

Court File No. CV-24-00000869-0000

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

GULED WARSAME and SHELLI SAREEN on their own behalf and on
behalf of all members of UNITE HERE Local 75

Plaintiffs

And

DAVID SANDERS, ASHLEY HAYES, RAFUNZEL KORNGUT AND ALLAN PACE on his
own behalf and on behalf of all members of THE TORONTO HOSPITALITY EMPLOYEES
UNION – CSN (THEU-CSN)

Defendants

FACTUM OF THE DEFENDANTS

(Plaintiffs' Motion for Injunctive Relief)

June 12 2024

LAURA YOUNG
Barrister & Solicitor
36 Toronto Street, Suite 1120
Toronto, ON M5C 2C5
LSO# 39937V
Tel: 416.366.4298
laura.young@lylaw.ca

WADDELL PHILLIPS
PROFESSIONAL CORPORATION
36 Toronto Street, Suite 1120
Toronto, ON M5C 2C5

**John Kingman Phillips (LSA# 8295 / LSO No.:
46206E)**
john@waddellphillips.ca
John-Otto Phillips (LSO No.: 70097N)
otto@waddellphillips.ca

Lawyers for the Defendants

PART I – OVERVIEW	1
PART II – SUMMARY OF FACTS.....	2
THE PARTIES	2
LOCAL 75’S CLAIM TO CONFIDENTIAL INFORMATION.....	3
THE DEFENDANTS DEPARTED LOCAL 75 IN 2018.....	3
LOCAL 75, THE TRUSTEESHIP OF UNITE INTERNATIONAL, AND UNIFOR.....	5
THE SOURCE OF THE MEMBER INFORMATION USED BY UNIFOR.....	7
LOCAL 75 KNEW ALL ABOUT IT.....	7
UNIFOR’S RAIDS WERE IMMEDIATELY SUCCESSFUL	8
EMPLOYEE INFORMATION CAN BE OBTAINED THROUGH OTHER MEANS	8
THE THEU AND LOCAL 75	9
PART III – STATEMENT OF ISSUES, LAW AND AUTHORITIES	10
LEGAL ISSUES BEFORE THE COURT	10
OVERVIEW OF LEGAL ARGUMENT	10
A RULE 44 ORDER CANNOT BE GRANTED	10
<i>Legal Test</i>	10
<i>Failure to adequately identify the Personal Property at Issue</i>	11
The Legacy Documents	11
Beyond the Legacy Documents	11
<i>The Value of the Member Contact Information and Local 75 “Damages”</i>	12
<i>Failure to provide accurate context of the facts and circumstances</i>	13
A RULE 44 ORDER SHOULD NOT BE GRANTED	13
<i>The “Substantial Grounds” Criteria</i>	13
<i>The Plaintiffs’ Claims are Statute-Barred</i>	14
<i>The Claims alleged against the Defendants will otherwise not Succeed</i>	15
<i>Balance of Convenience</i>	16
Laches and Acquiescence	16
Interest of Employees	17
ALTERNATIVE INJUNCTIVE RELIEF SHOULD NOT BE GRANTED UNDER RULE 40	17
<i>Strong Prima Facie Case / Serious Issue to be Tried</i>	18
NO IRREPARABLE HARM	19
THE BALANCE OF CONVENIENCE FAVOURS REFUSING THE INJUNCTION	20
PART IV – ORDER REQUESTED	20
SCHEDULE “A”.....	21
SCHEDULE “B”	23

PART I – OVERVIEW

1. The Plaintiffs (“Local 75”) bring this motion, and this action, for strategic purposes: to frustrate the Defendant union’s efforts to provide meaningful alternatives to representation by Local 75 during the current 3-month “open period” for displacement applications in several Toronto area hotels. This proceeding is not about protecting member information – Local 75 had the chance to do that over six years ago when Unifor used the information to raid its membership, and it chose not to do so.
2. Local 75 claims a high degree of urgency before this court and rushes this injunction in Kitchener, which is plainly the wrong region for this action,¹ after demonstrating indifference to the dissemination and use of membership contact information for many years. Local 75’s motion for injunctive relief is centred on an alleged breach of confidence, among other things, and a claim to “return” information and property. However, at this point, Local 75 is both legally and practically too late.
3. Legally, this proceeding is brought more than six years after the Defendants left the Local 75 workplace, moved to Unifor and actively engaged in high profile raiding activities on behalf of Unifor against Local 75. The motion, and the action, are both brought well out of time – both under the equitable doctrine of laches and the two-year limitations period set out in the *Limitations Act*.
4. Practically, the concept of “returning” the information which Local 75 is concerned with is both pointless and not feasible. The Defendants identify two categories of documents in response to this proceeding: there are “Legacy Documents” which were not “taken” but which resided on the personal devices of some of the Defendants when they left, by virtue of their previous work.

B-1-146

¹ The Defendants have brought an in-writing motion to transfer this matter to Toronto Superior Court. The Notice of Motion, and supporting affidavit, are provided at Tab 4 of the Defendants’ Responding Record (“RR”).

Those Legacy Documents are largely untouched and can be returned, but those Legacy Documents do not appear to be what Local 75 is after.

5. It is Local 75 member information (“Member Information”) that the Plaintiffs allege was taken by the Defendants (inaccurately, it happens) and upon which the Plaintiffs are focussed. This information has been disseminated widely in Unifor’s raids, and updated and changed based upon organizing activities and information acquired from other sources, since 2018. It is not possible to isolate, extricate and return it, and even if it were, there would be no practical reason, given that it was widely disseminated within Unifor and amongst those helping it raid back in 2018. Such information has long ceased to have the necessary quality of confidence.

