinham and O'Toole worked in Clarke's Flatbed Division. Upon resigning from Clarke, both were hired at the Flatbed Division of Day & Ross, a company providing a variety of transportation services across Canada through four divisions.

Preliminary issues

1. Admission of late filed affidavits and admissibility of hearsay.
2. Application of the Code of Conduct.

Issues

1. What is the test for an injunction in these circumstances?
2. Should an injunction be granted?

Admission of late filed affidavits and admissibility of hearsay

[4] At the outset, counsel for the defendants argued that two affidavits filed by Clarke on October 11, 2017 were late and consequently should not be admitted into evidence.

[5] By way of background, Wood, J. held a telephone conference on September 11, 2017, wherein he scheduled this motion and set the time for filing of affidavits, briefs and rebuttal materials.

[6] Clarke was to file any rebuttal affidavits by Friday, October 6, 2017. Instead, counsel for Clarke filed an affidavit of Emily Stokes (a Human Resources Recruiter with Clarke) (the "Stokes Affidavit") and a rebuttal affidavit of T. Peter Maillet ("Maillet Rebuttal Affidavit"), Director of Sales for Contrans (who has managerial responsibility for Clarke) on Wednesday, October 11, 2017. This motion was heard the next day.

[7] Clarke asked the court to abridge time pursuant to *Civil Procedure Rule* ("*CPR"*) 2.03(1)(c) and admit the affidavits. However, during the hearing, Clarke's counsel conceded the Stokes Affidavit was irrelevant to the motion.

[8] While counsel for the defendants argued against the abridgement of time to allow the Maillet Rebuttal Affidavit, arguing prejudice in the ability to address the late filed affidavits, counsel also conceded that he had released Maillet from cross-examination after receipt of the Maillet Rebuttal Affidavit. Counsel also advised, regardless of whether the court abridged time for the introduction of the affidavit, the defendant wished to proceed and would not seek an adjournment given the Maillet Rebuttal Affidavit also contained impermissible hearsay and was largely irrelevant.

[9] Given the above, I exercise my discretion pursuant to *CPR* 2.03(1)(c) to allow the Maillet Rebuttal Affidavit, subject to rejecting inadmissible hearsay.

[10] The defendants argued that paragraphs 4(a), 4(c), 4(g), 4(h) and all of para. 5 of the Maillet Rebuttal Affidavit should be struck as containing impermissible hearsay. Clarke agreed to strike paras. 4(a) and 5. I will deal with the rest of the challenged subparagraphs.

[11] Counsel for Clarke argued the rules against hearsay are relaxed in this motion given the application of *CPR* 22.15.

[12] *Civil Procedure Rule* 22.15 speaks to the rules of evidence, in relation to motions and provides:

> Rules of evidence on a motion
>
> 22.15 (1) The rules of evidence apply to the hearing of a motion, including the affidavits, unless these Rules or legislation provides otherwise.
>
> (2) Hearsay not excepted from the rule of evidence excluding hearsay may be offered on any of the following motions:
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> (a) an *ex parte* motion, if the judge permits;
>
> (b) a motion on which representations of fact, instead of affidavits, are permitted, if the hearsay is restricted to facts that cannot reasonably be contested;
>
> (c) a motion to determine a procedural right;
>
> (d) a motion for an order that affects only the interests of a party who is disentitled to notice or files only a demand of notice, if the judge or the prothonotary hearing the motion permits;
>
> (e) a motion on which a Rule or legislation allows hearsay.
>
> (3) A party presenting hearsay must establish the source, and the witness' belief, of the information.
>
> (4) A judge, prothonotary, commissioner, or referee may act on representations of fact that cannot reasonably be contested.

[13] Counsel for the defendants argued *CPR* 22.15 does not apply as this is not a motion to determine a procedural right, but a substantial right.

[14] *Civil Procedure Rule* 22.15 sets forth when hearsay is admissible. One such instance is a matter involving a procedural right. Murray, J. in *Gray Estate v. Gray*, 2016 NSSC 359 dealt with the admission of hearsay in an affidavit on a motion seeking injunctive relief. Murray, J. stated at para.18:

> While seeking an interlocutory injunction is not strictly speaking, a procedural right, it is a procedural step in the litigation process. . . .

[15] I will review the hearsay I have found inadmissible and have not considered in reaching my decision.

[16] The first sentence of para. 4(c) states a fact without stating the source. However, it is reasonable to conclude the affiant has knowledge based on his role at Clarke. The remaining sentence is not evidence of anything and will not be given any weight.

[17] Paragraph 4(g) offers opinion evidence based on both unlisted sources and a newspaper article. This is not admissible.

[18] Paragraph 4(h) does not state the source of the statement concerning other trucking businesses. The statement concerning the use of foreign workers is admissible but, as will be seen later in the decision, does not assist Clarke.

