NOVA SCOTIA COURT OF APPEAL

Citation: *TDC Broadband Inc. v. Nova Scotia (Attorney General)*, 2018 NSCA 22

Date: 20180308
Docket: CA 458552
Registry: Halifax

Between:
TDC BROADBAND INC, in bankruptcy, by its participating creditors granted leave pursuant to section 38 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended, being OWEN HUARD, CHRISTOPHER A. CHATTERTON, MERIT CONSULTING LIMITED, MURRAY McNUTT and GERALD R. PINEO

Appellant

v.

THE ATTORNEY GENERAL OF NOVA SCOTIA representing Her Majesty the Queen in Right of the Province of Nova Scotia

Respondent

Judge:	The Honourable Justice Cindy A. Bourgeois
Appeal Heard:	December 5, 2017, in Halifax, Nova Scotia
Subject:	Breach of confidence; compensatory damages; punitive damages
Summary:	After a 13-day trial, the appellant was successful in establishing that the respondent had breached its duty of confidence by improperly using information relating to its wireless high-speed broadband internet delivery system. The appellant claimed damages in excess of $3,000,000 under several heads of damage. The trial judge awarded the appellant $125,000 in compensatory damages for economic loss.
Issues:	(1) Did the trial judge err in his assessment of the appellant's claim for compensatory damages?

(2) Did the trial judge err in his assessment of the appellant's claim for punitive damages?

Result: Appeal dismissed. The assessment of compensatory damages arising from a breach of confidence is not defined by rigid rules. To the contrary, a flexible and often imaginative approach is required depending on the context. The trial judge was not required to utilize any particular approach to assess the appellant's economic loss. Further, the Court was not satisfied that the trial judge misapprehended the expert evidence adduced by the appellant.

With respect to punitive damages, the trial judge did not apply a wrong principle of law, or otherwise err in declining to award damages as sought.

NOVA SCOTIA COURT OF APPEAL

Citation: *TDC Broadband Inc. v. Nova Scotia (Attorney General)*, 2018 NSCA 22

Date: 20180308
Docket: CA 458552
Registry: Halifax

Between:
TDC BROADBAND INC, in bankruptcy, by its participating creditors granted leave pursuant to section 38 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended, being OWEN HUARD, CHRISTOPHER A. CHATTERTON, MERIT CONSULTING LIMITED, MURRAY McNUTT and GERALD R. PINEO

Appellant

v.

THE ATTORNEY GENERAL OF NOVA SCOTIA representing Her Majesty the Queen in Right of the Province of Nova Scotia

Respondent

Judges:	Bryson, Bourgeois and Van den Eynden, JJ.A.
Appeal Heard:	December 5, 2017, in Halifax, Nova Scotia
Held:	Appeal dismissed with costs, per reasons for judgment of Bourgeois, J.A.; Bryson and Van den Eynden, JJ.A. concurring
Counsel:	Robert H. Pineo and J. Paul Niefer, for the appellant Sheldon Choo, for the respondent

Reasons for judgment:

[1] Our daily lives are impacted in countless ways by advancements in technology. The creation and expansion of the internet is a prominent example. Financial services, the provision of government services, commerce and social media are only a few areas in which the internet has become integral.

[2] So important is the availability of the internet, the provision of affordable and reliable high-speed internet to all Nova Scotians became an election promise of the incumbent premier, Rodney MacDonald, in the spring of 2006. As part of the election campaign, electors were promised that by 2009, all Nova Scotians would have access to high-speed internet service. This was particularly important in rural areas.

[3] The appellant, TDC Broadband Inc., had its beginnings two years earlier. Through the efforts of its three principals, brothers Ted, Dennis, and Carter Cockerill, the appellant had developed a system to provide wireless high-speed broadband internet service in rural areas. In 2005, the appellant had worked closely with the Region of Queens Municipality to provide a system in that area. As part of what became known as the "Caledonia Project", the appellant shared technical and business information related to the system and its operation with various municipal and provincial employees.

[4] In September 2006, the respondent by virtue of its "Rural Broadband Project", issued a Request for Proposal ("RFP") seeking an internet service provider to implement broadband service in a pilot area in Cumberland County. The appellant submitted a proposal, but was not successful in obtaining the project.

[5] In June 2007, the respondent issued a further RFP to provide broadband service throughout the province. By that point, the appellant had entered bankruptcy and it did not respond to the province-wide RFP.

[6] In June 2009, the appellant sued the respondent for the improper use of its confidential information. Specifically, the appellant alleged its confidential information was disclosed in the contents of both the Cumberland and Provincial RFPs. The appellant claimed significant financial losses arising from the alleged breach of confidence.

