

## TRANSPORTATION

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### IN THIS ISSUE

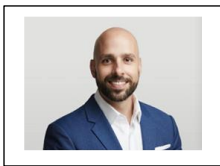
*This article addresses how to learn from your competitors in business without violating the law.*

## I Spy with My Little Eye... but Should I? The 10 Dos and Don'ts of Monitoring Your Competition

### ABOUT THE AUTHORS



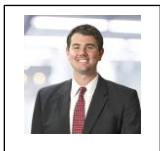
**Heather C. Devine** is one of Canada's leading transportation lawyers. From 2014-2020, she has been recognized as one of the Best Lawyers® in Canada for Transportation Law and is the current President of the Canadian Transport Lawyers Association. Heather was admitted to the Ontario Bar in 1999 and the Nova Scotia Bar in 1998 and has a J.D. law degree from Queens University. Heather worked as a commercial litigator until learning to fly single engine planes in 2009, which led her to focus in transportation law. Since then, her focus has included combining technology, transportation, and intellectual property to advise clients such as brokers, freight forwarders, carriers, and other clients who move goods locally and internationally. Heather can be reached at [hdevine@traffix.com](mailto:hdevine@traffix.com).



**Michael Furyk** is known for his honorable, yet unwavering, approach to litigation resulting in favorable resolutions of claims and disputes for his clients. Michael has been recognized as one of the Best Lawyers in Canada: Ones to Watch (2023 Edition) for Insurance Law recognizing lawyers who are earlier in their careers for their outstanding professional excellence in private practice. Michael is admitted to the Ontario, British Columbia, and Alberta Bar with a Bachelor of Laws from the University of Sussex. Michael is a commercial and civil litigator with a focus on insurance defense, transportation law, employment law, business disputes, and product liability. Michael has a passion for sports and fitness. He loves to golf and trains in Muay Thai Boxing. Michael can be reached at [mfuryk@ahbl.ca](mailto:mfuryk@ahbl.ca).

### ABOUT THE COMMITTEE

This IADC Committee was formed to combine practices of aviation, rail, maritime with trucking together to serve all members who are involved in the defense of transportation including aviation companies (including air carriers and aviation manufacturers), maritime companies (including offshore energy exploration and production), railroad litigation (including accidents and employee claims) and motor carriers and trucking insurance companies for personal injury claims, property damage claims and cargo claims. Learn more about the Committee at [www.iadclaw.org](http://www.iadclaw.org).



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*The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.*

We recently reviewed a Forbes article by Lillach Bullock on “3 Ways to Spy on Your Competitors – And Why You Need To Start Doing It Now”<sup>1</sup>. Ms. Bullock was questioned, “How do you gain that competitive edge? How do you outperform your competitors?”

Her answer was to spy on competitors.

Our answer is to monitor your competitors, but never take or steal confidential information or trade secrets.

The key is not to *steal* confidential information or corporate secrets but to use acceptable tools and research to gain data and information that will help you understand your competitors’ marketing strategies. In this article, we will explore the difference between monitoring versus spying on a competitor and provide you with a list of 10 “Dos and Don’ts” when monitoring your competition. This list will allow you to maintain a competitive edge without risking legal expenses, damage awards, criminal convictions, or loss of market share.

### **THE DOS - Publicly Available Tools for Monitoring Competitors**

#### **1. Social Listening**

It is acceptable to use social ‘listening’ to monitor your competitors. Social listening tools can be used to conduct market research, identify relevant influencers, and quantify the number of mentions (of you and your competitor) on blogs, forums, news sites, and online publications.

The information gained from social listening tools enables you to benchmark your business’ marketing performance compared to your competitors and can provide insight into competitors’ marketing strategies and results. A free social media search engine, such as Social Searcher, is a commonly used tool<sup>2</sup> to perform social listening on Twitter, Facebook, YouTube, and other platforms.

#### **2. Publicly Available Monitoring Tools**

It is permitted to use publicly available tools to “*effortlessly analyze your competitive landscape*”<sup>34</sup> and monitor your competitors’ web traffic, performance, and SEO strategy. There are online tools to measure the quantity, origin, keyword ranking, and site links for your competitors’ websites.