Application of the Code of Conduct

[19] Initially, in written submissions, Clarke argued a "Code of Conduct" was allegedly part of the employment contracts of Dinham and O'Toole. Clarke abandoned these arguments. Instead, Clarke focused on the argument that, as key employees, Dinham and O'Toole owe fiduciary duties to Clarke and argued there is a serious issue raised that these duties have been breached.

Law and Analysis

Extraordinary Remedy

[20] Section 43(9) of the *Judicature Act*, R.S.N.S. 1989, c. 240 governs injunctive relief:

> (9) A *mandamus* or an injunction may be granted or a receiver appointed by an interlocutory order of the Supreme Court, in all cases in which it appears to the Supreme Court to be just or convenient that such order should be made, and any such order may be made either unconditionally or upon such terms and conditions as the Supreme Court thinks just, and if an injunction is asked, either before or at or after the hearing of any cause or matter, to prevent any threatened or apprehended waste or trespass, such injunction may be granted if the Supreme Court thinks fit, whether the person against whom such injunction is sought is, or is not, in possession under any claim of title or otherwise or, if out of possession, does or does not claim a right to do the act sought to be restrained, under any

> colour of title, and whether the estates claimed by both or by either of the parties are legal or equitable.

[21] It is trite law that an injunction is a drastic remedy that is reserved for only extraordinary cases. Courts are reluctant and cautious to order injunctive relief unless there is clear evidence to demonstrate that an injunction is necessary. These overarching considerations have been summarized by Justice Saunders in *Noreco v. Laserworks*, (1994) 136 N.S.R. (2d) 309, at paras. 25 and 27:

> 25 In Nova Scotia neither approach is to be applied slavishly. A too rigid application of one test over the other might well lead to an unjust result. The particular circumstances *between the parties* should always be considered in deciding whether it is just and equitable to grant an interlocutory injunction.
>
> . . .
>
> 27 No matter what test is applied, the ultimate question remains the same: Is it just or convenient that I exercise my judicial discretion by granting the temporary but drastic remedy of interlocutory injunctive relief? I have considered the cases referred to me by counsel. They suggest to me a healthy reticence in allowing interlocutory injunctions. It is, after all, an extraordinary remedy reserved to those cases where there is clear evidence of circumstances necessitating its imposition. The reasons for restraint are obvious. To permit the application is to impose a harsh remedy at the interlocutory stage before there has been a through, proper and vigorous determination of the rights and obligations of the parties. There is also a heightened risk of error when applications are limited to affidavit evidence which may or may not be tested by cross-examination. In that respect I concur with the sentiments expressed by Burchell, J. in *Kelly's Stereo Mart (Atlantic) Ltd. v. Schneider Enterprises Limited* (1986), 72 N.S.R. (2d) 56 (T.D.) and Davison, J. in *J.W. Bird and Co. Ltd. v. Levesque et al.* (1988), 82 N.S.R. (2d) 435 (T.D.).

Test for an Injunction

[22] The three-part test for injunctive relief remains as stated in *RJR – MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311:

1. Is there a serious issue to be tried?
2. Will the moving parties suffer irreparable harm if the injunction is not granted?
3. Does the balance of convenience favour granting the injunction?

[23] The onus in on the applicant.

***Prima Facie* Case**

[24] Clarke argues that it need only demonstrate a serious issue to be tried in relation to the questions: (1) are Dinham and O'Toole key employees who owe fiduciary duties to their former employer and (2) did they breach those duties?

[25] Clarke argues they must raise an issue that is neither frivolous nor vexatious to receive injunctive relief. The defendants argue when the court is being asked to enjoin employees from contacting or soliciting business from customers (regardless whether such a remedy is being sought based on a non-competition clause, non-solicitation clause or on the bases of an alleged breach of fiduciary duties), the first part of the test for injunctive relief requires, not merely a serious issue to be tried, but requires the moving party to demonstrate a higher "*prima facie* case." While a serious issue threshold is a low one, discouraging a prolonged examination of the merits, a *prima facie* threshold is higher.

[26] In advancing this argument the defendants rely on *Keltic Transportation Inc. v. Montgomery*, 2014 NSSC 407, where Hood, J. said:

> 14 In cases involving employment, the old test of "*prima facie* case" has been used. . . .

[27] In so doing, Hood, J. had regard for the comments of LeBlanc, J. (as he then was) in *Front Line Safety Ltd. v. MacKenzie* (2002), 2003 NSSC 15.

> 21 . . . there is a general trend towards the application of the *'prima facie'* test in cases involving restrictive covenants in employment contracts. . . .

