Social Media and Post-Employment Obligations:
Is LinkedIn a Rolodex or Telephone Book?

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Introduction

Generally speaking, employees cannot take and misuse confidential information when they leave a company. In the days when rolodexes were used to store and organize customer contact information, the law was clear: the rolodex, and its contents, were the confidential property of the employer. However in today's age, social media has complicated an employer's ability to protect this type of information. LinkedIn, as a functional successor to the rolodex, presents a double-edged sword for employers; on one hand it's a convenient tool to "connect" with current and potential clients, but on the other hand, as a social media platform, it is anything but private.

Telephone Book vs. Rolodex

In the past, an employer's challenge to a former employee's alleged misuse of client contact information turned on characterizing the source of that information. At the risk of oversimplifying the issue, did the information come from a "rolodex" (confidential trade connections) or from a "telephone book" (publicly available contact listings)?

Under the "telephone book" approach, courts have accepted that if the allegedly confidential client contact information could be recalled and found in a telephone book, then it could hardly be said to be confidential. Courts have similarly held that even if the former employee came to know of the value of that client through his or her job with the company, this may simply be job "know-how" rather than a *bona fide* "trade secret".

For example, in *Barton Insurance Brokers Ltd. v. Irwin*,[1] the British Columbia Court of Appeal held that a departed employee could not be prevented from going through a telephone book to solicit persons whom she recalled were clients of her former employer. The Court accepted that the defendant was entitled to recall who she had dealt with, and aided by a telephone book, ask those people if they wished to do business with her new employer.[2]

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[1] (1997), 32 C.C.E.L. (2d) 160 (B.C.S.C.), aff'd 1999 BCCA 73 at para 10.

[2] While the Court acknowledged that there may be cases where memorization of material renders a former employer so vulnerable to loss of business that it would be unfair to use recalled information and reconstructed lists from memory to solicit customers, it noted that this was not such a case.

This is in contrast to the "rolodex" approach, where courts have accepted that the client contact information at issue came from the employer's confidential database, and in any event, that the value of said information came not from the names or telephone numbers themselves, but rather from the knowledge that said contact would be receptive to solicitation. This approach, often held in tandem with a finding of fiduciary status, was endorsed by the Alberta Court of Appeal in *Tree Savers International Ltd. v. Savoy*.[3]

As the cases below demonstrate, the distinction between confidential information arising from a "rolodex" or "telephone book" lives on as the law develops regarding the role of LinkedIn and post-employment obligations.

LinkedIn as a Rolodex

The English High Court recently addressed whether an injunction could be issued against employees for their misuse of client contact information taken from LinkedIn groups maintained by their former employer.

In *Whitmar Publications Ltd. v. Gamage & Ors*,[4] three employees left Whitmar, a publishing company, to start up a competing business. After the employees departed, Whitmar discovered that they had actively taken steps for over a year to compete with Whitmar before their resignations.

Among other things, Whitmar alleged that the former employees amassed its clients' contact information from LinkedIn groups maintained by Whitmar for its own promotion and benefit. In fact, one of the former employee's job functions while at Whitmar was to maintain and administer these LinkedIn groups. As a result, the Court did not hesitate to find that Whitmar had a proprietary interest in the contact information originating from these groups, noting 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 client contact information gleaned from these LinkedIn groups was accepted as being how the former employees were able to send out invitations to the reception which announced their new company.

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[3] 1992 ABCA 34.
[4] See Tab 4

Taken along with other alleged misconduct – namely soliciting Whitmar employees to join the new business, taking information from the employer's database, copying a large number of business cards while still in Whitmar's employ, and soliciting Whitmar's clients – the Court granted an injunction. Notably, both England and Canada share the same test for injunctive relief under the House of Lords case, *American Cyanamid.*[5]

Whitmar is important for recognizing that an employer may have a proprietary interest in aspects of its online social media presence. Here, the factors which led the Court to find such a proprietary interest included:

- The LinkedIn groups in question were setup and maintained by Whitmar for its own promotion and benefit;
- Presumably these groups were "invite-only" and as such the identities of its members were not otherwise publicly available; and
- One of the defendant's job duties while at Whitmar was to maintain these LinkedIn groups, which suggests a fraud perpetrated on her then-employer.

