

# Injunction denied in dispute between competing health clinics (Strength-N-U Inc. v. Silva)

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Businesses may feel aggrieved when faced with competition from former key personnel. While courts will closely examine contractual obligations and the potential misuse of confidential information, there is no general prohibition on competition in the marketplace. Rather, competition is generally viewed as a healthy and valued aspect of commerce. Before embarking on costly litigation to stifle competitors, businesses should carefully assess whether they meet the stringent requirements for obtaining any interim, injunctive relief.

In *Strength-N-U Inc. v. Silva*, 2024 ONSC 4009 (CanLII), the plaintiff alleged that a competitive health services business (PRT) was established by the individual defendants (Silva and Nahibuan) in breach of their fiduciary, contractual and other obligations.

Silva and Nahibuan worked as a chiropractor and physiotherapist, respectively, with the plaintiff until July 2023. The plaintiff alleged that it found evidence that Silva and Nahibuan had accessed the business's confidential software to export customer/client reports over a number of months at various times, which included customer/client names, phone numbers, email addresses, last date of visit, the treatment received and the staff member who performed the treatment. The plaintiff argued that this was an early and planned attempt by Silva and Nahibuan to take customer information for a competing business.

The plaintiff therefore terminated their positions with cause. Silva and Nahibuan began their competing business, PRT, the next day.

Litigation ensued and the plaintiff brought a motion for an injunction seeking orders that the defendants be prohibited from:

- carrying on or engaging in the practice of offering chiropractic and/or physiotherapy services to the plaintiff's "patients" until 11 January 2026;
- soliciting, contacting, calling upon, approaching, or in any way marketing to the plaintiff's "patients" in connection with a health services business, which is in direct competition with the business of the plaintiff until 11 January 2026.
- inducing any employees and other service providers from leaving the plaintiff's employment or from severing their contracts with the plaintiff until 11 January 2026.
- causing or inducing any other person or entity to engage in a health services business, which is in direct competition with the plaintiff until 11 January 2026.
- using and/or disclosing confidential information.

The motion judge referred to the traditional criteria for the granting of an injunction: (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 sought: *RJR MacDonald Inc. v. Canada (Attorney-General)*, 1994 CanLII 117 (SCC).

However, in circumstances where a plaintiff seeks an interlocutory injunction alleging breach of post-employment fiduciary obligations, a more stringent "strong *prima facie* case" is generally applied to the issue of whether or not the defendants were fiduciaries and breached fiduciary duties: *Benson Kearley & Associates Insurance Brokers Ltd., v. Jeffrey Valerio*, 2016 ONSC 4290, at paragraph 46; *Lockwood Fire Protection Ltd. v. Jason Caddick et al.*, 2015 ONSC 6320, at paragraph 36.

The motion judge concluded that the plaintiff had not established a strong *prima facie* case that the individual defendants were fiduciaries. A fiduciary is someone who has scope for the exercise of some discretion or power and can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests. Conversely, the beneficiary is peculiarly vulnerable to, or at the mercy of the fiduciary holding the discretion or power: *Boehmers Box v Ellis Packaging*,

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2007 CanLII 14619 at paragraph 41, quoting *Frame v. Smith*, 1987 CanLII 74 (SCC), [1987] 2 S.C.R. 99.

In the case at hand, Silva was a part-time chiropractor and Nahibuan was a part-time physiotherapist until their positions with the plaintiff were terminated. They were only two of the plaintiff's 44 staff members and there was no evidence that they had the power to "guide and direct" the affairs of the plaintiff, set prices, bind the plaintiff to contracts, or that they were otherwise integral and indispensable to the plaintiff's management team.

The primary basis for the plaintiff's assertion that Silva and Nahibuan were fiduciaries is that they had access to confidential information including a third-party software program for scheduling, charting, billing and payments from customers. The plaintiff contended that they had access to all of the plaintiff's customer lists, information stored in the software, business proposals, business plans and confidential information as well as personal contact information.

However, the plaintiff did not provide any supportive documentary evidence, other than bald statements, that the defendants had access to anything other than customer lists and client information. Based on the plaintiff's position, all staff who provided medical treatment to the plaintiff's patients would be considered fiduciaries since they used the same software.

The plaintiff also argued that it had discussions with Silva about him potentially investing \$50,000 in a third location that the plaintiff was planning to open and that they had entered into a Confidentiality Agreement and Non-Disclosure Agreement to facilitate negotiations. The plaintiff argued that Silva became aware of and was entrusted with corporate documents, business plans, financial statements, client lists and significant confidential information as a result. However, there was no supportive documentary evidence, apart from bald statements, that Silva received anything more than projections, revenue numbers and a pitch deck related to the proposed new location.

The plaintiff therefore failed to meet the higher threshold of establish a strong *prima facie* case.

For the purposes of the motion, the court accepted the plaintiff's evidence that there was a serious and substantial issue to be tried as to whether Silva and Nahibuan breached a duty of confidence by using exported confidential information from the software to contact and solicit former clients.

However, the plaintiff failed to establish a substantial issue to be tried concerning any breach of enforceable restrictive covenants. Silva's part-time contractor agreement did not contain any non-competition or non-solicitation clause, and the non-disclosure agreement did not restrict him from competing with the plaintiff.

Nahibuan's independent contractor agreement did not contain any terms restricting competition. Two terms that related to non-solicitation of patients or clients were too ambiguous, vague, and overbroad to be enforced on the motion.

Next, the court examined the issue of irreparable harm, which requires evidence of clear and non-speculative harm that either cannot be quantified in monetary terms or which cannot be cured by way of damages or other relief: *2158124 Ontario Inc. v Pitton*, 2017 ONSC 411 (CanLII), at paragraphs 47-49, citing *RJR Macdonald*, at page 341.

The plaintiff's argument was that that it could not determine the full extent of damages that may result from the alleged wrongdoing of Silva and Nahibuan and that they would continue to suffer a loss of customers and goodwill.

In the court's view, however, it would be possible to quantify damages with reference to the income earned by the defendants from customers improperly solicited using confidential information. The plaintiff had even included a detailed formula in the statement of claim which suggested that the harm, if proven, could be quantified in monetary terms. Further, the evidence related to damages for its loss of goodwill was highly speculative and the plaintiff had not provided any financial information as to its current circumstances given this competitive business. The plaintiff continued to operate two locations and was seeking investors for a third location. Irreparable harm was therefore not established in the circumstances.

Lastly, the court found that the balance of convenience did not favour granting an injunction since only 274 of the approximately 2,800 patients treated at the plaintiff clinic had continued to seek out Silva and Nahibuan for treatment. The injunction sought would interfere with the treatment of those 274 patients who had decided that they want to have the defendants provide them with medical care. On the other hand, the injunctions sought would allow the plaintiff operated its two, much larger locations as usual while stifling the competition that the defendants represented.

The plaintiff's motion for an injunction was therefore *dismissed*. A trial will be required to adjudicate the plaintiff's claims.

The decision shows the high evidentiary threshold that is required to obtain an injunction aimed at restricting competition absent some enforceable contractual restrictions. Businesses ought to expect that they will have competitors for the same types of services and that their pricing models will be challenged, including



by former staff members. A PDF version is available for download [here](#).

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