[7] The matter was heard by Justice Patrick J. Duncan over 13 days of trial. In his lengthy reasons (reported as 2016 NSSC 206), the trial judge concluded that the respondent "received, in confidence, unique technical and/or business information" of the appellant, which it then used without permission. The trial judge was satisfied such constituted a breach of confidence.

[8] With respect to damages, the appellant had claimed compensatory damages for economic loss in the amount of $2,495,000 as calculated by its expert, special damages of $56,147, general damages of $300,000 and punitive damages of $275,000. The trial judge awarded the appellant $125,000 in compensatory damages and declined to award any of the other damages sought.

[9] Before this Court, the appellant seeks to challenge the trial judge's damage assessment, submitting the compensatory damages are too low and the trial judge erred in not ordering punitive damages. For the reasons that follow, I would dismiss the appeal.

Decision under appeal

[10] To better put the appellant's arguments in context, some further background is helpful. The trial judge did an admirable job of setting out the factual background in his reasons. He condensed extensive and detailed evidence into a streamlined account of the matter before him. The events following the appellant's technical success with the Caledonia Project were described by the trial judge as follows:

> [15] The delivery system fulfilled the requirements for the provision of high speed wireless internet service in particularly difficult terrain, over a comparatively large geographic area and at a cost that was affordable and expected to be sufficient to sustain the company as it expanded its market. At the time, as the evidence demonstrates, there were no other internet service providers offering the same combination of availability, speed and reliability in this type of topography.
>
> [16] Notwithstanding their technical success, TDC did not develop a sufficient income stream to support the operations and its own resources were being exhausted. Bills from suppliers were not being paid in a timely manner and the service was at risk of being suspended. (In fact, service was suspended for a period beginning in the summer of 2006, due to financial difficulties).
>
> [17] Despite these problems, the Cockerills continued to seek out capital and to market the product around the province. They had considerable interest from Regional Development Agencies (RDAs) and believed that because of their work

with local Nova Scotia government officials in Queens they were well placed to obtain significant support from the Province which, if it came, would provide the financial stability to support the wide spread distribution of the delivery service.

[18] However, when the Province decided in March 2006 to seek out proposals to provide broadband internet service to unserviced or underserviced areas of the province they did it in such a manner that it effectively ensured that TDC could not compete with the large service providers, even though TDC had a proven delivery model and their competition did not, or were unprepared to deploy one.

[19] By the end of May 2006 the Province had selected an area near Tidnish, Cumberland County for a "Pilot Project". The Province then sent out a Request for Proposals to deliver broadband to the pilot area. In late November 2006, Seaside Communications was awarded the exclusive right to deliver broadband service to the Pilot area.

[20] Seeing no hope for provincial or private funding the plaintiff could not continue to operate and on May 11, 2007, a Trustee in Bankruptcy took over the affairs of TDC.

[21] In June 2007 the defendant issued a Request for Proposals to provide Broadband throughout Nova Scotia. The province was divided into 7 zones. The successful bidders were Seaside (4 zones), Eastlink (2 zones) and Omniglobe in Halifax Regional Municipality.

[22] A key component of the Province's Request for Proposals was the "sustainability" of the project. TDC scored poorly in the competition for the pilot project, largely as a result of the government's view that it was financially unsustainable and that the business side of the company was poorly run.

[23] The deck was stacked against TDC by the government's roll out plan and the financial requirements of the RFPs. It was a "Catch 22": in effect, the government would not give TDC the money necessary for their progress because TDC did not have the ability to pay their existing bills and was not attracting new investor money. Having the only technology that was proven to work was not sufficient to overcome their lack of capital, or business acumen.

[24] As time would show, the Province, while requiring the bidders to show significant financial stability at the point of submitting proposals, later gave the successful bidders very substantial grants to carry out their work. Seaside received $430,000 to assist with the pilot project. This money was characterized in a Cumberland Regional Economic Development Association (CREDA) newsletter as funds to "cover project expenses".

[25] By the time of trial, the defendant had provided grants totaling $23.8 million to Seaside and $2.2 million to Eastlink to assist these companies as they attempted to fulfill the terms of their successful bids.

[26] The plaintiff says that the Request for Proposals that the government put out for the Pilot Project (won by Seaside) included significant confidential

> information borrowed from TDC's business proposals and technical specifications. The plaintiff alleges that the Province breached their obligation to keep TDC's information confidential and misused the information by giving it to TDC's competitors thereby causing TDC significant financial injury, which ultimately led to the bankruptcy of TDC.
>
> [27] In short, the allegation is that the Province unlawfully gave TDC's technology and business information to its competitors who had the capitalization that TDC lacked but not the technical expertise that TDC did have.

