Non-Disclosure Agreements and Protection of Confidential Information

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Contract Review and Clause Negotiation

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INTRODUCTION

OVERVIEW

What is “Confidential Information” generally?

In the absence of a non-disclosure agreement or confidentiality agreement, the common law imposes a duty of confidence on the recipient of information that was confidential when disclosed, was communicated in confidence, and was misused by the recipient of the information. The common law provides guidance as to what types of information are considered confidential. In the Alberta case of Pharand Ski Corp. v. Alberta the Court considered the following non-exhaustive list of factors in determining whether or not information was confidential:

(a) the extent to which the information is known outside the owner's business;
(b) the extent to which it is known by employees and others involved in the owner's business;
(c) the extent of measures taken by him to guard the secrecy of the information;
(d) the value of the information to him and his competitors;
(e) the amount of money or effort expended by him in developing the information;
(f) the ease or difficulty with which the information could be properly acquired or duplicated by others [i.e. by their independent endeavours].

Given the broad common law principles listed above and the Court’s ability to interpret the same as it sees fit, it is essential for a disclosing party to enter into a non-disclosure or confidentiality agreement with a receiving party to clearly express the intention of the parties as it relates to the classification, identification, disclosure, use, evaluation, and retention of Confidential Information.

Non-Disclosure and Confidentiality Agreements

While non-disclosure agreements and confidentiality agreements (“NDA”) share the same purpose of protecting confidential and proprietary information (“Confidential Information”), this paper will use the term NDA to refer to both non-disclosure and confidentiality agreements, for ease of reference.

1 Lac Minerals Ltd. v. International Corona Resources Ltd. [1989] 2 SCR 574
2 1991 CanLii 5869 (ABQB) at para. 136
The protection of Confidential Information is an important consideration arising in the context of negotiating and drafting commercial agreements. The NDA is often the first agreement signed by the parties concerning a prospective commercial transaction that facilitates the sharing of Confidential Information necessary to evaluate the merits of pursuing a transaction. NDAs are so common in today’s business environment that they are often viewed as “standard form” and entered into with little consideration to the rights, obligations and objectives of the agreement.

The purpose of this paper is to provide solicitors with practical examples, tips, and explanations of how certain clauses in NDAs may be addressed based upon whether the solicitor is representing the disclosing party or the receiving party. While NDAs are recommended in all instances where sensitive commercial information is disclosed to another party, the focus of this paper will be on NDAs in the course of a prospective commercial arrangement or transaction.

Protection of Confidential Information through agreements other than NDAs

Depending on the nature of the information to be disclosed, the relationship of the parties, and the nature of the business transaction, some parties may not enter into a standalone NDA, but rather, protect Confidential Information via confidentiality clauses in the agreement governing the commercial arrangement.

Confidentiality provisions can be found in many commercial agreements. For example, unanimous shareholder agreements, employment agreements, consulting agreements, commercial lease agreements, service agreements and licensing agreements typically contain provisions concerning the disclosure, use and protection of Confidential Information. Whether confidentiality provisions are incorporated into a commercial agreement or fulsome NDA, the subject matter of this paper applies equally.

Trap

One aspect of NDAs, which is sometimes overlooked by solicitors, is compliance with provincial privacy legislation (Personal Information Protection Act, SA 2003, c. P-6.5 “PIPA”). For example, the disclosure of personal information of employees in the course of due diligence investigation can result in an unintentional breach of PIPA. It is important for solicitors to consider their clients’ business and responsibility to protect the personal information of individuals through a properly drafted NDA and, ultimately, any definitive agreement entered into in connection with the transaction.