IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Diamond Delivery Inc. v. Calder,* 2023 BCSC 194

Date: 20230209
Docket: S228772
Registry: Vancouver

Between:

Diamond Delivery Inc. and DIA Employees Ltd.

Plaintiffs

And

Leslie Calder, Pam Calder, West Coast Cartage Co. Ltd. and Judge Trucking & Imports Inc.

Defendants

Before: The Honourable Madam Justice Sharma

Reasons for Judgment

Counsel for the Plaintiffs:	R.A. Jarvis A. Kassam
Counsel for the Defendants Leslie Calder and Pam Calder:	C. Martin
Place and Date of Trial/Hearing:	Vancouver, B.C. November 15, 2022
Place and Date of Judgment:	Vancouver, B.C. February 9, 2023

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[1] This is an application by the plaintiffs for an interlocutory injunction. They allege the defendant Leslie Calder has violated the terms of a non-competition agreement he entered into when he sold his business.

[2] The position of the respondents Leslie and Pam Calder (who were spouses at the relevant time; the other named defendants did not participate in this application) is that the plaintiffs cannot enforce that agreement. They claim the non-competition agreement is not enforceable because: (1) it arose through Mr. Calder's employment, which was terminated when there was a change of ownership after Mr. Calder sold the business; and (2) the plaintiffs are not signatories to the non-competition agreement and, therefore, the non-competition agreement has essentially become void.

I. FACTS

A. Overview

[3] The plaintiffs operate a trucking company with operations across Western Canada under the brand name Diamond Delivery. Diamond Delivery has been in the trucking business for about 40 years. Although the details of its corporate structure have changed as a result of numerous acquisitions, the company has always operated under the Diamond Delivery name. Through its acquisitions, Diamond Delivery has expanded its business to offer a full range of transportation and logistics, and delivery services in Vancouver and throughout British Columbia.

[4] In 2015, the company expanded into the flat deck transport business by purchasing Sonic Transport Ltd. ("Sonic") from the defendants, Leslie and Pam Calder. As part of the purchase agreement, Mr. Calder was retained as an employee of Diamond Delivery to operate their flat deck transport business, which continued to operate under the Sonic name. However, on September 30, 2022, Mr. Calder announced his resignation from Diamond Delivery, and his last day of employment was October 11, 2022. He left to work for the defendant West Coast Cartage Co. Ltd. ("WCC"), indicating a desire to purchase the company.

[5] Diamond Delivery submits that Mr. Calder's work for WCC violates a non-competition agreement signed as part of its purchase of Sonic. It also alleges he continues to violate the non-solicitation clause of his employment contract. Diamond Delivery alleges Mr. Calder's actions have resulted in, and will continue to result in, the loss of customers and drivers, significant financial losses, harm to the business's reputation, and its ability to service its remaining clients.

[6] The plaintiffs filed several affidavits made by Diamond Delivery employees who held the following positions at the relevant times:

a) Michelle Medeiros, Controller;

b) Karl Gillies, President;

c) Rob Ross, General Manager;

d) Paul Korbeld, Area Manager; and

e) Lindsey March, Terminal Administrator.

[7] The respondents filed affidavits made by the following individuals:

a) the respondents Leslie and Pam Calder;

b) Sukhwant Singh Jhaj, owner and operator of WCC and the defendant Judge Trucking & Imports Inc. ("Judge Trucking"); and

c) four truck drivers who had worked with Mr. Calder, namely:

i. Ashad Ali;

ii. Harjit Singh Gosal;

iii. Karam Padda; and

iv. Amrinder Singh Deol.

B. The Founding of Sonic

[8] Mr. Calder started in the trucking industry as a driver. In 1989, he began working as a dispatcher. He worked with the same company for about 13 years. In 2002, Mr. Calder left this company to start a new company called Sonic with Ms. Calder.

[9] Sonic was a dispatching company rather than a trucking company, acting as an intermediary between customers who needed goods, equipment, or packages moved and truck drivers that provided delivery. Sonic brokered the transactions in exchange for a fee paid by the customer. From that fee, Sonic would then pay the drivers. Mr. Calder deposed that in his experience, the fee split has not varied much over the years, with approximately 25–30% of the fee remaining with the dispatching company and the remainder being paid to the driver.

[10] Mr. Calder deposed that Sonic succeeded because he built a reputation with his customers and drivers for being reliable and fair. In his view, the key to success was to establish trust with clients that their freight will be delivered on time and at market price. He strived to keep in constant contact with customers regarding complaints and delivery issues.

[11] At the same time, Mr. Calder deposed that because a dispatching company is completely reliant on independent truckers to deliver freight on time, he aimed to establish relationships with his drivers founded on fair treatment. Accordingly, he developed relationships with drivers at the company he worked at before Sonic, and many of those drivers decided to continue to work with him when he left to start his own business. His evidence is that a dispatcher's relationships with their drivers and customers are inherently personal because of the nature of the interactions.

C. Diamond Delivery Purchases Sonic

[12] The parties' evidence differs slightly regarding the events preceding the sale of Sonic. Mr. Gillies deposed that Mr. Calder approached Diamond Delivery in 2015

to ask if it wanted to purchase Sonic. He understood that Ms. Calder, who had done the bookkeeping for Sonic, no longer wanted to work.

[13] Mr. Calder deposed that Mr. Gillies made enquiries about Diamond purchasing Sonic in 2013, but no agreement was reached at that time. He also said that Sonic's eventual sale was preceded by Mr. Gillies' following-up in late 2014 to the enquiries he had made in 2013. However, their evidence is consistent as to the fact that Ms. Calder's desire to stop working made the deal viable at that time. I do not find this difference in the evidence to be material or significant.

[14] At that time, Diamond Delivery was interested in growing its business and was attracted to Sonic, which focused on flat deck trucking. There is no dispute that during their discussions, Diamond Delivery made it clear that its standard policy during any acquisition was to require the principals to sign a non-competition agreement. Diamond Delivery's rationale for this policy is its belief that the trucking industry is highly competitive; it wanted to protect the goodwill and assets that it was purchasing.

