

Court dismisses non-competition injunction against former key employee

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When relationships end between a business and an individual who was a principal thereof, the business may be understandably concerned about competitive ventures it may face from its former principal. These concerns are particularly acute during the critical time when the principal ceases to work with the business and is embarking on a competitive enterprise. The business may have concerns over confidential information which the principal may have had access to, or may have taken with them after ending their relationship. In some cases, the business may even have a written non-competition agreement with the principal, but restrictive covenants are notoriously difficult to enforce.

In *Labrador Recycling Inc. v. Folino*, 2021 ONSC 2195 (CanLII), Justice J.T. Akbarali addressed a motion for urgent injunctive relief sought by the plaintiff, a brokerage for the purchase and sale of scrap aluminum, against an individual who had worked for it since 2013. The individual, Folino, had resigned on December 21, 2020, providing 60 days' working notice. His last day with the plaintiff was 19 February 2021. At some point, Folino established a business in competition with the plaintiff. The plaintiff argued that Folino's new business was engaging in competition that was contrary to his fiduciary and contractual obligations and sought an injunction stopping him from doing so.

The motion involved the traditional test for an injunction, requiring the plaintiff to show (a) a serious question to be tried; (b) irreparable harm if the injunction is not granted; and (c) that the balance of convenience favoured granting the injunction: *RJR MacDonald Inc. v. Canada (Attorney-General)*, 1994 CanLII 117 (SCC), 1994 SCC 117, [1994] 1 S.C.R. 311.

However, because the plaintiff was seeking to impede the ability of Folino to earn a livelihood, Justice Akbarali followed a line of cases that require the moving party to show a strong *prima facie* case, rather than a serious question to be tried: *Camino Modular Systems Inc. v. Kranidis*, 2019 ONSC 7437, 58 C.C.E.L. (4th) 243, at para. 15. In so doing, the court dealt with several issues that frequently arise in these types of disputes:

1. Whether Folino owed fiduciary obligations to the plaintiff;
2. Whether Folino was in breach of a contractual restrictive covenant;
3. Whether Folino had misused any confidential information;
4. Whether the plaintiff would suffer irreparable harm without an injunction.

The first issue that the plaintiff had to contend with was whether Folino owed it any fiduciary duties. While Folino was not a director of the plaintiff, Justice Akbarali accepted that he had significant responsibilities and was a "key player" who was paid considerably more than the plaintiff's other employees. However, those factors alone did not elevate him to the status of a fiduciary. As opposed to a person's job title, the courts look at the nature of the relationship between the parties, their job function, and the responsibilities being performed.

The test established by the Supreme Court of Canada as to the characteristics of a fiduciary is whether: (i) the fiduciary has the scope for the exercise of some discretion or power; (ii) the fiduciary can unilaterally exercise that power or discretion to affect the beneficiary's legal or practical interests; and (iii) the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power: *Frame v. Smith*, 1987 CanLII 74 (SCC), [1987] 2 S.C.R. 99, at para. 60; *GasTOPS Ltd. v. Forsyth*, 2009 CanLII 66153 (Ont. S.C.), at para. 80.

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Justice Akbarali found that the plaintiff failed to establish that it was particularly vulnerable to Folino. In that regard, the plaintiff could not establish that Folino had any specific customer relationships that would leave it vulnerable to competition from him. Pricing rather than customer loyalty was the key feature of the industry, and there was no evidence that the plaintiff would be at the mercy of Folino with regard to pricing. Indeed, he had given the plaintiff two months' notice before leaving and had introduced his replacement to all the customers. Once Folino left, it was up to the plaintiff to compete with him based on pricing.

The plaintiff also argued that Folino should be bound by a contractual restrictive covenant that purported to prohibit him from soliciting and accepting business from any of the plaintiff's current or prospective customers. The term in question defined a "current or prospective customer of the company" with whom Folino had "direct or indirect contact, or access to conduct confidential information about, during the last two years of [his employment]." There was no attempt to specify or limit the types of customers or potential customers referred to in the restrictive covenant, no geographical limitations, and the duration of the restrictive covenant of one year was overly long given how quickly relationships in the industry could be established.

As a result, Justice Akbarali determined that the plaintiff had failed to establish a strong *prima facie* case as required to enforce a restrictive covenant based on the applicable law: *Ceridian Dayforce Corporation v. Daniel Wright*, 2017 ONSC 6763, at para. 37; *Donaldson Travel Inc. v. Murphy*, 2016 ONSC 740 at paras. 23, 28, aff'd 2016 ONCA 649, at paras. 3-5.

Next, the plaintiff alleged that Folino had misused confidential information because he was soliciting the plaintiff's customers. However, Justice Akbarali found that the identity of the vendors and purchasers in the aluminum scrap market was not information that was confidential to the plaintiff. Rather, the evidence was that vendors and purchasers make their contact information available online because they are interested in having a broad network from which to solicit quotes in order to maximize profits. Further, there was insufficient evidence to show that Folino's new business had misused any confidential information regarding pricing to undercut the plaintiff.

Lastly, the plaintiff failed to establish that it would suffer irreparable harm such as permanent loss of market share without the injunctive relief. Justice Akbarali assessed the evidence proffered by the plaintiff in support of this claim and found it to be insufficient. There was evidence that the plaintiff was actually hiring new employees to meet increased demand for its services. There was no indication that the plaintiff was in danger of shutting down as a result of loss of market share, substantial loss of revenue, or damage to its business reputation.

As a result, the motion was dismissed and the plaintiff was ordered to pay costs to the defendants in the amount of \$47,488.82.

An injunction in the case of a departing employee who has established a competing business is a preliminary skirmish in the battle, but is not necessarily the end of the matter. A plaintiff may well continue with the action through trial even if the injunction is dismissed, and seek to establish that a defendant is liable for damages. Parties are required to preserve and produce relevant documents during the course of a legal proceeding, and in many cases a court will order that financial records be maintained and produced for the purposes of trial so that damages can be assessed if liability is established. As a practical matter, however, a victory on a preliminary injunction often goes a long way towards establishing which side will ultimately prevail, as the court has engaged in a fairly extensive assessment of the parties' positions and merits of the case in deciding whether injunctive relief is warranted. A PDF version is available to download [here](#).

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