

## **Will the LinkedIn Injunction Come to Canada?**

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While the Rolodex may be a thing of the past, its functional successor lives on in social networking sites such as LinkedIn. It's no surprise then that companies encourage their employees to create profiles, share content, and "connect" with current and potential customers.

But what happens when an employee leaves the organization to hang up his or her own competing shingle?

In the days of the Rolodex, the answer was clear: the Rolodex was confidential company property and attempts to improperly take and/or misuse its contents could be subject to swift legal action.

The answer in the era of LinkedIn, however, is far less clear. These profiles often blur the line between personal and professional, and in any event, speak to an individual, not a company's, online personal identity.

This uncertainty may be why Canadian courts have yet to address the question of the "LinkedIn injunction", i.e. whether an employer may have a legitimate proprietary interest in an employee's LinkedIn profile such that its loss or misuse may give rise to "irreparable harm not compensable by damages".

### **English High Court Grants LinkedIn Injunction**

In *Whitmar Publications Limited v. Gamage and Others*, the English High Court recently addressed the question of the "LinkedIn injunction". The decision is especially notable given that [Canada's legal test for an injunction](#) – the *American Cyanamid* test – originated from English law.

Whitmar, a publishing company, sought and obtained a restraining injunction against three former employees who had set up a competing company while allegedly still in Whitmar's employ. As part of their scheme to unfairly compete, Whitmar alleged that the three former employees amassed contact information from members of LinkedIn groups maintained by Whitmar.

The Court did not hesitate to find that the LinkedIn groups in question constituted legitimate company property, stating that:

“Ms. Wright was responsible for dealing with the LinkedIn groups as part of her employment duties at Whitmar. Those groups operated for Whitmar’s benefit and promoted its business, and Ms. Wright used Whitmar’s computers to carry out her work on the LinkedIn groups.”

The contact information gleaned from members of these groups was also accepted as being how the former employees were able to send out the press release announcing their new company.

Taken along with other alleged misconduct – namely soliciting Whitmar employees to join the new business, copying large number of business cards while still in Whitmar’s employ, and soliciting Whitmar’s clients – the Court granted injunctive relief. Specifically, Whitmar received:

- An injunction restraining the use of its confidential information;
- Return of its confidential information;
- A limited forensic inspection of the defendants’ computer systems;
- Affidavits giving particulars of the alleged wrongful activities; and
- “Springboard” relief until trial.

### **How to Strengthen Employer Ties to an Employee’s LinkedIn Account**

Given that the path to injunctive relief is paved with proving proprietary interest, employers should make sure the following forms part of any policy or procedure regarding LinkedIn:

- Open the LinkedIn account with a company, not personal, e-mail address;
- Require that the biography text originate from the company’s communications department;
- Require that a company portrait be used as the profile picture, especially if the format is standardized; and
- Amend job descriptions to specify that business development includes cultivating connections on LinkedIn.

Above all, employers should clarify in employment contracts and social media policies that an employee’s LinkedIn presence is a database of proprietary trade information built on the employer’s behalf during working hours, for which compensation is given.

Because really, other than a grown-up version of Facebook, what else is LinkedIn?

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