[15] Mr. Calder's evidence was consistent on this point. During his discussions with Mr. Gillies, he understood Diamond Delivery viewed his continued employment with Sonic as a dispatcher to be essential. Mr. Gillies felt that there would be no value in the business unless Mr. Calder continued to dispatch for three years after the acquisition. This sentiment was reflected in the asset purchase agreement by the inclusion of a clause stating that Diamond Delivery would no longer be obligated to make further payments of the agreed purchase price should Mr. Calder resign from his position within three years of the closing date.

[16] On January 16, 2015, the Calders and the corporate entity that operated the Diamond Delivery brand, the R. Diamond Group of Companies Ltd. (the "Diamond Group"), entered into an asset purchase agreement whereby Sonic's assets were purchased for $450,000.

[17] As part of that deal, Mr. Calder entered into an employment agreement with the Diamond Group, remaining as the manager of Sonic's operations to preserve the business's contacts and goodwill. Mr. Calder was paid a yearly salary of $72,000. He worked Monday to Friday from 5:30 AM to 2:30 PM.

[18] The Calders also signed the required non-competition agreement. Both the non-competition agreement and employment agreement were attached as schedules to the asset purchase agreement.

[19] After acquiring Sonic, Diamond Delivery continued to operate the business under Sonic's brand until early 2022 because of the value of the name and brand recognition for customers. Diamond Delivery's position is that it relied almost entirely on Mr. Calder to manage that aspect of the business from 2015 until his recent resignation.

[20] The parties disagree as to how much control and autonomy Mr. Calder enjoyed while employed by Diamond Delivery after the sale of Sonic. The plaintiffs submit that Mr. Calder had "a significant amount of control and autonomy in managing the customer and driver relationships that were associated with the Sonic business". In contrast, Mr. Calder takes the view that he had no management role due to a number of circumstances relating to his employment. However, the evidence is consistent that he was considered the face of that part of the business and had unique and close relationships with customers and drivers.

[21] Mr. Calder acknowledged that he had "some measure of autonomy in dealing with problematic drivers", but stated that he was reprimanded or cautioned on the occasions where he went so far as to discipline drivers. He also deposed that he had no authority to hire or fire employees or enter into contracts with third parties (including drivers, who are subcontractors). Mr. Ross disputed that claim, deposing that Mr. Calder vetted and hired drivers on a regular basis, although he acknowledged that like all managers, Mr. Calder had to have the driver's abstracts approved by head office.

[22] Mr. Calder also deposed that he had no control over and made no decisions about freight rates. If a delivery rate was too low for a driver to take an order, Mr. Calder could not change it unilaterally. Instead, he would have to get approval from management to increase the rate in order to entice a driver to take the order. Mr. Gillies agreed with that statement, but was unaware of any example of management refusing to approve rates suggested by Mr. Calder.

[23] Mr. Ross again disagreed with Mr. Calder's evidence, deposing that Mr. Calder "often provided special quoted rates to his customers", and that he directly negotiated rates on larger accounts. Mr. Calder denied that there was a special or unique Sonic rate as alleged by Mr. Ross.

[24] Although he was only contractually obligated to remain working for Diamond Delivery for three years, in a 2018 conversation, he informed Mr. Gillies that he was enjoying the work and that he would stay on as dispatcher. Mr. Calder deposed he had not discussed the conditions of his employment with Mr. Gillies since this conversation.

D. Manitoulin Purchases Diamond Delivery

[25] In November 2021, the Diamond Group sold its assets, which included Diamond Delivery, to the Manitoulin Group ("Manitoulin"). Following the acquisition, business at Diamond Delivery continued as usual, and there were no significant operational changes. All employees, including Mr. Calder, were retained and signed employment continuation acknowledgement letters indicating they agreed that the terms of their employment would remain unchanged and their employment would be transferred from the Diamond Group to the plaintiff DIA Employees Ltd. ("DIA").

[26] DIA was part of the intercorporate group with the plaintiff Diamond Delivery Inc. ("DDI"), which is the entity that purchased Diamond Delivery when it was acquired by the Manitoulin. DIA acted as the payroll company, and DDI as the operating company.

[27] Mr. Calder was told in November 2021 that Diamond Delivery had been sold to Manitoulin. He deposed that he thought his non-competition and employment agreement with Diamond Delivery came to an end with this sale. While the Diamond Delivery's drivers were being asked to sign new independent contracting agreements with Manitoulin, Mr. Calder was not, which he stated contributed to his sense that his obligations under the asset purchase agreement for Sonic had come to an end.

[28] He deposed that he was told he had to sign an employment continuation acknowledgement letter to continue his salary and benefits, which read in relevant parts as follows:

> [T]his letter confirms that your employment is transferred from [the Diamond Group] to [DIA] as a result of the sale of the business effective November 19, 2021 per Section 189 (1) of the *Canada Labour Code*.
>
> We are pleased to confirm that your terms of employment are unchanged and shall remain as follows …The letter set out Mr. Calder's gross base salary, incentives, date of service, vacation eligibility, benefits and pay cycle, all of which were unchanged by the sale. Mr. Calder's signature is on the letter, dated November 19, 2021.

[29] Mr. Calder recalled signing the letter, but he deposed that he did not read it. However, he did notice the bolded amount listed for his gross base salary was incorrect. When he pointed out the error, he deposed that the terminal manager who had presented him with the letter stated, "Don't worry about it, everything will be taken care of". Otherwise, Mr. Calder says there was no discussion of the letter or its significance to his employment with Manitoulin, and that his meeting with the terminal manager lasted "less than a minute, as other employees were waiting to see [the terminal manager]". Mr. Calder did not recall being given a copy of the letter.

[30] Mr. Calder confirms there was no material change in his dispatching duties at Diamond Delivery after November 2021.

[31] In the spring of 2022, Diamond Delivery decided to stop using the Sonic brand. Up to that point, the company had three separate dispatchers, each of whom

were dispatching a portion of Diamond Delivery's flat deck trucks. For efficiency, it was decided that Mr. Calder would be responsible for dispatching of all of the company's flat deck trucks. Mr. Gillies' impression was that Mr. Calder was fully on board with and embraced this change.

E. Initial Talks with Mr. Jhaj

[32] In the summer of 2022, Mr. Calder began discussions with Mr. Jhaj, the owner of both Judge Trucking and WCC, about the purchase of either or both of these companies. Judge Trucking and WCC are trucking companies that make some portion of their deliveries using flat deck trailers. Counsel for the plaintiffs submit that Judge Trucking and WCC provide freight services similar to Diamond Delivery.