Forbes references Alexa<sup>5</sup> as a useful tool, while other articles reference Similarweb<sup>6</sup>, but there are many tools that provide website traffic statistics including, bounce

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<sup>1</sup> [3 Ways To Spy On Your Competitors - And Why You Need To Start Doing It Now \(forbes.com\)](https://www.forbes.com)

<sup>2</sup> [Social Searcher - Free Social Media Search Engine \(social-searcher.com\)](https://social-searcher.com)

<sup>3</sup> [How To Spy On The Competition: 10 Winning Techniques \(survicate.com\)](https://survicate.com)

<sup>4</sup> [Website Traffic - Check and Analyze Any Website | Similarweb](https://www.similarweb.com)

<sup>5</sup> [Amazon Alexa](https://www.alexa.com)

<sup>6</sup> [Website Traffic - Check and Analyze Any Website | Similarweb](https://www.similarweb.com)

rates, time on site, and the origin of traffic. Once this information is gathered through the monitoring tools, you can compare your website's performance to your competitors' and potentially discover new opportunities, keywords, and other advantageous information that you can implement into your marketing strategy to improve your performance.

### 3. Monitor Social Media Strategy

It is permitted to search your competitors' brand names on all major social networks and assess which are best performing. You can review the platforms to determine which competitors have earned the most followers and engagement, enabling you to identify the best platforms for your marketing strategy and quantify the updates posted and their performance.

Free tools like Google Alerts<sup>7</sup> provide basic monitoring to assess your competitors' social media strategies. In addition to Google Alerts, another more accurate listening tool to consider is Brand24<sup>8</sup>. The information gained from these tools and analysis can enable you to assess which media works best in your industry and what topics are covered within that media - whether it is Adwords<sup>9</sup>, reels, images, infomercials, etc.

In addition to assessing which media works best, you can use this data to identify a

target audience and the audience's origin. Note, this activity is about monitoring and assessing competitors' social media to improve your platform; it does not endorse copying and appropriating others' social media.

### 4. Data Analysis and Data Tracking

Tools like SEMRUSH<sup>10</sup>, which offer stats for cart, trial, and checkout success pages, can provide rank and traffic analysis of your competitors' websites, enabling you to pinpoint their most popular products, services, and categories.

Some tools, such as Monitor Backlinks<sup>11</sup>, will check your competitors' backlinks and send a report every 10 days with all the recent links they have built or earned. While the legality of these tools may appear questionable, they are legal as they are predicated upon accessing and analyzing publicly available data. Quite simply, publicly available data is not a competitor's confidential information.

### 5. Social Media Subscriptions

It is permitted to subscribe to your competitors' newsletters and social media since this is where companies announce new features and publish product updates and other news. This can provide insights into

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<sup>7</sup> [Google Alerts - Monitor the Web for interesting new content](#)

<sup>8</sup> [Brand24 - #1 Social Listening Tool](#)

<sup>9</sup> [Keyword Tool](#) [Google Keyword Planner](#) [\[ Search FREE \]](#)

<sup>10</sup> [Semrush: Your One-Stop-Shop For Competitive Research](#)

<sup>11</sup> [Monitor Backlinks](#)

what is happening now and potentially in the future.

<sup>12</sup>Some sites will require that you provide personal information to subscribe – and in this case, you can be sure that the watcher is being watched. However, this method of monitoring competitors is the most commonplace in many industries.

### **THE DON'TS - Potential Legal Ramifications of Corporate Espionage**

When assessing the “Don’ts” the first step is determining whether the information is confidential or a trade secret. In *LAC Minerals Ltd. v. International Corona Resources Ltd.*, the Supreme Court of Canada set out the following test to determine whether there has been a breach of confidence:

- the information in question must “*have the necessary quality of confidence about it*”;
- that information must have been imparted in circumstances importing an obligation of confidence; and
- there must be an unauthorized use of that information to the detriment of the party communicating it.

Further, in determining whether information should be recognized as confidential information, a court will consider several

factors, including whether the information is:

- generally known to others in the industry;
- unique and novel; and
- subject to measures to ensure its secrecy.