6. The evidence shows that the Member Information came to the Defendants through Unifor, which received it from disaffected members of Local 75. The Defendants did not take the Member Information and give it to Unifor – rather, they got it from Unifor. Local 75 was aware that its Member Information was being used in Unifor’s raids in 2018, and it took no action, ostensibly because it would not have made a difference. That was Local 75’s choice, but it cannot now pretend that it was unaware of these facts, and come to court seeking urgent relief, asking the court to unravel the last 6 ½ years.

7. Notwithstanding the limitations (and other) issues, the Defendants are prepared to provide Local 75 with copies of the Legacy Documents, delete them from their devices and swear to same. The Defendants are even prepared to delete and rebuild the Toronto Hospitality Employee Union (“THEU”) contact list after deleting the Legacy Documents, to ensure against any inadvertent use. As for the Member Information otherwise acquired by the Defendants, no remedy is appropriate.

PART II – SUMMARY OF FACTS

THE PARTIES

8. The individual Defendants are all long-time union organizers who worked on behalf of Local 75 until January 2018. Rafunzel Korngut (“Rafunzel”) and Allan Pace (“Allan”) were employed directly as organizers on staff, and Ashley Hayes (“Ashley”) and David Sanders (“David”) were employed by Local 75’s American parent, UNITE HERE (International) (“Unite International”) and were staffed to Local 75, before moving to Unifor in 2018, and ultimately coming to work for the THEU in 2022.²

9. The THEU was formed in 2022 with the goal of building a strong, member-driven union for hotel employees in Toronto, and is affiliated with the Confédération des syndicats Nationaux (“CSN”), a trade union confederation with more than 330,000 members and more than 1,600 autonomous member unions. CSN-affiliated unionized hotel workers in Montreal earn an average of \$5 more per hour compared to Toronto workers.³

LOCAL 75’S CLAIM TO CONFIDENTIAL INFORMATION

10. The crux of Local 75’s claim in this action, and on this motion, are allegations that the Defendants took property and confidential information when they left Local 75, including “Member Information” (names and contact information of Local 75 members), which Local 75 alleges is confidential.⁴

THE DEFENDANTS DEPARTED LOCAL 75 IN 2018

11. All of the Defendants left Local 75 as part of a mass departure of disaffected employees and members arising from the trusteeship imposed on Local 75 by Unite International, effectively

² Affidavit of Allan Pace, affirmed June 11, 2024 (“Allan’s Affidavit”), RR, Tab 1, para 2; Affidavit of David Sanders, affirmed June 11, 2024 (“David’s Affidavit”), RR, Tab 2, paras 1, 2, 7; Affidavit of Rafunzel Korngut, affirmed June 11, 20124 (Rafunzel’s Affidavit”), RR, Tab 4, paras 1, 2; Affidavit of Ashley Hayes, affirmed June 11, 2024 (“Ashley’s Affidavit”), RR, Tab 3, paras 1, 2, 5.

³ Allan’s Affidavit, RR, Tab 1, paras 3, 4. B-1-6

⁴ Allan’s affidavit, RR, Tab 1, para 5; Local 75 Statement of Claim, Tab 5B at paras 18-21.

B-1-140

B-1-5

B-1-74

B-1-135

taking control of Local 75 against the wishes of much of the membership.⁵ With respect to these departures:

- **Allan** – Allan ceased working under a threat of termination. He did not take any property of Local 75 when he left, including specifically, any Membership Information. To the extent that he had documentation relating to his work for Local 75 in his possession at home at the time, he destroyed it without having used it.⁶
- **Ashley** – Ashley was terminated from Unite International on or about January 9, 2018. She did not take any Local 75 property, including specifically Member Information, on her departure and to the extent that she had paper files, she returned them. Because she used her personal devices for work, she did have some digital materials from Local 75 on her devices (“Legacy Documents”), however she did not review or use those Legacy Documents after she left until this litigation was brought.⁷
- **David** - David’s employment was terminated by way of letter dated January 5, 2018. He did not take any Local 75 property, including specifically Member Information, on his departure and to the extent that he had paper files, he threw them out. He returned his work computer, but as he also used his personal computer for work, he had some Legacy Documents on it. David discovered these Legacy Documents when responding to this litigation, and believes it is possible that he inadvertently used some information when assembling contact information for the THEU without appreciating the source of the information.⁸
- **Rafunzel** – Rafunzel resigned her employment with Local 75, and did not receive a termination letter or any request to return documents or materials. She did not take any Local 75 property, including Member Information, on her departure and to the extent that she had paper files, she threw them out. Because she used her personal devices for work, she did have some Legacy Documents, however she did not review or use those Legacy Documents after she left until this litigation was brought.⁹

12. To clarify matters right at the outset, none of the Defendants took Member Information or any Local 75 property. If they had paper files, they destroyed or returned them, and if they had Legacy Documents by virtue of using personal devices for work, they did not use them - with the exception that David may have inadvertently used information from a Legacy Document when

⁵ Allan’s Affidavit, RR, Tab 1, para 6. B-1-6

⁶ Allan’s Affidavit, RR, Tab 1, paras 6-8. B-1-6

⁷ Ashley’s Affidavit, RR, Tab 3, paras 6-7. B-1-136

⁸ David’s Affidavit, RR, Tab 2, paras 4-5. B-1-75

⁹ Rafunzel’s Affidavit, RR, Tab 4, paras 4-7. B-1-141

preparing the THEU contact list in 2023. David had more current and useful information than that from 2017 and would not have used outdated information intentionally.¹⁰

