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LAW OF CONFIDENTIAL BUSINESS INFORMATION

The Honourable Julie A. Thorburn and Keith G. Fairbairn

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What's New in this Update:

- **Defences to Claims for Breach of Confidential Business Information — No Improper Use or Disclosure of the Information** — Rogers did not appropriate or misuse any significant element or component of either the Pink Phone program or the Call for the Cure program in creating and implementing the Pink Razr campaign. The only similarity between the proposals of the plaintiff and of the Pink Razr campaign of any significance was that each involved a donation to a breast cancer charity for each purchase of a cellphone. Rogers did not use the marketing concept proposed by the plaintiff. The concept of a donation to a breast cancer charity in connection with the sale of a product was a well-established marketing tool by 2005 and therefore

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did not constitute confidential information. The plaintiff was therefore required to establish that it communicated something more to Rogers that Rogers used in the Pink Razr campaign. Insofar as it was suggested that Rogers applied the plaintiff's marketing concept, the claim failed. The marketing concept proposed by the plaintiff was substantially different from the marketing concept that was implemented in the Pink Razr campaign. Three elements of the plaintiff's marketing concept were significant: (1) the focus on the sale of long-term airtime contracts; (2) the emphasis on the sale of such contracts, or extensions of existing contracts, to "loyalty" and "retention" customers, who were already existing Rogers customers; and (3) the reduced churn among Rogers' subscriber base and consequential lower cost of acquisition to Rogers of such contracts said to result from the affinity relationship, which would make the concept, as implemented by the Pink Phone or the Call for the Cure programs, profitable to Rogers. Justice Wilton-Siegel observed that none of these elements were part of the marketing concept underlying the Pink Razr campaign. The latter focused on the sale of a limited number of cellphones for image purposes to a target audience that was not part of Rogers' traditional customer base. Further, the marketing plan did not envisage any significant number of new customers joining the Rogers' network because of the affinity relationship with Rethink. In addition, any lowered cost of acquisition of airtime contracts resulted from Motorola's financial participation and the media-focused marketing strategy, rather than the affinity relationship: *Brand Name Marketing Inc. v. Rogers Communications Inc.*, 2016 ONSC 4567, 2017 CarswellOnt 17209 (Ont. S.C.J.).

- **Remedies for Breach of Confidential Business Information — Damages — Legal Basis for a Claim for Damages — Damages for Breach of an Equitable Duty of Confidence or Fiduciary Duty —** Justice Bourgeois dismissed the appellant's appeal of the trial judge's damage assessment. The trial judge's findings leading to the conclusion that the respondent did breach its duty of confidence were not challenged on appeal. The appellant submitted that the trial judge properly found the information used by the respondent was "something special". However, having made that finding, it argued that the trial judge was then bound to assess damages on the basis of "the value as between a willing seller and a willing buyer". The appellant submitted that the trial judge failed to undertake such an assessment, instead assessing damages as if the information were "nothing very special", resulting in an improper award based upon a consultant fee. Justice Bourgeois observed that a review of Justice Binnie's reasons in

Cadbury makes clear that in citing Seager, he was in no way endorsing a rigid or defined approach to assessing damages for breach of confidence, but in fact, stated the opposite. Justice Bourgeois observed that the facts of a particular case can give rise to numerous approaches to valuing the damages flowing from a breach of confidence. In Justice Bourgeois' view, in assessing compensatory damages, the trial judge utilized a flexible approach to the facts as he found them. The trial judge combined a willing seller/willing buyer approach with one that also recognized a depreciation in the value of the information disclosed. Justice Bourgeois saw no error in this approach: *TDC Broadband Inc. v. Nova Scotia (Attorney General)*, 2018 CarswellNS 145, 2018 NSCA 22 (N.S. C.A.).