Generally, obligations of confidence can arise through contract or the equitable doctrine of breach of confidence<sup>13</sup> – you may be surprised to learn that the existence of a confidentiality agreement is not necessary to prove a breach of confidence.<sup>14</sup>

The equitable doctrine of breach of confidence means that, unlike contractual duties, which may be enforced only against the party who has assumed the obligation in question, the equitable obligation not to misuse information acquired in confidence applies to any person into whose hands the information comes as a result of another’s breach of confidence.

Notably, the duty of confidentiality may be enforced not only against a former employee, for example, but also against any third party who acquires the information.<sup>15</sup> Further, the duty of confidentiality continues to apply after the termination of the

<sup>12</sup> *LAC Minerals Ltd. v. International Corona Resources Ltd.*, [1989] S.C.J. No. 83, [1989] 2 S.C.R. 574 (S.C.C.).

<sup>13</sup> *Ibid.*

<sup>14</sup> *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] S.C.J. No. 6, [1999] 1 S.C.R. 142 (S.C.C.) at para 20.

<sup>15</sup> *Printers and Finishers Ltd v. Holloway* [1964] 3 All ER 731.

employment relationship.<sup>16</sup> It continues because the confidant was exposed to secret information with the implicit understanding that they were not to pass this information on to third parties or use it in any other way.<sup>17</sup>

### Trade Secrets

In addition to the general duty of confidentiality, one may owe a specific duty not to share trade secrets with third parties, including competitors. Simply, a trade secret is any formula, pattern, device, or compilation of information used in one's business, and which gives that business an opportunity to obtain an advantage over competitors who do not know or use it.<sup>18</sup> It can consist of a wide variety of information including any plan, formula, code, tool, or mechanism known only to a business and those employed by it.<sup>19</sup>

The common law variables in determining whether the information is a trade secret or warrants the protection of the court includes considering:

- the extent to which the information is known outside the business;

- the extent to which it is known by employees and others involved in the business;
- the extent of measures taken to guard the secrecy of information;
- the value of the information to the holder of the secret, and to his competitors;
- the amount of effort or money expended in developing the information;
- the ease or difficulty with which the information can be properly acquired or duplicated by others; and
- whether the holder of the secret and the taker treat the information as secret.<sup>20</sup>

The court may look to the following factors to determine whether an employee has breached the duty not to share trade secrets:

- Did the employer possess and exercise a secret process?
- Did the employee, during his employment, know that such a process was secret?
- Did the employee acquire the trade secret during his employment? If so, has the

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<sup>16</sup> James D Kokonis, "Confidential Information" in Gordon F Henderson et al, eds, *Copyright and Confidential Information Law of Canada* (Scarborough: Carswell, 1994) 325 at 332).

<sup>17</sup> *Ibid* at 335.

<sup>18</sup> *Software Solutions Associates Inc. v. Depow* (1989), 25 C.P.R. (3d) 129 (N.B.Q.B.).

<sup>19</sup> *R.L. Crain Ltd. v. Ashton*, [1949] 2 D.L.R. 481 (Ont. H.C.J.), at pp. 485–6, *affd* [1950] 1 D.L.R. 601 (Ont. C.A.).

<sup>20</sup> *Mountour Ltée v. Jolicoeur*, [1988] R.J.Q. 1323 (S.C.), at p. 1330, quoting D. Vaver, "Civil Liability for Taking or Using Trade Secrets in Canada" (1981), 5 C.B.L.J. 253, at p. 265. See also Alberta Institute of Law Research and Reform, *Trade Secrets* (Report No. 46, July 1986), at p. 257.

employee made improper use of the trade secret acquired?<sup>21</sup>

information. It is reported that this case was settled for an undisclosed amount.<sup>23</sup>

Upon review of various cases, the following provide examples of behavior that can lead to criminal indictment, convictions, or findings of civil liability. With this as a guide, we set out the following “Don’ts” to complete our list:

### **1. Don’t Steal Confidential Information from a Competitor**

In *Air Canada v. WestJet Airlines Ltd.*<sup>22</sup> Air Canada alleged that for one year, WestJet accessed a website that Air Canada operated for the benefit of Air Canada employees and retrieved information regarding passenger loads and route information. Air Canada sought damages against WestJet in the amount of more than \$200 million for corporate espionage.

