

Law firm obtains injunction against former associate after Thanksgiving weekend coup

Litigation | Litigation & Dispute Resolution

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At 1 p.m. on the Friday afternoon of the October 2021 Thanksgiving long weekend, a lawyer employed as an associate in the Brampton location of the firm of Sokoloff Lawyers closed the office, asked the other employees to leave their computers on and not password-protected, and arranged for the locks to be changed and for the sign “Sokoloff Lawyers” to be removed. The lawyer downloaded client files. The lawyer had previously secured a domain name and prepared letterhead for her new firm. All of this was done without notice to her law firm employer.

At 7:29 p.m. on Thanksgiving Monday, the lawyer sent an e-mail to the firm’s principal and advised her that she was resigning her employment to start her own firm. She also advised that the other lawyers in the Brampton office, and four clerks would be joining her and that they intended to operate her new firm out of the same premises. The lawyer stated that she would be “contacting my clients to advise them of my departure, and I will present them with their three options as required by the Law Society”.

On the Tuesday morning after the long weekend, the associate’s former firm began receiving client file transfer authorizations. Since then over 200 clients transferred their files to the new firm.

Before the long-weekend takeover, the Brampton office was a lucrative operation for the firm. The office had grown from revenue of \$2.5 million when it was opened in 2014, to \$5.5 million in 2020. The associate’s compensation was based upon 40% of the profits. In 2020, she was paid \$2.17 million in compensation.

Understandably, the law firm was none too happy about these events. In November 2021, it commenced an application seeking injunctive relief regarding upfront payment of disbursements on the transferred files, and the arrangements for how the associate’s former firm would be compensated for legal work performed before the files were transferred.

On the return of the application, the court assessed whether the applicant firm had established the traditional criteria for the granting of an injunction by establishing (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), 1994 SCC 117, [1994] 1 S.C.R. 311.

The law firm’s position was that the actions of their former associate and the other respondents gave rise to a number of different causes of action, including frustration of solicitor’s lien rights, inducing breach of contract, unjust enrichment and breach of good faith and fiduciary duties. The firm argued that each cause of action was a serious issue to be tried.

In a decision released on 26 November 2021, the Ontario Superior Court of Justice found that that the former associate of the firm had conducted “a planned and deliberate operation” to take over the Brampton office of the law firm. Further, the court found that the lawyer had contacted clients about the transfer of files before she resigned from the firm: *Wendy Sokoloff Professional Corporation v. Chorney*, CV-21-00671885, 2021 ONSC (not yet on CanLII).

The firm relied on another ‘holiday office takeover’ case from 2009, where three associates and a paralegal removed 250 physical client files on Christmas Eve and resigned from a law firm to start their own firm: *Grillo v. D’Angela*, 2009 CanLII 7 (ON SC).

In *Grillo*, Strathy J. (as he then was) found that the firm had made out a strong *prima facie* case that the defendants breached their duties of loyalty and good faith by (a) contacting clients for their own purposes to induce them to leave the firm while they were still employed by the firm; (b) quitting without notice; (c) taking client files without the firm's knowledge and permission; (d) using the client files after their departure for the purpose of contacting clients of the firm with a view to inducing them to switch to the new firm; and (e) depriving the firm of the opportunity to inform its clients of the defendants' departure and of the options available to the clients and of the consequences of the various options.

While the respondents attempted to argue that *Grillo* was distinguishable since it involved "hard copy" files rather than electronic ones, the court did not accept that this was a meaningful difference. Rather, the issue was whether the defendants improperly accessed the information contained in the files for their own purposes.

Further, the respondents argued that they were engaged in a dispute about unresolved partnership issues and unpaid compensation, leaving them "no choice" but to set up the competing firm. This too met with little sympathy from the court, which echoed the concerns in *Grillo* about the less than ideal circumstances involved with the holiday office takeover.

The court was satisfied that the applicant firm had established serious issues to be tried regarding the claim to solicitor lien rights, inducement of breach of contract, and unjust enrichment, and a strong *prima facie* case that the former associate and other respondents breached their good faith and fiduciary duties to the firm.

As for irreparable harm, the court was satisfied that the case was one of "unfair competition". Unfair competition cases are often recognized as ones in which damages may be difficult to calculate and may not adequately compensate a plaintiff: *Precision Fine Papers Inc. v. Durkin*, 2008 CanLII 6871 at para. 25.

In that regard, it would not be fair or reasonable that the applicant firm finance its new competitor by carrying the disbursements on the transferred files. The court viewed it to be unreasonable for the respondents to be able to obtain control of the files through "self-help" and retain the value in those files without assuming any of the cost or risk in carrying the disbursements.

Lastly, the court was satisfied that the balance of convenience weighed in favour of the applicant firm since the *status quo* at the time of the hearing was an unfair situation created by the self-help conduct of the respondents. In the court's view, it was not an unfair or onerous burden to expect the associate's new firm to obtain financing to carry the disbursements on files taken from her previous firm. Had the respondents started a brand new firm, they would have needed a bank loan or other financing to cover the disbursements and its fees before files were settled and billed. There was no evidence before the court on the injunction that the former associate had made any attempts to obtain financing, or that she was denied financing.

In the result, the court ordered that within five months of the date of the decision, the former associate and the other respondents had to pay to the applicant firm the amount of the disbursements on all transferred files. The court also ordered that when each transferred file settled, the fees were to be paid 25% to the associate's previous firm and 25% to her new firm, with the balance paid in trust until the amount of the firm's fees, is determined.

The balance of the issues in dispute, including the associate's own action against the firm for unpaid compensation, were left to be determined on another day.

The case reflects the business reality that like in the case of transferring investment advisors or insurance brokers there will seldom be a peaceful transition of a sizeable practice from one law firm to another, particularly where the professional terminates his or her employment without notice and employs "self-help" remedies to build a new business based on the former employer's "clients". In general, courts take a harsh stance on this type of behaviour. Accordingly, an employee who has significant contact with an employer's client is wise to provide their employer with reasonable notice of their departure before moving or attempting to move a "book of business" elsewhere or hanging up their own shingle. This will avoid the headache of defending an injunction motion, which they could lose like in this case, and go a long way to avoiding a potentially sizeable damages award in favour of their former employer. A PDF version is available to download [here](#).

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