

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *NSD Disposal Limited v. Ruppel*,  
2025 BCSC 690

Date: 20250411  
Docket: S247364  
Registry: Vancouver

Between:

**NSD Disposal Limited**

Plaintiff

And

**Martin Terrence Ruppel**

Defendant

Before: The Honourable Justice Branch

## Reasons for Judgment

Counsel for the Plaintiff:

R. Jarvis

Counsel for the Defendant:

S. Dallen

Place and Date of Hearing:

Vancouver, B.C.  
January 16-17, 2025

Place and Date of Judgment:

Vancouver, B.C.  
April 11, 2025

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**Introduction**

[1] The plaintiff employer applies for interim injunctions: (1) requiring the return of confidential information, (2) restraining the defendant from soliciting business from the plaintiff's clients, and (3) allowing a forensic examination of the defendant's electronic devices.<sup>1</sup>

[2] The plaintiff claims that the defendant copied client contracts before he left the plaintiff's employ, and that he has been using these confidential documents to help target former clients.

[3] This injunction application arises in the context of a broader employment dispute. In related proceedings, the defendant has sued the plaintiff for constructive dismissal.

**The Facts**

[4] The plaintiff is in the business of supplying waste disposal bins to commercial enterprises.

**The Contractual Relationship**

[5] The plaintiff hired the defendant on or about January 11, 2013, as a territory manager. The defendant was to:

- a) maintain and build relationships with customers;
- b) grow revenue with existing customers;
- c) complete cold calls in his assigned territory;
- d) negotiate and complete customer service agreements based on book price and industry standards;

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<sup>1</sup> The application also included a request for a sealing order, but this was not the subject of argument at the hearing.

- e) complete the necessary paperwork for processing new contracts;
- f) respond to customer enquiries; and
- g) grow new business territories within the Greater Vancouver area.

[6] For the purposes of this application, the plaintiff does not assert that the defendant was in a fiduciary relationship. Rather, the plaintiff relies solely on the defendant's contractual obligations to support the injunctive relief sought.

[7] In terms of the employment contract, the defendant signed an agreement on January 14, 2013 (the "Restrictive Covenant Agreement") wherein he agreed, among other things:

- a) that the plaintiff is engaged in a highly competitive business and that, as territory manager, he would be placed in a position of trust and have access to the plaintiff's Confidential Information (as defined), the use of which by him for the benefit of a competitor would have a material adverse effect on the plaintiff's business;
- b) during his employment and for a one-year period after the termination of his employment, not to:
  - i. directly or indirectly solicit the trade or patronage of any customer of the plaintiff with respect to any services or products offered by the plaintiff;
  - ii. request or advise any customer of the plaintiff to withdraw, curtail or cancel their business with the plaintiff or any affiliate; and
  - iii. disclose to any other person, firm or business entity, the names or addresses of any customer of the plaintiff or of any affiliate of the plaintiff.

[8] The Restrictive Covenant Agreement also includes terms specifically protecting the plaintiff's confidential information:

2. I agree to hold in confidence all Confidential Information disclosed to me during the course of my employment with the Company and not to use or disclose the Confidential Information for any reason other than to enable me to carry out the duties of my employment with the Company. I agree that the restrictions set out in this section 2 will apply both during my employment and hereafter.

3. All documents, records, apparatus, equipment and other physical property, whether or not pertaining to Confidential Information, which are furnished to me by the Company or are produced by me in connection with my employment will be and remain the sole property of the Company. I will return to the Company all such materials and property as and when requested by the Company. In any event, I will return all such materials and property immediately upon termination of my employment for any reason. I will not take with me any such material or property or any copies thereof upon such terminations.

