

# Court of King's Bench of Alberta

Citation: 9344-7167 Quebec Inc v True North Mortgage Inc, 2024 ABKB 278

Date: 20240515  
Docket: 2201 13284  
Registry: Calgary

Between:

**9344-7167 Quebec Inc**

Applicant

- and -

**True North Mortgage Inc**

Respondent

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**Reasons for Decision  
of the  
Honourable Justice C.M. Jones**

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## **I. Introduction**

[1] This application is the result of unhappy differences that have arisen in a business relationship. The Applicant, 9344-7167 Quebec Inc. ("9344"), brought an application for injunctive and declaratory relief against the Respondent, True North Mortgage Inc. ("True North").

[2] For the reasons set forth below, 9344's application is dismissed.

## **II. Background**

[3] True North was incorporated pursuant to the law of the Province of Alberta. It provides residential mortgage solutions, including both brokerage and lending, across Canada. At some point, True North decided to cease carrying on the mortgage brokerage business in Quebec.

[4] The parties entered into a Trademark License Agreement (the "TLA") on July 25, 2016. Prior to that, Steven Levine, 9344's principal, was a salaried mortgage broker with True North.

[5] As the parties noted at the hearing on March 26, 2024, the intent was that 9344 would be “the face of True North in Quebec”. What that face looked like, the scope of the TLA, what rights it confers and the parties’ intentions in entering into it are at the core of this dispute.

[6] I note that the term of the TLA was eight years, meaning that it comes to an end on July 25, 2024. As will be evident from the discussion below, unhappy developments between the parties suggest that it is unlikely the TLA will be renewed.

[7] True North had developed a lending facility in respect of which it obtained the trademark THINK Financial (“TF”). I understand that TF is not a separate entity. It is simply the trademark that refers to True North’s inhouse lending facility and the intellectual property it embodies.

[8] 9344’s entitlement to access to TF is a central issue in this lawsuit.

### **III. Procedural History**

[9] In its Statement of Claim filed November 16, 2022, 9344 sought certain remedies including, *inter alia*:

1. An injunction restraining True North from conducting business in the Province of Quebec, in violation of the TLA, under the trademark of TF, other otherwise.
2. An order requiring True North to provide 9344 with the right, privilege and license to use the trademark TF on the same terms as the Trademarks set forth in the TLA, including but not limited to providing 9344 with the exclusive right to use TF in the Province of Quebec on the royalty terms set forth in the TLA.
3. An order requiring True North to forward and refer to 9344 100% of all leads received by True North for the Province of Quebec, including under the trademark of TF.
4. An order directing True North to disclose full details of:
  - (i) All leads for the Province of Quebec that it has retained for itself, under the trademark of TF or otherwise;
  - (ii) All leads for the Province of Quebec that True North has referred to other financial institutions since the inception of the TLA.
5. An order directing True North to reinstate 9344’s access to its marketing manager for pay per click campaigns on Google, or otherwise restore the level of online marking distribution required by the TLA.

[10] 9344 also sought damages, interest and costs.

[11] True North defended and also filed a Counterclaim. In its Counterclaim, it asserted that 9344 had failed to deliver services in Quebec to the same quality it had prior to the TLA. True North also alleged that 9344 had failed to advertise or otherwise promote the licensed website and brand name to clients or potential clients and was not tracking leads as required under the TLA.

[12] Except to a very limited extent, I do not need to deal with True North's Counterclaim in connection with this application. The allegations contained in it do, however, underscore uncertainties as to what each party's advertising responsibilities were to be. That uncertainty, in turn, speaks to the requirement for a serious issue to be tried or a strong *prima facie* case.

[13] This application has evolved somewhat over time. It was originally set down for a hearing on March 1, 2023. Due to a dispute over affidavits, it was adjourned to March 30, 2023. Further dispute over affidavits lead to another adjournment, this time to June 15, 2023.

[14] At the hearing on June 15, 2023, 9344 acknowledged that its focus had shifted. Instead of seeking primarily a mandatory injunction relating to access to TF, it was now seeking primarily an order declaring that it is entitled to that access. 9344 asserted that this change in focus arose from certain evidence acquired at questioning.

[15] I noted that, in its written materials to that point, 9344 had provided virtually no law or argument regarding the tests for declaratory relief or their application to the facts of this case. I could have entertained a request from True North to deny declaratory relief on that basis.