[28] LeBlanc, J. went on to refer to the text S.R. Ball in *Canadian Employment Law* (Aurora: Canada Law Book, 2002), page 22-4:

> Special considerations arise in the employment context as to the appropriate threshold test that should be utilized in deciding whether an injunction should issue. An examination of the relative strength of each party's case may be appropriate where the likelihood of delay in obtaining a hearing date for trial of the action will mean that the time which an employee can effectively be restrained will expire before trial. If an interlocutory injunction will effectively dispose of the action, there has been strong judicial sentiment to look at the merits of the case. Depending on the likelihood of a trial taking place, it may become necessary for the court to determine more than whether there is a serious issue to be tried,

> despite the fact that the court seeks to discourage prolonged interlocutory battles based on contradictory affidavit evidence.
>
> In *Jet Print, supra*, Nordheimer J., also noted at para. 11 that "when the injunction sought is intended to place restrictions on a person's ability to engage in their chosen vocation and to earn a livelihood, the higher threshold of a strong *prima facie* case is the more appropriate test to be applied."

[29] Clarke seeks an injunction for a period of twelve months. Consequently, the proposed injunction would, likely, expire before the action proceeds to trial.

[30] Given the jurisprudence in *Front Line Safety, supra*, and *Keltic Transportation Inc., supra*, I too conclude that the proper test to meet is a *prima facie* case. In doing so, I am mindful of the comments in *Imperial Sheet Metal Ltd. et. al. v. Landry and Gray Metal Products Inc.* 2007 NBCA 51; however, the court noted the employment law cases requiring the elevated standard of *prima facie* case and I conclude this is such a case.

[31] The allegation that Dinham and O'Toole are fiduciaries and therefore need to be enjoined for a period of twelve months calls for the imposition of the *prima facie* test.

[32] In reviewing the three factors, I am cognizant of the warning of Sharpe, J. against taking a too formalistic approach (*Injunctions and Specific Performance* (Toronto: Canada Law Book, loose-leaf, 2.600-2.630)).

What constitutes a *Prima Facie* Case?

[33] In *Keltic Transportation Inc., supra*, the court quoted, with approval, the description of a *prima facie* case in *Sheehan & Rosie Ltd. v. Northwood*, [2000] O.J. No. 716 (ONT. S. CPRJ.) at para. 19:

> 19 How does one quantify a "strong *prima facie* case"? If a plaintiff has a *prima facie* case, it means that he will succeed at trial on his evidence if that evidence is not rebutted; and, to succeed at trial, he must establish his case on a balance of probabilities. Thus, I gather that a strong *prima facie* case is one where the probability of success (in the absence of rebutting evidence) is better than 51% (but how much better I do not know).

[34] I must first consider whether the evidence demonstrates a *prima facie* case that Dinham and O'Toole are fiduciaries.

Are Dinham and O'Toole key employees who owe Clarke fiduciary duties?

[35] In considering whether this is the rare occasion requiring the extraordinary remedy of an injunction, the court must consider the preliminary question of the nature of the employment relationship and the existence of potential fiduciaries duties. While Clarke argued in its written submissions that both O'Toole and Dinham are fiduciaries, at the motion, Clarke only focused on Dinham. Clarke did not specifically abandon its argument that O'Toole is a fiduciary. I will address both.

Glen Dinham

[36] Dinham began employment at Clarke in April 2013, after leaving his employment at Day & Ross. On April 26, 2013, Dinham signed a revised employment agreement with Clarke. The revised employment agreement did not contain a non-competition clause. During negotiations, Dinham refused to enter into an agreement with Clarke containing a non-competition clause, consequently, Clarke acquiesced and removed the non-competition clause from the proposed agreement.

[37] On April 9, 2015, Dinham was promoted to General Manager, Atlantic Region, Flatbed Division, with Clarke. Dinham admits in his affidavit:

> 25. As General Manager – Atlantic Region, Flatbed Division, I made decisions with respect to the operations within the flatbed division.

[38] Maillet's original affidavit filed on September 13, 2017 (the "Maillet Affidavit") lists Dinham's responsibilities.

> 13. As General Manager – Atlantic Region, Flatbed Division, Dinham exerted significant autonomy and had the general sole responsibility for the Flatbed Division within Atlantic Canada. His day-to-day responsibilities included:
>
> - Setting the strategic direction of the flatbed maritime group;
> - Sourcing new revenue;
> - Managing existing port business and securing new volume;
> - Managing customer relationships;
> - Participating in the hiring of owner operators of trucks and company drivers;
> - Managing existing owner operators and CRT's driver fleet;

- Managing operations staff;
- Ensuring flatbed trailer banks are kept in good working order;
- Setting rates for revenue, negotiating rates with third party carriers and maximizing profit for the division;
- Dispute resolution – working with Credit and Collections on billing disputes; and
- Financial statement review and budget preparation.

