



Ex-employees enjoined from accepting business from former employer's customers

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Western Tank & Lining Ltd. recently obtained an extraordinarily broad interlocutory injunction restraining a group of former employees not only from soliciting Western Tank's clients but even from accepting business from customers that Western Tank did business with over the previous 5 years.¹

The plaintiff, Western Tank, sells and installs geosynthetic liners and bolted steel tanks. The four individual defendants were each employed by Western Tank in Manitoba. One was a field supervisor, one was an installer and two were salespeople. In March 2006 the four individual defendants resigned. However, before leaving Western Tank's employment they formed a partnership to compete with Western Tank in Manitoba. None of the defendants' employment contracts contained non-compete clauses. Western Tank sued and brought a motion for an injunction.

To obtain the injunction Western Tank had to show (1) that there is a serious issue to be tried, (2) that refusing the request will result in irreparable harm and (3) that the balance of convenience favours giving the injunction—that is, that the harm suffered by refusing the request outweighs the harm the other party would suffer if the request is granted.²

On the motion, Scurfield J. found that at least one, if not both, of the salespeople owed a fiduciary duty to the plaintiff because a relationship of dependence or vulnerability developed between them and Western Tank after entrusted them with all or a significant portion of its business in Manitoba. Consequently, all the defendants were subject to restrictions flowing from those duties that at least one member of the partnership owed to Western Tank Scurfield J. held.

Scurfield J. found that the defendants breached their duties to Western Tank because they delivered at least one competitive quotation for their own service to a potential customer of Western Tank and probably solicited Western Tank's customer directly while employed by it.

Scurfield J. thus found that the substantial evidence of a breach of fiduciary duty was a serious issue to be tried. He also held that irreparable harm would result absent the injunction because there was "...a real risk that the entire business operations of the plaintiff in Manitoba will be converted to the defendants' account without any form of compensation."³ However, Scurfield J. did not deal with the third requirement—the balance of convenience.

In addition to ordering the defendants not solicit customers of the plaintiff, Scurfield J. also ordered the defendants not to accept business from or on behalf of any customer that did business with the plaintiff over the previous five years. In support, Scurfield J. commented:

[I]n the present circumstances, an order that only prevents further solicitation would be inadequate. I say that because the defendants have already penetrated, and probably converted, the plaintiff's customer base before the hearing of this motion. Consequently, an order simply restricting further solicitation is unlikely to restore parties to their proper position.⁴

Scurfield J. limited the duration of the injunction so that it expires approximately twelve months following the date that the defendants provided actual notice that they would compete with the plaintiff.

This case is unusual in three ways. Firstly, it is unusual—though not unheard of—for salespeople to owe fiduciary duties to their employer. Generally, fiduciary duties are owed by directors and senior officers of a company.

Secondly, it is unusual to enjoin someone who is not subject to a non-competition or non-solicitation clause from competing with a former employer. Indeed, courts generally take a restrictive approach

to such clauses as they restrict former employees' ability to earn a livelihood.

Thirdly, it is unusual for a court to order a former employee from accepting business from unsolicited customers. This case thus manifests a much more sympathetic approach to an employer than is usual. Future cases will show whether this is a unique case based upon particular facts or part of a trend.

¹ 2006 MBQB 205, online:
<http://www.canlii.org/en/mb/mbqb/doc/2006/2006mbqb205/2006mbqb205.html>.

² *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] S.C.R. 311, [1994] S.C.J. No. 17 (S.C.C.), online:
<http://www.canlii.org/en/ca/scc/doc/1994/1994canlii117/1994canlii117.html>.

³ *Western Tank*, *supra* n. 1 at ¶29.

⁴ *Ibid.* at ¶30.



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