[16] Subsequent to the June 15, 2023 hearing, I wrote to the parties telling them that I would entertain an application by 9344 to amend its application to allow for proper articulation and application of the law relating to declaratory relief. I also directed the parties to make submissions regarding the issue of thrown away costs in connection with the June 15, 2023 application.

[17] 9344 made its application to amend in December 2023. True North did not oppose that application. I granted the request to amend, the result being that 9344 now seeks primarily a declaration that it is entitled to exclusive mortgage broker access to TF in the Province of Quebec for the remainder of the term of the TLA on the terms set forth therein and at the rates prescribed by the standard TF term sheet.

[18] The application for declaratory relief was argued before me on March 26, 2024.

#### **IV. Declaration / Injunction**

[19] The change in 9344's focus from injunctive to declaratory relief raises certain questions in respect of the standard applicable to its application. 9344 argued that, based on the evidence arising from questioning on True North's affidavit, it was satisfied that it was no longer useful to seek a prohibitory injunction preventing True North from carrying on business in Quebec. Nevertheless, it still seeks relief prohibiting True North from carrying on business in Quebec and granting 9344 exclusive access to TF in Quebec.

[20] 9344's initial application for access to TF was a request for a mandatory injunction. That engaged the tri-partite test articulated in *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311. Because it sought a mandatory injunction, 9344 would have had to establish a strong *prima facie* case for its entitlement to exclusive use of TF in Quebec. As discussed below, a strong *prima facie* case has been interpreted to mean a case that will "probably prevail at trial" or is "likely to succeed at trial." This, it seems to me, is a higher standard than balance of probabilities. Though this question seems to have attracted little judicial consideration, the Court

in *Simoni v Blue Cross of Atlantic Canada* (1999), 184 Nfld & PEIR 136 (NFTD) held as follows at para 20:

The authorities are clear that [mandatory injunction] is an extraordinary remedy which should be used sparingly but unhesitatingly in the right case. Without deciding the matter on the merits at this preliminary stage, which would be improper, the Court must have a close look at the merits in order to determine if the case before it is one which warrants the order requested. Short of deciding the merits, the Court must be satisfied on the basis of the pleadings and the evidence properly before it on the application that there is a high probability that the plaintiff will be successful at trial before granting a mandatory injunction. It should not ordinarily be a case which requires the assessment of credibility of witnesses or where the plaintiff is asserting novel or legally questionable theories to support its case. The probable success of the plaintiff's case should be reasonably clear on its face without a detailed analysis of the facts and law.

[21] I believe that by June 15, 2023, 9344 had concluded that it would not be able to meet that standard.

[22] An important procedural question emerges from this conclusion. Should the Court deny declaratory relief on a balance of probabilities when, but for the Court's permission to amend the application, an applicant would have encountered major challenges in seeking a mandatory injunction?

[23] I believe the answer is a qualified "no". Not every situation in which the Court has approved such a significant change in litigation strategy should result in denial of the changed relief sought. However, the Court must be very careful not to allow the lower onus required for a declaratory order to distract it from the real substance of the dispute between the parties. If a request for declaratory relief is really just a disguised application for a mandatory injunction, it may be inappropriate for the Court to apply the less stringent test.

[24] Another significant point is that a mandatory injunction is a form of interim relief. By contrast, in seeking a declaration that it is entitled to exclusive access to TF in the Province of Quebec, 9344 effectively seeks to determine the central issue that would have been resolved at trial. 9344 as much as acknowledged this when, at the hearing before me on March 26, 2024, it expressed the view that I had sufficient evidence and argument before me to decide this central trial issue and to grant declaratory relief.

[25] It seems to me that if a request for declaratory relief seeks the same outcome as would have been sought at trial, the Court should be careful not dilute the plaintiff/applicant's burden to establish its case on a balance of probabilities. If a trial would have required certain evidence to have been put before the Court in a certain manner, the plaintiff/applicant reasonably can be expected to meet those requirements as part of its request for declaratory relief.

[26] Further, principles of fairness apply when a Court exercises discretion to grant or withhold declaratory relief: *Scenic Acres Community Association v Calgary (City)*, 2015 ABKB 586 at para 69. True North argues that it is not fair to it to relieve 9344 of the onus of meeting the tests for a mandatory injunction when True North has been attempting to respond to those tests for the better part of one year. I agree that granting a declaratory order to a party that might otherwise have had to address the elements of irreparable harm and balance of convenience has

the potential to work an unfairness, particularly when the opposing party has invested time and effort into responding to all of the elements of the tri-partite test.