[9] "Confidential information" is defined in the Restrictive Covenant Agreement:

"confidential Information" means information regarding the Company's business and operations which has commercial value and include the following:

Customer lists; all contacts at all customers currently or formerly serviced by the Company; the expiration dates and terms of all existing and former customer service agreements; the contents of all proposals for the provision of services to any prospective customer; costing and estimation procedures and formulas; information regarding sales, profit and loss, profit margin, costs, overhead and other bookkeeping and accounting information; all information regarding business development and marketing; names and identities of vendors and suppliers not well known to the trade; all contacts at such vendors and suppliers and the terms of all contracts with vendors or suppliers and all proposals for the supply of goods or services; all financial information with respect to the Company and all third party information provide to the Company on the condition that the Company maintain same in confidence and all information developed by the Company in reliance on such third party information

[10] The defendant signed a separate confidentiality agreement on January 11, 2013 (the "Confidentiality Agreement"), the material terms of which state:

2. "Confidential Information" refers to any information or practices relating to the legitimate business interests of the Employer and known to the Employee as a consequence of his or her employment by the Employer, or developed

or contributed by the Employee for the benefit of the Employer during the course of his or her employment, and which is:

- (a) Not generally known in the industry in which the Employer is engaged; or
- (b) Not otherwise available to third parties from sources unrelated to or sources not controlled by the Employer; and

without restricting the generality of the foregoing, includes;

- (c) customer lists, lists of prospective customers and information obtained on any such lists;
- (d) marketing schemes;
- (e) plans, formulae and specifications;
- (f) computer software;
- (g) production forecasts and business plans;
- (h) information concerning the Employer's operations, dealings, organization, business or finances; and
- (i) trade secrets, confidential and proprietary information.

3. The Employee will not, during the term of his or her employment with the Employer or at any time thereafter, except as required for the performance of his or her duties, obligations and responsibilities arising from the Employment Contract;

- (a) disclose or reveal in any way any Confidential Information; or
- (b) use Confidential Information for his or her own purposes or for any purposes other than those of the Employer unless expressly authorized to do so.

4. All documents, records, working papers, notes, memoranda and similar records or containers of Confidential Information made available to the Employee at any time during his or her employment by the Employer including all copies thereof ("Documents and Records"), are the property of the Employer and belong solely to it.

5. The Employee will:

- (a) where permitted by the Employer, hold any Documents and Records solely for the benefit for the Employer; and
- (b) deliver to the Employer any Documents and Records the Employee holds upon any termination of the Employment Contract, whether such termination is deemed wrongful or not, or at any other time upon request by the Employer.

[11] I will refer to the two agreements collectively as the "Agreements".

[12] The plaintiff established an Information Technology Policy (the “IT Policy”) on or about February 14, 2023, a copy of which was provided to the defendant. The material terms of the IT Policy are as follows:

Electronic communication system and data

... Employees shall not use non-Company licensed or owned software or encryption software tools. The Company prohibits Employees from using any software, external hard-drives or encryption software tools to access Company data located on the Company electronic communication system, unless authorized to do so. Employees shall not disassemble, decompile, reverse engineer or tamper with any software or encryption software tools to prevent the Company from accessing or recovering all encrypted information.

**Business Development in the Waste Disposal Business**

[13] Waste disposal companies earn revenue by negotiating restrictive fixed-term contracts with customers with auto-renewal clauses. Lower Mainland waste disposal businesses, including the plaintiff, generally provide services pursuant to agreements with terms of 12 to 60 months. There is a defined window in which the customer can cancel before an automatic renewal is triggered.

[14] As such, the main challenge associated with any attempt to sign up new customers is that many will already have agreements in place with their current waste disposal bin provider. A competitor will have the best chance of securing a customer’s business during the defined cancellation window.

[15] Therefore, having potential customers’ current contract information, including prices, renewal, cancellation, and term dates, would provide a competitor with a clear advantage.

**The Defendant’s Departure and the Plaintiff’s Investigations**

[16] The relationship between the plaintiff and the defendant began to sour in November 2022 due to a dispute over how the defendant’s commissions should be calculated.

