NORTON ROSE FULBRIGHT

# Legal update

## Quebec Court of Appeal: resigning employees are not prevented by the duty of loyalty from competing with former employers, even when they have violated that duty

**February 2016**
**Employment and labour**

### Introduction

In its 2007 landmark decision on the duty of loyalty, *Concentrés scientifiques Bélisle inc. v Lyrco Nutrition inc.,*[1] the Quebec Court of Appeal summed up the applicable standards relating to the scope of the post-termination duty of loyalty. Along the way, it reiterated that resigning employees not bound by a non-competition clause are not prevented by the duty of loyalty from joining a competitor or forming a competing company the day after they resign.

There was still room to believe, however, that there were exceptional cases, such as when a person violated the duty of loyalty while still working for the former employer, where the courts could prohibit the employee from competing with the former employer for a specified time, even in the absence of a non-competition clause – something the Superior Court had done up to then on multiple occasions.[2]

However, in a decision handed down on December 11, 2015,[3] the Court of Appeal found that the trial judge had erred in preventing a resigning employee from competing with his former employer, even though the evidence showed that he had violated his duty of loyalty before resigning.

With this finding, we believe the court reiterated that, unless there is a non-competition clause, a court will not be able to restrict an employee's right to work except in exceptional circumstances.

### Facts and Superior Court decisions

On August 17, 2015, without notice and after almost 10 years of service, Mr. Loffredi announced to his employer, Milgram and Company Ltd. (Milgram), that he was resigning from his position as director of business development effective immediately.

According to the evidence, on July 27, 2015, about three weeks before the announcement, he had accepted a job in a similar position with a competitor.

He began his new job on August 24, 2015.

On August 31, 2015, Milgram representatives found a series of emails between Loffredi and one of their longstanding clients in which Mr. Loffredi, at the time still a Milgram employee, offered the client his future employer's services. The client in question ultimately signed a contract with Mr. Loffredi's new employer for the services mentioned in the emails.

A key fact: while Mr. Loffredi was bound to Milgram by a non-solicitation clause and a confidentiality clause, he was not bound by a non-competition clause.

In an interim order dated September 16, 2015, the Superior Court ordered Mr. Loffredi to comply with his non-solicitation and confidentiality covenants and return any documents or information belonging to Milgram.

In a safeguard order issued on October 13, 2015, the Superior Court ordered Mr. Loffredi to not only comply with his duty of loyalty and contractual non-solicitation and confidentiality obligations but also cease working for the competing company until December 16, 2015, with the further requirement that the competing company suspend him for that period with pay.

## Court of Appeal decision

In a unanimous decision from the bench, the Court of Appeal overturned the Superior Court's last judgment.

According to the court, although Mr. Loffredi had, in fact, violated his duty of loyalty, it was a single, isolated incident that had occurred two months before the Superior Court prohibited him from working for the competing company and, moreover, Mr. Loffredi, through his lawyer, had confirmed that he had complied with the initial interim order. The evidence also showed that the client Mr. Loffredi had solicited while still employed by Milgram had also been a client of the new employer since 2012.

According to the court, the Superior Court order to cease working was, under the circumstances, not needed to protect Milgram's legitimate interests, which had to be balanced against Mr. Loffredi's freedom to work. The court therefore found:

> [English]
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> The judge could not interfere with the appellant's right to work when doing so was not necessary and when the appellant had not signed a non-competition covenant. As Justice Marie-France Bich wrote, the second paragraph of Article 2088 *CCQ* must not be construed as the equivalent of a non-competition clause.[4]

## Conclusion

In our opinion, the facts of this case warrant the decision handed down by the Court of Appeal.

We believe that, when there are special circumstances, such as repeated violations of the duty of loyalty, the Superior Court will be allowed to restrict a person's freedom to work, even in the absence of a non-competition clause. To put it another way, it will be necessary to prove in such cases that the balance of inconvenience favours the protection of the former employer's interests.

In any case, this decision underscores the importance for employers of requiring their employees to sign a non-competition clause, as the protections provided by such a clause are not conferred by the duty of loyalty.

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## Footnotes

1. 2007 QCCA 676, para 42.
2. *Voyages Robillard inc. c Consultour/Club voyages inc.*, [1993] DTE 94T-95 (CA) (Prohibition from doing business in the absence of a non-competition clause); *Lessard c Givesco inc., division Les Produits de ciment Windsor*, [2005] DTE 2005T-243 (CA).
3. *Traffic Tech International inc. c Milgram et Compagnie ltée,* 2015 QCCA 2164. See the decision in first instance: *Milgram & Company Ltd c Loffredi,* 2015 QCCS 4757.
4. 2015 QCCA 2164, para 10.

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