

Confidential information: Departing employees ordered to return and destroy

By **James R.G. Cook**

Law360 Canada (May 5, 2025, 2:26 PM EDT) -- Businesses who have abruptly lost several key employees to a competitor may be inclined to seek injunctive relief from the courts to restrain their use of trade secrets and other confidential information. While departing employees are not permitted to take their employer's confidential documentation, a plaintiff may need to establish a strong case before a court will issue an order restraining defendants from doing business with their former employer's customers.

In *Mondee, Inc. v. Voyzant Inc.*, 2025 ONSC 2226, the plaintiff brought an action against several former employees and their new employer. The plaintiff and defendant employer were competitors in the travel industry where profit margins were very small. In mid-2024, seven of the plaintiff's employees left to join the defendant employer. The employees had positions ranging from senior managers to president of one of the divisions. Another 43 of the plaintiff's sales staff left a few months later to work with the defendants.



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Before leaving, one of the plaintiff's employees downloaded over 400 files from his employer's computer folders onto an external hard drive.

The plaintiff brought an action against the defendants on the grounds that the files contained the plaintiff's confidential information. The plaintiff argued that at least two of the departing employees were fiduciaries and that all defendants used the confidential information downloaded by the former employee to unfairly compete with it.

The plaintiff moved for an interlocutory injunction requiring the former employees and their new employer to return and destroy the confidential information and to restrain them from doing business with the plaintiff's customers for 18 months.

In response, the defendants argued that aside from the employee who had downloaded the computer files, none of the other defendants were aware that the employee had taken the plaintiff's confidential information, and that the information was not used by them.

The defendants further argued that the plaintiff failed to prove that the information was confidential or that the information was used to unfairly compete.

The defendants' position was that the plaintiff had been experiencing significant business issues for some time and that customers and employees had fled for this reason, not because of anything that these defendants had done.

The plaintiff's motion turned on the applicable test for an interlocutory injunction or mandatory order set out by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] S.C.J. No. 17: (1) whether the plaintiff has presented a serious issue to be tried or, in some cases, a strong *prima facie* case; (2) whether the plaintiff would suffer irreparable harm if the relief sought was left to be granted at trial; and (3) where does the balance of convenience or inconvenience lie in the granting or the refusing to grant the interlocutory injunction.

In some cases where a plaintiff seeks an interlocutory injunction alleging breach of post-employment fiduciary obligations, courts will apply the more stringent "strong *prima facie* case" test: *Parekh v. Schechter*, 2022 ONSC 302 at para. 34.

The motion judge first considered whether the plaintiff had established a substantial issue to be tried as to whether or not the defendants misappropriated and used confidential information. In this regard, the motion judge considered the underlying tort of breach of confidence, namely whether (i) the documents have a quality of confidence, (ii) the documents were imparted to the employee in circumstances importing an obligation of confidence, and (iii) they were used in an unauthorized manner: *Cantol Corp. v. State Chemical Ltd.*, 2019 ONSC 531, at para. 26; *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, at para. 152.

Confidential information is not limited to trade secrets but may include customer lists, knowledge about the employer's customers, and knowledge of the employer's policies and procedures that would make it possible to undercut the former employer with a view to inducing the customer to change to a competing business.

Based on the evidence, the defendants had no basis to retain any documentation containing the plaintiff's confidential information. The motion judge relied on *Imperial Sheet Metal Ltd. v. Landry and Gray Metal Products Inc.*, 2007 NBCA 51, in which the court stated: "Employees who depart with suitcases of documents, computer files or even a solitary customer list are in breach of their post-employment obligation."

They were therefore ordered to immediately return all the plaintiff's confidential files and destroy any copies made. The defendants were also ordered to turn over the hard drive on which the former employee had saved the plaintiff's confidential information so that it could be analyzed.

As to whether the plaintiff established a strong *prima facie* case that the individual defendants breached fiduciary obligations, the motion judge noted that the employee who had downloaded the plaintiff's confidential information was a senior vice-president for global sales and had exclusive relationships with customers and the authority to set prices. There was a strong *prima facie* case that he had breached fiduciary duties based on the fact that he downloaded the plaintiff's information and accessed it while employed by the defendant employer.

However, with respect to the other departing employees, the motion judge found that the plaintiff had only established a substantial issue to be tried, including as to whether the defendant employer was vicariously liable for the departing employees' conduct and whether it participated in any breaches. This did not meet the higher threshold required to obtain an injunction restraining the defendants from doing business with any customers.

Further, on the second branch of the injunction test — irreparable harm — the motion judge concluded that the plaintiff failed to show that it would suffer irreparable harm if the order restraining

the defendants from selling to the plaintiff's customers was not granted.

The plaintiff's evidence was that following the departure of the employees to the defendant employer, it had suffered a fall in customer-based sales amounting to decreased sales as compared to the same periods in the previous year. While the decreased sales were significant, the motion judge noted that the plaintiff was able to provide precise calculations as to what the lost sales were. The alleged harm could therefore be quantified in damages at trial.

The motion judge also noted that the evidence relied on by the plaintiff was only lost sales rather than lost profits, which would be the measure of its damages. The defendants' evidence was that the tens of millions of lost sales alleged by the plaintiff actually translated into tens of thousands of dollars. Even if the customers were permanently lost and the trial did not occur for five years, the measure of damages, based upon the figures in the motion evidence, would not be that great.

As to the third part of the injunction test, the balance of convenience, the motion judge found that it favoured the defendants on the issue of the customers. The defendant employer was selling to many of the customers before the plaintiffs' former employees joined it, and the evidence concerning the nature of the industry was that it was highly competitive with customers moving back and forth with the sales agents they worked with. In other situations, the plaintiff had similarly hired new employees from competitors with the hope that they would bring customers with them.

The motion judge also noted that the nature of an injunction would imply "significant wrongdoing" that could destroy any future dealings between the defendants and the customers. The court was therefore not inclined to make an interlocutory order restricting which customers the defendants could deal with.

The underlying dispute between the parties, including whether the defendants are ultimately found liable for breaches of any fiduciary obligations owed to the plaintiff, will continue in the ordinary course. The decision illustrates the high threshold that must be met before a plaintiff will be able to obtain relief relating to the restraint of competition by former employees prior to trial.

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