

# Alberta Court Rejects Non-Solicitation Injunction Application

written by Haley O'Halloran | August 6, 2024



In [1731271 Alberta Inc. v Reimer, 2024 ABKB 446](#) (Mah, J), the Alberta Court of King's Bench denied an application by an employer for an injunction preventing a former employee and her new employer from soliciting the prior employer's clients.

This case is important because it is a reminder that the Courts are reluctant to impose barriers to free competition on former employees, especially using interlocutory injunctions, and will only do so in certain specific circumstances.

For non-lawyers, notes that an "interlocutory injunction" is generally when the Court issues an order prohibiting someone from doing something until liability in a legal action is resolved. Injunctions are hard to obtain because the Court is giving a remedy before it has decided whether a party is liable, which can be severely harmful to the financial interests of a business.

## **Facts**

The following were some of the pertinent facts summarized by the ABKB:

- 1731271 Alberta Inc., operating as Imperial Printing, is the former employer of Angie Reimer
- Angie Reimer left Imperial Printing and started working for Westkey Graphics Ltd., a direct competitor to Imperial Printing in the printing industry
- Reimer (the "employee") had worked in the printing industry since she was a kid, and in 1999 she joined Imperial Printing. She moved up the ranks over time from order entry clerk to having a role doing scheduling, planning, estimating, stock purchasing and providing quotes to clients
- Imperial Printing came under new ownership in 2020, being purchased by Rayacom. The employee worked there until February, 2024 when she resigned due to increasing dissatisfaction, providing two weeks' notice
- The employee was not subject to a written confidentiality, non-solicitation or non-competition agreement
- The employee had inquired about employment at Imperial Printing about a year before resigning, and met with them. They said they would keep her in mind for future opportunities
- About a week after the employee was finished at Imperial Printing she contacted Westkey again. They hired her and she set to servicing existing Westkey clients as an account manager
- The employee sent some emails to former clients advising them of her new contact information and employer

- Imperial Printing sued the employee and Westkey, and sought a one year injunction preventing solicitation of its clients by the employee or Westkey
- Imperial Printing's position was that (1) the employee was a fiduciary of Imperial Printing, and therefore subject to a common law fiduciary duty of non solicitation for a reasonable time after her departure, and (2) the employee had improperly taken and used Imperial Printing's confidential information

## Analysis / Conclusion

Justice Mah first noted that the test for an injunction in Alberta when someone has alleged breach of fiduciary duty is the "strong *prima facie* case", also known as the modified *RJR-MacDonald* test. The full test therefore is that an injunction will be granted where:

- There is a strong *prima facie* case, which is one that will "probably prevail at trial";
- There would be irreparable harm to the plaintiff if the injunction were not granted;
- The balance of convenience favors the plaintiff

Justice Mah then considered whether the employee was a [fiduciary](#) of Imperial Printing, providing the following direction about the test for fiduciary status:

[28] The analytical framework for determining whether a fiduciary relationship exists is [...]:

- a fiduciary has scope for the exercise of discretion or power;
- the fiduciary can unilaterally exercise that discretion or power so as to affect the beneficiary's legal or practical interests;
- the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power; and
- the fiduciary has given an undertaking, express or implied, to act in the best interests of the beneficiary.

[...]

[31] The key concept in these cases is that the employer's vulnerability is created by the employee's ability to exercise unilateral power or discretion so as to affect the employer's legal or practical interests. The critical question is whether the employee has "actual authority or control over the employer's operation" (*RBC* at para 50) or "is imbued with discretion or control" (*Firemaster* at para 42).

[32] It is also important not avoid conflation of a valuable employee with a fiduciary employee. Given the onerous obligations held by a fiduciary, it is necessary to actually find that the employee is a "key employee" as opposed to merely being a good or valuable employee. [...]

[33] With respect to employees who deal with clients, it is also important not to make a fiduciary finding based entirely on relationships with clients. The focus of the assessment is whether the employee is a key employee such that the employee has sufficient control and authority over the employer's business. Client relationships are only one part of that context. [...]

[34] [...] the employer's particular vulnerability does not arise because the employee happens to be a good or valuable employee. To ground a fiduciary relationship, the required vulnerability is based on the employee's ability to exercise discretion or authority over the employer's operations [...]

Justice Mah went on to conclude there was not a strong *prima facie* case that the employee was a fiduciary, with the concluding reasoning on this point as follows:

[67] We have essentially the same position here: a good employee, a valuable employee, an experienced and knowledgeable one, and someone who is skilled at managing clients. What is missing is the employee having such discretion and power to make business decisions such that the employer's legal or practical interests are vulnerable to the exercise of that power discretion. Ms. Reimer was not there to lead the company. That was the purview of Martin Tran. Ms. Reimer's duties essentially were scheduling, planning, estimating, stock purchasing and providing quotes to clients, and carrying out the instructions of Martin Tran with respect to any other administrative tasks specifically assigned.

Respecting Imperial Printing's allegations about misappropriation and misuse of confidential information, Justice Mah had this to say about the rules surrounding confidential information generally:

[73] While the contact information for individual contacts for various clients is not confidential information (unless it is something like an unlisted telephone number), the fact that a certain company *is* a client may be confidential. I appreciate that Ms. Reimer would have used a Westkey computer when sending those emails. However, the emails were sent to the clients themselves, not third parties. She was carrying the information for the most part in her head and for the most part did not disclose the information to anyone. She was telling those clients about her own relocation which, without more, is not objectionable.

Justice Mah found that there was no breach respecting confidential information in this particular case, because what Ms. Reimer took with her was in her head or "at most readily accessible from public internet sources", and that customers seeking printing services go to multiple vendors to get quotes for different jobs, so the industry customers are generally known and not secret.

Justice Mah went on to consider "irreparable harm" and "balance of convenience", noting that in the right case if these elements of the test favored the plaintiff strongly enough, it could compensate for the weakness of the plaintiff's position on the first branch of the test (above).

Justice Mah found that the losses Imperial Printing was arguably suffering was quantifiable and not intangible, which cuts against a finding of irreparable harm.

In considering "balance of convenience", Justice Mah considered the following (1) the extent of irreparable disadvantage to either side if the injunction were granted or not (2) the public interest, and (3) the relative strength of each side's case.

In weighing these factors, Justice Mah (1) reiterated that the damages would be quantifiable if liability were found at trial, (2) noted that it was in the public interest for customers to be able to choose their vendors, and (3) that Imperial Printing's case that the employee was enticing customers away was speculative at this point in time.

In the end, the injunction was not granted and the application was dismissed.

## My Take

Any case involving alleged confidentiality, [non-solicitation or non-competition breaches](#) is interesting to me personally, and this one is no exception.

These cases are always intense, because when important employees leave and start competing and potentially soliciting, the business impact on the former employer can be severe. On the other hand, preventing the former employee from making a living and the new employer from fully competing are also severe impacts. In other words, the stakes are high.

On this occasion I will refrain from commenting too extensively however, because I am currently legal counsel for a party in several similar cases, one of which is eerily similar.

*The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.*

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