LOCAL 75, THE TRUSTEESHIP OF UNITE INTERNATIONAL, AND UNIFOR

13. In the many months leading up to the mass exodus of Local 75 employees and members in January 2018, Lis Pimentel (“Pimentel”) the then-president of Local 75, fought to prevent Unite International from imposing a trusteeship on Local 75, ultimately without success. The trusteeship was the culmination of a split within Local 75, involving contested executive and membership meetings and votes as well as, ultimately, several pieces of litigation.¹¹

14. Pimentel commenced proceedings to prevent the trusteeship, and Unite International imposed it anyway, effectively taking over Local 75’s operations, before a hearing on the merits of the injunction in that action was to be held. Unite International flooded a Local 75 January 9, 2018, members’ meeting with its own representatives, physically disrupting the meeting, while assaulting and intimidating Pimentel in the process.¹²

15. The Local 75 executives and members that supported Pimentel, including the Defendants, were left without recourse within Local 75, and therefore moved to Unifor to continue advocating for, and organizing, hospitality workers in Toronto.

16. On or about January 18, 2018, Unifor commenced a large-scale, public and targeted raid against Local 75 hotels, with the explicit purpose of converting Local 75 members to Unifor. The Defendants began raiding actions immediately on behalf of Unifor, which provided the Defendants

¹⁰ David’s Affidavit, RR, Tab 2, paras 5, 33. B-1-75 B-1-85

¹¹ Allan’s Affidavit, RR, Tab 1, paras 13-14; Litigation included Pimentel’s action on the trusteeship, Unite International’s action on the trusteeship, and two defamation actions by Pimentel arising from public allegations of racism by Unite International supports. Cavalluzzo LLP was counsel on all these matters.

¹² Allan’s Affidavit, RR, Tab 1, para 13. B-1-8

with lists of employees and contact information for each of the Local 75 hotels that they were instructed to target, with a focus on those hotels with open periods soon to close.¹³

17. A press release issued January 18, 2018, announced the Unifor campaign to bring Local 75 members into Unifor, and Unite International’s president acknowledged Unifor’s raid that same day.¹⁴ Shortly thereafter, Local 75 reported that departing staff were seen leaving Local 75 offices with multiple boxes, and that the trustee found the Local 75 offices in disarray with files missing and computers wiped of data.¹⁵

18. By January 23, 2018, just days after starting its raid of Local 75 workplaces, Unifor had obtained enough membership cards to initiate displacement votes at two Local 75 hotels, and those votes were successful.¹⁶

19. The United Steel Workers (“USW”) publicly condemned Unifor, stating: “The poaching of the top leader and some staff is a common tactic in these kinds of raids. After all, those people may well come with membership lists and other data that are important to raid leaders such as Mr. Dias.”. In a USW article dated January 31, 2018, the USW stated:

On January 17, 2018, Unifor announced it was leaving the Canadian Labour Congress. Within hours of that decision, Unifor had started a concerted campaign to raid the members of UNITE HERE Local 75 in Toronto. It subsequently emerged that Unifor hired the former president of Local 75, Lis Pimentel, and a number of staff from that union. Sister Pimentel and her staff presumably arrived at Unifor with membership lists and other information necessary for Unifor to steal hundreds if not thousands of members from Local 75.¹⁷

B-1-8

B-1-76

B-1-142

¹³ Allan’s Affidavit, RR, Tab 1, para 12, 16-17; David’s Affidavit, RR, Tab 2, para 7; Rafunzel’s Affidavit, RR, Tab 4, para 8; Ashley’s Affidavit, RR, Tab 3, para 8. B-1-136

¹⁴ Allan’s Affidavit, RR, Tab 1, para 15 and Exhibit B, CNW Press Release dated January 18, 2018. B-1-30

¹⁵ Allan’s Affidavit, RR, Tab 1, para 15; Exhibit “C” notice from Unite International dated January 18, 2018; Exhibit “F” – A Report titled “Summary Report of UNITE HERE Local 75 Trusteeship and Raid” dated Jan 30, 2018. B-1-43 B-1-33

¹⁶ Allan’s Affidavit, RR, Tab 1, para 15 and Exhibit “D”, news article from HR Reporter Titled “Toronto Hotel Workers Vote to Switch Unions” dated January 23, 2018. B-1-35

¹⁷ Allan’s Affidavit, RR, Tab 1, para 15, Exhibit “E” – The USW open letter dated January 29, 2018 and Exhibit “G” – USW article dated January 31, 2018.

B-1-39

B-1-49

THE SOURCE OF THE MEMBER INFORMATION USED BY UNIFOR

20. Unifor received Member Information in the form of seniority lists and call out lists from disaffected members of Local 75 who wanted to move to Unifor. Over 100 such people provided lists of employee information by hotel to Unifor, seeking to leave Local 75 and obtain representation from Unifor, and Unifor used those lists for raiding purposes.¹⁸

21. Many members within Local 75 supported Pimentel’s leadership and had already mobilized behind her in response to the move by Unite International to place Local 75 into trusteeship. Local 75 Member Information lists circulated in abundance because of the significant efforts to call out members to participate in meetings leading up to the trusteeship (placing lists in the hands of Local 75 employees, executives, volunteers and shop stewards and other workers). It was thus not difficult for individuals to acquire and share member lists with Unifor if they chose. Moreover, such lists were not marked as confidential or “do not circulate” or anything similar.¹⁹

22. Further, due to the dispute over trusteeship, many Local 75 members were fully engaged, explaining why so many people came to Unifor with Member Information.²⁰ Unifor took in Member Information provided to it and was able to compile information for essentially all Local 75 GTA hotels, and use it for raiding efforts, including texting, calls, house visits and emails.²¹

