TO DISCLOSE OR NOT TO DISCLOSE... THAT IS THE QUESTION - HOW MUCH DISCLOSURE IS ENOUGH DISCLOSURE?

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We all most likely have in our precedent settlement agreements the usual clauses that indicate the parties have are fully aware of the assets and liabilities of the other, and are satisfied with the extent of disclosure that has been exchanged. Examples are as follows:

“AND WHEREAS each party is fully advised and informed of the property, estate and prospects of the other party…”

“Each party agrees that they are satisfied with the disclosure of financial information concerning the assets, liabilities and financial circumstances of the other party and no further information is desired by either party prior to executing this Agreement.”

Sometimes we are only meeting the client once to provide independent legal advice and then sign the agreement. Do you ask to see the disclosure of the other party? Even if you have had an
ongoing relationship with your client, but only some disclosure has been exchanged, are these clauses sufficient to make the agreement a fully binding agreement? Are you protected as the lawyer giving the advice if there has been less than full disclosure? How much disclosure is enough disclosure, and to what extent can the client say “Oh no, I know what he or she has, I don’t need any other information”. Of course, most of us also have in our agreements a “material non-disclosure” clause, so that if something the client was unaware of comes to the surface later, it is the one loophole that allows the agreement to be re-visited. At least we the lawyers think that is the only loophole, but is it?

There have been a number of interesting cases in recent years dealing with the issue of whether there was enough disclosure to allow a settlement agreement negotiated by the parties to remain binding on the parties. This issue was addressed by Alberta Court of Appeal in March 2000, in the case of Moore v. Moore, 255 AR 342 (Alta C.A.) In this case the husband and wife entered into a settlement agreement with independent legal advice with the usual clauses referencing s.37 of the Matrimonial Property Act and a clause indicating that there had been no misrepresentation by either party and full disclosure had been made. About one and a half years after the agreement was signed, the husband had “come to the realization” that an RRSP had been overlooked in the disclosure. The trial judge however also found that he had failed to
disclose a whole life insurance policy, and a cash account at Midland Walwyn in the amount of $165,000. The husband had offered to pay the wife half of the RRSP, the wife’s half share being about $7,800. With the exception of the RRSP, the husband argued that throughout the marriage the wife have access to spreadsheets and other financial information regarding their assets. At trial and on the appeal, the husband argued that as long as one spouse is generally aware of the assets and liabilities of the other and there has been no deliberate attempt to conceal information, then if the spouse does not make a specific request for disclosure, there has been no breach of the contractual obligation to disclose. The trial judge found that there was a misrepresentation on the part of the husband by not providing full disclosure. The Court of Appeal held that a contractual duty in a settlement agreement to make full disclosure is

“the functional equivalent of a reciprocal request for specific disclosure at common law. It follows that a finding by a trial judge (as in this case) that full disclosure in the active sense has not been made, amounts to a finding of a failure to respond appropriately and fully to a request for specific disclosure. This is so even when the aggrieved party is found to be generally aware of the assets of the other and in the absence of concealment. The production of such disclosure must be regarded as fundamental to the agreement.”

The Court of Appeal held that the husband’s failure to provide the disclosure in question was a misrepresentation which did indeed constitute a breach of contract and the wife was therefore entitled to damages.