[11] The trial judge was tasked with determining two broad issues. Firstly, did the respondent breach its duty of confidence to the appellant? Secondly, what compensation ought to arise therefrom?

[12] The trial judge's findings leading to the conclusion that the respondent did breach its duty of confidence have not been challenged on appeal. It is the trial judge's approach to the assessment of damages that lies at the heart of the appellant's challenge to this Court.

Issues

[13] In its Notice of Appeal, the appellant sets out the following grounds:

1. That the Learned Trial Judge erred at law by awarding compensatory damages in the amount of $125,000 without an evidentiary foundation to establish that quantum of damages.
2. That the Learned Trial Judge erred at law by awarding compensatory damages in the amount of $125,000 by:
    a. Failing to apply the Plaintiff's expert evidence correctly. Respectfully, His Lordship applied the Plaintiff's expert evidence in the context of a claim for lost profits; whereas, the Plaintiff led that evidence for the purpose of demonstrating the income-earning potential (value) of its business plan and delivery method; and,
    b. Also, by failing to apply the Plaintiff's evidence of the cost of developing the business plan and delivery method.
3. That the Learned Trial Judge erred at law by failing to correctly apply the legal principles for awarding punitive damages and, in the result, incorrectly denied an award of punitive damages to the Plaintiff.

[14] In my view, the questions to be determined by this Court can be encapsulated as follows:

(a) Did the trial judge err in his assessment of the appellant's claim for compensatory damages?; and

(b) Did the trial judge err in his assessment of the appellant's claim for punitive damages?

Standard of Review

[15] The appropriate standard of review is not in issue. Both parties agree that the following principles articulated by Saunders, J.A. in *National Bank Financial Ltd. v. Barthe Estate*, 2015 NSCA 47, are applicable:

> [151] In matters such as this, the appropriate standard of appellate review is settled law. A standard of correctness will be invoked when reviewing questions of law. A standard of palpable and overriding error will be applied to findings of fact, or inferences drawn from facts, or issues of mixed law and fact: **Housen v. Nikolaisen**, 2002 SCC 33; **Gwynne-Timothy v. McPhee**, 2005 NSCA 80. In matters requiring a trial judge's exercise of discretion, which would include such things as: awarding or declining to award damages; deciding costs; or making rulings intended to ensure the fair and efficient conduct of a trial, considerable deference is paid on appeal and we will not interfere unless we are convinced that the judge erred in principle or caused an obvious injustice: **Coady v. Burton Canada Co.**, 2013 NSCA 95 at ¶19. Appellate intervention with respect to the amount of punitive damages will only be warranted where there has been an error of law or a wholly erroneous assessment of the quantum: **Richard v. Time Inc.**, 2012 SCC 8, at ¶190.

[16] This Court's ability to interfere with damages assessments was addressed by Hamilton, J.A. in *Go Travel Direct.Com Inc. v. Maritime Travel Inc.*, 2009 NSCA 42:

> [66] The principles applicable to appellate intervention in a damages award are dealt with by the Supreme Court of Canada in **Naylor Group Inc. v. Ellis-Don Construction Ltd.**, 2001 SCC 58:
>
> > 80. It is common ground that the Court of Appeal was not entitled to substitute its own view of a proper award unless it could be shown that the trial judge had made an error of principle of law, or misapprehended the evidence (*Lang v. Pollard*, [1957] S.C.R. 858, at p. 862), or it could be shown there was no evidence on which the trial judge could have reached his or her conclusion (*Woelk v. Halvorson*, [1980] 2 S.C.R. 430, at p. 435), or the trial judge failed to consider relevant factors in the assessment of damages, or considered irrelevant factors, or otherwise, in the result, made "a palpably incorrect" or "wholly erroneous" assessment of the damages

> (*Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, at p. 235; *Laurentide Motels Ltd. v. Beauport (City)*, [1989] 1 S.C.R. 705, at p. 810; *Widrig v. Strazer*, [1964] S.C.R. 376, at pp. 388-89; *Woelk, supra*, at pp. 435-37; *Waddams, supra*, at para. 13.420; and H. D. Pitch and R. M. Snyder, *Damages for Breach of Contract* (2nd ed. 1989) 15§ 5). Where one or more of these conditions are met, however, the appellate court is obliged to interfere.