[39] Both Dinham and O'Toole reported to upper management about financial and operational matters.

Jeffrey Scott O'Toole

[40] O'Toole commenced employment with Clarke in January 2001 as a dispatch load coordinator. Prior to being promoted to the position of Operations Manager, Atlantic Region, on April 9, 2015, Mr. O'Toole considered leaving Clarke to accept an offer from Jardine Transport Ltd. in March 2015. All other members of the Clarke senior management team left for the employ of Jardine at that time; Mr. O'Toole did not. Prior to Mr. O'Toole leaving the employ of Clarke in July 2017, Transforce Inc., which acquired Clarke in October 2013, was acquired by Contrans in July 2014. The involvement of Contrans is significant given Mr. O'Toole's experience with the company.

[41] O'Toole, in his affidavit sworn October 2, 2017, reviewed both his family's and his negative history with Contrans in the late 1990s. Prior to O'Toole leaving the employ of Clarke, there was an indication from the Vice-President of Contrans Flatbed Division, Steve Brooksaw (who was to be O'Toole's new boss), that Clarke's flatbed operation may relocate to Truro. In addition, O'Toole became privy to the issues surrounding the payment of Dinham's outstanding medical bills (to be discussed in more detail later).

[42] On July 6, 2017, O'Toole met with Mr. Brookshaw. This meeting left O'Toole with negative feelings towards Clarke. O'Toole resigned on July 14, 2017.

[43] O'Toole, as the Operations Manager, Atlantic Region, Flatbed Division, reported to and assisted Dinham, the then General Manager, Atlantic Region, Flatbed Division.

[44] The Maillet Affidavit lists O'Toole's responsibilities:

> 14. As Operations Manager, Atlantic Region, Flatbed Division, Mr. O'Toole equally exerted significant autonomy while reporting to and assisting Mr. Dinham. Mr. Branchaud, Mr. Snow and the various owner/operators reported to him. His responsibilities included:
>
> - Sourcing new revenue;
> - Managing existing general flatbed business and securing new volume;
> - Customer relationships:
> - Participating in the hiring of owner operators of trucks and company drivers;
> - Managing existing owner operators and CRT's driver fleet;
> - Managing CRT's operations staff when Mr. Dinham was away;
> - Setting rates for revenue, negotiating rates with third party carriers and maximizing profit for the division;
> - Dispute resolution – working with Credit and Collections on billing disputes;
> - Order entry in TL system, dispatch loads to the drivers;
> - Financial statement review and budget preparation.

[45] O'Toole admits at para. 21 of his affidavit:

> 21. As Operations Manager, Atlantic Region, I made decisions with respect to the operations within the flatbed division.

Fiduciaries

[46] The defendants submit that neither Dinham nor O'Toole are key employees or fiduciaries of Clarke. The defendants argue that any decisions either Dinham or O'Toole made were only with respect to the Flatbed Division of Clarke and neither individual were indispensable components of the entire Clarke organization. Furthermore, their day-to-day financial decisions required approval of upper management including from Mr. Brookshaw and Ms. Ruby Murphy Collins. The defendants admit that "Dinham and O'Toole made decisions with respect to the flatbed divisions of Clarke."

[47] The leading case on fiduciaries continues to be *Frame v. Smith*, [1987] S.C.J. No. 49 (SCC). The characteristics of a fiduciary relationship were set forth by Wilson, J. in dissent. However, the test has been widely accepted:

> 60. Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:

> (1) The fiduciary has scope for the exercise of some discretion or power.
>
> (2) The fiduciary can unilaterally exercise that power or discretion so as to affect, he beneficiary's legal or practical interests.
>
> (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

[48] The characteristics of a fiduciary duty were further commented upon in *Hospital Products Ltd. v. United States Surgical Corp*, (1984), 55 A.L.R. 417 (Australia H.C.) and accepted by the court in *Frame, supra*. In *Hospital Products Ltd., supra* a fiduciary's characteristics are further delineated at para. 432:

> . . . there were two matters of importance in deciding when the courts will recognize the existence of the relevant fiduciary duty. First, if one person is obliged, or undertakes, to act in relation to a particular matter in the interests of another and is entrusted with the power to affect those interests in a legal or practical sense, the situation is . . . analogous to a trust. Secondly, . . . the reason for the principle lies in the special vulnerability of those whose interests are entrusted to the power of another to the abuse of that power.

[49] In *Misener v. H.L. Misener & Son Ltd.* (1977), 77 D.L.R. (3d) 428 (NSSC), the court described the discretion which is typically reposed in a fiduciary at p. 440:

> The reason such persons are subjected to the fiduciary relationship apparently is because they have a leeway for the exercise of discretion in dealing with third parties which can affect the legal position of their principals.