[17] In light of their strained relations, the plaintiff decided to review the defendant's work computer in February 2023. The plaintiff's IT consultant says that he discovered at that time that:

- a) The defendant's browser history indicated he had been engaging in job search activity.
- b) The defendant's desktop was "remarkably clear," and there were some indicators that someone had cleaned up files.
- c) The defendant made email account changes.
- d) The defendant deleted his Google Chrome profile and changed it to a new address with a new recovery email and phone not connected to the company. This deletion of the defendant's profile prevented the recovery of files and erased logs that could have traced any deleted files.
- e) The defendant deleted a large number of files, including emails and customer information files.
- f) The defendant was engaged in an unusually high level of activity on the plaintiff's OneDrive account.

[18] On March 15, 2023, the defendant went on sick leave and never returned to work.

[19] On March 20, 2023, the plaintiff requested the defendant's password information for the defendant's Google account. The plaintiff accessed the account and observed that emails had been deleted. The plaintiff asked their IT consultant to try and recover the deleted files, but they were only able to recover those from the last 30 days.

[20] That same day, the plaintiff and its IT consultant conducted a further review of the defendant's desktop and Google Account and learned that someone had initiated a "takeout" of the defendant's Google Account, exporting and archiving into

a zip folder the entire contents of this account, including all customer contacts, search history, passwords, calendar, business messages, emails, mail, location history, and other activity (the “Google Takeout”).

[21] On April 1, 2023, the defendant’s employment with the plaintiff ended. Whether this was the result of a constructive dismissal or a resignation is the subject of the parallel proceeding.

[22] From April 2023 until the conclusion of his 12-month restrictive covenant period under the Restrictive Covenant Agreement, the defendant worked full-time outside of the waste management industry.

**The Defendant’s Move to Super Save**

[23] The plaintiff suggests that when the relationship started to sour with the defendant in late 2022, it started to receive a greater-than-normal number of cancellations in favour of one of its competitors—Super Save Disposal Inc. (“Super Save”). The plaintiff asserts that an unusual number of these cancellations occurred just before or during the plaintiff’s narrow contractual cancellation window. The plaintiff argues that the reasonable inference is that Super Save had access to the plaintiff’s confidential information by way of the defendant, including details of the cancellation windows in the plaintiff’s contracts.

[24] The defendant’s one-year non-solicitation/non-competition period expired in April 2024. In June 2024, the defendant started working for Super Save. Both the defendant and Super Save deny that the defendant shared any confidential information with Super Save either prior to his employment or afterwards. Super Save says its internal data prevents the drawing of the inference sought by the plaintiff.

[25] The plaintiff’s suspicion that it was suffering an increased cancellation rate caused it to examine the defendant’s workstation further. According to the plaintiff, this further review yielded the following additional information:

- a) On February 7, 2023, just after a meeting with the plaintiff's owner at which he demanded a payout and severance, the defendant accessed, saved, and then deleted customer files on the plaintiff's OneDrive. These files included customer contracts, information, quotes, proposals, and lead information.
- b) On February 14, 2023, the defendant connected an external hard drive to his desktop.
- c) On February 23 and 24, 2023, the defendant accessed hundreds of customer files he maintained on his desktop.
- d) On March 8, 2023, the defendant reviewed photos of Super Save's bins and investigated sales leads which he did not share with the plaintiff.
- e) On March 14, 2023, someone with the sales team's alarm code disarmed the alarm at the plaintiff's office premises in the middle of the night.
- f) On March 15, 2023, at 3:10 am, the defendant accessed hundreds of customer files, including signed customer contracts.

[26] The defendant denies having extracted or deleted any confidential information from the plaintiff, save for commission documents and documents related to two customer accounts, which he has now provided to his counsel for safekeeping. He says that he saved those documents for use in an Employment Standards complaint and that he has made no efforts to solicit either customer.

[27] The plaintiff also received cancellations in favour of Super Save after the defendant joined Super Save.

[28] Ms. Shannon Mann, the plaintiff's co-owner provided evidence regarding the plaintiff's alleged losses to date. Ms. Mann indicates that since the defendant left the plaintiff, they have received 52 cancellation letters in total. Of these, 29 went to Super Save with 23 of these cancellation letters sent within or near the cancellation window. Ms. Mann says they were able to re-sign seven of these clients. Ms. Mann

provided a spreadsheet setting out details on each of these 29 customer cancellations in favour of Super Save. It should be noted that the highest rate of window cancellations appears to be in the period before the defendant joined Super Save. The data is somewhat difficult to interpret, but it appears that before the defendant joined Super Save approximately 16/18 cancellations were within or near the window. Afterwards, only 7/11 were. Focusing only on cancellations actually within the proper cancellation window, the proportion declines from 14/18 before the defendant joined Super Save to 4/11 afterwards.