[67] In **Flynn v. Halifax Regional Municipality**, 2005 NSCA 81, this Court states:

> 107. An appellate court may not substitute a figure of its own for that awarded by the trial judge simply because it would have awarded a different amount of damages if it had tried the case. Before the court can intervene, it must be satisfied that the trial judge, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one) or that the amount awarded is either so inordinately low or high that it must be a wholly erroneous estimate of the damage. This standard of review, which was established in **Nance v. British Columbia Electric Railway Co.** [1951] 3 D.L.R. 705 (P.C.) at p. 713, remains the law (**Naylor Group Inc. v. Ellis-Don Construction Ltd.**, 2001 SCC 58 (CanLII), [2001] 2 S.C.R. 943).

[68] As discussed in the context of the second ground of appeal considering causation, a judge's failure to consider a relevant factor only gives rise to reviewable error if it has affected his or her conclusion, **H.L.**, supra, para. 69 and 70.

[69] Thus considerable deference is owed by this Court to the judge's quantification of damages.

Analysis

Did the trial judge err in his assessment of the appellant's claim for compensatory damages?

[17] The appellant submits that the trial judge made several errors which led to an inordinately low award of compensatory damages. At the hearing, the appellant presented three inter-related arguments, and a fourth in the alternative:

- Based on his own factual finding that the confidential information disclosed was "something special", the trial judge failed to apply the correct valuation analysis;

- Related to the above, the trial judge misunderstood the purpose of the expert evidence presented by the appellant which formed the basis of its claim for compensatory damages and, as such, he improperly discounted it;

- The trial judge further failed to consider the damages arising from the respondent's second improper disclosure in the Provincial RFP.

The appellant asserts the above errors led the trial judge to an inordinately low award, and that he ought to have awarded compensatory damages as calculated by its expert, Ms. Mary Jane Andrews of KMPG, and as set out in her report.

- In the alternative, the trial judge failed to award damages based upon the "springboard" doctrine.

[18] I turn to the appellant's first argument that the trial judge failed to apply a proper valuation analysis. In advancing this argument, the appellant grounds its argument in the judgment of *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142, where the Supreme Court of Canada addressed the principles applicable to assessing damages arising from a breach of confidence.

[19] The appellant argues that *Cadbury* adopts the earlier approach of the English Court of Appeal in *Seager v. Copydex Ltd. (No.2)*, *infra*, in which Lord Denning set out a method of damage assessment based upon the quality of the confidential information at the heart of the breach. The appellant says the trial judge explicitly accepted this approach to valuation, noting the following from his written reasons:

> [228] Lord Denning, writing in *Seager v. Copydex Ltd*. (No. 2), [1969] 2 All E.R. 718 addressed the approach to valuation of information unlawfully taken by a defendant:
>
> > The difficulty is to assess the value of the information taken by the defendant company. … The value of the confidential information depends on the nature of it. If there was nothing very special about it, that is, if it involved no particular inventive step but was the sort of information which could be obtained by employing any competent consultant, and the value of it was the fee which a consultant would charge for it; because in that case the defendant company, by taking information, would only have saved themselves the time and trouble of employing a consultant. But, on the other hand, if the information was <u>something special, as for instance, if it involved an inventive step or something so unusual that it could not be obtained by just going to a consultant, then the value of it is much higher. It is not merely a consultant's fee, but the price which a willing buyer-desirous of obtaining it-would pay for it. It is the value as between a</u>

> willing seller and a willing buyer.… The court, of course, cannot give a royalty by way of damages; but it could give an equivalent by calculation based on the capitalization of a royalty. Thus it could arrive at a lump sum. Once a lump sum is assessed and paid, and the confidential information would belong to the defendant company in the same way as if they had bought and paid for a final agreement of sale. The property, so far as there is property in it, would vest in them.… In other words, it would be regarded as a real outright purchase of the confidential information. The value should, therefore, be assessed on that basis; and damages awarded accordingly. (Emphasis by trial judge)

[20] The appellant says the trial judge properly found the information used by the respondent was "something special". However, having made that finding, it argues 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 says 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.

[21] The appellant's second source of error relates to the first. The appellant argues that the trial judge had the necessary evidence to establish the fair market value of the delivery system, but failed to use it as a means of determining damages on the basis of a "willing seller/willing buyer" assessment.

[22] The appellant says the expert opinion of Ms. Andrews was presented to the court below for the purpose of establishing the fair market value of the delivery system, which, the appellant asserts, is equivalent to what a willing buyer and willing seller would establish as a fair sale price. Ms. Andrews opined that value as being between $2,035,000 and $2,495,000.

[23] The appellant submits the trial judge did not use the expert opinion in the way it was intended. The trial judge wrote:

> [206] The plaintiff has presented two alternative ways to compensate for its economic loss. Those have been characterized as : (i) Net Present Day Value of the Delivery System's Earning Capacity; and (ii) Cost of Investment in the Delivery System and a Consulting Fee.
>
> [207] The first of these alternatives relies upon the KPMG Report to establish the amount of compensation due using a "lost profits" approach.
>
> . . .