[50] In considering whether a former employee owed fiduciary duties to their employer, Edwards, J., in *Survival Systems Training Ltd. v. Survival Systems Ltd.*, 2012 NSSC 202, stated at para. 38:

> 38 . . . Comeau, as Special Projects Officer, was a manager with SSTL and worked together with Carroll to develop and implement business strategies, market SSTL's services to clients and maintain client relations. . . .

[51] These collective descriptions bear a resemblance to the descriptions of the duties said to have been held by Dinham and O'Toole. Given the unchallenged evidence provided, there is a *prima facie* case that Dinham and O'Toole owe fiduciary duties to Clarke. In so concluding, I considered the factors set forth by

Justice Granger in *GasTOPS Ltd. v. Forsyth*, 2009 CarwellOnt 5773 (Ont. S.C.J.), at paras. 82-85:

> 82 . . . A key employee is one whose position and responsibilities are essential to the employer's business, making the employer particularly vulnerable to competition upon that employee's departure.
>
> . . .
>
> i. What were the employee's job duties with the former employer?
>
> ii. What was the extent or frequency of the contact between the employee and the former employer's customers and/or suppliers?
>
> iii. Was the employee the primary contact with the customers and (or) suppliers?
>
> iv. To what extent was the employee responsible for sales or revenue?
>
> v. To what extent did the employee have access to and make use of, or otherwise have knowledge of, the former employer's customers, their accounts, the former employer's pricing practices, and the pricing of products and services?
>
> vi. To what extent was the former employee's information as regards customers, suppliers, pricing, etc., confidential?
>
> . . .
>
> 84 After identifying an employee as "key", further determining whether that employee is a "fiduciary" is a difficult endeavour. According to James D'Andrea, "generally, a fiduciary is one who is empowered to act on behalf of and for the benefit of another with the ability to affect that other's interest through the use of discretion" (*Employment Obligations in Canada*, looseleaf (Aurora Ont.; Canada Law Book 2006))
>
> 85 The jurisprudence has imposed fiduciary obligations on employees in a number of different factual circumstances and in so doing have considered:
>
> (a) whether the employee has scope for the exercise of some discretion or power, the employee can unilaterally exercise that power or discretion so as to effect the beneficiary is [sic] legal or practical interest and whether the beneficiary is vulnerable to or at the mercy of the fiduciary holding the discretion or power;
>
> (b) knowledge of customer contact information, needs and preferences, and therefore, an ability to influence customers. An employee may be held to be a fiduciary if they are [sic] found to have "encyclopedic knowledge" of their employer's customers, unrestricted access to all customer lists and information concerning

> customers, privy to policy issues and personal contact with, and responsibility for, a large portion of customers: . . .
>
> (c) knowledge of the business and market opportunity of the employer or playing a role in the employer's strategic market development is a consideration in determining if the employees owed a fiduciary duty to the former employer. . . .
>
> (d) knowledge of and access to confidential information. It is not necessary for an employee to have access to corporate financial information to be found to be a fiduciary. It is the employee's access to information of which disclosure would make the employer vulnerable. In a sales environment, customer information is critical or in a technological environment, product specifications are critical. . . .
>
> (e) direct and trusted relationships with existing and potential customers, particularly where there is a "unique relationship with the clients personnel contacts and[the defendants] had direct access to confidential information as to the clients' needs, preferences and accepted rates": . . .
>
> (f) whether or not the employee's functions are essential to the employer's business, therefore rendering the employer vulnerable to the employee's departure. . . .
>
> Any one of these factors, or a combination of them, could result in a finding that an individual owes a fiduciary obligation to his employer.

[52] *FLS Transport Services Inc. v. Charger Logistics Inc.*, 2016 ONSC 3652, considered similar issues to those in this motion. FLS provided logistics and freight brokerage services. Mr. Spalding the senior branch director of FLS resigned. Several other employees resigned from FLS, and as a result, FLS saw a 90% decline in the number of orders placed by clients.

[53] The allegation by FLS was that former employees removed confidential information and used that information to solicit business. An injunction was brought against several former employees, including Spalding as the senior branch director.

[54] In *FLS, supra,* the court stated:

> 52 In determining whether an individual is a fiduciary, the court must look at the nature of the relationship between the parties, the job function and the responsibilities being performed. These factors are more determinative of the

> issue than the title held by the employee. The varying degrees of trust, confidence and reliance given to the employee and the corresponding vulnerability or dependency of the employer to competition when the person leaves are the most pertinent factors in determining whether a fiduciary duty exists.

[55] Both Dinham and O'Toole had extensive knowledge of Clarke's operation and customers. While O'Toole reported to Dinham, both had extensive managerial responsibilities and both had many individuals reporting to them. There is a *prima facie* case that they were both responsible for managing existing business, customer relations, hiring, setting rates for revenue, negotiating with third-parties, and were responsible for advancing the business. The evidence demonstrates they had a lot of personal contact with and responsibility for a vast proportion of Clarke's customers in the Flatbed Division.