It is important to note that *Whitmar* dealt with an employer's proprietary interest in the contents of its LinkedIn groups. No mention was made of the information learned or the connections made under the former employees' own LinkedIn profiles. Accordingly, even though the contact information for Whitmar's clients was presumably otherwise publicly available, the fact that it was gleaned from LinkedIn groups which had created by Whitmar for its own benefit caused the Court to treat said groups like a rolodex, rather than a telephone book.

LinkedIn as a Telephone Book

The facts which led to the "rolodex approach" being taken in *Whitmar* can be contrasted to the circumstances in *Exfo Inc. v. Les Réseaux Accedian Inc.*[6] and *Eagle Professional Resources v. MacMullin*,[7] which are decisions from the Québec and Ontario courts respectively.

In *Exfo*, a former employee of Accedian subject to a non-competition clause joined Exfo Inc., a competitor to Accedian. The former employee then posted an ad on LinkedIn for jobs available at Exfo Inc. and was accused by Accedian of trying to solicit former co-workers away from the company in breach of his non-competition covenant. To resolve the dispute, the Court had to address the question of whether direct solicitation of employees could take place over LinkedIn. Even though job ads on LinkedIn are targeted to a degree, Accedian was unable to demonstrate

[5] *American Cyanamid Co v. Ethicon Ltd* [1975] A.C. 396.
[6] *Exfo Inc. v. Les Réseaux Accedian Inc*., 2011 QCCS 3767 at para 5.
[7] *Eagle Professional Resources v. MacMullin, Reiffenstein, Emberley and Maplesoft Group*, 2013 ONSC 2501, (aff'd 2013 ONCA 639) at para 1.

that the ad in question was a direct and specific solicitation of its employees. The Court instead accepted that LinkedIn is an open network of users that is generally accessible to the public at large.

Similarly, in *Eagle Professional Resources Inc*., a motions judge held (and the Ontario Court of Appeal agreed) that three employees did not breach their employment agreements when they solicited their former employer's customers, employees, and contractors. While the employer alleged that the customer information in question was taken from a proprietary internal database, the employees stated that they simply looked up the information on social networking sites such as LinkedIn.

As a summary judgment case, the decision is brief and unfortunately does not go into detail about the nature of the social media sites, who owned, them, whether they were the companies' or the employees' sites, or whether the online public sources were open to anyone in or beyond the company. That said, because the Court accepted that the client information at issue was "publicly available" from LinkedIn, the former employer could not establish a proprietary interest in same.

The factors outlined by the courts in *Exfo* and *Eagle Professional Resources* suggest that solicitation arising from individual profiles and advertisements on LinkedIn may be more in line with the "telephone book" approach than the "rolodex" approach. The information in question is not only publicly accessible, but in the absence of fiduciary duties, a former employee likely cannot be prevented from communicating with their contacts on LinkedIn, which is itself a public network. Indeed, the LinkedIn terms of service clearly state that the owner of an account is the individual user of that account.[8]

Strengthening an Employer's Proprietary Interest

Given that the path to injunctive relief is paved with proving proprietary interest, employers should be mindful of certain practices and procedures regarding LinkedIn.

For one, an employer should ensure any new LinkedIn account for an employee is opened with a company, rather than personal, e-mail address. This not only has practical benefits with respect to accessing the account should the need ever arise, but it also helps an employer tie itself to the account's identity. Similarly, a company portrait should be used for the employee's profile picture, especially if the format is standardized, and the biography text should be written by the company's communication department.

[8] See sections 1.2, 2.2 and 2.4 of the LinkedIn user agreement.

More importantly, however, employment contracts and social media policies should clearly state that an employee's LinkedIn presence is a database of proprietary trade information built on the employer's behalf, using company equipment and during working hours for which compensation is provided. Relevant job descriptions should likewise state that business development includes cultivating and maintaining connections on LinkedIn.

Finally, in light of the ownership provisions in the LinkedIn terms of service, employers should also consider defining "company property" in relevant policies to include LinkedIn connections made during the course of employment. That way an employer could reasonably insist that a departing employee delete said connections upon leaving the company. This approach treats the issue of LinkedIn connections like the return of company property, and in doing so effectively sidesteps the trouble of having to prove ownership over the LinkedIn account itself.

Regardless of whether LinkedIn is properly considered a rolodex or telephone book, the fact remains that it is now a staple of the modern employee's networking toolkit. Accordingly, the prudent employer should take the necessary steps now to ensure that its interests in the future are protected.

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