[33] Mr. Calder deposed that Mr. Jhaj approached him in June 2022, asking if he knew someone who would be interested in purchasing WCC. After thinking the matter over, Mr. Calder decided he would be interested if the price was right, but he would need financial help to do so. His wife was unwilling to provide that assistance, so negotiations with Mr. Jhaj were "put on the back burner" in July 2022.

F. Mr. Calder's Dispute with Management & Renewal of Discussions with Mr. Jhaj

[34] In August 2022, Mr. Calder began reporting to Paul Korbeld, the new Area Manager of Diamond Delivery's Abbotsford Terminal. Mr. Korbeld reported to Diamond Delivery's general manager, Robert Ross.

[35] Mr. Calder "did not care for [Mr. Korbeld] from the outset and felt that they would have problems working together". He brought his concerns to Mr. Ross, who "made it clear that Mr. Korbeld had his full support". For his part, Mr. Korbeld deposed that "it was clear to [him] that [Mr. Calder] gave preference to Sonic customers and drivers" while attending to his dispatching duties.

[36] Although he generally enjoyed the work, Mr. Calder did not feel he could enjoy it with Mr. Korbeld as his manager, so he decided to renew discussions with Mr. Jhaj about WCC, and those discussions continued over the next five weeks.

[37] Although Mr. Jhaj and Mr. Calder could not agree on a contract for the sale of WCC, they also discussed Mr. Calder becoming a WCC employee.

G. Mr. Calder's Departure from Diamond Delivery

[38] Ultimately, Mr. Calder decided to leave Diamond Delivery, giving his two weeks' notice on September 30, 2022. Soon after, he was hired by WCC as a dispatcher earning $80,000 per year.

[39] As a result of Mr. Calder's resignation, a number of drivers started resigning from Diamond Delivery. As of the date of the filing of this notice of application, nine of 20 drivers who worked with Diamond Delivery have resigned. At least eight of those drivers left to work with Mr. Calder. Diamond Delivery also lost some customers with Mr. Calder's move, including its biggest customer for the flat deck trucking business under the Sonic brand.

[40] The plaintiffs allege that in September and October 2022, Mr. Calder directly solicited various customers and drivers to go with him in anticipation of his working for and eventually purchasing Judge Trucking and/or WWC.

[41] Mr. Calder acknowledged holding a meeting with drivers on October 8, 2022. At the meeting, which lasted 30 to 45 minutes, Mr. Calder did not hide from anyone at Diamond Delivery his interest in buying WCC. He told the drivers that he was working on purchasing WCC and hoping to get a deal done, but that he would start dispatching for the company immediately after leaving his present employment with Diamond Delivery. He then answered some questions.

[42] According to Mr. Calder, once he started telling drivers or customers that he was going to WCC, they would request his contact information or ask him how they could become WCC drivers or customers. Those inquires picked up in early

October, and he got WCC's contact information from Mr. Jhaj because he did not then have it.

[43] Mr. Calder denied asking drivers to leave Diamond Delivery for WCC. He also denied trying to induce customers to leave Diamond Delivery or to go to WCC. In response to both allegations, Mr. Calder deposed that he simply told the drivers and customers where he would be, and a number of them responded that they wanted to continue to work with him.

[44] Mr. Calder's evidence regarding his departure conflicts with that of several Diamond Delivery employees. According to the evidence of Ms. Medeiros, Mr. Ross, and Ms. March, Mr. Calder had told other Diamond Delivery employees that he intended on taking Diamond Delivery customers and drivers with him when he went to WCC. Mr. Ross also alleged that Mr. Calder sent text messages to several Diamond Delivery customers and drivers, informing them that he was leaving for WCC and wanted to maintain his relationship with them. Finally, Mr. Ross also deposed that Mr. Calder never "let on" to him that he intended to compete with Diamond Delivery's flat deck trucking work as this would have "raised [Mr. Ross's] hackles".

[45] With regard to the discrepancies between his own account and those of the other Diamond Delivery employees, Mr. Calder admits he told people different things regarding the details of the WCC sale at different times, but explained these differences reflected the fluid nature of the discussions between him and Mr. Jhaj. In one conversation with a Diamond employee, he acknowledges that he did not think the non-competition agreement applied to him because there was now a different employer. He deposed that he believed he "could advise the drivers and the customers where [he] was going and they c[ould] do what they wanted".

H. The Agreements

1. Asset Purchase Agreement

[46] The asset purchase agreement lists Sonic as the vendor and the Diamond Group as the purchaser. The Calders are collectively listed as the covenantor.

[47] Clause 2.1 confirms Sonic's $450,000 purchase price, of which $389,999 is attributed to goodwill. The closing date for the purchase was February 1, 2015: Clause 12.1. Clause 3.1 outlines the payment schedule for sale: A payment of $150,000 was due on the closing date and the remainder was to be paid in installments of $50,000 or $100,000, with the final payment due on February 1, 2018. However, pursuant to Clause 4.3, the Diamond Group would be freed from its obligation to make any outstanding payments if Mr. Calder resigned from his position within three years of the closing date.

[48] Clause 10 notes how the obligations of the Diamond Group are subject to the fulfillment of certain conditions precedent, two of which are relevant here. The first is Clause 10.5, which states both Sonic and the Calders "shall have entered" into a non-competition agreement with the Diamond Group. That non-competition agreement is attached to the asset purchase agreement as Schedule E.

[49] The second is Clause 10.6, which states Mr. Calder shall enter into an employment agreement with the Diamond Group. The employment agreement is dated February 1, 2015, and is attached to the asset purchase agreement as Schedule F.

2. Non-Competition Agreement

[50] The non-competition agreement is between Sonic as the vendor, the Diamond Group as the purchaser, and the Calders, collectively, as the principal. In the recitals, the agreement states that Sonic has agreed to sell its assets to the Diamond Group pursuant to the asset purchase agreement. The parties acknowledge that the purpose of the Diamond Group buying Sonic is to continue the business. The last recital continues that "in view of the foregoing, it is reasonable

and necessary to enter" into the non-competition agreement, whereby Sonic and the Calders agree not to compete with the business.