[56] This is not to say that every employee, who has knowledge of and contact with any employer's customers would be a fiduciary. However, in this case, both individuals held very senior managerial positions and the evidence makes out a *prima facie* case that they had knowledge and control over Clarke's operations. (*Phytoderm Inc. v. Urwin*, [1999] O.J. No. 383 (Ont. Gen. Div.).

[57] While Dinham and O'Toole both reported to others at Clarke concerning certain company matters, the evidence, at this interim stage, does satisfy, on a *prima facie* basis a level of knowledge of:

1. Customers and ability to influence

2. Business and market opportunity and development

3. Confidential information

[58] The Maillet Affidavit provides that both employees "exerted significant autonomy."

[59] Based on the information provided, I conclude a *prima facie* case has been made out that Dinham and O'Toole are fiduciaries.

Is There a *Prima Facie* Case that Fiduciary Obligations were Breached?

[60] Having found a *prima facie* case that Dinham and O'Toole owe fiduciary duties to Clarke, the next question is whether there is a *prima facie* case that

Dinham and O'Toole have breached those fiduciary duties. The evidence presented by Clarke includes the Maillet Affidavit and the Maillet Rebuttal Affidavit.

[61] The evidence provided at this interim motion is largely based on Maillet's conjecture and suspicion that Dinham and O'Toole have taken confidential information and are using it to solicit customers and owner/operators from Clarke. The affidavit evidence of the defendants categorically disputes these allegations.

Allegations

[62] Clarke's allegations of breach of fiduciary duties can be organized into the four categories:

1. Wiping the cellular phones;
2. Customer Contact List to External Email;
3. Soliciting customers;
4. Soliciting Employees and Owner/Operators.

[63] Both Dinham and O'Toole specifically deny the use of or misuse of confidential information.

Wiping the Cellular Phone

[64] Both Dinham and O'Toole address this allegation. Dinham wiped his company cellular phone and says that the device was erased to remove all personal information, including personal contacts, photographs and music.

[65] O'Toole says he installed personal banking software on the cellular phone and used the phone to store personal family information, including photos and personal apps. He wiped the cellular phone to remove the personal information that he had stored on that phone.

[66] There is no evidence any emails contained on the phone were lost or not backed up by the company server.

Client Contact List to External Email

[67] Clarke alleges that prior to Dinham's resignation, while still employed at Clarke, he sent "highly confidential information" belonging to Clarke to an external email account. Specifically, the allegation is that Dinham sent a client contact list to an external email on July 7, 2017.

[68] Clarke alleges that Dinham transmitted other company information including revenue and financial information. The evidence of these alleged transmissions has not been provided.

[69] Dinham's affidavit asserts that while employed by Clarke he was permitted to work from home one day a week. He would send work related information from his work email to his personal email at home and print documents from his home computer.

[70] Dinham admits sending a list of contacts from his work email at Clarke to his personal email account. He deposed he did so to separate his personal contacts from his professional contacts and update his personal contacts list.

Soliciting Customers

Wilsons

[71] Clarke alleges Dinham was arranging freight services for another company while still employed by Clarke. Specifically, Clarke points to an email recovered from Dinham's laptop that purports to show on July 20, 2017, a day prior to resignation, Dinham emailed Scott Demont to arrange for the pick up of certain machines at "Wilsons." Mr. Demont is said to be an employee of Day & Ross.

[72] Dinham also explained his communications about machines at Wilsons and deposed that none of Clarke's owner/operators were available in the area at the time the delivery needed to be made. Dinham brokered the load through Day & Ross. Dinham's affidavit stated that it was common practice in the flatbed trucking industry to broker loads to other companies when their own owner/operators were unavailable.

Mathers

[73] The Maillet Affidavit purports to provide evidence that Dinham and O'Toole were communicating with Mathers Freight Forwarding ("Mathers"), a customer of Clarke, after they left the employ of Clarke. There is also the statement that Clarke is no longer receiving work from Mathers. The inference the court is asked to draw is the alleged loss of work is due to breach of fiduciary duties by Dinham and O'Toole.

[74] On October 2, 2017, the defendants filed an uncontested affidavit of Helene McCrea, ("McCrea Affidavit") who is the Manager of Customs and Freight Forwarding for Mathers Logistics Ltd. a Division of IH Mathers. Mathers Freight Forwarding is a Division of IH Mathers.

[75] Ms. McCrea states that Mathers is not an exclusive customer of any one trucking company. Ms. McCrea states she has dealt with Dinham both when he was employed with Day & Ross up to 2013, and after when he was employed by Clarke. Ms. McCrea further deposes that she attempted to contact Dinham at Clarke on two occasions on Friday, July 21, and Monday, July 24, 2017. She was advised by Tom Branchaud that Dinham was no longer employed with Clarke.

