

Court Prohibits Competing Restaurant Business from Opening

Interlocutory Injunction | Litigation | Litigation & Dispute Resolution | Non-Compete | Restaurant | Shareholders' Agreement

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Many will be grateful to see 2020 in the rearview mirror, none more so than restaurant owners. With restaurants scrambling to re-focus on take-out service, perhaps the last thing an owner needs is for one of its owners to walk away with an intention to establish a competing “ghost kitchen” that offers similar foods just around the corner. Ghost kitchens are a recent phenomenon. Instead of offering dine-in services, they only serve customers through delivery services such as UberEats or Skip The Dishes.

This is precisely what happened in *11766554 Canada Inc. v. Tingz Restaurant Bar LTD., 2020 ONSC 7986 (CanLII)*, and which resulted in Justice R. Smith granting an interlocutory injunction to the applicant, Tingz Restaurant Bar LTD (“Tingz”), to prohibit its former director and chef, Jae-Anthony Dougan-Holder, from opening a ghost kitchen serving similar cuisine one block away from Tingz’s existing location in Ottawa’s downtown core.

Dougan-Holder is a chef of some renown in Ottawa (the apparent creator of jerk-chicken poutine), and was a director and minority owner of Tingz through a numbered company.

In February 2020, Tingz’ majority owner and Dougan-Holder’s numbered company signed a unanimous shareholders’ agreement (“USA”). The USA contained a non-competition clause which applied for twenty-four months and extended to any activity in Ottawa which would “reasonably be foreseen to be competing with the activities of Tingz.” The USA was drafted by Dougan-Holder’s lawyer.

At some point thereafter, Dougan-Holder resigned as a director of Tingz, and intended to open a ghost kitchen nearby.

To facilitate his plan, Dougan-Holder commenced an application against Tingz seeking to strike down the non-competition clause in the USA. In response, Tingz brought a motion for an injunction to enforce the non-competition clause and to prohibit Dougan-Holder from opening the new ghost kitchen.

In December 2020, the Court heard Tingz’s injunction motion.

To obtain an injunction, the moving party must, in general, meet the three-pronged test set out in the seminal case of *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1994 CanLII 117 (SCC), which is as follows:

- a) Whether there is a serious issue to be tried;
- b) Whether damages will provide the moving party with an adequate remedy or whether it could suffer irreparable harm if the injunction were refused, and
- c) Whether the balance of convenience favours of the moving party.

In some cases, under the first stage of this test, a moving party will be required to establish that it has a strong *prima facie* case. However, here, Justice Smith determined that Tingz did not need to meet this higher standard.

His Honour had little difficulty finding that there was a serious issue to be tried on the basis that Tingz was seeking to prohibit Dougan-Holder from setting up what is alleged to be a competing Caribbean fusion restaurant contrary to the non-competition clause of the USA and contrary to Dougan-Holder’s fiduciary duties as a director of Tingz. The allegations as to whether Dougan-Holder was holding himself out as the “face of 117” when he signed the USA and whether he had

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violated his fiduciary duty as a director of Tingz, were serious issues to be determined at trial.

With regard to irreparable harm, Justice Smith's view was that a reasonable person would conclude that Dougan-Holder's actions would cause Tingz potentially irreparable harm. In that regard, the new ghost kitchen intended to serve the same food as Tingz, Dougan-Holder had a large social media following, and the two locations were in close proximity. This was also not a situation where potential harm to Tingz could simply be readily quantified by maintaining records showing a loss of business until the issues were determined at trial. Rather, Justice Smith found that Tingz would likely be irreparably harmed without the interim injunction, and stated:

It is likely that Tingz will be forced to close its business as a result of the loss of customers to Dougan-Holder's kitchen. Allowing Dougan-Holder to set up a competing business in such close proximity would cause irreparable harm to Tingz, which is not compensable in damages.

When assessing irreparable harm, the evidence of harm generally must be more than just speculative, and in cases where there isn't a clear contractual provision prohibiting competition by a former director or employee, an injunction may be more difficult to obtain.

For instance, in the 2016 decision of *2184472 Ontario Inc. v. 1637601 Ontario Ltd*, 2016 ONSC 7256 (CanLII), the Court dismissed a motion by a Lounge seeking to enforce an exclusory clause in a lease against an allegedly competing restaurant which was opening in the shared commercial plaza, due in part to insufficient evidence that the Lounge would in fact lose substantial business or be forced to close without an interim injunction. Such cases turn on their own facts.

Lastly, Justice Smith found that the balance of convenience also favoured Tingz. The Court noted that the USA non-competition clause had been drafted by Dougan-Holder's lawyer and that Dougan-Holder had commenced the application seeking to strike down the terms in order to open his competing business. For the purposes of the injunction, Justice Smith was satisfied that Dougan-Holder's fiduciary duties to Tingz and the terms of the USA meant that he should be prohibited from opening a kitchen so close to Tingz.

Justice Smith noted that the balance of convenience might have been different if Dougan-Holder had planned to set up a similar business in Ottawa a reasonable distance away from Tingz.

What a "reasonable distance" means for a delivery-only restaurant was, however, not addressed in the decision. These issues may reappear in future cases as courts deal with the ongoing business restrictions of the COVID-19 pandemic.

While the case demonstrates that it is possible for a business to obtain an interim order prohibiting competition from a former director and owner, it is unknown whether or not the impact that COVID-19 was having on the restaurant industry influenced the decision in favour of Tingz. In another case, particularly one without a clear non-competition clause set out in a USA, there may have been a more fulsome argument over whether a ghost kitchen was an actual competitor of Tingz's dine-in restaurant experience, and whether the non-competition clause was enforceable in such circumstances.

Notwithstanding Tingz's success on the motion, however, it appears from Tingz's online presence that even with the injunction it may have closed its doors permanently.

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