Federal Court  Cour fédérale

Date: 20220725

Docket: T-1453-22

Citation: 2022 FC 1107

Ottawa, Ontario, July 25, 2022

PRESENT: Mr. Justice McHaffie

BETWEEN:

INTEL AUTO TRADE INC. d.b.a.
GO LUXURY CARS

Plaintiff

and

OCEAN NETWORK EXPRESS (CANADA) INC.,
OCEAN NETWORK EXPRESS PTE. LTD.,
TOLT INTERNATIONAL LOGISTICS INC.

Defendants

ORDER AND REASONS

I. Overview

[1] At the conclusion of the hearing of this matter on July 21, 2022, I ordered that the interim order initially issued *ex parte* on July 13, enjoining the defendants from taking steps to release three Mercedes-Benz vehicles in Tianjin, China, would not be continued, for reasons that would follow. These are those reasons, together with my order and reasons on costs.

[2] As set out in further detail below, I conclude that in coming to the Court on an *ex parte* basis on July 13, Intel Auto Trade Inc dba Go Luxury Cars [Intel] did not meet its obligation to provide the Court with full and frank disclosure of relevant and material matters. In particular, Intel was aware that the defendant, Tolt International Logistics Inc [Tolt], had disputed Intel's ownership and right to possession of the vehicles based on shipping documents and corporate relationships between Intel, 2708042 Ontario Inc [270 Ontario], and other companies said to be involved in the purchase, export, and sale of the vehicles. Regardless of the merits of Tolt's position, Intel's response to it, or the role of 270 Ontario or the other companies, it was incumbent on Intel to ensure that the Court had a complete picture of the situation when asking the Court to exercise its discretion to issue an *ex parte* injunction. While a material non-disclosure is not always fatal to maintaining an *ex parte* order, I conclude in the circumstances that I should not exercise my discretion to continue the injunction.

[3] For clarity, in deciding not to continue the injunction, the Court makes no determinations with respect to the legal ownership of the vehicles, entitlement to their possession, or the merits of the positions of either Intel or Tolt. There are certainly questions that arise from the evidence put forward to date by the parties, particularly Intel and Tolt. These are matters to be determined when this action is decided on the merits.

[4] The defendants are entitled to their costs of the motion. Intel does not dispute the claim of Ocean Network Express Pte Ltd [ONE] and Ocean Network Express (Canada) Inc [ONE Canada] to costs in the amount of $11,612.50, payable forthwith, and I so order. For the reasons below, costs shall be payable to Tolt in the amount of $20,000, payable to Tolt in any event of the cause.

II. Factual Background

A. *Procedural Background and the Evidence Filed*

[5] Intel filed its *ex parte* motion on July 13 on an urgent basis, with a supporting affidavit from Rui Fernandes, a lawyer at the law firm representing Intel. An affidavit from counsel was apparently used in light of the urgency of the matter. I granted the requested order on an interim basis, enjoining the ONE parties, who were understood to have shipped the vehicles and to be in possession of them in Tianjin, from releasing them, and enjoining Tolt from taking steps to secure their release. The interim injunction was effective until a return of the motion on July 15, and required Intel to serve the order and their materials on the defendants.

[6] In advance of the July 15 hearing, Intel filed an affidavit from Jian Jiao, an owner of Intel and its Logistics Manager, sworn July 14. That affidavit largely replaced Mr. Fernandes' affidavit, while providing some additional evidence, particularly about the reputational harm Intel was facing.

[7] At the July 15 hearing, all parties were represented by counsel. To permit time for the defendants to respond to Intel's motion, the parties agreed the matter would be further returned on July 21, with the injunction to continue in the interim. After hearing the parties' submissions on the appropriate terms for the continuation of the interim injunction, the injunction was continued until July 21.