[76] Ms. McCrea contacted a mutual friend, Dennis O'Toole, who works in the transportation industry, who advised her that Dinham had commenced employment with Day & Ross.

[77] The McCrea Affidavit directly disputes the Maillet Affidavit and the suggestion that Dinham solicited Mathers business from Clarke.

ACL

[78] Clarke alleges a loss of business from Atlantic Container Lines ("ACL"). An email from Scott Mclaughlin is offered as evidence that Day & Ross now services ACL again as a client. Clarke says this demonstrates a *prima facie* case that Dinham and O'Toole are responsible for the loss of business caused by their breach of fiduciary duties.

United Rentals

[79] Clarke argues the Maillet Affidavit evidences O'Toole bidding on United Rentals contracts using his personal email address. United Rentals was a customer of Clarke, and Clarke says they are no longer receiving work from United Rentals.

[80] Clarke suggests the inference to be drawn from these emails is that Dinham and O'Toole were actively soliciting customers from Clarke.

[81] O'Toole refutes the allegations that he solicited United Rentals.

[82] O'Toole explains the United Rentals system of inviting bids. O'Toole says that on or before October 23, 2015, the Clarke email server blocked emails from the mass bid request sent from United Rentals. Tenders from United Rentals would then be sent directly to O'Toole's Gmail address. O'Toole would use that email account to bid on United Rental tenders.

[83] The Maillet Affidavit suggests O'Toole was competing with his employer bidding for a competitor. O'Toole explains he was bidding for Clarke.

Atlas

[84] The Maillet Affidavit also offers that Atlas Copco Canada ("Atlas") was a customer of Clarke, with Dinham as their primary contact. Clarke says they are no longer receiving work from Atlas.

[85] Dinham says that United Rentals, Mathers, Atlas and ACL were customers of Day & Ross prior to him leaving Day & Ross in April 2013.

Soliciting Employees and Owner/Operators

[86] Clarke further argues that resignations of other employees, as well as owner/operators are all due to Dinham and O'Toole soliciting them to work at Day & Ross. There is however, little to demonstrate a serious issue of solicitation let alone a *prima facie* case.

[87] Dinham denies soliciting any owner/operators or employees. Dinham also listed several employees who have left Clarke and have not gone to work for Day & Ross, but have gone to work for other competitors. He denies any suggestion that resignations were solicited by him.

[88] There are two affidavits of owner/operators, the affidavit of Steve Daley and Scott MacDonald, both filed on October 2, 2017. Both individuals depose that they have been working as an owner/operator in the transportation business for more than 20 years.

[89] Mr. MacDonald notes that he has worked for nine different companies in the transportation industry. He worked as an owner/operator with Clarke beginning in 2003 and left in 2011 to work as an owner/operator for Premium Ventures. He returned to Clarke in 2013. He notes that he developed a good working relationship with O'Toole and it was in July 2017 that he was advised by another owner/operator that O'Toole had left the employment with Clarke.

[90] Mr. MacDonald deposes that he contacted Day & Ross and O'Toole to arrange to commence working for Day & Ross as his work with Clarke had been slowing down. He says neither O'Toole, Dinham, nor anyone else at Day & Ross solicited him to come and work.

[91] Mr. Daley provided an affidavit which gives his history of working in the transportation industry as an owner/operator and as an employee at Day & Ross until 2013, when he began working at Clarke. Mr. Reid, the Manager of the Flatbed Division of Clarke, informed Mr. Daley that Dinham had left Clarke.

[92] Mr. Daley contacted Day & Ross and learned that Dinham had commenced employment with Day & Ross and Mr. Daley advised that he wanted to work with Day & Ross. He says neither O'Toole, Dinham, nor anyone from Day & Ross solicited Mr. Daley.

[93] There have been no affidavits provided in support of Maillet's assertions that Dinham or O'Toole solicited any owner/operators.

Summary of Allegations

[94] All allegations are vigorously defended by the defendants whose counsel characterize the allegations as "a hail of invective." In all the circumstances, I agree.

[95] In reviewing all the authorities relied upon by Clarke, the basis of injunctions has been identifiable conduct and unfair competition.

[96] In reviewing the affidavits, there is very little evidence, at this initial interim stage that demonstrates a *prima facie* case or even raises a serious issue that the defendants are soliciting employees, customers or owner/operators, or using confidential information. Some customers and owner/operators have followed Dinham and O'Toole to Day & Ross; however, this alone does not support the imposition of an injunction. Evidence may be marshalled during the litigation, but at this interim, early stage of the proceedings, I find the circumstances do not support the extraordinary and rare remedy of an injunction.