[29] Due to threats of cancellation, the plaintiff says it had to reduce fees for at least 40 customers to keep their business. The plaintiff says that it has suffered a revenue loss of approximately \$100,000 to date. Its personnel have also had to spend more time and effort following up with customer enquiries and cancellations and protecting against reputational impact.

[30] In Ms. Mann's 2<sup>nd</sup> affidavit of December 3, 2024, she raises the following further customer issues and cancellations that arose following the preparation of her 1<sup>st</sup> affidavit: four clients requested their contract; two clients called requesting to cancel; four clients requested a lower rate; and four clients sent cancellation letters, one of which was within the cancellation window. Ms. Mann indicates that Super Save was associated with at least four of these customer issues.<sup>2</sup>

[31] In Ms. Mann's 4<sup>th</sup> affidavit of January 13, 2025, she raises further customer issues and cancellations that arose following her 2<sup>nd</sup> affidavit. She says that five customers sent cancellation letters, of which two were within the cancellation window. In addition, one customer emailed requesting a contract copying the defendant. The defendant agrees that he signed up six clients to Super Save but says that he only had a relationship with one of them through his work at the plaintiff. The rest were cold calls.

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<sup>2</sup> One request for contract was a "Super Save format letter"; one cancellation was a "Super Save template"; and two of the clients requesting lower rates indicated they had received a quote from Super Save.

[32] The defendant does not deny approaching former plaintiff customers, but says that: (1) these approaches all happened after the expiry of the restrictive covenant period, and (2) none of these approaches was done with the aid of any confidential information from the plaintiff. Between his start date with Super Save and November 24, 2024, the defendant says he signed up 75 new customers, and only 27 were former plaintiff customers. Of the customers mentioned by name in the plaintiff's affidavits, the defendant says he personally only signed up 14 of them to Super Save, and only two of these were cancellations within the cancellation window.

[33] The defendant provided evidence that he has limited financial resources, such that the requested judicial extension of the restrictive covenant period would be a significant hardship.

**Relief Sought**

[34] The plaintiff seeks the following three injunctions in their Notice of Application, although it indicated at the hearing that it was open to some wording clarifications:

1. An interlocutory injunction restraining and enjoining the Defendant from using, altering, erasing, reproducing, sharing or disclosing any of the NSD Confidential Information (as such term is defined in the materials filed in support of this application) including all documents and files or other property of NSD in any form or format which the Defendant copied or took or otherwise transferred from NSD (or NSD devices) to the Defendant (or the Defendant's devices) and which remains in the possession or control of the Defendant, until conclusion of the trial or other disposition of this action or until further order of this court;
2. An interlocutory injunction restraining and enjoining the Defendant from directly or indirectly contacting NSD Customers or NSD employees or directly or indirectly soliciting business from any of the Plaintiff's clients or customers until conclusion of the trial or other disposition of this action or until further order of this court; and
3. An order that:
  - a. within two (2) days of this Order being granted the Defendant deliver to a forensic computer specialist identified by the Plaintiff (the "Forensic Specialist") any of the Defendant's computers, electronic devices, cellular phones, tablets, computer records and files, backup drives, hard drives, USB drives and any other electronic storage media including all

- electronically stored data including, or other electronic media located at the Premises, online, on "cloud based" servers and on the "internet" (the "Devices");
- b. that the Forensic Specialist be permitted to search the Devices over the period of 7 days, or such further period agreed to by the parties in writing or ordered by the Court, for any NSD Confidential Information and remove same from the Devices;
  - c. that the Devices be returned to the Defendant 10 days from the date the Devices were provided to the Forensic Specialist;
  - d. the Defendant return to the Plaintiff all the NSD Confidential Information in the Defendants' possession and/or control (the "Return Order"); and
  - e. within two (2) days of this order being granted, the Defendant deliver to the Plaintiff's counsel details and identities of all persons or entities to whom the Defendant has disclosed the NSD Confidential Information.

