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LAW OF CONFIDENTIAL BUSINESS INFORMATION

The Honourable Julie A. Thorburn and Rachel Chan Release No. 3, September 2025

What's New in this Update

This release features case law updates to Chapter 6 (Defences to Claims for Breach of Confidential Business Information) and Chapter 7 (Remedies for Breach of Confidential Business Information).

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Highlights:

- **Defences to Claims for Breach of Confidential Business** Information—No Improper Use or Disclosure of the Information—Generally —The Plaintiff moved for certification of a proposed class action concerning an alleged data breach by the Ministry in its operation of the Ontario Disability Support Program ("ODSP"). On December 20, 2018, an ODSP case worker emailed to 103 of the program's clients a spreadsheet containing some 45,000 ODSP clients' names, email addresses, and ODSP identification numbers. One of the case workers then further sent the email, with the spreadsheet attachment, to 103 ODSP clients - i.e. to persons outside the organization's employees. The Plaintiff conceded that no further dissemination or misuse of the data had occurred. Justice Morgan explained that the controversy was with respect to the third element of a claim for breach of confidence: the detriment to the confider that results from the misuse of the information. The Federal Court of Appeal has indicated that damages may not be negligible or speculative and has subsequently taken this one step further, reasoning that absent some manifestation of material loss, "the assertion of personal anguish, humiliation and embarrassment did not show detriment" sufficient for this cause of action: John Doe v. Canada, 2023 FC 1636, 2023 CarswellNat 4909, 2023 CarswellNat 6805, 2023 CF 1636, (F.C.) at para. 181. The Federal Court has most recently suggested that the claimant must "shed . . . light on intentionality [and] provide any material facts or particulars relating to their detriment": Jacques v. Canada, 2024 CarswellNat 2188, 2024 CarswellNat 2912, 2024 FC 851, 2024 A.C.W.S. 2866, 2024 FC 851 (F.C.), at para. 85. Losing a USB key, like sending an errant email, does not tend to be based on material facts pointing to any form of intentionality. Justice Morgan explained that it was clear that the attachment to the e-mail was not a "springboard" for activities detrimental to the ODSP clients. What the Amended Statement of Claim described was what could only be understood as a mistake. It was plain and obvious that that cause of action could not succeed: Quantz v. Ontario, 2025 CarswellOnt 122, 2025 A.C.W.S. 28, 2025 ONSC 90 (Ont.
- Remedies for Breach of Confidential Business Information—Equitable Relief—Interim and Interlocutory Injunctions—Serious Issue to be Tried Test—Justice Lema concluded that GNE had not shown the existence of a serious issue to be tried about the duration of the fiduciary period, with no material evidence supporting an extension. GNE also argued that the individual respondents continued

to have confidential information belonging to it and misused that information, including releasing some or all of it to Paloma. The request to extend the injunction presumed that the information in question remained confidential throughout. However, Justice Lema accepted that GNE waived the possible confidential character of certain information and documents disclosed in various GNE-representative affidavits in the proceedings. A large, if not virtually complete, overlap existed between the confidential information allegedly misappropriated and the proposed-to-be-sealed information. In the alternative, Justice Lema accepted that Paloma did not receive any confidential information or, if it did, it was not confidential in the first place or was no longer confidential when it received it. There was no serious issue to be tried relating to Paloma's possible use of such information: Great North Equipment Inc. v. Penney, (2024), 54 B.L.R. (6th) 206, 2024 CarswellAlta 2268, 2024 A.C.W.S. 4634, 2024 ABKB 533 (Alta. K.B.), varied (2025), 59 B.L.R. (6th) 241, 2025 CarswellAlta 101, 2025 A.C.W.S. 309, 2025 ABCA 16 (Alta. C.A.), additional reasons 2025 CarswellAlta 241, 2025 A.C.W.S. 649, 2025 ABCA 44 (Alta. C.A.), additional reasons 2025 CarswellAlta 134, 2025 A.C.W.S. 342, 2025 ABKB 42 (Alta. K.B.).