[51] Clause 1.1 of the non-competition agreement states that Mr. Calder cannot compete with Diamond Delivery within 100 km of its premises in Delta for a five-year period from the date Mr. Calder ceased to be employed:

> 1.1 The Vendor and the Principal and each of them will not, directly or indirectly, whether as owner, shareholder, director, agent, officer, employee, consultant, independent contractor or in any other capacity whatsoever, of a corporation, partnership or proprietorship, compete with, or engage in, or be financially concerned or interested in, or advise, lend money to, guarantee the debts or obligations of or permit his or her name to be used or employed by any person engaged in or concerned with or interested in the provision of the Services within 100 km of the Premises (the "Territory") for a period of five (5) years commencing on the last date that either of the Principal is employed by the Purchaser (the "Effective Date").

[52] The non-competition agreement's preamble defines "Services" as "multi-carrier distribution, local cartage and charter trips, and freight services".

[53] Clause 2.1 of the non-competition agreement contains several important acknowledgments and agreements between the parties. In particular, the plaintiffs point to Clause 2.1(c), which declares that the purchase price "is substantially based on the exclusive right to carry on the Business to the extent contemplated in this Agreement … [which] will not be possible if the Vendor or the Principal acts in breach of this Agreement".

[54] Clause 2.1(e) provides an acknowledgement that "[t]he covenants and conditions of this Agreement are reasonable and necessary for the protection of [the Diamond Group's] investment in the Assets, and for the protection of the Business."

[55] Clause 2.2 acknowledges that a breach of the non-competition agreement would result in damages to the Diamond Group that would not be fully compensable with monetary damages, such that the Diamond Group would be entitled to seek an injunction, in addition to any other available remedies.

[56] The plaintiffs also focus on Clause 3.1, which deals with the assignment of the non-competition agreement:

> Subject to the limitations on assignment contained herein, each and all of the covenants, terms and provisions of this Agreement shall be binding upon and ensure to the benefit of the Purchaser, its successors and assigns and shall be binding upon and enure to the benefit of Vendor and the Principal, and their heirs, executors and personal representatives.

[57] Mr. Calder emphasized that Clause 3.3 states the non-competition agreement has a "personal nature", it may be not be assigned by Sonic.

3. Employment Agreement

[58] This agreement lists the Diamond Group as the employer and Mr. Calder as the employee, hired as a "Dispatcher/Manager". His duties are outlined in Schedule A to the employment agreement. The clauses relevant to the issues in this application are described below.

[59] Clause 22 prohibits Mr. Calder from soliciting Diamond Delivery's customers and employees during his employment and for six months following termination:

> The Employee agrees that during employment and for [a] period of 6 months following the termination of his employment, however caused, the Employee: shall not hire or take away or cause to be hired or taken away any employee of the Employer; and the Employee shall not directly or indirectly solicit business from any client or customer of the Employer which the Employee regularly serviced or solicited during his employment with the Employer.

[60] Certain clauses under a heading titled "Non-Competition" have been struck out and replaced with a notation, "See Asset Purchase Agreement with Sonic Transport Ltd.".

[61] Further, Clause 20 prohibits Mr. Calder from sharing or using any of Diamond Delivery's confidential information:

> 20. The Employee agrees that except in the normal course of performance of his duties and responsibilities, or as required by law, the Employee will not directly or indirectly, orally or in writing, divulge, discuss, use, disseminate or employ any confidential or proprietary information of the Employer relating to the Employer's assets, contracts, performance, customers, wages, salaries or any other matter or thing which the Employer deems or treats as confidential.

[62] Clause 35 prohibits the Diamond Group and Mr. Calder from assigning or transferring their respective interests in the agreement to any person "without the prior consent in writing of" the Diamond Group. Mr. Calder's consent is not required. Clause 36 states the employment agreement inures to the benefit of the parties' "respective heirs, executors, administrators, successors and permitted assigns".

II. LEGAL PRINCIPLES

[63] The parties do not dispute the general test to establish an injunction. An interlocutory injunction is an extraordinary remedy that may be granted when "it appears to the court to be just or convenient" to do so: *Law and Equity Act*, R.S.B.C. 1996, c. 253, s. 39(1).

[64] In *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at 334, 1994 CanLII 117 [*RJR-MacDonald*], the Supreme Court of Canada affirmed the three-stage test for courts to apply when considering an application for an interlocutory injunction, which asks:

a) Have the applicants raised a fair question for trial or a serious question to be tried?

b) If the injunction is not granted, will the applicant suffer irreparable harm, *i.e*., harm that cannot adequately be compensated by damages?

c) Does the balance of convenience favour granting the injunction such that the applicants are likely to suffer greater harm than the respondents if the injunction is refused?

(See also *British Columbia (Attorney General) v. Wale*, 9 B.C.L.R. (2d) 333, 1986 CanLII 171 (C.A.).)

[65] It is well-established that the *RJR-Macdonald* test is not to be applied in a rigid or formulaic manner "because the criteria are only a judicial expression or explanation of the statutory authority for injunctions" found in s. 39(1) of the *Law and*

Equity Act: *Tracy v. Instaloans Financial Solutions Centres (B.C.) Ltd.*, 2007 BCCA 481 at para. 33.

[66] Non-competition obligations that form part of an employment agreement are viewed with heightened scrutiny. In an injunction application where a party seeks to enforce a restrictive covenant, a higher standard of proof is required: Instead of simply demonstrating that there is a serious question to be tried, the applicant must establish a strong *prima facie* case against the defendants: *Belron Canada Incorporated v. TCG International Inc.*, 2009 BCSC 596 at paras. 38–49, aff'd 2009 BCCA 577.

[67] However, the law distinguishes between non-competition obligations that form part of an employment agreement and those arising the context of a commercial agreement involving the transfer of ownership of a business: *Payette v. Guay inc.*, 2013 SCC 45 at paras. 2, 58; *Shafron v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6 at paras. 21–22.

[68] While "a restrictive covenant in an employment contract is *prima facie* unenforceable unless demonstrated to be reasonable" (*Garcha Bros Meat Shop Ltd. v. Singh*, 2022 BCCA 36 at para. 90), a restrictive covenant arising as part of an agreement to sell a business reverses this presumption, such that the obligation will be considered "lawful unless it can be established on a balance of probabilities that its scope is unreasonable" (*Payette* at paras. 35–39, 58).