> [209] The Report's conclusion estimates the plaintiff's economic loss at between $2,035,000 and $2,495,000. This represents the difference between the projected profits from the Delivery Method, but for the "Alleged Harm" (disclosure of TDC's confidential information in the Cumberland RFP), and the actual cash received by TDC during the projection period (September 12, 2006 – September 11, 2018).

[24] The appellant says the above passages highlight the trial judge's error. It contends he was confused with respect to the purpose of the expert report – it was not to make a claim for lost profits, but rather to reflect the fair market value of the delivery system for the purpose of establishing a sale price between a willing buyer and seller.

[25] The appellant attempts to build on this alleged error. It submits that based on this misapprehension, the trial judge erroneously discounted the expert opinion based on certain assumptions relied upon by the expert. In his decision, the trial judge noted a number of assumptions contained in the expert opinion:

> [213] Counsel for the plaintiff instructed KPMG to make the following assumptions:
>
> • That the Delivery Method and Business Model were disclosed in the Cumberland RFP rendering it to have no commercial value as of September 12, 2006 the date on which the Cumberland RFP was issued. (The Report sets this date as the Valuation Date - the date that the period of loss commences. *i.e.*, when the Alleged Harm occurred); (section 5.2 at p.17)
>
> • That but for the Alleged Harm, TDC would have been awarded the Cumberland pilot and subsequently awarded Zone 1; (section 5.4.1 at p. 18)
>
> • That because of TDC's operations in Queens County the plaintiff would have been awarded Zones 5 and 6 on terms equivalent to those in the Seaside Contract; (section 5.4.1 at p.18)
>
> [214] In addition to these, the report makes certain other assumptions, including:
>
> • That but for the Alleged Harm, TDC would have commenced deployment on a provincial basis in December 2007, with service provision commencing in 2008; (Section 5.4.1 at p. 19)
>
> • That but for the Alleged Harm, the Minister's contribution to TDC would include $430,000 for the Cumberland Pilot; $3,831,976 for Zone 1 and $2,211,000 for Zones 5 and 6. (section 5.5.2 at p. 28 – Tables 13 and 14)
>
> • That capital expenditures, net of the Minister's contributions would be $9.2 million for the period 2008 – 2016; (section 5.5.2 at p. 29)
>
> [215] The scope of Ms. Andrews' review was limited by certain factors:

> • Dennis Cockerill advised her that she was not permitted to discuss the matter under litigation, projected financial information, or the outlook for TDC with either of Carter Cockerill or Ted Cockerill;
>
> • The estimated amount and basis of governmental contribution to the Broadband for Rural Nova Scotia Initiative was an important factor in the quantification of the economic loss. KPMG was not provided with the specific actual amounts nor the basis of the governmental contributions, and so any difference in those amounts from the estimates made for the preparation of the Report have the potential to influence the conclusion;
>
> • KPMG was not provided with documentation to confirm the projected costs to construct towers, which the Report describes as "a key element of our analysis".
>
> [216] Ms. Andrews is an impressive witness and the Report is well constructed. As the Report makes clear, the conclusions are dependent upon the accuracy of the assumptions that underpin them. The defendant submits that the plaintiff has not proven the factual assumptions upon which this conclusion is based. In my view, the defendant is correct.

[26] The appellant says that none of the above assumptions were relevant to the purpose of Ms. Andrews' valuation – to establish what a willing buyer would pay for the delivery system. All of the assumptions criticized by the trial judge applied to a scenario in which the appellant retained the delivery system and continued to operate it. None applied to a scenario where the system was purchased by any number of potential buyers. As such, the assumptions the trial judge viewed as undermining Ms. Andrews' valuation, which related only to factors applicable to the appellant, would have no impact on the value of the system to a willing buyer. The appellant argues that the trial judge ought not to have rejected Ms. Andrews' opinion and should have awarded the higher end of her valuation.

[27] The appellant's third source of alleged error is that the trial judge, in undertaking his consideration of compensatory damages, only considered the breach of confidence arising from the misuse of information in the Cumberland RFP. Despite having found that further technical information "consistent with the TDC system" had been released in the Provincial RFP, the trial judge improperly confined his valuation to the damages arising from the initial disclosure.

[28] As a result of the above errors, the appellant submits that this Court ought to vary the compensatory damages awarded at trial, and replace it with what a willing buyer would pay for the delivery system, i.e. the top range suggested by Ms. Andrews – $2,495,000.

