

Competing with Your Employer... Watch Out!!!



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Implicit duty of good faith and loyalty towards employers prohibits employees from competing with their employer during employment.

The recent British Columbia case of *Cinema Internet Networks Inc. (c.o.b. Cinemaworks) v. Porter* [2006] B.C.J. No. 3200 (“Cinemaworks”), is a warning to employees contemplating starting their own businesses in direct competition with their employer – do not compete with an employer with whom you are still employed. Even without signing an explicit non-competition or non-solicitation agreement, the common law imbues employees with an implied duty of fidelity, loyalty and good faith towards their employer. Competing with an employer during the course of employment is a breach of that employee’s duty of fidelity, loyalty and good faith.

In the *Cinemaworks* case, three employees started their own company, Highspeed Systems Corp., while employed with *Cinemaworks* and provided similar services to the same client base as their employer. The employees resigned from *Cinemaworks* once their company was established, but not before they copied all of *Cinemaworks*’ existing customer contracts, customer lists and business proposals, which they later used as templates for their own proposals. In addition, the employees contacted all of *Cinemaworks*’ clients with whom they had personal dealings prior to resigning their employment for the purpose of soliciting these clients away from *Cinemaworks*. The employees were successful in stealing several customers from *Cinemaworks*, resulting in a loss of profits to *Cinemaworks* due to the employees’ improper solicitation of these customers. In rendering a decision, the Court held

that the employees’ actions constituted a breach of their duties of good faith and loyalty and consequently, *Cinemaworks* was entitled to recovery of its lost profits from customers improperly solicited by the employees.

In reaching its decision, the Court highlighted the delicate balance that exists to protect both employers and employees. Specifically, while an employee’s duty of fidelity, loyalty and good faith prohibits the employee from competing with an employer during the course of employment, this does not prevent an employee from competing with a ex-employer once the relationship ends – providing the competing is done fairly, does not involve misuse of confidential information and is not prohibited by any agreement entered into by the employer, among other things.

It appears from the *Cinemaworks* case and other recent decisions that merely planning to start a competing business does not, by itself, constitute a breach of an employee’s duty of fidelity, loyalty and good faith. However, by making the decision to misuse an employer’s confidential and proprietary information or taking steps to solicit the employer’s customers to join the employee in a new, competing business, while still employed with the employer, this clearly violates the employee’s duty of fidelity, loyalty and good faith, for which the employer is entitled to a legal remedy. **MB**

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