[69] In *Elsley v. J.G. Collins Ins. Agencies*, [1978] 2 S.C.R. 916 at 924, 1978 CanLII 7, the court explained the rationale for this distinction as follows:

> The distinction made in the cases between a restrictive covenant contained in an agreement for the sale of a business and one contained in a contract of employment is well-conceived and responsive to practical considerations. A person seeking to sell his business might find himself with an unsaleable commodity if denied the right to assure the purchaser that he, the vendor, would not later enter into competition. Difficulty lies in definition of the time during which, and the area within which, the non-competitive covenant is to operate, but if these are reasonable, the courts will normally give effect to the covenant.

> A different situation, at least in theory, obtains in the negotiation of a contract of employment where an imbalance of bargaining power may lead to oppression and a denial of the right of the employee to exploit, following termination of employment, in the public interest and in his own interest, knowledge and skills obtained during employment. …

[70] In both instances, the test for assessing the reasonability of a non-competition clause is whether it is not more restrictive than necessary to adequately protect the interests of the party seeking to uphold it, based on factors including its temporal length, territorial scope, the nature of activities prohibited and overall fairness: *Tank Lining Corp. v. Dunlop Industrial Ltd.*, 140 D.L.R. (3d) 659 at 665–666, 1982 CanLII 2023 (Ont. C.A.); *Shafron* at para. 26; *Aurum Ceramic Dental Laboratories Ltd. v. Hwang*, 1998 CanLII 5759 at para. 11, [1998] B.C.J. No. 190 (S.C.).

[71] It is also important that the covenant be clear and unambiguous to meet the test of reasonability: *Shafron* at para. 43.

[72] Thus, while a restrictive covenant arising in an agreement for sale of a business will usually be enforced because "it is in the best interests of the seller to be able to provide a reliable assurance to the purchaser that the promise not to compete in the same business can be enforced" (*IRIS The Visual Group Western Canada Inc. v. Park*, 2017 BCCA 301 at para. 21), a restrictive covenant arising in the context of an employment contract will be *prima facie* void because it is contrary to the "important public interest in discouraging restraints on trade, and maintaining free and open competition unencumbered by the fetters of restrictive covenants" (*Elsley* at 923; see also *Greening Industries Ltd. v. Penny*, 49 M.P.R. 219 at 225, 1963 CanLII 971 (N.S.S.C.)). As a result, employees are generally free to leave their employment and compete with their former employer absent a reasonable restrictive covenant: *RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc.*, 2008 SCC 54 at para. 39.

III. STRONG *PRIMA FACIE* CASE

[73] The plaintiffs accept that their case must meet a higher standard when an injunction is sought to enforce a restrictive covenant, even when it exists within a

contract for the sale of a business. They submit the evidence establishing the enforceability of the non-competition agreement and Mr. Calder's "flagrant breach" of the non-competition agreement amount to a strong *prima facie* case.

[74] In answer, Mr. Calder submits the plaintiffs have not met the test. He submits the non-competition agreement is part of his employment contract, raising a presumption that it is not enforceable. He submits the plaintiffs' evidence falls short of displacing that presumption; therefore, they cannot establish they have a strong *prima facie* case for the injunction.

[75] In any event, he also submits the non-competition agreement was terminated when the Diamond Group sold its business because he consented to neither the sale nor the transfer of his employment to the plaintiffs. In the alternative, if the non-competition agreement is valid, he submits it is not enforceable because its terms are not reasonable.

[76] Because this is an interim application preceding the trial, it is not appropriate for this Court to make findings about disputed issues. The plaintiffs submit that, as per *RJR-MacDonald*, even where the higher "strong *prima facie* case" standard applies, the Court ought not to examine carefully the merits of the claim. In my view, this may misstate the applicable test: the Supreme Court of Canada said that "[a] prolonged examination of the merits is generally neither necessary nor desirable" in cases where the lower "serious question to be tried" standard applies: *RJR-MacDonald* at 338; see also *Belron Canada Incorporated* at para. 47. On the contrary, where the higher standard applies, a prolonged examination of the case's merits would appear both necessary and desirable.

A. Nature of the Non-Competition Agreement

[77] The parties disagree on whether the non-competition agreement should be seen as part of a corporate asset sale (as the plaintiffs allege) or a term in an employment contract (as alleged by Mr. Calder). The legal significance of this distinction relates to who bears the burden of persuasion. If at trial, Mr. Calder succeeds on that issue, he would benefit from a presumption that the non-

competition agreement is not enforceable. However, if the plaintiffs are correct, Mr. Calder would bear the burden to demonstrate that the restrictions within the non-competition agreement are unreasonable.

[78] As this is the plaintiff's application, the issue before me is whether they have adduced evidence demonstrating a *prima facie* case that the non-competition agreement was part of an asset sale rather than a term of an employment contact, that it is valid and enforceable, and that Mr. Calder has breached his obligations.

[79] In *Payette*, the court commented on how the issues should be approached:

> [45] To determine whether a restrictive covenant is linked to a contract for the sale of assets or to a contract of employment, it is, in my view, important to clearly identify the reason why the covenant was entered into. The "bargain" negotiated by the parties must be considered in light of the wording of the obligations and the circumstances in which they were agreed upon. The goal of the analysis is to identify the nature of the principal obligations under the master agreement and to determine why and for what purpose the accessory obligations of non-competition and non-solicitation were assumed.

