Interlocutory Injunctions And Non-Compete Clauses – How "Irreparable" Is Your Harm?



The British Columbia Court of Appeal recently released its decision in Karras v. Wizedemy, 2024 BCCA 301, a case involving breach of a non-competition clause after termination of a workplace contract.

The defendant in Karras v. Wizedemy was a professional tutor who provided tutoring services to students, sometimes working independently and sometimes as an independent contractor for other companies. The plaintiff, Wize, was a small educational services company that provided tutoring products and services to students and hired professional tutors for this purpose.

In 2020, the parties entered into a contract whereby the defendant would provide tutoring services and exam prep products to students at UBC and Concordia through Wize. The contract contained a **non-competition clause** which prohibited the defendant, for 12 months after termination of the agreement, from being engaged or employed in any education services business directly competitive with Wize or available to students at the same institutions as Wize.

The contract was terminated in early 2024 when Wize discovered that the defendant had been engaging in competitive behaviour for his own benefit and to the detriment of Wize. There was no dispute at trial that the defendant had breached the non-compete clause – the question was whether or not an interlocutory injunction should be granted as a remedy. The trial judge determined that it should, and the Court of Appeal agreed.

"Non-competition" clauses, like the one in Karras v. Wizedemy, are a type of **restrictive covenant** often included in employment contracts. They prohibit a former employee or independent contractor from entering into or starting a business in the same market as their employer for a specified period of time after the employment has ended.[1]

Where a former employee has breached a non-compete clause, or other restrictive covenant, the employer may apply to the court for a remedy. The two most common remedies are:

- An award of **damages** whereby the former employee will pay the employer a sum of money, but is free to continue the non-compliant behaviour; or
- An **interlocutory injunction** prohibiting the former employee from engaging in the

non-compliant behaviour for a specified period of time.

The Court at both the trial (2024 BCSC 630) and appeal levels in Karras v. Wizedemy reviewed the law surrounding the granting of interlocutory injunctions for breach of restrictive covenants in the context of employment contracts. The overarching test for injunctive relief comes from the case of RJR-MacDonald Inc. v. Canada (Attorney General), [1994] 1 SCR 311, and requires:

(1) an assessment of the merits of the case;

(2) consideration of whether the applicant will suffer **irreparable harm** if the injunction is not granted; and

(3) an assessment of the balance of convenience.

The Court emphasized that this test is not to be seen as an "inflexible straightjacket," and that the ultimate consideration is whether granting the injunction is just and equitable in all the circumstances.[2]

In regard to what constitutes irreparable harm, the court determined that it must be harm that cannot be quantified in monetary terms or cannot be cured.[3] Examples of irreparable harm include, permanent market loss or loss of customers, irreparable damage to reputation, loss of the ability to exploit a market, and inability of a defendant to pay damages if the plaintiff is successful.

In considering whether Wize would suffer irreparable harm, the relevant facts determined by the trial judge were as follows:

- There had been a significant drop in revenue to Wize attributable to the defendant's competitive behaviour, especially at Concordia.[4]
- Wize had to discount prices for its services in order to remain competitive in the market.[5]
- Wize was not in immediate financial difficulty or on the brink of bankruptcy, however, there was a possibility of bankruptcy if the revenue at Concordia declined further to near zero.[6]

After consideration, the trial judge found that Wize would suffer irreparable harm if the defendant were allowed to continue the competitive behaviour in breach of the non-competition clause, and this harm could not be compensated with a monetary award. The trial judge granted the injunction, and the Court of Appeal agreed and dismissed the appeal.

The decision in Karras v. Wizedemy prompts the question: what types of harm are truly "irreparable"? Is it really true that loss of market share and loss of customers cannot be compensated with an award of damages? Where do we draw the line between harm that is difficult to compensate with monetary damages, and harm that cannot be compensated with monetary damages at all?

Ultimately, the decision in Karras v. Wizedemy reinforces the idea that granting an injunction is a fact-specific determination that the court will make based on the specific circumstances in each case. The line between a harm which is "reparable" and "irreparable" is thin, and it is not always easy to predict on which side of the line a particular case may fall.

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constitute legal or professional advice.

Footnotes

1 *For the purposes of this article, I use the terms "employee", "employer", and "employment", but the*

2 *Paras 27-29 trial decision.*

3 *Para 39 trial decision.*

4 *Para 98 trial decision.*

5 *Para 101 trial decision.*

6 *Paras 100-102 trial decision.*

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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