[8] Prior to the July 21 hearing, Intel filed a further affidavit from Mr. Jiao, sworn July 20. Tolt filed an affidavit from an employee, Yuwei Zhang, affirmed July 19, together with an affidavit affirmed the same day from Yongsheng Wang, a legal assistant with Tolt's counsel, which confirmed Ms. Zhang's translations of certain Chinese documents and messages on WeChat, a Chinese messaging app. The ONE parties filed an affidavit from Eric Chang, Associate General Counsel with a ONE affiliate, sworn July 20. The morning of the hearing on July 21, the ONE parties filed a further affidavit from Mr. Chang containing newly received information regarding claims to the vehicles.

[9] None of the affiants were cross-examined on their affidavits. The parties made their arguments based on the affidavits as presented, and no party contended that adverse inferences should be drawn based on another party's refusal or failure to permit cross-examination.

B. *The Vehicles and Shipments*

[10] The three vehicles at issue on this motion are each 2022 Mercedes-Benz GLS450 sport utility vehicles. They bear vehicle identification numbers [VINs] 4JGFFKE6NA726246, 4JGFFKE5NA708174, and 4JGFFKE3NA71123, respectively. A fourth vehicle of the same year, make and model, bearing VIN 4JGFF5KE4NA723295 [Vehicle 3295], is also at issue in the underlying action and relevant to the factual background. The four vehicles were bought from Mercedes dealers in Toronto and Montreal in April and May 2022. Province of Ontario vehicle permits show Intel as the registered owner of the vehicles.

[11] According to Mr. Jiao in his July 20 affidavit, Intel and 270 Ontario agreed in April 2022 that Intel would buy the vehicles and ship them to China. 270 Ontario was to act as a salesperson for the vehicles in China, and if it could not source a buyer and did not pay Intel for the vehicles, then Intel and its business partner in Hong Kong could dispose of them. At the suggestion of 270 Ontario, Intel engaged Tolt, a British Columbia based logistics and shipping company, to act as freight forwarder. Arrangements for shipment of the vehicles across Canada and on to China were apparently made beginning in April. On May 2, in an exchange on WeChat between Intel, 270 Ontario, and Tolt, Intel sent a message in Chinese that was translated as either "make sure every cargo release is confirmed by 3 parties in the group" (Mr. Jiao's translation) or "every time release the cargo, please confirm with three parties" (Ms. Zhang's translation, confirmed by Ms. Wang).

[12] Tolt prepared and sent to Intel "house" bills of lading with respect to the four vehicles. Each identifies the Shipper as Intel; the Forwarding Agent as Tolt; the Notify Party as Jiangu Guotai H and B Co, Ltd [H&B]; the Consignee as "To Order"; and the Shipping Agent at Destination as Tianjin Ocean Skyline International Forwarders Co, Ltd [Ocean Skyline]. Under the "Description of Goods and Services," they each refer to the vehicle, including its VIN and to a letter of credit number. The house bill of lading for Vehicle 3295 shows it being loaded on a ship operated by ONE, on May 27, 2022. The house bills of lading for the other three vehicles show them being loaded on a different ship operated by ONE on June 19 and 20, 2022.

[13] Tolt also prepared Canadian Export Reporting System [CERS] declarations for the Canada Border Services Agency. For each of the vehicles, the reports show Intel as the Exporter, H&B as the Consignee, Tolt as the Service Provider, and ONE as the Carrier.

[14] Tolt sent the house bills of lading for Vehicle 3295 and two of the other vehicles to Intel by email on June 3. On June 7, Intel wrote to Tolt indicating that it had found overseas letter of credit fraud in a previous case, which it was investigating, and requested copies of the master bills of lading for these three vehicles and all future vehicles. Intel asked that Tolt amend and send both the master bills of lading and CERS declarations with the Consignee and Notify Party identified as World Auto Trading (HongKong) Limited [World Auto], Intel's Hong Kong agent. World Auto is affiliated with Intel's agent in China, Tianjin Jingxicheng International Trading Co, Ltd [Tianjin Jingxicheng].

[15] Tolt responded to Intel's request (via WeChat) on June 8, saying they could not change the Consignee information owing to the letter of credit arrangements associated with the vehicles, which involved H&B and another Hong Kong based company, KSK Investment Limited [KSK].