[80] The language of the non-competition agreement supports the plaintiffs' position that the main purpose of entering into the agreement was most closely related to Diamond Delivery's purchase of Sonic. Specifically, the following, when read together, demonstrate this:

a) Recital D recognizes that the non-competition agreement is entered into "in order to protect and facilitate [Diamond Delivery's] purchase of the Assets".

b) The paragraph following the recitals, which precedes the specific clauses states, in part, "in consideration of the purchase by the Purchaser of the Assets and other good and valuable consideration". Similar contractual language was used by the Supreme Court of Canada in *Payette* to ground the conclusion that "the actual language of the parties' agreement confirms that the existence of the restrictive covenants is closely related to the conditions for the sale of the assets": para. 47.

c) Clause 2.1 states that both vendor and principal benefit from the sale of the business and its assets. As in *Payette*, this is an indication that Mr. Calder accepted the restrictive covenant "in consideration of the substantial advantages he would be deriving from the transaction, not of his potential status as an employee": para. 47.

d) Clause 2.1(c) stipulates that since the purchase price was paid for the business and its assets "substantially based on the exclusive right to carry on the Business", if either Sonic or the Calders breach the non-competition agreement, exercise of that exclusive right would not be possible. This specifically links the price paid and the restrictive covenant to Diamond Delivery's ability to successfully operate Sonic after the purchase.

e) Clause 2.1(e) explicitly states the non-competition agreement is reasonable to protect Diamond Delivery's investment in the assets and protection of the business itself.

[81] Both parties' evidence was consistent that brand recognition, or familiarity with a particular trucking service, is vitally important in the trucking industry. Mr. Calder emphasized in his affidavit that Sonic's success, in his view, was very closely tied to the relationships he built with customers and truck drivers. Mr. Gillies deposed that the trucking industry is one in which it is relatively easy to compete and is service focussed, heightening the importance of non-competition agreements.

[82] This is reflected in the asset purchase agreement and context in which it was executed. Mr. Gillies described that he told Mr. Calder that Diamond Delivery had a standard policy of requiring a non-competition agreement and that it was a non-negotiable requirement. He confirms the sale would not have concluded if Mr. Calder had not agreed to and signed the non-competition agreement.

[83] The purchase price was $450,000, of which $389,999 was allocated for Sonic's goodwill ($60,000 was identified as equipment, and $1 for material contracts

and inventories). If Mr. Calder left his employment, he obviously would not be paid wages, but he would also be deprived of a significant portion of the sale price (see above para. 48). Mr. Calder deposed that he understood "there would be no value in the business" if he ceased dispatching for the company within three years of the acquisition. He also noted that he was informed of post-employment restrictions on competition.

[84] The foregoing demonstrates that the parties understood that the value of the asset Diamond Delivery was purchasing (the Sonic business and its goodwill) was very closely tied to Mr. Calder's association with Sonic. Even if he retired within three years (and did not become a competitor), the value of the asset he sold would diminish. This is a strong indication of the centrality the non-competition agreement had to the asset purchase rather than to Mr. Calder's continued employment.

[85] As in *Payette*, the non-competition agreement was also intended to survive beyond termination of Mr. Calder's employment: para. 52. Clause 1.1 of the non-competition agreement restrains Mr. Calder from any competition within 100 km for five years commencing on the last date he is employed with Diamond Delivery. The Supreme Court of Canada confirmed that reference in a non-competition covenant to termination of employment does not change the character of the agreement itself: *Payette* at para. 55.

[86] The plaintiffs acknowledge they are not the original parties to the non-competition agreement, but submit that its express contractual terms and the terms of the Manitoulin agreement give them the right to stand in the shoes of the contracting party, the Diamond Group, to enforce the non-competition agreement. They submit that the non-competition agreement, and both the asset purchase agreement and the Manitoulin acquisition agreement, make it clear that the plaintiffs are both a successor and an assign.

[87] Clause 3.1 of the non-competition agreement "enure[s] to the benefit of the Purchaser, its successors and assigns" and is binding on both Sonic and the

Calders. Moreover, clause 3.3 restricts only Sonic from assigning the non-competition agreement.

[88] The plaintiffs expressly acquired and assumed, as part of the Manitoulin acquisition, all of Sonic's assets, including any agreements and contracts related to Diamond Delivery's business. That is set out in Clause 1.1.43 of the agreement by which Manitoulin acquired Diamond Delivery, which defines "purchased contracts" as including "any agreement [or] contract … related to the Business". Clause 2.1 of this agreement, which sets out the assets purchased in the agreement, includes the "purchased contracts" as Clause 2.1.3.

[89] Mr. Calder relies on what he alleges is the "personal nature" of the non-competition agreement. Primarily, he bases this on Clause 3.3, which states that "[b]ecause of the personal nature of this Agreement, this Agreement may not be assigned by the Vendor". He also alleges that, as per *Goska J. Nowak Professional Corporation v. Robinson*, 2016 ABCA 240 at para. 19, "Personal services contracts are not assignable without consent", pointing out that he was not asked and did not consent to Diamond Delivery's sale to Manitoulin. Mr. Calder submits that since he never sold Sonic to the plaintiffs, his employment with Diamond Group was terminated and so was the non-competition agreement. His position which rests on the assertion that the non-competition agreement must be viewed as being part of his employment contract rather than part of the asset purchase agreement.

[90] The flaw with his position is that the restriction on assignment clearly only applies to the Vendor, namely Sonic, and not the purchaser, namely Diamond Delivery. This distinction is logical given the evidence that Mr. Calder's association with Sonic was understood by both parties to be inexorably linked to its success and, therefore, of significant value in the context of the asset purchase agreement. That value would be significantly diminished if Mr. Calder was able to assign away his obligation to refrain from competition. On the other hand, an assignment by the purchaser would not impact the value of Sonic. This is borne out by the uncontested evidence that after the sale to Manitoulin, there was little change in Sonic's

operations. Mr. Calder confirms this by deposing that he saw “no material change” in his dispatching duties. Mr. Gillies stated that the sale “did not result in any change in operations or staffing” and that it “was business as usual”.

[91] For these reasons, I am satisfied that the plaintiffs have established a strong *prima facie* case that the non-competition agreement was part of the asset purchase agreement. This significantly weakens Mr. Calder’s position.

B. Reasonability of the Non-Competition Agreement

[92] The reasonability of the specific terms of a restrictive covenant is relevant to its enforceability regardless of whether it arises within an employment contract or a commercial asset purchase agreement. What differs is the operative presumptions.

[93] In the commercial context, a restrictive covenant will be reasonable and lawful provided that its territorial scope and limitations on activities only go as far as necessary to protect the interests of the party in whose favour it was drafted. In the employment context, such restrictions are generally unenforceable unless they can be demonstrated to be reasonable.

