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### **LAW OF CONFIDENTIAL BUSINESS INFORMATION**

**The Honourable Julie A. Thorburn and Keith G. Fairbairn**

**Release No. 2023-3, September 2023**

#### **What's New in this Update**

This release features updates to case law and commentary in Chapter 3 (Defining Confidential Business Information), Chapter 4 (Confidential Business Information and the Employment Relationship), Chapter 5 (Claims for Breach of Confidential Business Information), and Chapter 7 (Remedies for Breach of Confidential Business Information). Appendix B has also been updated.

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## Highlights:

- **Defining Confidential Business Information—Information Capable of Protection—The “Confidential” Nature of the Information—The Quality of Confidence—**Justice Harris explained that a key question was whether the information had the “necessary quality of confidence” required to sustain the claim for breach of confidence. Here, the information consisted of the list of PRM’s clients, details regarding their operations as gathered and analyzed and the underwriting information developed from that information. That information was not in the public domain. It was not a mere list of clients. The information was conveyed in circumstances of confidentiality and Marsh’s use of that information caused loss and damage to PRM. Justice Harris noted that contractual obligations do not preclude the existence of fiduciary obligations. Evidence of a mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party is required. PRM provided its confidential client information to Marsh on the understanding that it would not be used for any purpose other than placing insurance for PRM and Marsh accepted the information on that basis. PRM’s business interests were affected by Marsh’s decision to take and use its confidential information to secure PRM’s clients for itself. Justice Harris was of the view that Marsh was a fiduciary of PRM’s and breached its duty when it used PRM’s client information for its own purposes: *PR Construction Ltd v. Colony Management Inc.*, 2023 CarswellAlta 95, 2023 ABKB 025 (Alta. K.B.).  
**Claims for Breach of Confidential Business Information—Civil Actions—Breach of Fiduciary Duty—Types of Fiduciary Duties Owed—Director or Senior Officer—**The principal issue on appeal was whether the judge erred in deciding that the action was suitable for determination by means of summary trial. AIM contended that the matter was not suitable for summary trial on the basis that Russell had not completed his document production because in order properly to assess when, what and to whom confidential information had been communicated, it required access to the metadata from Russell’s electronic devices and email accounts. Justice Harris noted that the core of AIM’s position on appeal was the proposition that an allegation of misuse of confidential intellectual property inherently relies for its proof on evidence from the defendant. Justice Harris was of the view that AIM had not advanced any plausible argument on appeal that the evidentiary record before the judge was insufficient to allow the judge to find the facts necessary to decide the issues of fact and law. Justice Harris explained that the critical

problem with AIM's argument that it ought to have been granted the opportunity to develop further evidence, principally through Russell, to establish its case was that AIM was not able to point to anything concrete or material in the document production or elsewhere that could lay a foundation for arguing that further discovery was needed. The argument that further discovery was essential had no air of reality but was simply a fishing expedition: *Arbutus Investment Management Ltd. v. Russell*, 2023 CarswellBC 33, 2023 BCCA 9 (B.C.C.A.).

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