



## Obligations of a Departing Fiduciary: Two Views from the Bench

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In a 2010 decision of the Ontario Superior Court of Justice (Commercial List), *Aquafor Beech v. Whyte, Dainty and Calder*, the plaintiff employer, an engineering company, sued two former employees and their new company for breach of fiduciary duty.

Neither of the two employees, who were senior professional engineers, had been subject to any non-competition agreement. They had left the employer to establish their own professional engineering firm. Prior to departing, they had enjoyed responsibility over the employer's mining and land development clients; representing 25% of the employer's gross revenues.

The employer claimed that the former employees had secretly planned to leave and set up a competing firm; failed to give adequate notice of their departure; solicited clients and employees; and had used confidential information to do so. The employer sought damages by way of disgorgement of profits of \$2.3 to \$3.2 million.

The Court found on the facts that both employees were fiduciaries of their former employer, having played significant roles within the company including having key client responsibilities and involvement in corporate, administrative and profit sharing matters as partners of the company.

The Court further found that as a general principle, the failure to give adequate notice does not amount to a breach of a fiduciary duty but rather a breach of contract. In any event, it was held that the notice provided by the two employees, being five weeks and four weeks respectively, was reasonable.

As well, the Court ruled that mere planning to establish a new company is not a breach of fiduciary duty, noting that it was done outside of business hours and did not conflict with their duties and responsibilities to their former employer. The Court noted that there was no evidence that the two had actually competed prior to departing.

Relying on the 2009 decision of the Ontario Superior Court of Justice in *GasTOPS Ltd. v. Forsyth*, which is discussed below, the former employer argued that the two employees had an obligation to disclose that they were intending to establish a competing business. However, the Court declined to follow *GasTOPS* and held that there is no such disclosure requirement in every case and that whether or not there is such an obligation is fact dependent.

The Court did state that the solicitation of clients by a fiduciary is prohibited for a reasonable time after departure as it prevents the employer from having the opportunity to solidify its client relationships. However, on the facts, the Court held that while a number of the former employer's clients became clients of the two employees' new company, there was insufficient evidence to establish actual solicitation of those clients by them. In particular, the Court held that the letter of introduction did not constitute solicitation as it was general in nature and was not directed at the former employer's clients, albeit some were on the list.

Finally, the Court held that accepting work from the former employer's clients, in the absence of solicitation, did not constitute a breach of fiduciary duty as it was not a corporate opportunity which belonged to the former employer.

In making that finding, the Court noted that as professionals, the two employees' client relationships had a personal nature to them, as do lawyers and doctors, and that the law recognizes the right of a client to choose which professional it will rely upon for expertise.

It is interesting to note that in this case, the Court reached a very different result than in *GasTOPS*, where the Court found in favour of the plaintiff former employer, another engineering firm, and against the two former business managers who were alleged to be fiduciaries. Again, the employees were not subject to any contractual prohibition against competing or soliciting.

The two former employees were found to be key technical engineers who had developed the employer's software programs and a significant part of the employer's business.

After providing two weeks' notice, the two key employees incorporated their own company and began competing against their former employer. A mass exodus of other employees followed; including 75% of the employees within one division.

After a trial of 295 days, resulting in an extremely lengthy decision, the Court found that the two former employees were liable in breach of contract for failure to give reasonable notice and noted that their failure resulted in existing and potential customers looking to the competing company for technical advice. Interestingly, the Court made this finding even though the employer had in fact rejected the notice offered by the two employees and asked them to leave immediately. In fact, the Court held that the employer was justified in doing so after the employees failed to give reasonable notice. The Court held that the departing employees' knowledge that if they left their employment an overwhelming number of employees would leave to join the new company, was another element in finding that insufficient notice had been given.

The Court also extended the scope of solicitation in respect to the other employees of the former employer; finding that the act of offering employment to those employees who sought work while they were still employed by the former employer, even though they had not been actively solicited, amounted to a breach of fiduciary duty by the two departing employees. The Court focused on the intentions of the two employees, which was found to be deliberate and designed to give them a business advantage.

While the two employees did not actively compete or incorporate a new company until after they had been asked to leave, the Court found that as they had planned to abuse confidential information and trade secrets to benefit their future company while still employed, they had breached their fiduciary duty.

The Court also held that as fiduciaries, the two employees had a duty to disclose their intention to compete to their employer, notwithstanding the lack of any finding of actual competition while employed.

On the issue of solicitation, the Court held that fiduciaries must not unfairly do so after leaving their employment. Applying such principles, the Court found that the departing employees had actively solicited their former employer's existing and prospective clients by making presentations to them and advertising that their new company employed many employees of their former employer. The Court went on to further find that even absent active solicitation "*fiduciaries simply cannot work with clients of the former employer for the duration of the fiduciary duty*", and that therefore, even acceptance of work from the former employer's clients constituted a fiduciary breach.

Finally, the Court found that the departing employees had used confidential information to develop a competing software system which they marketed to the former employer's clients, and in doing so, had appropriated a corporate opportunity.

*GasTOPS* serves to significantly extend the scope of prohibited conduct by employee fiduciaries in favour of former employers. It may well be that the Court was significantly offended by the two employees' deliberate intentions to disrupt the business of their former employer and the appropriation and use of confidential information to make broad findings of liability against the employees.

*GasTOPS* is under appeal which is scheduled to be heard later this year.

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*Aquafor v. Whyte, Dainty and Calder*, 2010 ONSC 2733 (CanLII)  
*GasTOPS Ltd. v. Forsyth*, 2009 CanLII 66153 (ON S.C.)