[94] The court considers the circumstances of the parties’ negotiations to assess the reasonability of the scope of the non-competition obligations: *Payette* at para. 62. In both the employment and commercial contexts, the factors to determine reasonability include its temporal length, territorial scope, the nature of activities prohibited and overall fairness (see above para. 71).

[95] The non-competition agreement prohibits Mr. Calder from engaging in “services” (defined as “multi-carrier distribution, local cartage and charter trips, and freight services”) within 100 km of Diamond Delivery’s Delta address for five years after he leaves his employment with the company. The plaintiffs contend that the scope of activity prohibited in the non-competition agreement is only as broad as necessary to protect the business it purchased. Diamond Delivery was motivated to purchase Sonic, in part, to expand its existing business to include flat deck trucking.

Viewed in that light, there is a logical and sound basis for it to want to protect its pre-existing and acquired business by prohibiting the services as defined.

[96] The plaintiffs submit that the non-competition agreement's geographical area is tailored to what is necessary because the hundred-kilometre radius from Diamond Delivery's address in Delta corresponds to the area in which its flat deck trucking business operates. The plaintiffs point out that much larger geographical areas, such as the entirety of British Columbia and Alberta, have been deemed reasonable: *DaKow Ventures Ltd. v. Daski Contracting Ltd.*, 2018 BCSC 2016 at para. 18 [*DaKow*]. Finally, they submit that since commercial contracts with periods up to ten years have been found to be valid (*Payette* at para. 63; *DaKow* at paras. 16–17), five years is clearly reasonable.

[97] Mr. Calder's submissions about the reasonability of the duration, scope, and territory of the non-competition agreement are premised on his position that they have to be viewed as a restraint on his employment, rather than a part of the commercial asset purchase agreement. That said, he also contents that the covenant is "both unreasonably wide and ambiguous to the point of being unreasonable" because the geographic area is too large and the definition of "services" in the non-competition agreement is overly broad, prohibiting Mr. Calder from seeking a number of non-competing jobs.

[98] Whether a strong *prima facie* case exists is determined through a consideration of the material placed before the court by both sides: *2100 Bridletowne Inc. v. Ding*, 2021 ONSC 2119 at para. 33. In my view, Mr. Calder's arguments do not displace the plaintiffs' strong *prima facie* case on this point. His position rests largely upon bald assertions, and he has led little evidence to support those assertions, or to significantly challenge the plaintiffs' submissions about the reasonable necessity for the specific terms.

[99] Finally, it is significantly material that Clause 2.1(e) of the non-competition agreement contains Mr. Calder's express acknowledgement and agreement that its terms are reasonable and necessary to protect the business being sold.

[100] For all those reasons, I find the plaintiffs have established a strong *prima face* case that the terms of the non-competition agreement are reasonable in the context of a commercial agreement.

C. Breach of the Non-Competition Agreement

[101] The plaintiffs submit that through his employment at WCC, Mr. Calder has been, and continues to be, in flagrant breach of the non-competition agreement (as well as his employment agreement and the fiduciary duties he owes to them). They also submit that courts will generally "grant an interim injunction in most commercial cases involving solvent and sophisticated litigants where the plaintiff has established a strong *prima facie* case that the defendant has breached a restrictive covenant": *853947 B.C. Ltd. v. Source Office Furniture & Systems Ltd.*, 2016 BCSC 2233 at para. 94 [*Source*].

[102] I do not understand Mr. Calder to submit his actions were not contrary to Clause 1.1 of the non-competition agreement. Rather, his position is that the non-competition agreement is not valid nor enforceable as against him. He believed it was terminated when the Diamond Group was purchased by Manitoulin. Given that, I am satisfied that the plaintiffs have established a strong *prima facie* case that the non-competition agreement has been breached.

IV. IRREPARABLE HARM

[103] As the Supreme Court of Canada has explained, harm is "irreparable" because of "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": *RJR-MacDonald* at 341. Included in this concept are instances "where one party will suffer permanent market loss or irrevocable damage to its business reputation": *RJR-MacDonald* at 341.

[104] The plaintiffs say that where an injunction is sought in relation to a clear breach of an express negative covenant, as they allege is the case here, the court

should reduce the weight it places on irreparable harm and the balance of convenience in proportion to the strength of the plaintiff's *prima facie* case: *Landmark Solutions Ltd. v. 1082532 B.C. Ltd.*, 2021 BCCA 29 at paras. 53–57 [*Landmark*].

[105] In the context of non-competition agreements, irreparable harm has been found to include the loss of actual or potential customers (*J-Tech Design Ltd. v. Bosnjak*, 2009 CanLII 9469 at para. 19, [2009] O.J. No. 932 (S.C.)), loss of market share (*Source* at para. 100), and/or the inability to build goodwill or distinguish a company from its competitor (*Source* at para. 100). Importantly, a loss of goodwill will constitute an irreparable harm only if that harm is incalculable, and the jurisprudence is rife with examples where loss of goodwill both has and has not been found to amount to irreparable harm: *Landmark* at paras. 64–65.

[106] The plaintiffs rely on Clause 2.2 of the non-competition agreement whereby the Calders expressly acknowledged that a breach of the non-solicitation provisions would result in damages that could not be determined monetarily. The inclusion of that type of clause in a non-competition agreement is a significant factor supporting a finding of irreparable harm: *Merrill Lynch Canada Ltd. v. Pastro and Marshall*, 2000 BCSC 1889 at paras. 9, 54; *Source* at para. 102; *Landmark* at paras. 49–51.

