

# Court has domain in determining injunctive relief: O'Connor

By AdvocateDaily.com Staff



A recent Ontario Superior Court decision confirms that although a contract may contain a clause setting out when a breach causes irreparable harm, the court will ultimately determine whether harm has been established and if injunctive relief is appropriate, says Toronto civil litigator [Sarah O'Connor](#).

The case involved a plaintiff company that had an arrangement with the defendant to sell and promote the company's paint. After the parties' relationship broke down, says the decision, the company commenced an action against the defendant for breach of contract, breach of confidence, breach of the duty of good faith, intentional interference with economic relations and defamation.

The company brought a motion for an injunction to prevent the defendant from, among other things, revealing confidential information in violation of a non-disclosure agreement (NDA).

As the decision notes, in order to obtain an interlocutory injunction, a moving party must satisfy the well-known test from a [1994 Supreme Court of Canada case](#).

The threshold requires that when a serious question is to be tried, the moving party will suffer irreparable harm if the relief is not granted, and the balance of convenience favours granting the injunction.

This case provides a good review of the test in relation to obtaining an injunction, what a party needs to prove, and what the court looks at, says O'Connor, principal of [O'Connor Richardson Professional Corporation](#).

"It's a low threshold for a motion for injunctive relief, so most of the time, a party will get past that first 'is there a serious question' unless its frivolous on its face," she tells [AdvocateDaily.com](#). "As to the second part, the 1994 Supreme Court decision says irreparable harm is harm that can't be quantified in monetary terms or which cannot be cured.

"It sounds like, in this case, what the company was alleging could have been cured by monetary damages — loss of business, loss of goodwill, damage to reputation, those could all be compensated. If it was more like the defendant was disclosing the actual makeup of the paint, or the ingredients or their trade secret is now out in the public domain, that would be irreparable harm," says O'Connor.

In this matter, the court determined that the plaintiff failed to demonstrate irreparable harm as there was "no evidence of a loss of market share, customers or profits." Although it alleged irreparable harm arising from the defendant's use of the identity of its supplier to achieve an unfair competitive advantage, there was "no evidence that [the defendant] has, in fact, started a competing business or made any further use of the information."

In this case, the claim of irreparable harm was the basis for the failure of the injunction, says O'Connor.

Ultimately, she says, the case demonstrates that even though there's a clause in a contract that sets out when a breach would cause irreparable harm, the court still has exclusive domain in determining whether injunctive relief is appropriate and if irreparable harm has been established.

Irreparable harm, she notes, has to be clear and not speculative.

"Even though there's a clause, it doesn't mean that you can just rely on that and not have this other burden to show that there's irreparable harm. The court will still function to make sure that if you seek this injunction, you have to prove why it's damaging," O'Connor says.

"You can't just say, 'Well, we signed a contract.' That's not sufficient. You still need to prove why. You just can't say in your pleadings that 'We agreed not to do this and you did,'" she adds.

"I think this case is really good for making parties examine what they're looking for in an interlocutory injunction. Irreparable harm is a high standard to prove. And you should seriously consider it, because of the costs — if you don't win in getting the injunction, you're paying costs on the motion," O'Connor says.