LOCAL 75 KNEW ALL ABOUT IT

23. The raid by Unifor against Local 75 hotels was public, explicit and transparent, with Unifor’s raiding office becoming a hive of activity, with dozens of workers and organizers coming and going freely throughout the day. It is impossible that Local 75 did not know that Unifor had and was using Member Information. Indeed, this is essentially Local 75’s evidence on this motion

¹⁸ David’s Affidavit, RR, Tab 2, paras 12-13. B-1-77

B-1-77 ¹⁹ David’s Affidavit, RR, Tab 2, paras 13, 14; Ashley’s Affidavit, RR, Tab 2, para 13. B-1-137

²⁰ David’s Affidavit, RR, Tab 2, para 16. B-1-78

B-1-7 ²¹ Allan’s Affidavit, RR, Tab 1, para 11; David’s Affidavit, RR, Tab 2 paras 9, 16; Rafunzel’s Affidavit, RR, Tab 4, para 12; Ashley’s Affidavit, RR, Tab 3, para 10. B-1-76

– Local 75 was aware of what was happening at the time but recognized the legitimate support for Pimentel and so decided to respond to the raid with a counter-campaign rather than dealing with Member Information.²²

24. In accordance with this approach, Local 75 did not issue any demand or make any claim against Unifor, or any of the Defendants who were working for Unifor at the time, alleging misuse of confidential information, nor did it assert or communicate any breaches at that time, or at any time thereafter, to the Defendants prior to commencing this action in 2024.²³

UNIFOR’S RAIDS WERE IMMEDIATELY SUCCESSFUL

25. Within two weeks of starting the campaign against Local 75, Unifor had cards signed by approximately 2,000 of Local 75’s 8,000 members, and Unifor quickly converted that to bargaining rights over seven Local 75 hotels. This was an astounding accomplishment attributable to Local 75 members’ dissatisfaction with the trusteeship, as well as the support for Pimentel as a leader. That said, there is no way that kind of support could have been organized from a standstill without knowing who to reach out to and how to contact them.²⁴

26. As a result of Unifor’s raiding, Membership Information is now available widely within Unifor and likely within the employee ranks at various hotels as well.²⁵

EMPLOYEE INFORMATION CAN BE OBTAINED THROUGH OTHER MEANS

27. The Member Information, while useful, can be compiled through common organizing methods. Employees within workplaces share employee names and contact information to facilitate unionization in the workplace. That is how the process of unionization occurs.²⁶

B-1-7

B-1-76

B-1-143

²² Allan’s Affidavit, RR, Tab 1, paras 10, 22; David’s Affidavit, RR, Tab 2, para 8; Rafunzel’s Affidavit, RR, Tab 4, para 14; Ashley’s Affidavit, RR, Tab 3, para 12; Affidavit of Shelli Sareen, sworn May 28, 2024 (“Shelli Affidavit”), Plaintiff’s MR, Tab 1, paras 39-40. B-1-137 A24

B-1-7 ²³ Allan’s Affidavit, RR, Tab 1 para 10; David’s Affidavit, RR, Tab 2 para 8, 32; Rafunzel’s Affidavit, RR, Tab 4 paras 9, 10; Ashley’s Affidavit, RR, Tab 3 para 9. B-1-137 B-1-76 B-1-142

B-1-13 ²⁴ Allan’s Affidavit, RR, Tab 1, para 19 and Exhibit “I” Unifor announcement. B-1-67

²⁵ Allan’s Affidavit, RR, Tab 1, paras 21, 22. B-1-14

²⁶ Allan’s Affidavit, RR, Tab 1, para 25. B-1-15

28. If the threshold number of membership cards are signed in support of a new union (40% of the bargaining unit under the *Ontario Labour Relations Act*), then a vote will proceed and, through that process, the union will be provided with a list of employees within the bargaining unit as well as their position. For example, both Local 75 and the THEU acquired a list with respect to the Royal York in 2022 by virtue of the vote at that time.²⁷

THE THEU AND LOCAL 75

29. The THEU and Local 75 are competing entities. The THEU organized the Hosts and Hostesses of the Royal York into a certified bargaining unit in May of 2022, and followed with front desk workers in November. The remaining hotel staff are in a single Local 75 bargaining unit for which the THEU has brought a displacement application. A vote of that group was held in May 2022, and as several ballots were challenged, and that matter remains before the labour board.²⁸

30. In December 2023 and April 2024, the THEU sent information mailings directed towards workers at several Toronto hotels, some of which are represented by Local 75, and in January and April it sent out text blasts.²⁹

31. In late May of this year, the THEU applied unsuccessfully to represent the workers at the Drake Hotel, a workplace that did not have a union. Essentially simultaneously, while THEU organizers were busy with the vote, Local 75 delivered this claim and then Unite International and Local 75 representatives showed up at the Drake - not to compete for member support, but simply to campaign against the THEU. The Plaintiffs' claim in this action was served on the Defendants while they were actively campaigning and shortly before the vote.³⁰ Local 75's action and motion are not about Member Information, it is about trying to shut down a competing union.³¹

²⁷ Allan's Affidavit, RR, Tab 1, para 27. B-1-15

²⁸ Allan's Affidavit, RR, Tab 1, para 32. B-1-17

²⁹ Allan's Affidavit, RR, Tab 1, paras 29, 30, David's Affidavit, RR, Tab 2, para 33. B-1-85

³⁰ Allan's Affidavit, RR, Tab 1, para 31. B-1-17

³¹ Allan's Affidavit, RR, Tab 1, para 26. B-1-15

PART III – STATEMENT OF ISSUES, LAW AND AUTHORITIES

LEGAL ISSUES BEFORE THE COURT

32. In assessing the relief sought by the Plaintiffs, this Court must consider:
- 1) Have the Plaintiffs provided sufficient evidence of substantial grounds allowing an order for recovery of personal property pursuant to Section 104 of the Courts of Justice Act and Rule 44 of the Rules of Civil Procedure? If so, should this Court grant such an order?
 - 2) Have the Plaintiffs otherwise established that they are entitled to injunctive relief pursuant to Section 101 of the Courts of Justice Act and Rule 40 of the Rules of Civil Procedure?