[27] Taking all of this into consideration, I find that, while I permitted 9344 to amend its application, I must approach the amended application with considerable caution. That said, my conclusion on 9344's amended application removes the need for concern.

## V. Analysis

### A. Declaratory Relief

[28] As stated in its Supplemental Submissions dated February 23, 2024, 9344 seeks “a declaration that it is entitled to exclusive mortgage broker access to [TF] in the Province of Quebec for the remaining term of the [TLA].”

#### 1. The Test

[29] In support of this application, 9344 cites *SA v Metro Vancouver Housing Corp*, 2019 SCC 4 where the Supreme Court of Canada outlined the test for declaratory relief at para 60:

Declaratory relief is granted by the courts on a discretionary basis, and may be appropriate where (a) the court has jurisdiction to hear the issue, (b) the dispute is real and not theoretical, (c) the party raising the issue has a genuine interest in its resolution, and (d) the responding party has an interest in opposing the declaration being sought...

[30] 9344 also cites *Harrison v Antonopoulos* (2002), 62 OR (3d) 463 (SCJ), as quoted in *Fehr v Sun Life Assurance Company of Canada*, 2018 ONCA 718 at para 105:

Declaratory relief, being only a declaration of parties' rights, is mainly sought in commercial matters to help parties *define their rights*, and as a means to settle matters amicably where reasonable people would otherwise disagree on their mutual obligations and wish to resolve the matter in order to avoid future disputes. [Emphasis added.]

[31] I note that the highlighted portion of this passage indicates that a declaratory order should not create rights that do not exist, but only clarify rights that already exist.

[32] 9344 argues that the four criteria articulated in *SA* are met here. It asserts that declaratory relief will define the parties' rights under the TLA with respect to TF. This will assist the parties in determining their existing dispute and avoiding future disputes.

[33] True North argues that no right to use of TF accrues to 9344 under the TLA and that simply adding reference to TF to the TLA would create new rights not contemplated by the parties. It argues that a litigant seeking declaratory relief must demonstrate a right that has been infringed by or requires protection from the other party. If the right cannot be demonstrated, the party does not have standing and the court does not have declaratory jurisdiction: *Epost Innovations Inc v Canada Post Corporation* (1999), 2 CPR (4<sup>th</sup>) 76 (BCSC) at para 41.

[34] Accordingly, 9344 must persuade the Court on a balance of probabilities that it is entitled under the TLA to exclusive access to TF in Quebec. In order to determine if 9344 is entitled to a declaration that it has exclusive use of TF, I must examine the TLA in an attempt to ascertain its meaning and the objective intention of the parties. In this interpretive quest, I am mindful of *Sattva*

*Capital Corp v Creston Moly Corp*, 2014 SCC 53, in which the Supreme Court of Canada noted that contractual interpretation raises questions of mixed fact and law and recognized the role of “surrounding circumstances” in the interpretive process. The Supreme Court of Canada noted that contracts are not to be interpreted in a vacuum. Rather, courts must interpret the words of a contract in light of the background facts and surrounding circumstances. The goal is to determine the parties’ objective intention. What each party, after the fact, says they intended is not a fruitful line of inquiry for the Court.

[35] I must also be mindful that I did not conduct a trial in this matter and, therefore, I must be cautious in my assessment of the strength of the evidence before me. While there is evidence before the Court from the parties’ principals in the form of affidavits and questioning thereon, I do not have the benefit of observing demeanor and seeing that evidence tested through cross-examination at trial.

## 2. The TLA

### a. The Specified Trademarks

[36] In broad brush, the TLA gives 9344 a license to use in the Province of Quebec certain trademarks belonging to True North. That license is reflected in a recital to the TLA and in clause 1 thereof:

WHEREAS, LICENSOR [True North] is the sole and exclusive owner of the following trademarks and registrations: TNM Hypotheque; True North Mortgage; TN Rebate Realty (the “Trademarks”);

...