## **Analysis**

### **Test for Interlocutory Injunction**

[35] In *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 1994 CanLII 117, the Supreme Court set out a three-part test for an interlocutory injunction at p. 334. The applicant must establish that:

- a) there is a serious question to be tried;
- b) the applicant will suffer irreparable harm if an injunction is not granted; and
- c) the balance of convenience favours the granting of an injunction.

[36] In British Columbia, courts often apply the modified two-part test adopted in *British Columbia (Attorney General) v. Wale*, 9 B.C.L.R. (2d) 333 (C.A.), 1986 CanLII 171, under which irreparable harm is simply treated as an element of the balance of convenience assessment.

### **The Merits Tests**

[37] The merits threshold for most interlocutory injunctions requires only that a serious question be tried. This test applies to the first injunction requested, i.e., to enjoin the use of confidential information.

[38] However, where a plaintiff seeks an interlocutory injunction based on a restrictive covenant in an employment agreement, and the injunction would inhibit the respondent's ability to earn a living, the applicant must establish a strong *prima facie* case rather than only a "serious question to be tried": *Ipsos S.A. et al v. Angus Reid et al*, 2005 BCSC 1114 at para. 69. This is the test that would apply to injunctions 2 and 3(a)-(c).

[39] In *Alpine Building Maintenance Inc. v. Mollard*, 2015 BCSC 609, the court explained the basis for applying the heavier strong *prima facie* case in a restrictive covenant case as follows:

[18] The first prong, strength of case, is generally viewed as presenting the relatively low threshold of whether the plaintiff has demonstrated a fair question to be tried. It has also been noted, however, that where the granting of an interlocutory injunction would effectively end the litigation, then the strength of the applicant's case should be the predominant consideration: *RJR-MacDonald* at 403.

[19] Moreover, where the injunction sought is intended to place restrictions on a person's ability to engage in their chosen vocation and to earn a livelihood, the courts have raised the threshold by requiring the applicant to establish a strong *prima facie* case: see, for instance, *Boehmer Box LP v Ellis Packaging Ltd*, 2007 CanLII 14619 (Ont SCJ) at para 39, and *Phoenix Restorations Limited v Brownlee*, 2010 BCSC 1749 (CanLII) at para 24.

[20] In the present case, the granting of the interlocutory injunction that the plaintiff seeks would effectively determine the enforceability of the plaintiff's restrictive covenants, given that their 12 month duration would expire well before this case could come on for trial. Taking this factor together with the potential impact of the order sought on Mr. Mollard's ability to engage in his chosen vocation, I conclude that, in the interests of justice, the higher threshold is appropriate in this case. See *Phoenix Restorations* at para 25.

### **Application of the Tests**

[40] The plaintiff says that the key confidential information at issue for the purposes of this application are customer contracts and customer lists. The plaintiff disputes that the defendant is justified in using his professional network to solicit their customers for Super Save. They say customer-related information "that Mr. Ruppel has developed over his years as an employee with NSD is also confidential and this includes any information that Mr. Ruppel memorized". At the hearing however, the plaintiff narrowed their focus to customer contracts rather than his

broader knowledge base. This may have been the result of their decision not to pursue the fiduciary allegation at this time. I focus my submissions below on the case as presented i.e. on the customer contracts.

[41] In this case, there is little debate about the contractual limits placed on the defendant's conduct with respect to confidential information. Indeed, the defendant effectively conceded that if the plaintiff were able to establish to the requisite standard that information was taken from the plaintiff, then at least the first injunction would be reasonable. However, the defendant argues that the plaintiff has not established the removal of confidential information for use in solicitation to the higher standard necessary to support the issuance of the latter two injunctions.