OVERVIEW OF LEGAL ARGUMENT

33. In summary, the relief sought by the Plaintiffs under Rules 44 and 40 should be denied because:

- **The Claim is Out of Time** - The Plaintiffs' own evidence, buttressed by the evidence of the Defendants, shows that the Plaintiffs are unlikely to succeed at trial, let alone meet the “high assurance of success” or “strong *prima facie* case” thresholds as the claims advanced are barred pursuant to Section 4 of the *Limitations Act, 2002*, as well as the doctrine of laches.
- **The Plaintiffs Acquiesced** – Local 75 has known for years that Membership Information was being used at Unifor and was no longer within its control, and yet it took no steps to stop this. Consequently, by acquiescence, Local 75 has allowed the Membership Information to lose any confidential character it may have possessed.
- **The Balance of Convenience Favours the Defendants** - The balance of convenience favours the Defendants who have an established 6 plus years of using, building on and integrating Member Information into their organizing efforts, without complaint from Local 75. This status quo is of Local 75's making, and it can continue to live with it while the parties continue their organizing efforts.

A RULE 44 ORDER CANNOT BE GRANTED

Legal Test

34. Rule 44 relief, namely an order for the return of property, requires evidence providing: (a) a description of the property sufficient to make it readily identifiable; (b) its value; (c) that the

plaintiff is the owner or lawfully entitled to possession of the property; (d) that the property was unlawfully taken from the possession of the plaintiff or is unlawfully detained by the defendant; and, (e) the facts and circumstances giving rise to the unlawful taking or detention.³²

Failure to adequately identify the Personal Property at Issue

35. There is no tangible property at issue here. Rather, there are two categories of digital information usefully distinguished into: Legacy Documents and everything else relating to Local 75. The “everything else” category is essentially Member Information, obtained from Unifor, as updated and changed over the last 6 ½ years, which is the product of organizing efforts by the Defendants, including over the last 2 years with the THEU. Inextricably included in the “everything else” category is the evolution of the Royal York employee information, where a contest remains regarding which party will represent the general bargaining unit, as well as every other hotel where canvassing and outreach has been done, where employees have sought support from the Defendants, and where membership cards have been signed and votes have been conducted. Whatever the Membership Information might have been in January 2018, it no longer exists as such now.³³

The Legacy Documents

36. With respect to the Legacy Documents the THEU is prepared to cooperate, notwithstanding the existence of limitations periods and other issues that may not entitle Local 75 to such relief, by agreeing to delete and confirm the deletion of the Legacy Documents, and further to delete the THEU contact list (which may or may not have used Legacy Document information), without prejudice to a right to recreate a contact list after the deletion of the Legacy Documents.³⁴

Beyond the Legacy Documents

³² *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, R. 44. ~~H~~ r. 44

³³ Allan’s Affidavit, RR, Tab 1, para 38, David’s Affidavit, RR, Tab 2, para 10. B-1-76

³⁴ Allan’s Affidavit, RR, Tab 1, para 38. B-1-19

37. The Defendants have Member Information that derives from their time with Unifor in 2018 but that information is no longer as it existed at the outset of the 2018 Unifor raids. The Defendants have developed current information about employees in many workplaces.³⁵ Such Member Information cannot be regarded as confidential information of Local 75. It is not clear how the THEU could isolate the Unifor-originating Member Information from 2018, or even Member Information (if that means name and contact information for anybody currently within Local 75), and therefore how the THEU could return or delete such information without:

- walking away from the application for workers at the Royal York (this matter remains before the labour board);
- ceasing organizing work at all Local 75 hotels, which would effectively prevent the THEU from competing with Local 75; and
- impairing the THEU's ability to communicate with its members and those who have expressed an interest in the THEU, contrary to the freedom provided in section 5 of the *Labour Relations Act*, which provides that every person is free to join a trade union of their choice.³⁶

38. Further, providing the Plaintiffs with Member Information as updated over the last 6 ½ years would disclose the THEU's organizing progress and the identities of workers seeking a change in representation, opening those workers up to reprisals (as discussed further below), all while Member Information remains at Unifor.³⁷

39. Rule 44 is crafted to facilitate the return of specified, identifiable property, not a broad category of information that cannot be clearly defined or extricated.³⁸ The question here is how can the court delineate such property in these circumstances? The answer is, it cannot.

The Value of the Member Contact Information and Local 75 “Damages”

³⁵ Allan's Affidavit, RR, Tab 1, para 28. B-1-16

³⁶ Allan's Affidavit, RR, Tab 1, para 56.

³⁷ Allan's Affidavit, RR, Tab 1, paras 40-41; David's Affidavit, RR, Tab 2, para 34. B-1-86

³⁸ *Evertz Technologies Limited v. Lawo AG*, [2019 ONSC 1355](#) at paras [32-33](#).

40. Local 75's approach to the "property's value", suggesting a potential loss of \$750,000 per year, is unrealistic. Member Information, particularly that as it existed in 2018, has limited value given the high turnover in the industry, and the fact that it can be compiled with some effort. Further, having the names and contact information for workers facilitates contact, but it does not guarantee a change of union, nor if a change occurs does it follow that it was simply because the individual was contacted. Local 75 vastly overrates the value of Member Information.

Failure to provide accurate context of the facts and circumstances

41. Local 75 has failed to furnish accurate context. The Membership Information was not stolen by the Defendants, and it is now legitimately in their possession and has ceased to be treated as confidential.