### **2. Don’t Reconstruct a Competitor’s Shredded Records Containing Confidential and Sensitive Information**

In that same case, WestJet counterclaimed against Air Canada, alleging that investigators took shredded recycling materials and reconstructed them to obtain confidential, sensitive financial and business

### **3. Don’t Steal Trade Secrets for Sale to Others**

In April 2021, following a thirteen-day trial, a U.S. federal jury convicted Dr. Xiaorong You of conspiracy to commit trade secret theft, possession of stolen trade secrets, economic espionage, and wire fraud.

The U.S. Department of Justice reported<sup>24</sup> that Dr. You was found to have stolen valuable trade secrets related to formulations for bisphenol-A-free (BPA-free) coatings for the inside of beverage cans. Dr. You was granted access to the trade secrets *while* working at The Coca-Cola Company in Atlanta, Georgia, and the Eastman Chemical Company in Kingsport, Tennessee. The stolen trade secrets belonged to major chemical and coating companies, including Akzo-Nobel, BASF, Dow Chemical, PPG, Toychem, Sherwin Williams, and Eastman Chemical Company, and cost nearly \$120 million to develop.

In 2022, the Royal Canadian Military Police (“RCMP”) laid a historic first charge of economic espionage against a researcher in Quebec who was accused of obtaining trade secrets from Hydro-Quebec for the benefit of China. The RCMP alleged the researcher

<sup>21</sup> *Amber Size and Chemical Co. v. Menzel*, (1913), 30 R.P.C. 433, at p. 441.

<sup>22</sup> *Air Canada v. WestJet Airlines Ltd.*, 2005 CanLII 47722 (ON SC)

<sup>23</sup> *Air Canada v. WestJet Airlines Ltd.*, 2005 CanLII 47722 (ON SC)

<sup>24</sup> <https://www.justice.gov/usao-edtn/pr/phd-chemist-sentenced-168-months-conspiracy-steal-traded-secrets-economic-espionage>.



had been involved in securing trade secrets and charged him with fraud for obtaining trade secrets, breach of trust, and unauthorized use of a computer.<sup>25</sup>

#### **4. Don't Introduce Malware into a Computer Network to Extract Data and Extort Ransom Money**

A federal grand jury in the District of Nevada issued an indictment charging that an accused conspired to intentionally cause damage to a protected computer.<sup>26</sup> The indictment alleged that the accused, a Russian Citizen, attempted to recruit an employee of a company, with the purpose of introducing malicious software into the company's computer network, extracting data from the network, and thereafter extorting ransom money from the company under the threat of making the extracted data public.

The malware would purportedly provide the accused and his co-conspirators with access to the data within the computer system. After the malware was introduced, the accused would extract data from the network and then threaten to make the information public, unless the company paid their ransom demand.

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<https://www.theglobeandmail.com/canada/article-rcmp-china-espionage-quebec/>

<sup>26</sup> <https://www.justice.gov/opa/pr/russian-national-indicted-conspiracy-introduce-malware-computer-network>

#### **5. Don't Utilize Phishing or Email Caricaturing Tricks to get Confidential Data from a Company's Employees**

One of the oldest cybercrimes<sup>27</sup>, phishing is considered a significant cyber threat to many organizations. Phishing scams trick victims by using social engineering to create a sense of urgency. Once a victim opens a phishing email or text message and clicks the malicious link, they are taken to a fake website that matches the legitimate site. Phishing gathers confidential information like login credentials, credit card numbers, bank account numbers or other financial information by masquerading as a legitimate email.

Finally, phishing emails may also contain infected attachments to install malware such as ransomware or to gain unauthorized access to sensitive data to cause a data breach.

#### **FINAL THOUGHT**

We have provided our list of 10 "Do's and Don'ts" to assist in determining whether your proposed activity may be considered monitoring your competition or engaging in corporate espionage. If you are unsure which category your actions fall under, we

<sup>27</sup> <https://www.upguard.com/blog/phishing> - this article defines 11 types of phishing which is very informative



recommend that you obtain the appropriate legal advice before continuing with any further monitoring activities. If you have any questions, please get in touch with Michael Furyk and the legal professionals at Alexander Holburn Beaudin + Lang LLP.



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