#### 1. LICENSE GRANT

- A. LICENSOR hereby grants to LICENSEE an exclusive license to use the Trademarks on or in association with the Licensed Products in the province of Quebec (Territory), as well as on promotional and advertising material associated therewith for a period of 8 years.
- B. LICENSEE may not grant any sublicenses to any third party without the prior express written consent of the LICENSOR which may be withheld for any reason.

[37] In these Reasons, I will refer to the trademarks set out above as the “Specified Trademarks”. Significantly, the Specified Trademarks do not include TF. Indeed, TF is not mentioned anywhere in the TLA. True North asserts that this is because the parties never intended TF to be made available to 9344 under the TLA.

[38] Further, True North asserts that the Specified Trademarks are used exclusively in connection with the mortgage brokerage business, a business that it used to carry on in Quebec but agreed it would cease in light of the license of the Specified Trademarks to 9344. The extensive affidavit evidence placed before me establishes that the Specified Trademarks were applicable to the mortgage brokerage business, not the mortgage lending business.

[39] True North argues that it agreed under the TLA only that it would cease the mortgage brokerage business in Quebec, not the mortgage lending business. It asserts that the TF trademark

has application in mortgage lending, not mortgage brokering. Therefore, 9344 cannot assert any right to use TF, let alone exclusive right to use it in Quebec.

[40] 9344 asserts that the distinction between mortgage brokering and mortgage lending is a “red herring”. In my view, that distinction is borne out by the other provisions of the TLA.

[41] Recital two provides as follows:

WHEREAS, LICENSOR has the power and authority to grant to LICENSEE the right, privilege and license to use the Trademarks on or in association with the goods and/or services covered by the registrations (the “Licensed Products”).

[42] I find that the nature of the Licensed Products helps to delineate the nature and scope of the trademarks the parties intended 9344 to make use of under the TLA. The Licensed Products are described in clause 6 A. of the TLA, which provides:

The Licensed Products include the French website (mmhypotheque.ca), [www.truenorthmortgage.ca.fr](http://www.truenorthmortgage.ca.fr); the phone numbers (514-876-4441, 877-572-6677, 877-551-6907), email address’s ending in “@tnmhypotheque.ca, Tracker software (not the data inside Tracker) online reviews as well as all promotional, signage, and advertising material relative thereto.

[43] By itself, this is not particularly illuminating, but clause 6 B. provides, *inter alia*, that:

The Licensed Products and services shall be delivered to the same quality as those which is at least equal to *comparable services previously offered marketed by LICENSEE prior to this agreement....* [Emphasis added.]

[44] Prior to the TLA, 9344 provided mortgage brokerage services, not lending. Therefore, taken together, recital two and clauses 6A. and B. indicate that the parties’ intention was that the Specified Trademarks and Licensed Products were intended to be those associated with the mortgage brokerage business, not the mortgage lending business.

[45] This is reinforced by clause 9D, which provides for a penalty on 9344 in certain circumstances and states, *inter alia*, that:

The penalty will be waived (not the royalties owed) by the LICENSOR only if the LICENSEE voluntarily annuls their mortgage *brokerage* license. In the event that LICENSEE annuls their mortgage *brokerage* license and the \$75,000 penalty is waived, it shall once again become due if the LICENSEE reinstates their mortgage *brokerage* license within a 2 year period of this penalty being waived. [Emphasis added.]

[46] The reference to mortgage *brokerage* license supports True North’s assertion that the parties intended 9344 to operate as a mortgage broker and to be given access to mortgage brokerage trademarks. True North contends that 9344 was not intended to be given access to TF, a mortgage lending trademark.

[47] True North also argues that giving 9344 access to TF could require additional terms not contained within the TLA. I will address this below.

**b. Exclusivity**

[48] To a considerable extent, 9344's allegations are based on clause 23 of the TLA:

**EXCLUSIVITY**

During the term of this agreement, the parties agree that True North Mortgage Inc. shall not conduct business in the Province of Quebec, the sole exclusivity being that of the LICENSEE [9344].

[49] In its Statement of Claim filed November 16, 2022, 9344 alleged that True North had been conducting business in the Province of Quebec in violation of this clause. In this application, 9344 advocates a literal interpretation of this clause, asserting that True North is precluded from carrying on any business in Quebec, including the mortgage lending business, and is in breach of its covenant to not do so. It also argues that granting it exclusive access to TF in Quebec is consistent with True North's covenant not to carry on business in Quebec during the term of the TLA.