[16] Tolt contracted with ONE for the shipment of the vehicles from Vancouver to Tianjin. The Court does not have the ONE bill of lading for Vehicle 3295, but Mr. Chang provided the three ONE bills of lading for the three other vehicles, which ONE issued on June 20, the date the vehicles were loaded on board ONE's ship in Vancouver. The bills of lading each identify Tolt

as both the Shipper and Forwarding Agent, and Ocean Skyline as both the Consignee and the Notify Party.

[17] Vehicle 3295 arrived in Tianjin on June 20. On that day, Tolt reported to 270 Ontario and Intel via WeChat that a vehicle, presumably Vehicle 3295, had arrived at its destination and that there was only 14 days of free storage there. Intel responded, according to Ms. Zhang's translation, that "[a]fter 270 company make payment, it can be release." Tolt and Intel then appear to have had a disagreement over the payment of storage costs and the release of the vehicle, during which Intel noted that "[t]he problem is 270 didn't pay," while Tolt took the position that Intel's dispute was not related to Tolt's logistics and that Tolt needed to speak with KSK.

[18] Vehicle 3295 was released on June 28. According to Mr. Jiao, it was released to an unknown person, without Intel's knowledge or permission, and Intel does not now know where it is. Intel therefore became concerned about the three remaining vehicles, which were in transit to Tianjin. It sent two emails to Tolt on July 6. In those emails, Intel referred to the unauthorized pickup of Vehicle 3295 and to the "To Order" bill of lading, asserting that the vehicles could only be released on Intel's authorization. It requested that the Consignee and Notify Party for the remaining three vehicles be changed to its Chinese agent, Tianjin Jingxicheng, and demanding that the three vehicles not be released without Intel's authorization.

C. *The Correspondence in China*

[19] The same day, July 6, Tianjin Jingxicheng issued a "Notification Letter" addressed to all member units and dealers of Tianjin Circulation Association of Parallel Import Cars [Tianjin Association]. The Notification Letter stated that Tianjin Jingxicheng had initiated a report against Ocean Skyline, KSK, Tolt, and other companies for suspected letter of credit fraud and forged bill of lading fraud. The Notification Letter identified the four vehicles, called on dealers and brokers not to pick up the vehicles to "avoid falling into the trap designed by criminals," and urged Ocean Skyline to release the goods to Tianjin Jingxicheng.

[20] Tianjin Jingxicheng also circulated on July 6 a "Report Letter on Suspected Letter of Credit Fraud and Forged Bill of Lading Fraud" which appears to be the report referenced in the Notification Letter. The Report Letter identifies Intel as the owner and exporter of Vehicle 3295 and alleges that Tolt and Ocean Skyline conspired to release the vehicle to an improper consignee. It also identifies the three remaining vehicles, and states that Intel had instructed Tolt to release them to Tianjin Jingxicheng. Again, the Report Letter urges Ocean Skyline to release the three vehicles to Tianjin Jingxicheng upon arrival in port, and calls upon dealers and brokers not to deal with the four vehicles. The Report Letter states that it attaches a Canadian vehicle ownership certificate, CERS declaration, and other property certificates, as well as the bill of lading issued by Tolt to Intel. The version of the Report Letter before the Court as an exhibit to Ms. Zhang's affidavit does not include these attachments, so it is uncertain whether the letter attached documents for all four vehicles or just Vehicle 3295. However, it appears from the context of the letter and Tolt's response that the attachments related to Vehicle 3295.

[21] Tolt responded to the July 6 Notification Letter and Report Letter on July 8, through a Special Declaration addressed to the members of the Tianjin Association and through a Legal Letter from their lawyers to Tianjin Jingxicheng. The Special Declaration contested the assertions in the Notification Letter and Report Letter, and denied any fraud or unlawful behaviour on its part. Tolt's Special Declaration stated that Intel was not a client of Tolt, but that the client in the transaction was 270 Ontario. It also stated that the CERS declaration and their house bill of lading were amended at the request of 270 Ontario, were for the purposes of tax refunds in Canada, and were not proof of the vehicle owner's true identity. The Special Declaration went on to describe the payment arrangements by letter of credit and the validity of the bill of lading ultimately prepared. Tolt alleged that the "true circumstances" were that 270 Ontario and Intel were business partners with disputes over financing interests, and that Intel was only purporting to be the cargo owner in an attempt to illegally take possession of the vehicles.