A RULE 44 ORDER SHOULD NOT BE GRANTED

42. Even if the court determines that the relief requested *can* be granted, Local 75 must show that it *should* be granted in this case by demonstrating that: (1) there are substantial grounds for the Plaintiffs' assertion that they are the legal owner or entitled to possession of the property; (2) there are substantial grounds for their claim that the property is being unlawfully detained by the Defendants; and, (3) the balance of convenience favours the Plaintiffs.³⁹

The "Substantial Grounds" Criteria

43. To show "substantial grounds" under parts 1 and 2 of the test, the Plaintiffs must demonstrate a "high degree of assurance" regarding their potential success at trial.⁴⁰ Local 75

³⁹ *Baca v Tatarinov*, [2017 ONSC 2935](#) at paras [27-28](#); *Dong v. J. Lockwood Leasing*, [2023 ONSC 5228](#) at para [6](#).

⁴⁰ *Clark Door of Canada Ltd. v. Inline Fiberglass Ltd.*, 1996 CarswellOnt 193, [1996] O.J. No. 238, Book of Authorities ["BOA"], Tab 1 at 22-23. [B-1-255](#)

points to its various claims now asserted against the Defendants, but these fail to justify the granting of injunctive relief because they are statute-barred or, alternatively, because the evidence does not meet the requisite high degree of assurance for success at trial standard.

The Plaintiffs' Claims are Statute-Barred

44. This action is statute-barred. Section 4 of the *Ontario Limitations Act* states that “a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered”.⁴¹ Discoverability is determined on either an “objective standard” under section 5(1)(a) or a “subjective standard” under section 5(1)(b).⁴² The Plaintiffs will fail on this action if they *knew* or *ought to have known* of the allegations set forth in the claim *more than two years* prior to commencing this action in May 2024.

45. The Plaintiffs draw the Court’s attention to the following key evidence of knowledge of possession and use of the Membership Information back in 2018:

- Unifor’s raiding included significant outreach, including traditional print media, phone calls, texting, house visits and emails, as well as workplace visits. Not only do these modes have a broad reach, but calls, emails, and house visits require employee contact information.⁴³
- There are a couple of key Unifor supporters from 2018 who worked closely with Unifor staff and the employee lists, who later returned to Local 75;⁴⁴
- Local 75 says they knew that the THEU had Member Information because it was able to contact people who had not provided contact information to the THEU, however the same is true of Unifor, and that outreach went far beyond the THEU’s outreach more recently. Local 75 knew that Unifor was calling its members and doing house visits. Local 75 complained that Unifor was “bombarding” people with phone calls and doing house visits, despite covid protocols;⁴⁵
- Local 75 could see from the Royal York hotel that Unifor organizers were set up and working at the Tim Hortons across from the hotel, and the Local 75 representatives

⁴¹ *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B, s 4.

⁴² *Rasul v. Whelan*, 2022 ONSC 6743 at para 38.

⁴³ Allan’s Affidavit, RR, Tab 1, para 18; David’s Affidavit, RR, Tab 2, paras 18-22; Rafunzel’s Affidavit, RR, Tab 4, para 12; Ashley’s Affidavit, RR, Tab 3, para 10. B-1-137

⁴⁴ David’s Affidavit, RR, Tab 2, para 23. B-1-80

⁴⁵ David’s Affidavit, RR, Tab 2, paras 24, 28. B-1-81

kept an eye on them, regularly walking through the restaurant where Unifor organizers could be observed working from lists and calling workers;⁴⁶

- Local 75 and Unite International fought back hard against the raids at the time, bringing in dozens of US organizers to go into the Local 75 hotels and to engage with workers, and scrutinize Unifor organizing activities and who would observe the use of seniority and other employee lists;⁴⁷
- It is not possible for Unifor to have acquired so much support, so quickly, without knowing who to reach and how to reach them.⁴⁸
- Local 75 expressed their suspicion about losing Member Information as early as December 2017, in the affidavit filed on the trusteeship matter, claiming boxes had been removed from Local 75's office, and later issuing a report to the membership describing the apparent removal and destruction of Local 75 information and files.⁴⁹
- The removal and use of membership lists was noted as a common practice at the outset of the Unifor raids, and USW stated, "Pimentel and her staff presumably arrived at Unifor with membership lists and other information necessary for Unifor to steal hundreds if not thousands of members from Local 75."⁵⁰ and
- According to the affidavit of Shelli Sareen filed on this motion, when Local 75 regained access to its office (ie. When they found that documents had been deleted and removed, per its report), it suspected that Pimentel and others had taken member information, but because Pimentel was a threat with or without contact information, they simply focussed on defending the raids. As a result, Local 75 did not do a forensic audit of the computer system to see exactly what Pimentel had taken. What the Shelli affidavit does not say is that Local 75 did not know that Unifor was using Member Information. Indeed, Shelli's evidence on this point is essentially that it did know, but that it did not matter.⁵¹

46. Local 75 is out of time to bring this action and, consequently, cannot seek relief under Rule 44 or by way of a more general injunction under Rule 40. This claim was discoverable, on an objective or a subjective standard, as of early 2018.

The Claims alleged against the Defendants will otherwise not Succeed

⁴⁶ David's Affidavit, RR, Tab 2, para 29. B-1-84

⁴⁷ David's Affidavit, RR, Tab 2, para 26, 27. B-1-83

B-1-84 ⁴⁸ David's Affidavit, RR, Tab 2, para 30; Allan's Affidavit, RR, Tab 1 para 19. B-1-13

B-1-9 ⁴⁹ Allan's Affidavit, RR, Tab 1, para 15, Exhibits "A" and "F". B-1-24 B-1-43

B-1-9 ⁵⁰ Allan's Affidavit, RR, Tab 1, para 15, Exhibits "E" and "G". B-1-39 B-1-49

⁵¹ Shelli Affidavit, Plaintiff's MR, Tab 1, paragraphs 37-40, 43-44.

