

CONFIDENTIALITY AGREEMENT LEADS TO INTERIM NON-COMPETE INJUNCTION

C.B. Constantini Ltd. v. Slozka, [2006] B.C.J. No. 1798 (B.C.S.C.)

By Wesley D. Booker

The British Columbia Supreme Court has granted an interim injunction, prohibiting a former employee from doing business with, or soliciting business from, a specific list of his former company's clients. In granting the injunction, the court relied upon the employee's violation of a confidentiality agreement rather than applying a non-compete clause found in the same agreement.

Ryan Slozka began work as an agricultural commodities trader at C.B. Constantini Ltd., in September of 2002. By February of 2004, he had become a high-ranking member of the Company, with extensive responsibilities.

Slozka had discretionary authority over prices for purchases and sales worth many millions of dollars. He was responsible for over 350 clients, worth approximately \$22 million, for 26 percent of the Company's gross sales, and for 41 percent of the Company's purchases.

Three other employees left the Company just prior to Slozka's departure. Together the four employees represented approximately 66 percent of the Company's sales. The Company suspects that the four employees are working together.

Market information plays an important role in the agricultural commodities trading industry. The Company uses proprietary management software to closely monitor who is in the market for a purchase or sale, on what terms, and what may influence their decision to buy or sell. The Company is dependant on this information to solicit business.

Employees are told that the contents of the system are confidential, and the Company requires them to sign a confidentiality agreement. The agreement states that confidential information regarding the Company's business and customers remains the property of the company and must be kept in confidence. The agreement also contains a covenant by the employee to not solicit the Company's customers following the termination of his or her employment.

Two days before leaving the Company, Slozka emailed a document to his private email account, containing contact and purchasing information for many clients. According to the Company, Slozka then began contacting numerous clients in an attempt to solicit their business.

The Company applied for an injunction to stop Slozka from taking its clients. The Company claimed that Slozka breached his fiduciary duty, wrongfully used confidential information, and failed to give reasonable notice.

Justice Ross applied the test from *RJR – MacDonald Inc. v. Canada (A.G.)*, [1994] 1 S.C.R. 311 at 334, and found that there was a serious question to be tried on all three issues. The court held that the applicant would suffer irreparable harm if the injunction were not granted, and that the

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applicant would suffer greater harm if the injunction were not granted than the respondent would suffer if the injunction were granted.

Despite a clear statement in the confidentiality agreement that Slozka would not compete directly with the Company, the Company instead chose to rely upon the confidentiality aspect of the agreement. Its decision was likely based on the fact that employers frequently have difficulty enforcing non-competition clauses against former employees. Courts are often apprehensive about unduly limiting an individual's ability to earn a living.

The decision prohibits Slozka from doing business with the clients listed in his email for six months, and from soliciting business from those clients for twelve months. Justice Ross took comfort in the fact that the injunction was based on a misuse of confidential information, and that the limit on competition only applied to a portion of the potential market, reducing the potential harm to Slozka. This suggests that if the Company had applied for a non-competition injunction with a wider scope, they may not have been successful.

This decision highlights how employers can be creative in defining the scope and focus of their non-competition agreements, and how creative approaches can alleviate courts' concerns, increasing the chances that the agreement will be enforced.

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