[22] The Legal Letter similarly asserted that Tolt had never received instructions from Intel and "has no direct business dealings with it"; that the CERS declaration and house bill of lading were for the purpose of tax refunds only and had no other significance, and referred to the financing, letter of credit, and bill of lading arrangements. The Legal Letter demanded that Tianjin Jingxicheng publish an apology letter within 15 days. On July 18, Tianjin Jingxicheng did publish an apology letter, referring to the steps Intel had taken, including in this Court, but concluding after consideration that it was inappropriate for them to have issued unfair comments when the case had not been concluded.

[23] In the interim, on July 11, Intel reported Vehicle 3295 as stolen to the York Regional Police. The same day, the remaining three vehicles were unloaded from the ONE vessel in Tianjin. On July 12, Intel became aware, through counsel, that ONE's transport documentation did not identify Intel as the Shipper of the vehicles or as having any connection with the vehicles.

III. Full and Frank Disclosure

A. *The Obligation to Make Full and Frank Disclosure*

[24] Litigation in Canada generally proceeds in an adversarial context, with each party on notice of the other parties' arguments and evidence, and given an opportunity to respond before the Court decides the matter. In some circumstances, typically due to urgency or a concern that giving notice would undermine the relief sought, a party may seek an injunction on an *ex parte* basis, that is, without notice to the other party or parties: *Federal Courts Rules*, SOR/98-106, Rule 374(1). In such cases, without the usual checks and balances of the adversary system, the Court and the absent party are "at the mercy of the party seeking injunctive relief": *United States of America v Friedland*, [1996] OJ No 4399 (Gen Div) at para 26; *Canadian Security Intelligence Service Act (CA) (Re)*, 2021 FCA 92 at paras 122–123 [*Re CSIS Act*]. The law therefore imposes on both the party seeking *ex parte* relief and their counsel an exceptional duty of candour, requiring them to make "full and frank disclosure" of the case: *Friedland* at para 26; *Re CSIS Act* at paras 120–122; *TMR Energy Ltd v Ukraine*, 2005 FCA 28 at paras 63–64. In some courts, this has been codified in practice rules: see, *e.g.*, *Rules of Civil Procedure*, RRO 1990, Reg 194, Rule 39.01(6). In the Federal Court, it remains a common law principle arising from the nature of *ex parte* applications.

[25] The obligation of full and frank disclosure means that a party seeking *ex parte* relief cannot present only its side of the case in the best light. It must make a balanced presentation of the facts and law, and must inform the Court of points of fact or law known to it that favour the other side: *Friedland* at para 27; *Ruby v Canada (Solicitor General)*, 2002 SCC 75 at para 27; *Re CSIS Act* at para 121. The duty is described as an obligation to "act in utmost good faith": *Re CSIS Act* at para 121; *TMR Energy* at para 65, citing *Canadian Paraplegic Assn (Newfoundland and Labrador) Inc v Sparcott Engineering Ltd*, 1997 CanLII 14645 (NL CA) at para 18.

