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**LAW OF CONFIDENTIAL
BUSINESS INFORMATION**

**The Honourable Julie A. Thorburn
and Keith G. Fairbairn**

Release No. 35, March 2019

What's New in this Update:

- **Claims for Breach of Confidential Business Information — Civil Actions — Breach of Fiduciary Duty — Types of Fiduciary Duties Owed — Solicitor Client Relationships** — There may be situations whereby a lawyer has received confidential information from a former client that may be relevant to the issues in another case involving different parties. However, the applicant in such a case would have to establish the risk of such confidential information being used to his or her prejudice. The Chambers judge's failure to recognize the distinction affected her assessment of the relationship between the prior retainer with the respondent's brother and the current retainer with the appellant. This was an error in principle, which resulted in

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findings that did not meet the legal standard of “sufficiently related” and were not supported by the evidence. The evidence did not support a finding that the two retainers were sufficiently related. Importantly, each retainer involved different parties raising family law issues in a different context. The respondent’s concern involved two matters of some commonality — the loan from his brother and the caregiving capacity of the respondent’s mother — but when each is assessed in the proper context it was apparent that the issues were not the same in the two retainers. In the brother’s case, the issue of the loan was focused on establishing the loan and its value, and it was resolved by an agreement that the brother would be responsible for the parties’ debts and entitled to receive payment for loans made, including this loan to the appellant and the respondent. In the appellant’s case, the fact of the loan had been admitted and the only issue was whether it was repaid. Whatever the true state of affairs, the brother’s legal rights were not engaged in the dispute between the appellant and the respondent. That the brother had commenced a separate action to recover the loan was further evidence of this obvious proposition. The caregiving issue regarding the capacity of the respondent’s mother related to different children of different ages at different periods of time. In the brother’s case, he succeeded in obtaining an order for shared parenting of his two children despite complaints by his former wife about his mother’s care. To counter these complaints, the solicitor took an affidavit from the mother that attested to her involvement in the care of the brother’s children. In the appellant’s case, the respondent was also seeking shared parenting, and the appellant was taking issue with the quality of the mother’s caregiving. However, the factual issues were different, as they involved three young children at a different period of time. Nothing adduced in evidence or decided in the appellant’s case could have any bearing on the brother’s legal interests arising from his family law case. The fact that both disputes may involve consideration of the respondent’s mother’s caregiving abilities did not establish a sufficient relationship between the two retainers: *Sandhu v. Mangat*, 2018 CarswellBC 3203, 2018 BCCA 454

- **Defences to Claims for Breach of Confidential Business Information — Person Suing Must be Someone to Whom a Duty of Confidence is Owed** — The chambers judge erred in dismissing Scott’s breach of confidence action on the basis that there had been no direct dealings between Scott and Ghost Pine. Scott could still have a claim against Ghost Pine if it knowingly received Scott’s confidential information from Finavera and used that information in a manner not authorized by Scott. The finding by the Finavera trial judge that Finavera did not

misuse Scott's confidential information was not an answer to Scott's claim against Ghost Pine. Whether any of Scott's confidential information was misused by Ghost Pine was a different issue. However, that did not end the matter. Before the Chambers judge, Ghost Pine also submitted that the Finavera trial judge had found that very little information provided by Scott to Finavera was actually confidential information of Scott, and that there was no evidence that any of the identified confidential information had been received by Ghost Pine. The Chambers judge did not address these submissions, as he had dismissed Scott's breach of confidence claim for other reasons. Ghost Pine's officer had sworn that Ghost Pine had produced all of the relevant and material records relating to the action that it had in its possession, custody or power, and identified all the relevant and material records that it once had, but no longer had, in its power. Moreover, when that officer was cross-examined on the affidavit of records, she confirmed that all documents received from Finavera had been provided to their counsel, and counsel confirmed that all documents from Finavera had been included in the affidavit of records. The Court of Appeal was satisfied there was evidence on the record before the Chambers judge that Ghost Pine never possessed any of Scott's confidential information. Accordingly, the appeal of the summary dismissal of Scott's claim for breach of confidence was dismissed: *Scott & Associates Engineering Ltd v. Ghost Pine Windfarm LP*, 2019 CarswellAlta 9, 2019 ABCA 2

