Confidentiality

- Confidentiality clauses or agreements are found in virtually all areas of commercial law
  - M&A and joint ventures
  - Supplier and distributor agreements
  - Licensing and IP agreements
  - Employment agreements
Topics

1. The Law of Confidential Information
   - Breach of Confidentiality
   - Breach of Fiduciary Duty
   - Duty of Fidelity

2. Confidentiality Agreements

3. Protecting your Confidential Information – Best practices
Confidentiality – Common Law

- Even in the absence of a confidentiality agreement, there are a number of bases upon which claims can be brought for inappropriate use or disclosure of confidential information
- Of particular relevance are:
  1) Breach of confidence
  2) Breach of fiduciary duty
  3) Duty of Fidelity
Confidentiality – Common Law

Leading case in Canada *Lac Minerals Ltd. v. International Corona Resources Ltd.* [1989] 2 SCR 574

- **Facts:**
  - During the course of negotiations with respect to a possible joint venture, Lac was given detailed information by Corona on mineral findings including core samples.
  - Corona advised Lac that it was pursuing the acquisition of the adjacent Williams property.
  - Lac acquired the Williams property for itself.
  - During the Lac/Corona meeting, the issue of confidentiality was not raised and no confidentiality agreement was signed.
  - Corona sued Lac for breach of confidentiality.
Confidentiality – Common Law

- Issues considered by the Supreme Court in *Lac* case:
  - Did Lac owe a duty of confidence to Corona?
  - Did a duty of confidence give rise to a fiduciary duty?
  - Is a constructive trust available as a remedy for a breach of confidence?

- Decision:
  - Breach of confidence
  - No fiduciary duty (minority dissent)
  - Remedy: Constructive trust
Confidentiality – Common Law

- Breach of Confidence at Common Law
- Three elements:
  - Information conveyed was confidential
  - Information was communicated in confidence
  - Information was misused by the party to whom it was communicated
Confidentiality – Common Law

- First element – was the information confidential?
- Factors courts consider in analyzing whether information is truly confidential include:
  - The extent to which the information is known outside the owner’s business
  - The extent to which it is known by employees and others involved in the owner’s business
  - The extent of the measures taken by owner to guard the secrecy of the information
  - The value of the information to the owner and its competitors
  - The amount of money or effort expended by the owner in developing the information
  - The ease or difficulty with which the information could be properly acquired or duplicated by others
Confidentiality – Common Law

Second element – Was it communicated in confidence?

- How widely is the communication made?
- What level of detail is included in the communication?
- Is the information communicated traceable and retrievable?
- Is the fact that the information is being “communicated in confidence” made clear by the owner?
- What measures are in place to contain the communication only to the party intended to receive the disclosure?
- What is industry practice?
Confidentiality – Common Law

Third element – Misuse by party to whom it was communicated

- Corporate espionage
- Departing employees taking and using customer lists to the benefit of a new employer
- *Lac Minerals* circumstances, where information obtained via a negotiation and was used for the recipient’s exclusive use
- Cannot use information for purposes other than the purpose for which it is disclosed
- Onus is on the recipient to show that the use to which he/she put the information was not prohibited
Breach of Fiduciary Duty

- Where a fiduciary relationship exists, there is a corresponding duty on the part of the fiduciary
- What constitutes a fiduciary relationship?
  1. The fiduciary has scope for the exercise of discretion or power
  2. The fiduciary can unilaterally exercise the power of discretion so as to affect the beneficiary’s legal or practical interests
  3. The beneficiary is particularly vulnerable to or at the mercy of the fiduciary*

*Lac quoting *Frame v. Smith* 42 L.R. (4th) 81
Breach of Fiduciary Duty

- In *Hodgkinson v. Simms* [1994] 117 D.L.R. (4th) 161 SCC, the Court stated that a fiduciary relationship will arise between commercial parties where one party has relinquished its own self-interest and agreed to act solely on behalf of the other party.
Breach of Fiduciary Duty

- Fiduciary relationship is rare in the context of arm’s length relationships
- Lac Minerals Case – “While it is perhaps possible to have a dependency of this sort between corporations, that cannot be so when, as here, we are dealing with experienced mining promoters who have ready access to geologists, engineers and lawyers.”
- Note that in Visagie v. TVX Gold Inc. (1998) 42 B.L.R. (2d) 53 (Ont. Ct. J. Gen. Div.) the court found that a joint venture operator occupied a position of trust in respect of the joint venture partners
Duty of Fidelity - Employees

- Common law duty of fidelity to employer is owed by all employees
- This prohibits the use of confidential information by an employee or former employee, whether or not they are a fiduciary
- The obligations extend for a “reasonable” amount of time after the termination of employment
- What is reasonable depends on the circumstances
- Challenge to differentiate between confidential information and know how
Remedies

Potential remedies for Breach of Confidence or Breach of Fiduciary Duty include:

- Damages
- An accounting of profits
- Constructive trust
- Injunctive relief
- Restitution
Remedies

- Damages vs. Constructive Trust
- In Lac/Corona, the court held that constructive trust was the appropriate remedy and imposed a constructive trust on the property.
- Their reasoning was this remedy essentially deprives the offending party from the benefit of their actions.
- Recognition that mining properties are inherently hard to value and damages may not be an appropriate remedy.
- The court found that the value of a gold mine was “virtually impossible to determine with any degree of certainty.”
Confidentiality Agreements