[26] The duty to make full and frank disclosure requires the disclosure of all relevant and material facts. It is not, however, imposed in a formal or mechanical manner, and must recognize the context of an *ex parte* motion, which is often urgent, brought on short time frames and on the basis of known information: *Friedland* at para 31. Mere imperfections in an affidavit or the failure to disclose inconsequential facts will not be considered a breach of the duty depriving the plaintiff of a remedy: *Friedland* at para 31; *Pardhan v Coca-Cola Ltd*, 2003 FCA 11 at para 26. Conversely, materiality is not assessed simply by determining whether the result would have been the same, and a fact may be material even if it is not determinative: *Friedland* at para 36; *Unilin Beheer BV v Triforest Inc*, 2017 FC 76 at para 46; *Kisti v Kisti*, 2020 ONSC 4706 at para 22. The Ontario Divisional Court has described a material fact as being "any fact that would have been weighed or considered by the motions judge in deciding the issues, regardless of whether its disclosure would have changed the outcome": *Stans Energy Corp v Kyrgyz Republic*, 2015 ONSC 3236 (Div Ct) at para 5, citing *Forestwood Co-operative Homes Inc v Pritz*, [2002] OJ No 550 (Div Ct) at para 26.

[27] Given the importance of the duty to make full and frank disclosure, a breach of it is serious and may result in the order obtained *ex parte* being set aside or discontinued, even if the plaintiff might have been otherwise entitled to the order: *Friedland* at paras 30, 112, 175; *Stans Energy* at para 5. This is so whether the omission is deliberate or unintentional, as there need not be any intention to mislead the Court: *ME2 Productions, Inc v Doe*, 2019 FC 214 at para 63.

[28] Nonetheless, a breach of the obligation is not invariably fatal. The Court retains a discretion to assess the breach and determine whether the *ex parte* order should continue: *Pardhan* at paras 26–27; *ME2* at para 64; *Kisti* at para 30. This is a discretion that should be exercised "with great caution": *TMR Energy* at para 65 citing *Landhurst Leasing plc v Marcq*, [1997] EWJ No 1490 (CA) at p 15, paras 63–66. Relevant factors in the exercise of discretion include the nature of the failure, the importance of the information to the issues and outcome, the degree and extent of the applicant's culpability or intent, and any prejudice to other parties: *TMR Energy* at paras 65, 68; *Pardhan* at para 27; *ME2* at para 64; *Kisti* at para 30.

B. *Intel did not Make Full and Frank Disclosure*

[29] Having reviewed the evidence presented by all parties at the hearing of July 21, I conclude that Intel did not meet its obligation of full and frank disclosure when it came to the Court on an *ex parte* basis on July 13.

[30] As set out above, Intel's *ex parte* motion on July 13 was presented on the basis of Mr. Fernandes' affidavit. Mr. Fernandes' affidavit was based in large part on information from

Mr. Jiao and documents from Intel, as well as some information obtained by Intel's counsel in discussion with counsel for ONE.

[31] Intel's evidence on July 13 set out its claim to legal ownership of the four vehicles, attaching its purchase documents and the Province of Ontario vehicle permits. It provided the house bills of lading and CERS declarations provided by Tolt. It provided a copy of Intel's June 7 email raising the concern about overseas letter of credit fraud and asking Tolt to amend the master bills of lading and CERS declarations to show World Auto as Consignee and Notify Party. Mr. Fernandes stated in his affidavit that he was informed that Tolt responded through WeChat refusing to alter the bills of lading, but that "since June 7, 2022, Tolt has not responded to any communications sent by Intel Auto Trade or their legal counsel."

[32] Mr. Fernandes also referred to Intel's July 6 email about the remaining three vehicles, although it appears that it was not attached to his affidavit owing to oversight. Mr. Fernandes stated, again on information, that "no response to this email was received from Tolt."

[33] The impression left by the evidence presented by Intel on July 13 was that after Tolt refused to alter the bills of lading in response to the June 7 email, it had effectively gone silent and had not responded "to any communications," including the July 6 email. This was apparently Intel's counsel's understanding as well, given his submission to the Court that the response to the June 7 email was "their last communication from Tolt."

[34] The evidence now before the Court, however, is that there were additional exchanges directly between Intel and Tolt in at least late June, as well as the exchange of correspondence between its Chinese agent and Tolt in early July. The evidence presented on July 13 did not refer to the WeChat exchanges between Intel and Tolt on June 20 and 21, after the arrival of Vehicle 3295 in Tianjin, in which Intel indicated the vehicle could be released after 270 Ontario made payment, and that the problem was that 270 Ontario did not pay.

