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LAW OF CONFIDENTIAL BUSINESS INFORMATION The Honourable Julie A. Thorburn and Keith G. Fairbairn Release No. 2022-2, May 2022
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What's New in this Update

This release features updates to case law and commentary in Chapter 4 (Confidential Business Information and the Employment Relationship), Chapter 5 (Claims for Breach of Confidential Business Information), Chapter 7 (Remedies for Breach of Confidential Business Information), and Chapter 8 (Advice for Protecting Confidential Business Information). Appendix B has also been updated.

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Highlights:

- **Remedies for Breach of Confidential Business Information—Equitable Relief—Interim and Interlocutory**

Injunctions—Irreparable Harm—Justice Tranquilli was not satisfied the plaintiff had demonstrated irreparable harm that justified the additional terms sought. Cases involving the use of confidential information or restrictive covenants can raise a presumption of irreparable harm. However, the court, in exercising its discretion with respect to the remedy sought, is to have regard to the presumption raised by the contract and whether the responding party has discharged the presumption. Assuming without deciding that the defendants were in possession of the plaintiff’s confidential proprietary information and that the covenants were enforceable, Justice Tranquilli was not satisfied that there was irreparable harm warranting the further injunctive relief sought. The interim injunction had been in place since August 2021 and the defendants ceased doing any business with identified clients of the plaintiff. The impugned conduct took place between February and August 2021. The defendants had raised evidence through their accountant to show that damages from the alleged breaches could be identified: *AM Group of Companies v. Gouin*, 2022 CarswellOnt 817, 2022 ONSC 317 (Ont. S.C.J.).

Remedies for Breach of Confidential Business Information—Damages—Legal Basis for a Claim for Damages—Damages for Breach of Contract—Justice Vermette concluded that Perera breached his obligation under section 6 of the Intellectual Property Agreement that provided for an obligation to safeguard and not disclose Confidential Information when, shortly before his departure from Aris, he forwarded to himself the Cando contracts, the proposal to Trent University and the passwords and master password; and Perera breached his implied contractual duties of loyalty, fidelity and good faith in that: (i) he was working for a competitor, CBS, during the course of his employment with Aris; (ii) he took with him documentation belonging to Aris for the purpose of potentially using such documentation in competing with Aris; and (iii) he went on a trip with Serebriakova, the property manager for YCC 86, after his resignation and after YCC 86 terminated its contract with Aris, thereby misusing an opportunity that belonged to Aris and failing to work on transition, as directed by Mann. While Perera may have breached duties he owed to the plaintiffs, Justice Vermette noted that there was no evidence that those breaches caused any damages to the plaintiffs. In particular, there was no evidence that: (a) Perera used the information that he forwarded to his personal e-mail account; (b) Perera solicited clients of the plaintiffs and/or caused clients to terminate their relationship with the plaintiffs and move their business to CBS; and (c) YCC 86 became a client of CBS or Perera’s company after it terminated its contract with Aris. Justice Vermette

concluded that the plaintiffs failed to establish causation between Perera's breaches of duties and any damages suffered by the plaintiffs. Justice Vermette concluded that the plaintiffs had failed to establish causation between Perera's breaches of duties and any damages suffered by the plaintiffs. In any event, the plaintiffs' evidence on damages was wholly inadequate. The amount of lost profits claimed by the plaintiffs was largely unsupported. While Mann attributed the entire drop in profits from 2010 to 2011 to the conduct of the Defendants, it was not possible to reach such a conclusion as drops in profits can be caused by a number of factors. Justice Vermette also noted that other employees, notably Desai, left the plaintiffs in 2010 and competed with them in 2010 and 2011. In addition, there was no evidence supporting the assumption that the plaintiffs would have earned the same revenues from the "lost clients" in 2011 compared to 2010, especially with respect to construction projects and service calls. While the plaintiffs claimed \$25,000 in damages in relation to costs allegedly incurred to change and reprogram passwords, there was no evidence that such costs were incurred and what they consisted of. Justice Vermette explained that this was not a case where damages were, by their inherent nature, difficult to assess. Rather, this was a case where the plaintiffs had not discharged their onus to prove the facts upon which the damages were estimated. Where the absence of evidence makes it impossible to assess damages, the litigant is entitled to nominal damages at best. Nominal damages may be given in all cases of breach of contract and may be awarded where a breach has been established but damages flowing from that breach have not. Nominal damages are a trivial amount, typically one dollar, and serve a symbolic rather than a compensatory purpose. They are always available for causes of action, like breach of contract, that do not require proof of loss, even if they are not pleaded. However, it is open to the court in an appropriate case to decline to award nominal damages where there is a proven breach of contract. In Justice Vermette's view, it was appropriate to award nominal damages to the plaintiffs for the breaches of contract of Perera, even though the plaintiffs failed to establish damages flowing from those breaches. Accordingly, Justice Vermette awarded \$1.00 to the plaintiffs in nominal damages as against Perera: *Mann Engineering Ltd. v. Desai*, 2021 CarswellOnt 16711, 2021 ONSC 7580 (Ont. S.C.J.)

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