Legal Link Marvin Joel Huberman

Divulging Secrets and Other Breaches of Confidence

"A secret spoken finds wings."
---Robert Jordan, *The Path of Daggers*

We – individuals, corporations and governments – all have secrets. Some are of tremendous value; others less so. Some are complex; others are simple.

Broadly speaking, it is wrong to divulge – to spread among the multitude – a secret. By definition, a secret is "something that is kept or meant to be kept unknown or unseen by others". And while there are exceptional circumstances which may justify or even compel the disclosure of the secret, protecting the confidential information and honouring the relationship of trust and the expectation that the information conveyed will be kept private and confidential are often the paramount consideration.

Sometimes revealing something communicated in confidence is not only morally or professionally wrong, it is also unlawful. For example, when confidential business information is shared and requires protection, a contract known as a confidentiality agreement or a non-disclosure agreement (NDA) is often entered into to protect confidential or "trade secrets" from disclosure and is signed by the persons to whom the confidential information is to be disclosed. Where the recipient of the confidential information or trade secrets has breached the confidentiality agreement, that constitutes a breach of contract affording remedies in contract law to the confider, the most common of which is damages for losses sustained in consequence of the breach of contract.

But even in the absence of a confidentiality agreement, the law of equity may be available to protect confidential information and to enforce the obligation of confidence by requiring the recipients – even third parties – to keep confidences and to not disclose or use the confidential information or trade secrets.

Equity relies on the doctrine that "he that has received information in confidence shall not take unfair advantage of it". As the British Columbia Supreme Court, in the case of *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, put it:

"Equity, as a court of conscience, directs itself to the behaviour of the person who has come into possession of information that is in fact confidential, and was accepted on that basis, either expressly or by implication. Equity will pursue the information into the hands of a third party who receives it with the knowledge that it was communicated in breach of confidence (or afterwards requires notice of that fact even if innocent at the time of acquisition) and impose its remedies."

BREACH OF CONFIDENCE

In a civil action for breach of confidence, three elements must be proven: The plaintiff must show that he conveyed information that was confidential to the defendant; that he communicated the information in confidence; that the information was misused by the defendant and that the defendant suffered loss or detriment as a consequence of the breach. The plaintiff must also plead with particularity, among other things, the relationship in which the confidence arose and the damages resulting from the breach.

The test to determine whether the information was conveyed in confidence is if the circumstances are such that any reasonable person standing in the shoes of the recipient of the information would have realized that on reasonable grounds the information was given to him or her in confidence. This determination requires an analysis of the specific context and facts and circumstances of the given case presented. It is not necessary that the confidential information be disclosed to a third party.

Once information is communicated in confidence, the recipient of that information is obligated to show that the use to which he or she put the information is a permitted use – and not a prohibited one.

Numerous types of confidential information may be protected, including business trade secrets, unpatented inventions, innovative products, processes and ideas, information disclosed to induce the entry into a partnership, joint venture or corporate takeover, or information disclosed to a lender or a potential investor, and even confidences told to a husband by his wife. Unauthorized disclosure of personal information may also fall within the scope of a breach of confidence action.

DEFENCES

A claim for breach of confidence may be defeated where:

- The plaintiff expressly or by implication consented to the disclosure of the confidential information;
- The information alleged to be confidential was at all material times public knowledge or alternatively was generally known to numerous persons;
- The disclosure of the confidential information was required by law, for example where the rules of professional conduct of a lawyer require a disclosure of the subject information;
- The disclosure of the confidential information was in the public interest and where the interest of the public clearly outweighs the duty of confidentiality; and
- The plaintiff is guilty of latches or acquiescence of sufficient seriousness to deprive him or her of a remedy in equity by consciously delaying the commencement of the lawsuit for an unreasonable period of time which would be unfair to the defendant, and which under the principle

of equitable estoppel could defeat a claim for breach of confidence in court.

REMEDIES

In an action for breach of confidence, the court has much flexibility in "fashioning a remedy", including compensatory damages, an accounting of profits, injunctive relief, or the imposition of a constructive trust. The court will focus on the loss to the plaintiff and, as a result, the particular position of the plaintiff must be analyzed. In Canada, the courts have authority to award financial compensation for breach of confidence. The aim is to put the confider in as good a position as he or she would have been but for the breach of confidence. To achieve that objective, the court will exercise its ample jurisdiction to fashion an appropriate remedy from the full scope of remedies available, including financial compensation by way of a damage award.

If the defendant used the confidential information to purchase property, the court may impose a constructive trust in favour of the plaintiff on the property acquired by the defendant if, but for the defendant's breach of confidence, the plaintiff would have himself or herself acquired that property.

In assessing damages, the most appropriate method is to place the plaintiff in the same position as he or she would have been if they had not sustained the wrong. The plaintiff is entitled to have damages assessed on the most favourable basis depending upon the facts before the court. Here, the objective is to restore the plaintiff to the position he or she would have been in but for the breach of confidence.

In addition to damages, the court may award a permanent injunction where the confidential information was used by the defendant as a "springboard". The injunction would prohibit the defendant from continuing to use the plaintiff's confidential information in order to compete for the time it would otherwise have taken the offending party to obtain the confidential information by lawful means.

In cases of an injunction for misappropriation of confidential information, the court will balance the protection of trade secrets against the public interest in order to maintain competition, preserve commercial morality and to promote inventions. If the defendant has engaged in outright theft, fraud or other similar conduct, the balance will clearly tilt in favour of a more robust injunction having regard to the lack of good faith and integrity on the part of the defendant as a key factor.

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