[35] The evidence presented on July 13 also did not refer to the fact that Intel's agent in China, Tianjin Jingxicheng, had sent the Notification Letter and Report Letter a week earlier, alleging that Intel owned one of the vehicles based on essentially the same grounds and documents that Intel presented to the Court. Significantly, the evidence presented on July 13 also did not reveal that Tolt had responded through the Special Declaration and Legal Letter on July 8, denying Intel's ownership of the vehicles, denying any fraud, denying any business relationship with Intel, and characterizing the issue as a dispute between Intel and 270 Ontario. Intel does not contend that it was unaware of this correspondence involving its agent in Tianjin.

[36] The evidence presented on July 13 did not refer to these exchanges or to Tolt's known position. Indeed, the evidence presented did not refer to the existence of 270 Ontario at all, to its relationship as salesperson for the vehicles in China, or to Tolt's concern that 270 Ontario had not paid. Nor did it refer to the involvement of KSK or the letter of credit issues that had been flagged by Tolt.

[37] These were relevant and material matters. Intel argued on July 13 that it met the requirements for an injunction, namely that (a) there was a serious issue to be tried; (b) Intel would suffer irreparable harm if the order were not made; (c) the balance of convenience favoured granting the order; and (d) the granting of relief was just and equitable in the circumstances: *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 at p 334; *Google Inc v Equustek Solutions Inc*, 2017 SCC 34 at paras 1, 25. The facts that were known to Intel and not presented to the Court were relevant and material to these submissions.

[38] On the serious issue to be tried, Intel argued it "retains all right, title and interest in the Vehicles," and that Vehicle 3295 had already been obtained by fraud by either Tolt or a third party. The fact that Tolt's position on these issues was known, namely that it contested Intel's ownership of the vehicles and any involvement by Tolt in fraud, was material to this issue, as was Tolt's basis for that position. So too was the involvement of 270 Ontario as Tolt's sales representative. These were, in the words of the Divisional Court, a "fact[s] that would have been weighed or considered by the motions judge in deciding the issues": *Forestwood* at para 26.

[39] On the issue of irreparable harm, Intel relied primarily on the damage to its reputation with its business partners in China, although its evidence of this harm was not presented until Mr. Jiao's July 14 affidavit. The fact that its agent in China had itself made public allegations of fraud against third parties, which had been denied by Intel to the extent of a Legal Letter demanding retraction, was material to the assessment of this issue.

[40] Similarly, on the balance of convenience, Intel referred to its interest in the vehicles and to the potential harm to ONE of having to maintain possession of the vehicles. However, it did not refer to the fact that Tolt had asserted that the relevant shipping documents and transactional background gave another party an entitlement to possession of the vehicles.

[41] These matters are material regardless of the merits of Tolt's position, and regardless of whether the involvement of 270 Ontario or other companies in the transactions ultimately affect Intel's ownership or entitlement to possession of the vehicles. There are certainly some questions that arise on the face of Tolt's evidence. In particular, the evidence does not fully explain why Tolt issued house bills of lading to Intel, while the ONE bills of lading contained different information and were not provided to Intel. The evidence also does not explain why Tolt asserted in its Special Declaration that Intel was not a client and in the Legal Letter that Tolt had no direct business dealings with Intel, when Tolt clearly issued at least the house bills of lading and two invoices to Intel. It would have been open to Intel to present its refutation of Tolt's position to the Court, or argue why it should not be accepted. It was not open to Intel to effectively present to the Court a factual scenario in which the correspondence in China did not exist.