47. Further, the Plaintiffs cannot show a high degree of assurance for success at trial for any of the causes of action. The Defendants do not meet the test to be fiduciaries of Local 75, they did not intentionally take or use Local 75's information, or breach any contractual obligations, and the information that the Plaintiffs seek to protect is not confidential.

Balance of Convenience

48. The balance of convenience requires a determination of which party will suffer greater harm from a refusal or a grant of the injunction, or put differently, which party can best bear the results of injunctive relief.⁵²

Laches and Acquiescence

49. A court may deny injunctive relief based on the doctrine of laches if such relief is not sought expeditiously. The leading case on laches is the Supreme Court's decision in *M. (K)*.⁵³

50. The equitable defence of laches may apply under two separate circumstances - if the plaintiff's delay constitutes acquiescence or where there has been reliance on the inaction.⁵⁴ Acquiescence is a standalone branch of laches that does not require a finding of prejudice,⁵⁵ and will be found where, after a party has been deprived of their rights, and with knowledge of their existence, does nothing, leading to an inference that their rights have been waived.⁵⁶

51. Knowledge of one's rights is to be measured by an objective standard,⁵⁷ and with regard to the relevant underlying facts.⁵⁸ The establishment of acquiescence hinges on the plaintiff's failure

⁵² *Boni v. Leonardo Worldwide Corporation*, [2018 ONSC 1875](#) at para [64](#) [*Boni*]; *Lightbox Enterprises Ltd. v. 2708227 Ontario Inc.*, [2022 ONSC 1873](#) at para [53](#) [*Lightbox*]; *2158124 Ontario Inc. v Pitton*, [2017 ONSC 411](#) at para [65](#) [*Pitton*].

⁵³ *M.(K.) v. M.(H.)*, [1992 CanLII 31 \(SCC\)](#), [1992] 3 S.C.R. 6 at [77-78](#).

⁵⁴ *Zurich Insurance Company v. TD General Insurance Company*, [2014 ONSC 3191](#) at para [36](#) [*Zurich Insurance*], quoting R.P. Meagher, J.D. Heydon, M.J. Leeming, et al., *Equity Doctrines & Remedies* (Sydney: Butterworths LexisNexis, 2002), at p. 1031.

⁵⁵ *McMurtry v. McMurtry*, [2016 ONSC 2853](#) at para [161](#); *Zurich Insurance Company v. TD General Insurance Company*, [2014 ONSC 3191](#) at paras [32 to 37](#).

⁵⁶ *M.(K.) v. M.(H.)*, *supra* note 54 at [78](#).

⁵⁷ *Ibid.*, quoting *Taylor v. Wallbridge* (1879), [1879 CanLII 1 \(SCC\)](#).

⁵⁸ *Ibid.*

to respond to the defendant's *conduct*, thereby justifying barring of the plaintiff's claim against the defendant.⁵⁹

52. In *Cadbury Schweppes*, the Supreme Court refused to uphold a permanent injunction against continued use of the plaintiff's confidential information given the plaintiff's serious delay in pursuing legal action, prioritizing the defendant's ability to carry on operations.⁶⁰ Similarly, the British Columbia Court of Appeal, while rejecting an appeal for an interim injunction pertaining to an indigenous governance issue brought nearly two years after the fact, emphasized the principle that "equity aids the vigilant and not those who slumber on their rights."⁶¹ This maxim is apt here. The considerations outlined in the *Limitations Act* discussion above also sustain an equitable defence of laches to the injunctive relief sought under both Rules 40 and 44.

Interest of Employees

53. The balance of convenience must consider the interests of the employees who are entitled to choose their union pursuant to the *Labour Relations Act*.⁶²

54. The very purpose of the relief sought by the Local 75 is to restrict communication and choice, contrary to employee interests during the existing and pending open periods. Employee interests also favour ensuring that employee communications with the THEU (evident from updated membership information for example) are not disclosed to Local 75, given the evidence of the risk of reprisals.⁶³

ALTERNATIVE INJUNCTIVE RELIEF SHOULD NOT BE GRANTED UNDER RULE 40

55. Local 75 can no more succeed on Rule 40 than it could on Rule 44, as it cannot make out the test: (1) that there is either "a strong *prima facie* case" or "a serious issue to be tried"; (2) that

⁵⁹ *Zurich Insurance*, *supra* note 55 at para 39.

⁶⁰ *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, 1999 CanLII 705 (SCC), [1999] 1 SCR 142 at para 86.

⁶¹ *Barton v. Nisga'a Tribal Council*, 1998 CanLII 4327 (BCCA), at para 18.

⁶² *Labour Relations Act*, 1995, SO 1995, c 1, Sch A, s 5.