***Confidential Information Injunctions***

[42] Indeed, the defendant was prepared to consent to the first injunction on the terms proposed, given that this injunction does little more than enforce the Agreements already in place. Further, the defendant accepts that there was at least a technical breach of the Agreements in relation to the two client files.

[43] As such, I am prepared to issue the first requested order. The evidence raises at least a serious question to be tried in relation to the defendant's extraction of the plaintiff's confidential data. Beyond the two admitted client file extractions:

- a) It is difficult to understand why the defendant would have accessed the plaintiff's entire OneDrive or why he would have needed to copy and move files to another location. I find the available evidence raises a reasonable inference that there was an extraction of information from the OneDrive in breach of the Agreements.
- b) It is also difficult to understand why the defendant would need to initiate the Google Takeout. Again, I find this evidence also raises a sufficiently strong inference that there was an extraction of such information in breach of the Agreements to support the first injunction.

[44] The balance of convenience test is clearly met in relation to the first injunction, given that the defendant has no legitimate interest in maintaining control over any of the plaintiff's confidential information. Nor does the general public have an interest in encouraging the disclosure of confidential information contrary to the terms of the Agreements negotiated by competent parties. There is clearly irreparable harm to the plaintiff created by the potential extraction of its confidential information, given the loss of control over such data: *Pakage Apparel v. Ellis*, 2014 BCSC 884 at para. 47.

[45] Regarding the list of injunctions sought at paragraph 3 of the Notice of Application, this paragraph combines injunctions related to confidential information 3(d) and (e) with the forensic injunctions 3(a-c). I find that the former injunctions are better grouped with the first injunction. I am also prepared to grant the injunctions listed at 3(d) and (e) since (1) the evidence supports that there is a "serious question to be tried" in relation to the improper extraction of confidential information, and (2) on the balance of convenience, these additional terms do little more than require respect for the Agreements. Indeed, I expect from the affidavit material produced to date that the defendant will simply return the two files he admits to taking, and will assert that there has been no other disclosure of Confidential Information. But this will, at a minimum, lock the defendant into a position going forward.

***Non-Solicitation Injunction***

[46] The defendant opposes the request for the second injunction, which seeks to prevent solicitation of the plaintiff's clients for an extended period beyond the contractually agreed-upon twelve months.

[47] The plaintiff acknowledges that there is no direct evidence to suggest that the defendant is soliciting in breach of the Agreements. However, it suggests that the necessary inferences supporting a non-solicitation injunction can be drawn from the evidence. I disagree.

[48] While it is true that courts have been prepared to infer misuse where confidential information is found in the possession of the defendant (see *XY, LLC v.*

*Canadian Topsires Selection Inc.*, 2012 BCSC 1797 at para. 75). I find that I am unable to draw the necessary inference here. There are simply too many flaws, gaps or weaknesses in the evidence to meet the higher standard necessary for this type of injunction. Specifically:

- a) The plaintiff relies on the increased number of customers moving to Super Save before and after the defendant's eventual employment by Super Save. However, customers may have moved to Super Save during that period simply because Super Save was offering better terms, and not because of information supplied by the defendant. There is evidence that Super Save, the much larger company, can offer more competitive terms.<sup>3</sup> Further, the plaintiff's case regarding the period before the defendant arrived at Super Save is particularly weak. There is direct evidence from Super Save and from the defendant that they had no contact prior to his employment. Nothing in the material directly rebuts those assertions, and I have little reason to doubt them at this stage of the litigation. I do not see sufficient evidence of "corporate espionage" during the period before the defendant was employed by Super Save to support a non-solicitation injunction. For example, there is no evidence that the defendant was paid for disclosing information even before he was on the Super Save payroll.
- b) The plaintiff relies on an assertion that the percentage of cancellations that occurred during the cancellation window grew from earlier levels. If true, this would be compelling evidence, as presumably only someone who knew the contract expiration dates would be able to target those dates specifically. However, when one drills into the actual evidence, it is imperfect. First, it would appear that the increasing number and percentage of "in period cancellations" began prior to the defendant joining Super Save. The plaintiff's co-owner states that the number of cancellation

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<sup>3</sup> For example, the plaintiff complains that it has had to reduce prices to compete with Super Save. Further, Ms. Mann provides a list of six current NSD clients quoted by Super Save. The quote from Super Save is significantly lower in all cases at between 35%-60% of the current price.

letters in the contractual window grew from 17% in 2021 to 27% in 2022, and to 53% in 2023-2024. However, the defendant did not join Super Save until June 2024. The “window cancellation rate” appears to have been increasing well before that time.