Purpose

- Identify and protect the confidential information of the disclosing party
- May restrict the use of the confidential information
- May provide for a structured disclosure process
- May set out time frames of obligations and a process for return of information at the end of the transaction
- May contain other provisions such as standstill clauses and non-solicits
Confidentiality Agreements

Drafting considerations

- Each confidentiality agreement or clause must be carefully crafted to ensure that is appropriate for the context
- Consider whether to enter into a confidentiality agreement in the first place
Confidentiality Agreements

- Who should be bound by the obligations?
  - Is it a one-way flow of information, or should both parties be bound?
  - Important that the party which is subject to the confidentiality requirement has appropriate measures internally to track its obligations
Confidentiality Agreements

- Defining Confidential Information:
  - Kitchen sink approach vs. itemized approach
  - Typically parties will address issues such as oral vs. written information, electronic information
  - Courts will only protect truly confidential information
  - Consider whether “confidential information” should include the existence of the agreement/transaction
  - Ensure the definition deals with pre-execution disclosures
Confidentiality Agreements

- Typical Exclusions
  - Information in the public domain
  - Information already known to the recipient
  - Information independently developed by the recipient
Confidentiality Agreements

- **Standard of protection**
  - General “maintain confidentiality”
  - Specific measures can be required
  - Can impose a general standard of care based on industry standards or the level of protection the receiving party accords its own confidential information
Confidentiality Agreements

- Exceptions to confidentiality obligation
  - Information disclosed to advisors on a “need to know” basis
  - Information required to be disclosed by law
- It is particularly important when dealing with public companies to address the ability to make disclosures required by law
- If parties wish to make press releases at various stages of transactions, this should also be specifically addressed
- Can be important to include the right to disclose information to a bona fide third party purchaser
Confidentiality Agreements – Restrictions on Use

- Most confidentiality clauses contain restrictions on use and generally this is important to include.
- Whether to include this restriction on use has to be considered in the context of each contract.
- Restrictions on use clauses can be challenging in certain contexts such as mining.
Confidentiality Agreements

- In *Minera Aquiline Argentina S.A. v. IMA Exploration Inc.*, courts reinforced the concept that a restricted use clause has no limit as to geographic scope and that an area of interest clause did not restrict the limitation on use clause.
- Increasingly, parties are choosing to rely on an area of interest clause rather than a restricted use clause in order to provide certainty to both parties.
Confidentiality Agreements

- In *Centurion v Research In Motion Limited*, the Ontario Superior Court of Justice enjoined RIM from pursuing a hostile takeover bid for Centurion on the basis that RIM used confidential information to pursue the bid in violation of an NDA.
- Consider shorter terms for NDAs.
- Insert internal confidentiality screen to preserve the right to pursue a hostile takeover.
Confidentiality Agreements

- Term
  - Often, the disclosing party will seek to have an unlimited term
  - Important that parties have an appropriate system to track their obligations
  - Consider different terms for other covenants frequently found in confidentiality agreements such as non-solicits
Confidentiality Agreements - Standstills


- Standstill provisions are enforceable and binding even if no confidential information was exchanged unless it is stated explicitly or at least is demonstrably implied.
- Purpose of a standstill agreement is essentially to allow parties to retreat from the negotiating table without fear that their efforts at negotiation will leave them vulnerable to a hostile takeover bid.
- Similar considerations apply for non-solicits.
How to Protect Your Confidential Information

- M&A transactions and other preliminary discussions
  - Sign a stand alone NDA before any information is exchanged
  - Tiered disclosure – least sensitive information provided at the earlier stages
  - Establish a single point of contact for each party
How to Protect Your Confidential Information

- Alternative methods of disclosure
  - Provide for on site viewing with no copies
  - Provide numbered hard copies
  - In virtual data rooms watermark documents and limit the ability to print or save documents
How to Protect Your Confidential Information

- Aggregate information and redact where possible such as removing client names
- Ensure that agreements are reviewed to prevent breaches of third party confidentiality provisions
- Make notes of oral disclosures and circulate to other party for confirmation
- Require receiving party to adopt specific safeguards
How to Protect Your Confidential Information

- Employment
  - Key employees should sign confidentiality agreements
  - A general confidentiality policy should be in place and employees should sign acknowledgments that it has been read and they agree to abide by it
  - Provide training to employees on procedures for dealing with confidential information – especially sales people
  - No disclosure to family, friends, on social media, in sales pitches, at trade shows, etc.
How to Protect Your Confidential Information

- Departing employees have confidentiality obligations enforced in an exit interview
- Return all company property and confidential information
- Make sure access to company premises and systems is terminated immediately
Protecting Your Confidential Information

- Day to Day Practices
  - Mark sensitive material as confidential
  - Limit access physically and online
  - Use security cards to access
  - Employ security cameras
  - Break down manufacturing contracts so no one supplier has all the information
Protecting Your Confidential Information

- Limit disclosure to those who need to know
- Train employees involved in third party transactions re use of NDA’s
- Develop precedents and protocols
- Make sure legal review is included in material transactions
- Limit rights of employees to revise clauses
- Ensure that visitors are logged and require security passes
- Ensure robust cyber security
- Take prompt action in the event of a breach