[50] True North argues that, considering the TLA in light of the surrounding circumstances, the parties intended only that True North would not carry on the mortgage brokerage business. True North argues that it makes no sense to restrict its mortgage lending activities in Quebec when the TLA granted 9344 access only to mortgage brokerage trademarks. The parties cannot have intended True North to refrain from engaging in mortgage lending when the TLA did not purport to empower 9344 to engage in that activity.

[51] Further, as alluded to above, True North argues that to grant 9344 access to TF would require negotiations, additions to and changes in the TLA. There is no provision in the TLA that requires True North to negotiate access to TF if True North should decide to roll it out in Quebec.

[52] I note that clause 23 does not say that True North will not carry on "any" business in Quebec. The absence of the word "any" is significant. Since I found above that the Grant of License relates only to mortgage brokerage, matters outside the mortgage brokerage business, like mortgage lending, should not be within the purview of clause 23. That clause strikes me as more consistent with the notion that True North agreed to vacate only the mortgage brokerage business in Quebec, and not some other business, like mortgage lending.

[53] I note that here is evidence that TF was actively deployed in the mortgage lending business in the Province of Quebec in 2022 for a very brief period. The evidence satisfies me that True North informed 9344 that this would happen but ceased this activity when 9344 objected.

**c. Understandings**

[54] 9344 also made allegations in respect of certain "understandings" set forth as follows in clause 20 of the TLA:

**UNDERSTANDINGS**

It is understood the LICENSEE [9344] will:

- Acquire and maintain a highly visible storefront locations within the Province of Quebec



- Maintain and advertise competitive mortgage rates
- Advertise or otherwise promote the licensed website and brand name to clients or potential clients
- Track all mortgage leads and resulting revenues
- Utilize the LICENSOR “Tracker” CRM system (not to be reconciled by the LICENSOR)
- Utilize the MCC CRM system if the LICENSEE wishes
- Utilize the LICENSOR’s Filogix firm ID
- Maintain proper “slip and fall” and “Errors & Omission” insurance
- Maintain all proper payroll and tax accounting systems

It is understood the LICENSOR [True North] will:

- In consideration of a payment of \$1.00, which the LICENSOR acknowledges receipt thereof, the LICENSOR will Transfer ownership “as-is” of all furniture, leasehold improvement and equipment currently located at the “Eaton Store” as per Appendix “A”
- Provide access to all historical Quebec client information and data in which LICENSEE becomes the owner of all client information and data upon the effective date of this Agreement August 1, 2016
- Maintain lender relationships
- Maintain the True North Mortgage French website
- Provide Quebec only access to online Rate Manager
- Maintain and forward all Quebec leads derived from [www.truenorthmortgage.ca/fr](http://www.truenorthmortgage.ca/fr) and [www.truenorthmortgage.ca](http://www.truenorthmortgage.ca)
- Maintain the current level of online marketing distribution if possible
- Provide access to all TN Rebate Realty marketing materials

[55] 9344 alleges that True North is in breach of some of these “understandings”. Specifically, it asserts that True North has failed to maintain online marketing distribution and has been referring leads for the Province of Quebec to other lenders. In addition, 9344 contends that True North has failed to maintain lender relationships in that it has failed to make TF, its proprietary mortgage lending facility, available exclusively to 9344 for use in Quebec. TF existed in some form at the time the TLA was entered into and 9344 argues that maintaining lender relationships extends to affording it access to TF.

[56] 9344 also argues that the term “lender relationships” extends to new relationships that came into existence during the term of the TLA. It asserts that a relationship between TF, as lender, and 9344, as broker, would be one such relationship that True North was required to “maintain”.

[57] I must state to begin with that it is not at all clear to me that these “understandings” were intended to create obligations with consequences for failure to perform. If that was indeed

intended, the parties could have referred to them as “covenants” or included them in section 5 of the TLA, which sets out certain undertakings referred to as “obligations”. My concerns are exacerbated by the vagueness of these “understandings”. They are amorphous and no metrics are provided in the TLA to assist in evaluating compliance.

[58] There is no indication of what online marketing distribution involves, how it is to be measured and what steps might reasonably be taken to “maintain” online marketing distribution. In any event, if this truly does represent a positive covenant on True North’s part, it arises only if maintenance could be said to be “possible”.