[29] The appellant's alternative argument is presented in the event this Court finds that it was open to the trial judge to reject the "willing seller/willing buyer" valuation as quantified by its expert. The appellant says that having rejected that opinion, the trial judge ought to have employed the "springboard" doctrine. This was explained by the appellant in its post-trial submissions to the trial judge as "the value of the cost of developing the Delivery System and a consulting fee as the Province saved itself those costs by taking and improperly using the Delivery System".

[30] At the hearing before this Court, the appellant asserted that the value, utilizing a 2.5-year time frame representing the time to develop the system, would equate to damages of $750,000. It calculated this as being a consultation fee, being the salary over the development period for the three Cockerill brothers, plus the compensatory damages awarded by the trial judge.

[31] With respect, none of the arguments advanced by the appellant are persuasive. Prior to explaining why, it is useful to first set out key factual findings of the trial judge and his conclusions relating to the compensatory damage claim.

[32] Although the trial judge made numerous factual determinations, several are particularly relevant to his assessment of economic loss:

- The respondent did not use or disclose "the most valuable part of the appellant's delivery system";
- Neither Seaside, the successful bidder on the Cumberland RFP, nor the other successful bidders on the Provincial RFP, utilized systems based upon the confidential information disclosed;
- The appellant's factual assertion that "*Absent the Province improperly using the confidential information regarding the Delivery System, TDC would have been the only provider with a technology that was proven to work in the topography of rural Nova Scotia*" was rejected as an overstatement;
- The appellant was the only company that had attempted to provide a fixed wireless delivery system in rural areas, but it had not shown that its system was financially viable;

- The Cumberland RFP required, amongst other criteria, that a successful bidder have a viable business plan, which the appellant did not have.

[33] None of the above findings were challenged on appeal and are entirely supportable on the record.

[34] With respect to assessment of the appellant's claim, the trial judge found there was a basis for an award of compensatory damages. In particular, he noted:

> [225] I am satisfied that the TDC delivery system and Business Proposal had value and that some of that value was lost by the inclusion of TDC's confidential information in the Cumberland RFP. Further, I find that a sum that recognizes the value to the Province for its use of the plaintiff's confidential information is also an appropriate basis upon which to assess damages.
>
> [226] I do not agree that most or all of the value of the delivery system was lost by the disclosure to bidders of TDC's information in the Cumberland RFP. As such, I do not accept that the defendant should be liable for the entire value of the cost of developing the Delivery System.

[35] After considering the approaches to valuation and the evidence before him, the trial judge concluded:

> [239] Learning what the issues were and determining the ways to address those problems made that information a valuable asset. However, what ultimately ended up in the RFP was an identification of the issues and not a lot of the answers arrived at by TDC. However, the RFP designers were not experts in the industry and so the TDC information that the Project members sought and obtained provided a shortcut, which the defendant did not have the permission to take and did not pay for.
>
> [240] The Province gained from the knowledge acquired by TDC's principals over an extended period of time. There is an important difference though between what the Rural Broadband Project team members knew of the TDC delivery system and Business Proposal, and what it misused. The defendant is only liable for that which it provably misused. There is no basis upon which to conclude that members of the Rural Broadband project passed on any TDC confidential information to Seaside or the other bidders in ways other than that set out in the pilot RFP.
>
> [241] Once the pilot RFP was released the extent of the damage to TDC had crystallized. There was no basis upon which the defendant would have required TDC's further assistance, unless it was prepared to seek the undisclosed and more

> valuable TDC information held by Dennis Cockerill. It did not and so TDC cannot be compensated for that which it did not provide.
>
> . . .
>
> [245] I have concluded that the value of the plaintiff's economic loss is to be measured by considering the value to the Province of retaining TDC to assist the Rural Broadband Project between the Project's inception in March 2006 and the release of the RFP in September 2006; and also as a product of the intrinsic value of the information that was lost by TDC and gained by the defendant. **A way of looking at the value of the misused information is the cost that would be agreed to by a willing buyer and a willing seller where the product purchased was the provision of TDC's information and in person expertise, together with the right for the Project to use the information for the development of the Rural Broadband project and the construction of the pilot RFP. In giving up this information to the Province there would be a corresponding diminishment in the overall commercial value of the information provided by TDC, once published in the RFP**.
>
> [246] I have weighed the evidence and conclude that the value of the plaintiff's economic loss is $125,000. (Emphasis added)

[36] Both parties assert that *Cadbury, supra,* supports their respective views of the trial judge's assessment of damages. As outlined earlier, the appellant says the trial judge was obligated to quantify economic loss on the basis of a "willing seller/willing buyer" scenario. The respondent says there is no such requirement.