- c) There does appear to be a number of “in cancellation period” transfers to Super Save after the defendant’s departure, but, as noted above, any evidence of improper communication between the defendant and Super Save before he joined the firm is non-existent. After the defendant joined Super Save, he was no longer within his one-year solicitation period. At that point, it was logical for him to approach former clients. The data on the number of “in cancellation period” cases after the defendant’s arrival at Super Save is light, perhaps a handful of clients at most.<sup>4</sup> Given that the plaintiff is already asking the Court to draw an inference from indirect data, one would have expected more complete, understandable and statistically significant data to facilitate the drawing of the inference. There is limited evidence that the defendant utilized any knowledge of customer contract cancellation windows. Mr. Mann does remember hearing from one customer that the defendant reminded him of the renewal date. In addition, he says that another customer was approached by the defendant and when the customer offered to get their NSD contract, the defendant said he “didn’t need it”. On the other hand, however, Mr. Mann heard from two customers that the defendant requested they get copies of their NSD contract, which suggests the defendant did not have the contracts. The evidence cuts both ways at best and is insufficient to establish that the defendant had access to the customer contracts and cancellation windows. Further, this evidence from customers is hearsay, and while admissible on an injunction application, should be approached with

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<sup>4</sup> The chart provided by the plaintiff lists 11 clients who moved from the plaintiff to Super Save. However, only four of those were within the contractual cancellation window, three were before the window opened, and three were not close to the window. This is far from compelling evidence of improper conduct or knowledge.

caution: *British Columbia (Attorney General) v. Malik*, 2011 SCC 18 at para. 51. The defendant also provided some evidence from customers, who confirmed that the defendant had never indicated that he had their contract during his sales approach. The defendant acknowledges that at least one plaintiff client was signed up to Super Save's services during its cancellation window but notes this was virtually unavoidable, as this particular client was on a month-to-month contract.

- d) For those clients who moved to Super Save outside the cancellation window, the plaintiff has a different theory – that the defendant has engaged in a tortious inducement to breach their contract. There is a degree of inconsistency in taking this position. The plaintiff first alleges that the defendant has all the contracts and so can time his approaches to be in the window. However, the plaintiff notes that there are several new client transfers outside the window. For these, the plaintiff raises the allegation of tortious inducement. It seems like the defendant “can’t win for trying”—whether a transfer was inside or outside the window, the plaintiff asserts that they have a claim. In relation to those cases that were outside the window, if the plaintiff had all the contracts in advance, why would he approach a client with such a low likelihood of success?

The tort of inducing breach of contract requires that the defendant “engaged in conduct intended to cause a breach of the contract”: *Himark Homes Ltd. v Janas*, 2017 BCSC 1719 at para. 21. The defendant says that when approaching a client with a current contract, he does not seek to undermine their existing client relationship. Rather, the standard practice in the industry, which he follows, is to sign the client up to a contract that begins only when their current contract expires to ensure the client does not breach the current contract. I cannot conclude that the tortious inducement theory is sufficiently strong to support the injunction request, and indeed, the mix of theories actually undermines the plaintiff's arguments.

- e) In relation to the most recent plaintiff clients approached by the defendant, the defendant has sworn in his 2<sup>nd</sup> Affidavit as to the details of each such approach, and confirmed directly that he did not have the plaintiff's contracts when making the approaches. There is little evidence that would allow me to reject that evidence and draw the opposite inference proposed by the plaintiff.