Irreparable harm

[97] In concluding that there is a *prima facie* case that Dinham and O'Toole owe fiduciary duties but not a *prima facie* case that they breached those duties, I will go on to address the issue of irreparable harm and complete the tripartite analysis.

[98] Even if Clarke could demonstrate a *prima facie* case that the defendants breached fiduciary duties, Clarke has failed to demonstrate that without an injunction it would suffer irreparable harm that could not be compensated for by way of damages. In *RJR – MacDonald Inc., supra*, the court described the nature of the harm that must be suffered to attract an injunction at para. 64:

> 64. "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision (*R.L. Crain Inc. v. Hendry* (1988), 48 D.L.R. (4th) 228 (Sask. Q.B.)); where one party will suffer permanent market loss or irrevocable damage to its business reputation (*American Cyanamid, supra*); or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined (*MacMillan Bloedel Ltd. v. Mullin*, [1985] 3 W.W.R. 577 (B.C.C.A.)). The fact that one party may be impecunious does not automatically determine the application in favour of the other party who will not ultimately be able to collect damages, although it may be a relevant consideration (*Hubbard v. Pitt*, [1976] Q.B. 142 (C.A.)).

[99] The only evidence of irreparable harm provided by the plaintiff is contained in the Maillet Affidavit:

> 67. Dinham, O'Toole and others acting on behalf of Day & Ross have been actively soliciting, and succeeding, in taking business from CRT's customers. Mathers, United Rentals, ACL and Atlas Copco are all former CRT customers

> and represent 18.3% of CRT's 2016 revenue. If we lose any more owner/operators or market share to the Defendants, then CRT's business is at risk.

[100] Clarke's Flatbed Division is a subsidiary of a larger company, Clarke Inc., which in turn is a subsidiary of a larger organization, TFI International Inc. The reference in the Maillet Affidavit to Mathers, United Rentals, ACL, and Atlas, representing 18.3% of Clarke's revenue in 2016 is only in relation to the Flatbed Division. This does not reflect the larger operation of Clarke Inc. and the even larger operation of TFI International Inc. The Maillet Affidavit also suggests that if there is increased loss, in the future, then the business will be at risk. The risk is not alleged to be present currently, consequently there is no irreparable harm. The argument that Clarke will suffer irreparable harm is based on conjecture.

[101] Furthermore, if damages are proven at trial, the damages are capable of monetary quantification. There is no suggestion that Clarke will be put out of business without an injunction and there is no evidence of a permanent market loss. If Clarke is successful at trial, any losses are calculable based on revenue earned based on historical performance and any increase in Day & Ross' business based on the prior year. Quantification of loss in these circumstances is routinely done by accountants, actuaries and business valuators.

[102] Furthermore, Clarke does not say its business is at risk, only that it will be if a larger market share and more owner/operators leave. This alone demonstrates no irreparable harm. There is no suggestion that damages at the end of a trial would not compensate Clarke if their case is made out. Damages are an adequate remedy. There is no evidence Clarke will be put out of business or there will be irreversible damage. There is some evidence of loss of market share, but that alone is not enough (*Imperial Sheet Metal Ltd. et al. v. Landry and Gray Metal Products Inc., supra*).

Does the Balance of Convenience Favour Granting an Injunction?

[103] The balance of convenience requires "the determination of which of the two parties will suffer the greater harm from the granting or refusal of an injunction, pending a decision on the merits" (*RJR – MacDonald Inc, supra*).

[104] If the interim injunction is granted Dinham and O'Toole would be restrained from competing at all with Clarke, and Day & Ross would be restrained from conducting business.

[105] When weighing the balance of convenience, there is the argument by Clarke that an injunction will assist to prevent any breaches of fiduciary duties as required by law and will have no inconvenient effect on the defendants if they are indeed complying with their obligations in any event. However, this fails to appreciate that the remedy sought would prevent the defendants from obtaining business from customers who had a pre-existing business relationship with Day & Ross. An injunction could have an effect of unfairly restraining trade. The fact is customers are perfectly free to follow their contact to any business.

[106] It is true that if the defendants have neither solicited nor used confidential information then there would be no negative effect on them, however the remedy sought is more expansive and there needs to be a basis for the imposition of such a draconian remedy.

[107] Much turns on the fact and they are disputed. It may be Clarke will succeed at trial, but Clarke also may not. The balance of convenience weighs in favour of the defendants.

Conclusion

[108] Given this motion is heard well before there is a hearing on the merits and given courts are to be cautious in ordering injunctive relief, I find it is neither just nor convenient, in all the circumstances, at this stage to exercise my discretion and order an injunction.

[109] The motion is dismissed. I will hear from the parties on costs in the event they are unable to reach an agreement.

Justice Christa M. Brothers