[42] In this regard, I cannot accept Intel's submission that the matter is simply a contract of carriage case, and that the business relationships and financing arrangements for the vehicles were ultimately irrelevant. Even on Intel's own evidence, as ultimately presented in Mr. Jiao's second affidavit, 270 Ontario had an apparent authority to act as salesperson for the vehicles in China. In a WeChat exchange on May 3 presented by Ms. Zhang, 270 Ontario advised Tolt and Intel that "we have deposit and contract on each vehicle with each customer," suggesting that

270 Ontario had found customers for the vehicles in question. Earlier that morning, Intel had apparently recognized KSK's involvement and interest, noting with respect to one of the vehicles that since KSK was the beneficiary under a letter of credit, in principle it already had property in the vehicle. Intel appears to argue that 270 Ontario's customer only had a right to possession if Intel was paid. Regardless, these financial and transactional arrangements were relevant to the Intel's asserted ownership and right to possession of the vehicles.

[43] I underscore that in making the foregoing comments, the Court makes no findings or determinations regarding who owns or owned the vehicles, who is or was entitled to possession of them, or who is or was entitled to be paid for them. These matters will be determined in the underlying action after all parties have had the benefit of discovery. The issue for the present is simply that Intel had an obligation to present a full and objective picture of the relevant matters and did not do so.

[44] I also underscore that there is no indication that Intel's counsel was responsible for the lack of complete information. However, this does not affect the analysis, as the obligation of full and frank disclosure is one that lies on both the party requesting relief and its counsel: *Re CSIS Act* at para 122.

C. *Impact of the Failure to Make Full and Frank Disclosure*

[45] As noted, a breach of the obligation to make full and frank disclosure is not invariably fatal. The Court retains a discretion to assess the circumstances and decide whether the failure to

make full and frank disclosure should be dispositive. In the present circumstances, I conclude that my discretion should be exercised by not continuing the injunction.

[46] In my view, the information that was not disclosed when Intel came to the Court was material and substantial. The very issue Intel was presenting was its entitlement to possession of the vehicles that had been shipped for sale in China. It presented information regarding the context of its sale and shipment arrangements, but did not present the whole picture regarding the parties involved, the nature of the transactions, the claims of other parties, and the known positions of one of the parties it suggested may have been involved in unlawful conduct.

[47] This limited picture presented by Intel continued at the return of the motion on July 15, when Intel filed Mr. Jiao's first affidavit. Mr. Jiao did not refer to the exchange of correspondence in China involving Tianjin Jinxicheng, even though he spoke directly to Intel's concern about its reputation and the concern that Tianjin Jingxicheng would no longer do business with Intel to protected its own business reputation. Tianjin Jingxicheng's own notice to the industry accusing Tolt and others of criminal conduct, and its receipt of a response from Tolt, were material to these allegations but were not disclosed. Even in Mr. Jiao's supplementary July 20 affidavit, he referred to Tolt's Special Declaration and Legal Letter, but not to Tianjin Jingxicheng's Notification Letter and Report Letter that prompted Tolt's response. While the matter was by then a motion on notice rather than an *ex parte* proceeding, I consider Mr. Jiao's apparent reluctance to provide a complete picture relevant to the issue of discretion.

[48] I also consider relevant the impact of the additional information on the merits of the underlying injunction motion. Evidently, if the *RJR-MacDonald* test is no longer met, there is no reason for the injunction to continue. I conclude that I need not decide whether the *RJR-MacDonald* test is met on the totality of the evidence, as the new information before me at least raises serious questions as to whether Intel has established irreparable harm or that the balance of convenience favours the injunction.

[49] On irreparable harm, as previously indicated, Intel relies primarily on the harm to its reputation with its business partners and clients in China. On July 13, this was presented as a matter of argument. On July 15, Mr. Jiao presented evidence regarding the scope of its business in China and expressed a concern that Tianjin Jingxicheng would no longer do business with Intel if the vehicles are lost. It now appears that some of the reputational concerns may have arisen because Tianjin Jingxicheng issued a notice to the local industry in Tianjin raising allegations of fraud, for which it was ultimately forced to apologize. In these circumstances, it is far from clear that any irreparable reputational harm faced by Intel would arise simply from the requested injunction not being granted.

