THE GR COURT DOCKET

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Interlocutory injunction denied for failure to provide undertaking in damages

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An interlocutory injunction is a powerful and drastic remedy which Courts have said should only be granted sparingly. In that regard, an interlocutory injunction is generally a tool through which the Court can order a party to do something or refrain from doing something pending a final disposition of a dispute on the merits. Given that an interlocutory injunction will have an effect on a party before all of the evidence has been developed, it is considered an extraordinary remedy which should only be granted in rare cases. However, this does not mean that motions seeking interlocutory injunctions are necessarily rare, and they can arise in various contexts.

The power of the Court to grant an interlocutory injunction is governed by Section 101 of the *Courts of Justice Act* and is further supported by Rule 40 of the *Rules of Civil Procedure*. Under Rule 40.03, a party seeking an interlocutory injunction is, in general, required to provide an undertaking in damages.

It has long been held that the failure to provide an undertaking in damages can be fatal to obtaining an interlocutory injunction. This was the result in *Enersavings Inc. v. O'Connor*, (Court File No. CV-22-691044, Justice Myers, December 7, 2022).

In this case, the moving party, E, sought an interlocutory injunction against a former employee or consultant, O, and a competitor. The competitor had engaged O as a consultant shortly following her resignation from E.

The moving party alleged that O was a fiduciary and that she had sent 57 emails to herself prior to resigning. The 57 emails purportedly attached and included confidential proprietary information of E. E further alleged that the competitor had used the confidential information to solicit its clients.

The evidence from E to support the interlocutory injunction was sparse. O was only served with the motion materials a few days before the Court heard E's request for an injunction. Meanwhile, E's competitor denied having utilized any confidential information

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purportedly taken by O. The competitor filed robust responding material to show that upon learning of E's allegations, it took steps to ensure that O would not use any of E's confidential information, if in her possession, to solicit clients. The competitor also showed that any contact with two purported prospective clients of E occurred well before it hired O's services and that no confidential information from E was relied upon in contacting those prospective clients. Accordingly, there was no evidence that the competitor had pilfered any of E's prospective clients.

The competitor and O contended that E's request for an injunction should be dismissed because E failed to provide an undertaking in damages and that it did not meet the three-part test as established in *RJR- Inc. v. Canada (Attorney General)*, 1994 CanLII 117 (SCC) for obtaining an interlocutory injunction.

Despite the arguments made by the competitor and O regarding E's failure to provide an undertaking in damages, both in written argument and orally at the hearing, E did not request to be relieved of the requirement and provided no submission as to why an undertaking in damages could not or should not be given.

In *The Catalyst Group Inc. v. Moyse*, 2015 ONSC 4388 (CanLII), the Court clearly stated that the failure to provide an undertaking is fatal to an injunction. This is especially so in commercial cases.

E's case was a commercial case. E was seeking to enjoin a competitor from alleged unlawful competition and to prevent it from selling its products and services to hundreds of potential customers.

The granting of an injunction can cause substantial losses to an enjoined party. The undertaking in damages is intended to ensure that the moving party will abide by any damages award to an enjoined party that suffers a loss because of an injunction that is ultimately found to have been wrongly granted. Accordingly, the relief sought by E had to be refused for the failure to provide an undertaking in damages.

In the alternative and notwithstanding the lack of an undertaking as to damages, the Court held that E had failed to meet the test for an interlocutory injunction. There was no evidence that O had signed a non-solicitation agreement or a confidentiality agreement or that she owed a fiduciary duty to E. In general, directors, officers upper management employees and "key employees" owe fiduciary duties to their employer. However, there was insufficient evidence to suggest that O fell within any of these categories.

Similarly, there was no evidence to show that the competitor had used E's confidential information.

The Court stated that even if E had demonstrated that there was a serious issue to be tried against the competitor and that irreparable harm could be presumed, the balance of convenience favoured the competitor. E failed to act urgently from the date it first became aware of O's potential breach of confidentiality and entering into an agreement to provide services for the competitor. E also failed to lead the evidence necessary to support the granting of an interlocutory injunction. E did not give any definition of the "customers" who the competitor would be prohibited from contacting or doing business with. The Court explained that an injunction could not be granted when the party to be enjoined did not know who is and is not included in the prohibition.

Representation by Gardiner Roberts LLP

The competitor was represented by Alexander

Melfi. Mr. Melfi is a litigation lawyer and partner in the Dispute Resolution Group of Gardiner Roberts LLP.

Mr. Melfi was assisted in the preparation of evidentiary materials by Rob Winterstein, a litigation lawyer and partner in the firm's Dispute Resolution Group.

Stephen Thiele also assisted Mr. Melfi in the preparation of the written argument used to defend the competitor against E's request for the injunction. Mr. Thiele is a partner and the firm's Director of Legal Research.

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