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## Competing After Employment (Part Two)



By [Richard Stobbe](#)

Last summer, Jawbone, a fitness tracking hardware and software maker, sued its arch-rival Fitbit ([CNET, 2015](#)) alleging that Fitbit lured its employees away to obtain access to Jawbone's confidential information and product plans. How would Canadian courts deal with this situation?

In our earlier article [Competing After Employment \(Part 1\)](#), we reviewed a case in which the Employer attempted to prevent a departing employee from using confidential information. In that case, the Employer failed to describe the confidential information with enough specificity and detail, and the Employer was unable to get its injunction from the Court.

In *Brandt Engineering Products Ltd v. Rockford Engineering Works Ltd.*, [2014 SKQB 339](#), an employer enjoyed a different result.

After several employees left Brandt to join a competitor, Brandt sued its competitor alleging that the former employees of Brandt each breached their fiduciary duties, breached confidence, and breached their employment contracts, among other things. Brandt sought an injunction to prevent the use of confidential information by the ex-employees and their new employer.

The Saskatchewan Court of Queen's Bench noted that:

"each of these individuals were either professionals or they were engaged in doing, assisting or supporting the work of the professional/design team at Brandt. I am satisfied from the evidence that each of them would have been aware of the confidential and proprietary nature of the designs, processes, customer and supplier lists and generally and specifically financial, organizational and technical information respecting Brandt and its operations. Whether by virtue of their employment contracts, their status as professionals, the confidentiality and proprietary notices which much of Brandt's documentation contained, or the role that each of the individual defendants played as members of the design group at Brandt, each could not help but be aware of and recognize the confidential and

proprietary nature and character of much of the information to which they had access and were privy." [Emphasis added]

It was discovered during the course of the lawsuit that the ex-employees had downloaded or removed various confidential documents ("approximately 9,713 documents" burned onto discs and a "banker's box" of materials) and provided some of this information to the new employer, Brandt's competitor.

The Court granted the injunction restricting the ex-employees and their new employer from using confidential information and upholding the non-solicitation covenants. The Court made a few important points which bear repeating:

1. "Where employees have a non-competition clause in their contract of employment or they are determined to be employees having fiduciary obligations – the employee has a continuing duty to maintain confidences for a reasonable period of time and the employee is not permitted to actively solicit the former employer's customers nor to use confidential information to the employee's own employment advantage..."

2. "An interim injunction should not issue for the sole purpose of eliminating competition or effectively reducing it. In cases such as this, the purpose of the injunction is to constrain improper competition – that is to say the use or potential use by former employees of confidential and proprietary information, the property of and acquired from a previous employer to whom the employees owe a fiduciary duty of confidentiality, to compete with that employer."

3. It is also worth noting that:

- the terms of the employment agreements as well as internal confidentiality notices helped bolster the argument that these ex-employees were aware of their confidentiality obligations, and
- the evidence of misappropriation of specific documents avoided the problem in the *JTT Electronics Ltd. v. Farmer, 2014 BCSC 2413* case regarding the need to describe the confidential information with enough specificity and detail.

In summary, the employer in this case succeeded in enjoining improper competition by departing employees. Get advice on departing employees, restrictive covenants and intellectual property protection from the experienced counsel in Field Law's [Intellectual Property and Technology Group](#).

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