[59] Similarly, in its Statement of Claim and pursuant to one of the above understandings, 9344 sought an order directing True North to disclose full details of all “leads for the Province of Quebec” that True North had retained for itself or referred to other financial institutions. There is nothing in the TLA to elucidate what is meant by the phrase “leads for the Province of Quebec”. Consequently, it is difficult to understand what True North’s obligations, if any, are in this regard and how they are to be enforced.

[60] There is no description of “lender relationships” or of what “maintaining” those relationships might involve. Notwithstanding this lack of definition, 9344 and True North appear to agree that lender relationships would include arrangements that existed between True North and third-party lenders immediately prior to True North’s exit from Quebec and the execution of the TLA. However, True North asserted in argument before me that it is hardly in a position to tell third-party lenders that they must deal with its contracted mortgage broker, being 9344. I agree. It is not clear to me how True North might be expected to maintain relationships to which it is no longer a party and 9344 has not persuaded me that True North should be expected to do so.

[61] Nevertheless, 9344 argues that True North’s “understanding” simply means that it should give 9344 access to TF. In substance, 9344 argues that even though TF existed at the time of the TLA, the TLA omitted reference to TF, and efforts in 2022 to negotiate a new TLA that expressly gave 9344 access to TF were not successful, True North nevertheless had an obligation to give 9344 access to TF once it became operational in Quebec.

[62] I do not accept this argument. While I appreciate that TF was a lending trademark in existence when the TLA was entered into, it was not referred to in the TLA and I have found that it was not intended to be included in 9344’s license. Accordingly, I find it hard to imagine that the parties could have expected True North to maintain for 9344’s benefit something that was not the subject of 9344’s license under the TLA. 9344 asks the Court to draw inferences from what it alleges are the surrounding circumstances, the effect of which is to add to the TLA an express provision regarding TF that it does not include. I decline to do so.

[63] As I find that there was no intention that TF be made exclusively available to 9344 in Quebec, 9344’s assertion that True North was in breach of its understanding to maintain lender relationships in Quebec fails.

### **3. The Need for Consequential Relief**

[64] 9344 would have the Court conclude that simply declaring that TF is to be made available to 9344 on the terms set forth in the TLA and at the rates prescribed by the standard TF term sheet

is sufficient. True North asserts that access to a lending trademark requires the parties to agree to different terms of engagement than does access to a mortgage brokerage trademark. Its evidence is that special arrangements, including rate-pay combinations, volume targets, lender underwriting and obligation requirements as well as lender representations and warranties, would need to be agreed between the parties in order to afford 9344 functional use of TF. Thus, True North argues that the declaratory order sought by 9344 will necessitate further negotiations.

[65] Declaratory relief is discretionary in nature. Section 11 of the *Judicature Act*, RSA 2000, c J-2 provides that “the Court may make binding declarations of right whether or not any consequential relief is or could be claimed”. Nevertheless, while a declaration may be granted even where consequential relief may be required, I do not believe the Court should ignore the practical implications of granting a declaration. In this case, I am concerned that granting the declaration 9344 seeks would result in the need for further Court intervention.

[66] I agree with True North’s observation that a declaratory judgment goes no further than stating rights. Here, 9344 does not seek just a declaration that it has exclusive access to TF in Quebec. It also asks that its rights to TF be governed by the “standard TF term sheet”. However, it has not established what the standard TF term sheet is, if indeed one exists. Nor has it established why it should be governed by whatever terms True North offers to others.

[67] In my view, the declaration 9344 seeks is analogous to an “agreement to agree”. I agree with True North that further negotiations would be required. Moreover, I find that such negotiations are likely to be fruitless, given the parties’ current attitudes toward one another. The result is likely to be further Court intervention which likely would not be available until the fall of 2024, months after the TLA expires.

[68] Consequently, the declaration 9344 seeks is potentially harmful to the parties’ legitimate interests, risks incurring further delay in the resolution of this matter, and potentially further engages scarce Court resources, all to no apparent end. None of this, in my view, is appropriate.

#### **4. Conclusion on Declaratory Relief**

[69] 9344 is not entitled to a declaration that it is entitled to exclusive use of TF in Quebec for the balance of the TLA.

[70] It has not established on a balance of probabilities that the parties ever intended it to have access to that trademark. That conclusion follows irrespective of whether a mortgage broker like 9344, which is not currently a mortgage lender, could nevertheless make use of that trademark.