⁶³ Allan's Affidavit, RR, Tab 1, para 37. B-1-19

the moving party will suffer irreparable harm if the injunction is not granted; and (3) that the balance of convenience favours the granting of the injunction.⁶⁴

Strong Prima Facie Case / Serious Issue to be Tried

56. The court will look at the nature and impact of the relief sought to determine whether to require a moving party demonstrate only a “serious issue to be tried” or the more demanding “strong *prima facie* case”. Where that relief is such that it will interfere with an individual’s ability to earn a livelihood (ie. enforcing non-competition or non-solicitation covenants, or post-employment fiduciary obligations.⁶⁵), or that would require the defendant to take positive action, the higher test applies.⁶⁶ Put differently, if the practical consequences are intrusive to the responding party, the strong *prima facie* case test applies”.⁶⁷ This has been found where the motion to restrain an action would interfere with a business plan,⁶⁸ and where it would halt commercial activities.⁶⁹

57. As the relief Local 75 seeks would effectively derail the THEU’s organizing activities, it must demonstrate a strong prima facie case. This case can be distinguished from the recent *Dymon*⁷⁰ decision which applied the lower standard to the return of confidential information because that information was readily identifiable and could be handed over. There is no discrete, returnable property to be handed over to Local 75 in this case. The effect of the order sought would impair ongoing organizing efforts including relating to the contested (but still Local 75) Royal York general bargaining unit employees.

⁶⁴ *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1994 CanLII 117 (SCC), [1994] 1 SCR 311 at 348.

⁶⁵ *Viana Canada Inc v. Sartotex Inc.*, 2021 ONSC 1288 at paras 26-27 [“Sartotex”].

⁶⁶ *Dymon Storage Corporation v. Nicholas Caragianis*, 2022 ONSC 5883 at para 20 [*Dymon Storage*].

⁶⁷ *Dymon Storage*, *ibid* at para 21, citing *Boni*, *supra* note 53 at paras 30-32, citing *Shipka v Trevoy*, 2012 ABQB 416 at para 22.

⁶⁸ *Boni*, *supra* note 53 at para 30-31.

⁶⁹ *Vaultose Digital Asset Services Inc. v. Kunz*, 2023 ONSC 5790 at para 65.

⁷⁰ *Dymon Storage*, *supra* note 67 at para 25.

58. The “strong *prima facie* case” threshold is “an extremely high bar to meet”⁷¹, requiring the moving party to demonstrate the case is “almost certain to succeed”.⁷² On Local 75’s own evidence, it is out of time on these claims and thus cannot meet any merits test. Everything Local 75 claims now (breach of confidence, breach of fiduciary duty, breach of contract) it could have claimed back in 2018, if it wanted to pursue these parties. It did not do so, and it is now too late.

NO IRREPARABLE HARM

59. The moving party bears the onus of demonstrating irreparable harm: loss that is incapable of compensation through an award of damages.⁷³ Difficulty in quantifying harm, such as business loss, does not make it irreparable.⁷⁴ The loss must be *impossible* to quantify.⁷⁵ Further, evidence of *actual* (not theoretical) irreparable harm is required.⁷⁶ Indeed, a claim for actual or potential business losses that is based on a misappropriation of confidential information “must have a solid evidentiary basis in order to meet this branch of the *RJR* test”.⁷⁷

60. This was the Court’s conclusion in *Lightbox*, where it held that speculative losses from potential future impact on business relationships and market share, including relationships with customers, staff, vendors and third parties, were insufficient to establish irreparable harm.⁷⁸

61. The absence of irreparable harm can be inferred from a party’s failure to expeditiously pursue an injunction, which is certainly the case here.⁷⁹

⁷¹ *Sarotex*, *supra* note 66 at para 27.

⁷² *Sarotex*, *supra* note 66 at para. 27, citing *Benayoune & Associates FZE v. Kanata Chemical Technologies Inc.*, 2014 ONSC 5874 at para 40; *R v Canadian Broadcasting Corp.*, 2018 SCC 5 at paras 17-18.

⁷³ *Boni*, *supra* note 53 at para 59.

⁷⁴ *Stress-Crete Limited v Harriman*, 2019 ONSC 2773 at paras 58-59; *Parekh et al. v Schechter et al*, 2022 ONSC 1328 at para 7.

⁷⁵ 2158124 Ontario Inc. v Pitton, 2017 ONSC 411 at para 50.

⁷⁶ *Ibid* at para 49; *Labrador Recycling Inc v Folino*, 2021 ONSC 2195 at para 31.

⁷⁷ *Aware Ads Inc. v Walker et al*, 2021 ONSC 7452 at para 66.

⁷⁸ *Lightbox Enterprises Ltd. v 2708227 Ontario Inc.*, 2022 ONSC 1873 at para. 51 [*Lightbox*].

⁷⁹ *Dylex Ltd. v. Factory Carpet Corp.*, 1989 CarswellOnt 482, [1989] C.L.D. 1161, [1989] O.J. No. 1337, 16 A.C.W.S. (3d) 442, 44 C.P.C. (2d) 96, BOA, Tab 1. *Nu Image v Seager*, 2017 ONSC 6101 at paras 41-43.

62. The potential harms identified by Local 75 will not be caused by its loss of any alleged confidential information; rather, *it will result from its own members choosing another union during an open period after receiving information that better unions are available to represent their interests.* The Plaintiffs have not satisfied this test.

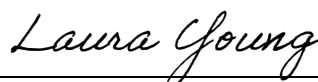
THE BALANCE OF CONVENIENCE FAVOURS REFUSING THE INJUNCTION

63. The Defendants refer to the submissions as set out under the Rule 44 discussion which demonstrate that the balance of convenience favours the status quo.

PART IV – ORDER REQUESTED

64. If a remedy is considered necessary, the Defendants propose an Order:
- 1) Requiring them to delete and swear to the deletion of the Legacy Documents;
 - 2) Requiring the THEU to delete the contact information list used by it for the mailouts / text blasts, and to swear to the deletion of same, without prejudice to the THEU's right to reassemble a contact list after all Legacy Documents have been deleted; and
 - 3) Dismissing the balance of the Plaintiffs' motion, without costs to it, or, alternatively, with costs in the cause.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of June, 2024



Laura Young, Counsel for Defendants



John-Otto Phillips, Counsel for Defendants