[37] 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. In fact, he said the opposite:

> 24 The result of *Lac Minerals* is to confirm jurisdiction in the courts in a breach of confidence action to grant a remedy dictated by the facts of the case rather than strict jurisdictional or doctrinal considerations. See J. D. Davies, "Duties of Confidence and Loyalty", [1990] *Lloyd's Mar. & Com. L.Q.* 4, at p. 5:
>
> > There is much to be said for the majority view [in *Lac Minerals Ltd.*] that, if a ground of liability is established, then the remedy that follows should be the one that is most appropriate on the facts of the case rather than one derived from history or over-categorization.

[38] Justice Binnie further cites with approval the Manitoba Court of Appeal in *Apotex Fermentation Inc. v. Novopharm Ltd.*, [1998] 10 W.W.R. 455 at page 512:

> Where injury has been suffered in a complex commercial setting, a "flexible and imaginative approach" to the assessment of the damages may be required.

[39] It is clear that the facts of a particular case can give rise to numerous approaches to valuing the damages flowing from a breach of confidence. In *Halsbury's Laws of Canada – Patents, Trade Secrets and Industrial Design*, authors Dino P. Clarizio and Roger T. Hughes (Markham: LexisNexis Canada, 2016) describe the methods of assessing damages at page 607 as follows:

> **HPT-193 Methods of calculating damages.** Damages may be assessed in a variety of ways such as "fair compensation" or an indemnity basis as well as an account of profits or calculation of loss. In assessing damages the court must attempt as far as possible to restore the plaintiff monetarily to the position it would have been in had it not been for the defendant's wrongful conduct. **Damages may be measured by any one or a combination of the following**:
>
> 1. Confider's loss of profit.
>
> 2. Value of a consultant's fee.
>
> 3. Depreciation of the value of the information as a consequence of the breach of confidence.
>
> 4. Development costs in acquiring the information.
>
> 5. Capitalization of an appropriate royalty.
>
> 6. Market value as between willing sellers and buyers.
>
> The proper approach is to be determined by examining the position of the plaintiff and the position of the defendant and then deciding which of the six methods would best put the plaintiff in the same position as if no wrong had been sustained. The plaintiff is entitled to have damages assessed on the basis most favourable to itself. However, if a plaintiff fails to prove any damage, it may be liable to have its action dismissed. … (Footnotes omitted. Emphasis added)

[40] In my view, in assessing compensatory damages, the trial judge utilized a flexible approach to the facts as he found them. At paragraph [245] of his reasons (see [35] above), he combined a willing seller/willing buyer approach with one that also recognized a depreciation in the value of the information disclosed. I see no error in his approach.

[41] I turn now to the appellant's complaints regarding the trial judge's treatment of the expert evidence, and his alleged misunderstanding of Ms. Andrews' opinion.

[42] In my view, the trial judge in no way misapprehended the purpose of the expert opinion or its content. The appellant's claim that the trial judge misunderstood the report as being a loss of profits quantification, as opposed to

establishing a market value for the purposes of a willing buyer and willing seller, is refuted by the report itself.

[43] In the expert report, two alternative approaches to quantifying the appellant's economic loss were considered – the Lost Profit approach and the Business Valuation approach. Ms. Andrews concluded that the former was the appropriate means of establishing the appellant's loss. She explained this approach as follows:

> The calculation of lost profits is predicated on the comparison of the actual profits earned by the business during a period of loss to the profits that would have been earned by the business, i.e., projected profits, but for the incident in question. The difference between the projected and actual profits during the loss period is the quantum of lost profits. . .

[44] The report continues to reference the evaluation as being a calculation of the appellant's lost profits. Nowhere in her report, nor in her *viva voce* evidence, does Ms. Andrews opine that the range of damages she identified reflected the value of the delivery system to a willing buyer.

[45] Given the framing of the expert opinion and its Statement of Claim seeking "loss of past and future profits", the appellant's assertion that the trial judge suffered from a misapprehension is unwarranted.

[46] Further, I do not accept the appellant's suggestion that the factual assumptions identified by the trial judge as undermining the expert opinion were irrelevant to its claim. In her report, Ms. Andrews specifically indicated that should the evidence at trial not support the assumptions she had been asked to apply by the appellant and its legal counsel, her opinion may change. The trial judge found that the evidence at trial did not support several of those key assumptions. As such, he was entitled to view the expert's valuation with wariness.

[47] The appellant also says the trial judge failed in quantifying its economic loss, failed to consider the results flowing from the Provincial RFP and erred in viewing its losses as having crystallized at the issuance of the Cumberland RFP. As outlined above, the appellant based the quantification of its economic loss on the KPMG report. The author identified the "valuation date" as being the issuance of the Cumberland RFP. No additional quantification was presented for additional damages arising from the second release.