[71] True North has satisfied me that the parties intended 9344 to have access only to the Specified Trademarks. True North also has satisfied me that affording 9344 access to TF would necessitate new agreements or at least substantial modifications to the TLA that were not contemplated at the time it was entered into.

[72] I find that it is not reasonable to interpret the exclusivity provisions of the TLA, in conjunction with the “understanding” that True North will maintain lender relationships, as indicative of an intention to grant 9344 access to TF, if, as and when it became operational in Quebec.

## **B. Injunction**

[73] As noted above, 9344 initially applied primarily for an injunction, with declaratory relief only in the alternative. It subsequently changed course, but it has not abandoned its request for injunctive relief. Accordingly, for the sake of completeness and in the event that I am wrong in my assessment of 9344's request for declaratory relief, I will now address injunctive relief.

[74] It is well-established that the test for granting injunctive relief is that articulated by the Supreme Court of Canada in *RJR*, cited above. In this case, 9344 seeks injunctive relief in three separate contexts. In two of those, it seeks a mandatory injunction while, in the third, it seeks a prohibitory injunction. This is significant because, as discussed below, the standard to be met at the first stage of the *RJR* test is different for the two types of injunction.

### **1. Access to TF**

#### **a. Strong *Prima Facie* Case**

[75] First, 9344 seeks a mandatory injunction requiring True North to give it exclusive access to TF in Quebec. In *BrettYoung Seeds Limited Partnership v Dyck*, 2013 ABQB 319 at para 13, Wakeling J (as he then was) said that an applicant for a mandatory injunction must establish a “strong *prima facie* case” rather than the usual “serious issue to be tried”. As noted above, this requires the applicant to show that it will “probably prevail at trial” or is “likely to succeed at trial.”

[76] For the reasons outlined above, I accept True North's assertion that it intended to exclude access to TF from the TLA. Further, I do not accept 9344's argument that the limitation on True North's ability to conduct business in Quebec pursuant to clause 23 of the TLA, combined with the alleged covenant to maintain lender relationships, operates to grant 9344 exclusive access to TF. Accordingly, I do not believe that 9344 is likely to succeed at trial in establishing a right to exclusive access to TF in Quebec. I am not sure how much more evidence can be placed before the trial court that was not already put before me on this issue.

#### **b. Irreparable Harm**

[77] With the passage of almost one year since this matter was first scheduled to be heard in this Court, it becomes increasingly difficult for 9344 to argue that it will suffer irreparable harm if an injunction is not granted. Despite its argument that lack of access to TF would put it out of business, it appears that 9344 continues to carry on business in Quebec under the TLA.

[78] Nor has it made a cogent argument as to why monetary damages at trial would not compensate it for whatever loss it suffers if it does not have exclusive access to TF.

#### **c. Balance of Convenience**

[79] Similarly, with the passage of time, it becomes increasingly difficult for 9344 to argue that the balance of convenience favours it. As noted above, the TLA expires in July and no one has suggested to the Court that it will be renewed, on any terms.

[80] Access to TF in the Province of Quebec may afford access to a profitable mortgage lending market. Because True North operates throughout Canada while 9344 operates solely in Quebec,

9344 argues that denying it access to TF in Quebec has more significant financial implications to it than denying True North the right to use TF in Quebec would have to True North.

[81] That is as may be, but as discussed above, I am satisfied that TF cannot simply be added to the Specified Trademarks in the TLA. Rather, doing so would require effort and expense from both True North and 9344 to negotiate terms of usage. I accept True North's argument that such an exercise would be a waste of money and effort, given the limited term remaining in the TLA.

[82] Further, I view with some favour True North's argument that it has a real interest in protecting the intellectual property that TF represents. True North argues that it has made an investment in developing TF and ensuring that its use in Quebec will comply with Quebec law. It asserts that further steps are required to ensure compliance. If 9344 disputed True North's assertion regarding delayed rollout in Quebec, it could have provided this Court with evidence from someone licensed to practice law in Quebec affirming its position. Alternatively, it could have provided confirmation from Quebec regulatory authorities that requirements for use of TF in Quebec had been met. The Court has been provided with neither.