[49] The plaintiff relied on Justice Marchand's (as he then was) issuance of an injunction against a departing employee in *Natural Trade Ltd. v. MYL Trading Ltd.*, 2018 BCSC 1176 [*Natural Trade*], further proceedings 2019 BCSC 1368. Although there are similarities between the cases:

- a) There is no evidence that the defendant in the present case transacted business for their personal benefit before leaving the plaintiff: *Natural Trade* at para. 66.
- b) There is no evidence that the defendant incorporated a company prior to his departure: at para. 66.
- c) The injunction sought in *Natural Trade* was sufficiently narrow that it only engaged the lower "serious question to be tried" test: para. 45. In particular, the plaintiffs were only seeking an injunction restraining the use of confidential information, and not seeking to prohibit the defendants from competing with them: para. 68.

### ***Forensic Examination Injunction***

[50] I am not prepared to grant an injunction to allow a forensic review of the defendant's computer as set out in paragraphs 3(a)-(c). The plaintiff agreed that the higher "strong *prima facie* case" applied to the request for this injunction.

[51] The nature of the order sought shares similarities with an *Anton Piller* order, which in addition to a strong *prima facie* case requires the applicant to establish actual or potential serious damage from the alleged misconduct, convincing

evidence that the defendant has incriminating documents in their possession, and a real possibility that the defendant may destroy material before discovery: *Celanese Canada Inc. v. Murray Demolition Corp.*, 2006 SCC 36 at para. 35.

[52] It is also similar to the order sought in the follow-up decision in *Natural Trade* where the applicant was seeking a forensic examination order pursuant to Rule 7.

The Court stated:

[109] The plaintiffs recognize that the orders they seek are extraordinary. They accept the law as stated in *Sonepar* that to obtain access to a hard drive or electronic data storage unit for imaging, the applicant needs to provide evidence that “a party is intentionally deleting relevant and material information, or is otherwise deliberately thwarting the discovery process.”

[53] Given that the same heightened preliminary merits test applies to the injunctions, I find that it is not met for the reasons noted above regarding the second injunction.

[54] Further, as required when seeking an *Anton Piller* order, or a forensic examination during discovery, there must be a sufficiently strong reason to suppose that the existing discovery process will not function appropriately. This is especially so when seeking an order before discovery even begins. The standard was met in *Natural Trade*, at least to an extent sufficient to justify an order for a limited and controlled forensic electronic review. However, this order was only issued where the Court noted that the defendants had not met their discovery obligations, had admitted to destroying relevant documents on at least one occasion, and there was strong evidence to suggest they had done so on other occasions: *Natural Trade* at para. 111. These concerns are not present in the present case, at least not yet.

### ***Evidentiary Issues***

[55] The defendant raised several evidentiary concerns during the hearing, including the following:

- a) The failure of the plaintiff’s deponents to specifically confirm their belief in each individual hearsay statement reported in favour of an “omnibus

preamble” that “I believe the facts contained in the document are true”:  
see *L.M.U. v. R.L.U.*, 2004 BCSC 95 at para. 33-39.

- b) The affidavit of the plaintiff’s IT specialist, Mr. David Barber, should be excluded because it included expert opinion.
- c) The other affidavits contained various impermissible hearsay and opinion evidence.

[56] Given that I have found that the necessary evidentiary standard to support the contested injunctions regarding solicitation and forensic examination has not been met, even assuming the admissibility of the challenged evidence, it is not necessary for me to directly address these evidentiary objections.

### ***Conclusion on Strong Prima Facie Case***

[57] I have found that the plaintiff has not established the strong *prima facie* case necessary to support the injunctions sought in paragraphs 2 and 3(a)-(c). As such, it is not necessary for me to address the balance of convenience test in respect of those injunctions.

### **Disposition**

[58] The plaintiff’s application for an injunction is granted in part, as set out above.

[59] If the parties are not able to agree on the issue of costs, then they may each file written arguments of no more than five pages on the following schedule:

- a) Plaintiff: 30 days from this judgment.
- b) Defendant: 30 days after the receipt of the plaintiff’s costs submission.
- c) Plaintiff’s reply: 7 days after receipt of the defendant’s costs submission.

“The Honourable Mr. Justice Branch”