[50] On the balance of convenience, Intel initially presented the balance as being exclusively between the harm to its financial and ownership interest in the vehicles and the harm to ONE of retaining custody of the vehicles. It is now clear from the complete picture before the Court that there are at least two competing claims to possession of the vehicles, and that the resolution of those claims may be more complex than Intel initially presented. The continuation of the injunction while those claims are resolved risks increasing the overall costs of storage and reducing the value of the cars by the passage of time. Again, the information that was not

initially presented is material to this balance and raises significant questions as to whether the balance of convenience favours, or ever favoured, the detention of the vehicles.

[51] As noted, I need not decide these matters determinatively. However, my concerns about whether the test for injunction is met on the evidence as a whole support my conclusion that I should not exercise my discretion in favour of continuing the injunction notwithstanding the lack of full and frank disclosure.

[52] For the foregoing reasons, I ordered at the conclusion of the hearing on July 21, 2022 that the injunction initially issued on July 13 and continued on July 15 would not continue.

IV. Costs

[53] As Intel recognizes, the defendants are entitled to their costs as successful parties. The ONE parties presented their costs at the hearing as totalling $11,612.50. They argued that they were simply a third party carrier caught in the middle of a dispute between other parties, and ought to be indemnified for those costs. Intel did not quarrel with the ONE parties' request for costs in the amount of $11,612.50, payable forthwith, and I so order.

[54] Tolt estimated its solicitor-and-client costs at $25,000. It argued that solicitor-and-client costs were appropriate given the Court's finding that Intel had breached its obligation to make full and frank disclosure, and similarly asked that they be payable forthwith. While Intel recognized that Tolt was entitled to costs of the motion, it argued that solicitor-and-client costs were not warranted in the circumstances. It also argued that since Tolt may ultimately be found

liable for Intel's losses associated with the vehicles, any costs were appropriately payable in the cause of the underlying action.

[55] While the obligation to make full and frank disclosure is an important one, and a breach of it necessarily serious in consequence, a failure to make full and frank disclosure does not invariably merit an award of solicitor-and-client costs. In *Friedland*, Justice Sharpe concluded that solicitor-and-client costs, payable forthwith, were warranted given both non-disclosure and misrepresentations made by the plaintiff: *Friedland* at paras 205–206. Conversely, in *TMR Energy*, the Federal Court of Appeal concluded that even though there had been a material non-disclosure, costs should not be awarded on a solicitor-and-client basis, but nonetheless exercised its discretion to grant increased costs: *TMR Energy Ltd v Ukraine*, 2005 FCA 231 at paras 4–8. In *Kisti*, Justice Schabas awarded reduced partial indemnity costs despite his conclusion that the plaintiff failed to make full and frank disclosure: *Kisti v Kisti*, 2020 ONSC 5295 at paras 2–3.

[56] In the present circumstances, I conclude that the approach taken by the Court of Appeal in *TMR Energy* is appropriate, and find that full solicitor-and-client costs are not appropriate but that elevated costs are. Considering the nature of the matter and the urgency involved, I conclude that an award of $20,000 is appropriate. I agree with Intel that these costs should not be payable forthwith, but do not agree that they should be in the cause of the main action. Rather, they should be payable by Intel to Tolt in any event of the cause.

[57] For clarity, the foregoing costs cover the parties' responses to Intel's motion and the attendances of July 15 and 21, 2022.

ORDER IN T-1453-22

THIS COURT'S ORDER is that

1. Ocean Network Express Pte Ltd and Ocean Network Express (Canada) Inc shall have their costs of the Court's Order of July 21, 2022, in the amount of $11,612.50, payable by Intel Auto Trade Inc dba Go Luxury Cars forthwith.

2. Tolt International Logistics Inc shall have its costs of the Court's Order of July 21, 2022, in the amount of $20,000.00, payable by Intel Auto Trade Inc dba Go Luxury Cars in any event of the cause.

"Nicholas McHaffie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1453-22
STYLE OF CAUSE:	INTEL AUTO TRADE INC. d.b.a. GO LUXURY CARS v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	JULY 13, 2022
JUDGMENT AND REASONS:	MCHAFFIE J.
DATED:	JULY 25, 2022

APPEARANCES:

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