[83] I can understand why True North would be reluctant to share its intellectual property with the opposing party in litigation, especially given that in a matter of weeks, the very agreement under which 9344 claims access to TF expires. Accordingly, the balance of convenience weighs in favour of permitting True North to deploy TF in a manner and through an operational structure that best maximizes its recovery.

#### **d. Conclusion**

[84] Consequently, I find that 9344 has not met the requirements for a mandatory injunction granting it exclusive access to TF in the Province of Quebec.

### **2. Carrying on Business**

[85] 9344 continues, in its Amended Application, to seek an injunction prohibiting True North from carrying on any business in the Province of Quebec.

#### **a. Serious Issue to be Tried**

[86] Since this is an application for a prohibitory injunction, 9344 must establish a serious issue to be tried. As the Court of Appeal stated in *AC v Alberta*, 2021 ABCA 24 at para 39, "...a serious issue to be tried does not mean anything other than that the case is neither frivolous nor vexatious; rather it is arguable." Despite this low standard, I find that 9344's position on this issue is not arguable.

[87] In my view, 9344's argument that the TLA prohibits True North from carrying on *any* business in Quebec overreaches. First, the evidence indicates that True North ceased to carry on any business activity in Quebec when 9344 objected. A direction to refrain from doing something that is not currently being done seems an unnecessary exercise of the Court's discretion.

[88] Second, as discussed above, I am not satisfied that 9344 has established an arguable case that the TLA restricted True North from carrying on any business in Quebec. Rather, it seems clear that the TLA represented True North's agreement not to compete with 9344 in the mortgage

brokerage business it was taking over from True North. There is no suggestion that True North has, in fact, been carrying on the mortgage brokerage business in Quebec.

### **b. Irreparable Harm**

[89] Even if I am wrong in respect of the serious issue to be tried, 9344 has not satisfied me that it will suffer irreparable harm if a prohibitory injunction is not granted. It has not satisfied me that it will be put out of business as a result of a breach of the TLA by True North.

[90] Any harm 9344 may have suffered as a consequence of True North's brief foray into mortgage lending in Quebec can be quantified at trial and compensated in damages.

### **c. Balance of Convenience**

[91] 9344's interpretation of clause 23 of the TLA to prohibit True North from carrying on *any* business in the Province of Quebec, whether or not connected with mortgage lending or brokering, seems unnecessarily restrictive. It is hard to imagine what legitimate interest 9344 could have in enforcing such a restriction. Put simply, what interest could 9344 have if True North were to decide to carry on business in Quebec by selling cars, opening a restaurant or running a cleaning service? 9344's claims might have found greater resonance with the Court had it argued that clause 23 was limited to the mortgage lending business.

[92] Accordingly, I find the balance of convenience favours True North.

### **d. Conclusion**

[93] Consequently, I find that 9344 has failed to meet the requirements for an injunction prohibiting True North from carrying on any business in the Province of Quebec.

## **3. Injunctive Relief Based on Understandings**

[94] 9344 seeks a mandatory injunction requiring True North to direct all Quebec leads to it, maintain lender relationships and maintain the current level of online marketing (if possible). Accordingly, it must show a strong *prima facie* case. At trial, 9344 will need to establish:

- 1) That the "understandings" in the TLA rise to the level of covenants enforceable at law;
- 2) What the term "lender relationships" meant on July 25, 2016 and what True North might have been expected to do to "maintain" them;
- 3) What the term "Quebec lead" meant and whether or not specific leads can be said to have been derived from True North trademarks; and
- 4) What the term "level of online marketing distribution" means and what level existed on July 25, 2016.

[95] Based on my review of evidence before me, 9344 has not established the strong *prima facie* case required.

[96] Further, given the short time horizon before the expiry of the TLA, I find that 9344 has failed to establish that it will suffer irreparable harm if the injunction is not granted and that the

balance of convenience favours it. Therefore, the requirements for the requested injunction have not been met and I decline to grant it.

## **VI. Conclusion**

[97] 9344's application is dismissed. If the parties cannot agree on costs, they are directed to provide me written submissions in respect thereof within thirty days of the date of this decision.

Heard on March 1, March 30, June 15, December 4, 2023, and March 26, 2024  
**Dated** at the City of Calgary, Alberta this 15<sup>th</sup> day of May 2024.

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**C.M. Jones**  
**J.C.K.B.A.**

### **Appearances:**

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Navdeep Kaur  
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