[107] The plaintiffs also say the following evidence supports their position that they have suffered or will suffer irreparable harm:

a) Mr. Gillies deposed that Mr. Calder's departure to WCC had been "devastating" to Diamond Delivery's flat deck trucking business, causing the loss of "several important customers" and "a sizeable amount of its truck drivers". These losses have, in turn, led to "an immediate and significant loss in revenue", left Diamond Delivery unable to adequately service its remaining customers, and adversely impacted the business's reputation with existing and prospective customers.

b) Mr. Ross deposed that Mr. Calder's work for WCC has led to a loss of drivers, immediate financial losses, and reputational damage to the business. Mr. Calder's relationship with the business's drivers and customers left it "very vulnerable" to his departure, and the flat deck trucking business has been "decimated … in the matter of a few weeks". Nearly half of the company's drivers, many of whom possess specialized flat deck trucking skills and customer-specific delivery equipment, left after Mr. Calder's departure, and this made the customers they serviced more likely to leave as well due to a desire to avoid delivery disruptions. Mr. Ross also mentioned how the loss of these drivers, many without notice, impacted Diamond Delivery's ability to service its remaining customers.

c) Ms. Medeiros deposed to the harm done by Mr. Calder's employment with WCC, affirming the evidence of Mr. Gillies and Mr. Ross and echoing their concerns regarding the financial and reputation impacts on Diamond Delivery's flat deck trucking business.

d) Mr. Korbeld deposed to how, after Mr. Calder was told not to return to work on October 11, 2022, "it was obvious by that weekend that something was wrong" as Diamond Delivery's largest flat deck trucking customer, who usually made delivery requests over the weekend, did not make any.

[108] Mr. Calder submits the plaintiffs' evidence demonstrates their losses are calculable, negating their claims of irreparable harm. In particular, he points to the plaintiffs' estimation of lost revenues and/or lost customers.

[109] I disagree. The plaintiffs have not referred to these figures to suggest they represent, or are an estimation of, their total loss. Instead, Mr. Gillies, Mr. Ross, Ms. Medeiros, and Mr. Korbeld have identified in general terms the types of harms Diamond Delivery is suffering and may continue to suffer. Moreover, the evidence from both parties was clear in explaining the importance in the trucking industry of

brand recognition and engagement with customers and drivers, both which are intangible in nature. The plaintiffs have adduced facts that can be quantified, but those are illustrative and only part of the potential damage to their business by the breach of the non-competition agreement.

[110] I am persuaded that the plaintiffs have established they have or probably will suffer irreparable harm if the injunction is not granted.

V. BALANCE OF CONVENIENCE

[111] I am satisfied that the balance of convenience favours granting the injunction. In *Canadian Broadcasting Corp. v. CKPG Television Ltd.*, 10 B.C.A.C. 211 at para. 23, 1992 CanLII 560 (C.A.), the court stated that factors relevant to assessing the balance of convenience include:

a) the adequacy of damages as a remedy for the applicant if the injunction is not granted, and for the respondent if an injunction is granted;

b) the likelihood that if damages are finally awarded they will be paid;

c) the preservation of contested property;

d) other factors affecting whether harm from the granting or refusal of the injunction would be irreparable;

e) which of the parties has acted to alter the balance of their relationship and so affect the *status quo*;

f) the strength of the applicant's case; and

g) any factors affecting the public interest.

[112] The plaintiffs submit that several of these factors arise in the present matter and favour granting the injunction:

a) Should the injunction not be granted, the plaintiffs submit that damages would be inadequate to compensate them for the harm caused by the loss

of market share, inability to build or retain goodwill and loss of customers and drivers flowing from Mr. Calder's alleged breach of the non-competition agreement.

b) There are some doubts regarding the likelihood that the Calders would pay any damages awarded at trial, as they have no property in their name. I do not understand Mr. Calder to contest this evidence.

c) An injunction would assist in preserving the assets that were purchased from the Calders, as the terms of the order sought by the plaintiffs simply reflect the terms of the non-competition agreement, which they say was fairly bargained for and agreed to by the Calders. In exchange for $450,000, the plaintiffs received the benefit of the asset purchase agreement, including Mr. Calder's obligation not to compete.

d) It was Mr. Calder's conduct that altered the balance of the relationship.

e) The plaintiffs have a strong *prima facie* case that Mr. Calder breached the non-competition agreement, the employment agreement, and his fiduciary duties.

f) It is in the public interest to enforce contracts between parties to prevent vendors of businesses from essentially taking back what they agreed to sell for their own benefit.

[113] The preceding factors are compelling in support of the plaintiffs' position.

[114] In response, Mr. Calder submits that it would not be just and equitable to grant the injunction because it would prevent him from working in an industry in which he has participated for 36 years. He also contends that with his limited education or experience in other fields, he would be forced to retire, as it would be difficult to find other work. This, in turn, would result in financial hardship.

[115] The plaintiffs have adduced evidence that challenges some of those assertions. Specifically, Mr. Gillies deposed that there is a "huge need" for

dispatchers in the industry. The plaintiffs also produced job postings for a number of positions which, Mr. Gillies deposed, Mr. Calder could qualify for and work in without breaching the terms of the non-competition agreement.

[116] Even without that evidence challenging Mr. Calder's assertions, I find the balance of convenience favours granting the injunction.

VI. CONCLUSIONS

[117] Accordingly, I find that the plaintiffs have satisfied the test for the granting of an interlocutory injunction by demonstrating that they have a strong *prima facie* case, have suffered irreparable harm due to Mr. Calder's departure, and are favoured by the balance of convenience.

[118] Given those conclusions, it is unnecessary for me to consider the plaintiffs' alternative grounds for seeking the injunction, namely, that Mr. Calder was a "key employee" owing heightened fiduciary duties to Diamond Delivery, including duties not to unfairly compete and not to solicit, which he breached by leaving the company to work for WCC.

[119] Accordingly, I order an interlocutory injunction be issued that includes the following terms:

> Leslie and Pamela Calder are restrained from directly or indirectly, whether as owner, shareholder, director, agent, officer, employee, consultant, independent contractor or in any other capacity whatsoever, of a corporation, partnership or proprietorship, compete with, or engage in, or be financially concerned or interested in, or advise, lend money to, guarantee the debts or obligations of or permit their name to be used or employed by any person, engaged in or concerned with or interested in the provision of the Services, defined as the business of providing multi-carrier distribution, local cartage and charter trips, and freight services, within 100km of the Premises, defined as a location with the civic address of 107-7311 Vantage Way, Delta, BC, including the defendants West Coast Cartage Co. Ltd. and Judge Trucking &

Imports Inc., for a period of five years commencing on October 12, 2022, until October 12, 2027.

[120] I have assumed that the order sought in paras. 4–5 of the notice of application were being sought in addition to the order I have granted, and I am inclined to grant those. However, it is not clear to me if the parties specifically addressed that at the hearing. For that reason, the parties have leave to seek a brief hearing before me to address that issue so long as that request is made within 14 days of this judgment.

"Sharma J."