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Competing After Employment (Part One)



By [Richard Stobbe](#)

A key employee departs. The employer, worried that confidential information has leaked out of the company, scrambles to respond. After a frenzied period of preparation, the employer starts a lawsuit and seeks an injunction against the ex-employee.

In two recent Canadian cases, those same basic facts apply but with very different results. First, let's look at the BC case decided in December 2014 ([JTT Electronics Ltd. v. Farmer, 2014 BCSC 2413](#)). In that case, the employer sued the ex-employee and the employee countered with an argument that the employer could not actually identify the confidential info it sought to protect.

The Court agreed, noting: "the need to identify with some reasonable degree of specificity what a plaintiff asserts is confidential or proprietary serves three important and related functions." To summarize:

1. It enables the ex-employee to respond to the lawsuit, and to bring into question whether the purported confidential information is actually confidential or whether it is information that is in the public domain.
2. If the employer can establish that specific information in its possession is confidential, and the remaining elements of an injunction are made out, the ex-employee can understand (by virtue of the court order) what it is that he or she can or cannot do.
3. Unless there is a "reasonable level of precision or definition", it is difficult or impossible for the court to enforce the order.

Because the employer could not describe the confidential information with enough specificity and detail, the order was not granted.

Next, the non-solicitation and non-competition clauses which purportedly bound the ex-employee were, by the court's analysis, "undefined," "ambiguous," "overly broad," since they appeared to impose a worldwide ban which imposed a "blanket prohibition of unlimited geographic scope on any post-employment competition" by the ex-employee. On that basis, the Court refused to grant an order to enforce these restrictive covenants.

From this case we can take away a few practical lessons for business:

- “Confidential information” is broadly understood to be anything that is valuable because it is secret to the company. But in the case of an injunction application, courts will require a clear, specific definition of what *exactly* constitutes confidential information in that case, as it relates to that particular company and the ex-employee in question. While the definition in the underlying agreement - for example, a confidentiality agreement, non-disclosure agreement, employment agreement or even a shareholders agreement - is likely to be broad, the specificity must come into play at the point where the court order is sought.
- Ensure that non-competition restrictions are carefully drafted, are reasonable in their scope, and consistently use defined terms. For example, in this case, the defined term “Business” was given a particular meaning in one section, but the seemingly generic term “business” was used in another section. This caused the court to question why the two terms would be different, and merely added to the court’s finding of ambiguity.

[Richard Stobbe](#) is an IP lawyer, trademark agent and Certified Licensing Professional. To discuss the importance of intellectual assets within your organization, contact [Richard](#) in our [Intellectual Property and Technology Group](#).

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