[48] Given the appellant's expert treated the initial release as the moment when its damages crystallized, the trial judge can hardly be faulted for doing the same. In light of how the appellant chose to structure its claim at trial and the evidentiary record, I am satisfied the trial judge was not obligated to consider additional damages arising from the Provincial RFP.

[49] The appellant's alternative argument criticizes the trial judge for not employing the "springboard" doctrine to assess its economic loss. It asserts that the trial judge ought to have utilized this doctrine to compensate it for the time and money it spent developing the delivery system.

[50] The "springboard" doctrine has been described and applied by multiple courts. Recently, the British Columbia Supreme Court in *Sateri (Shanghai) Management Ltd. v. Vinall*, 2017 BCSC 491, explained the concept as follows:

> 475 A collection of principles that have come to be known as the springboard doctrine are relevant in assessing information that is partly public and partly confidential, or was disclosed in confidence but subsequently made its way into the public domain: *Cadbury* at para. 67. The doctrine recognizes that the receipt of information derived from one or more public sources may save a defendant substantial time, effort and expense in searching for and gathering it himself or herself and, therefore, may be regarded as confidential even though the defendant could have collected it from sources available to the public. The information is viewed as having offered the defendant a "springboard" in the sense that it has eliminated the bother of having to do the groundwork to source it out and compile it, and has some degree of value because it has given the defendant a head start in the endeavor at hand: *Lac Minerals* at 610; *Cadbury* at para. 67.
>
> 476 The springboard doctrine was instructively summarized by Griffin J. in *No Limits*:
>
> > [19] Where information is the creation of work product and it can give the reader of the document a "head start" or a "springboard" and advantage to the detriment of the information-provider, the information may have the necessary quality of being confidential and give rise to liability for its use even if the information later becomes public: *Lac Minerals* at 610; *Cadbury* at para. 67.
> >
> > [20] In this regard, Sopinka J. in *Lac Minerals* held at 610-611:
> >
> > > *Seager & Copydex Ltd.*, [1967] 1 W.L.R. 923 (C.A.), cited by the appellant, provides a useful illustration of the concept of the use of added information to get a head start or to use it as a springboard. The plaintiff Seager was the inventor of a patented carpet grip. He negotiated with the defendant Copydex with a view to

> development of his invention. Negotiations were terminated without a contract. Copydex then proceeded to produce a competing grip. The Court found that much of the information which Seager gave to Copydex was public. But there was some private information that resulted from Seager's efforts such as the difficulties which had to be overcome in making a satisfactory grip. At pages 931-32, Lord Denning M.R. stated:
>
> > When the information is mixed, being partly public and partly private, then the recipient must take special care to use only the material which is in the public domain. He should go to the public source and get it: or, at any rate, not be in a better position than if he had gone to the public source. He should not get a start over others by using the information which he received in confidence. At any rate, he should not get a start without paying for it. (Emphasis in original)

[51] In the present case, the appellant says the respondent obtained a head start in the drafting and development of the RFPs by using its confidential information. The trial judge agreed with that assertion. The trial judge also found, however, that the successful bidders did not ultimately deploy systems that used the appellant's confidential information. He further found the breach did not involve the most valuable aspects of the delivery system.

[52] As noted earlier, the approach to assessing damages for a breach of confidence is necessarily a flexible one. The appellant has presented no authority for its proposition that the trial judge was obligated to use any particular assessment approach. Further, the appellant has not demonstrated that the trial judge erred by failing to award its claim for its entire research and development costs.

[53] The trial judge was faced with a complex and unique set of factual circumstances where the appellant established a breach of confidence, but the evidence supporting its claim for damages was lacking. The trial judge was entitled to consider the evidence and apply a flexible approach to assessing damages. For the reasons outlined above, I see no error justifying intervention by this Court. I would dismiss this ground of appeal.

Did the trial judge err in his assessment of the appellant's claim for punitive damages?

[54] The appellant says the trial judge's failure to award punitive damages was anchored in two sources of error. Firstly, the trial judge failed to rely upon the factors giving rise to an award for punitive damages as articulated by the Supreme Court of Canada in *Whiten v. Pilot Insurance Co.*, 2002 SCC 18. Instead, he used older authority. Secondly, the trial judge weighed factors irrelevant to a proper consideration of punitive damages.

[55] The appellant says the lack of punitive damages in this instance constituted a failure by the trial judge to recognize the need to "rap the knuckles" of the respondent and to deter it from conducting itself in such an egregious fashion in future.

[56] The trial judge set out the legal principles relating to punitive damages as follows:

> [252] The plaintiff seeks punitive damages. The Supreme Court of Canada in *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 held:
>
> > 196 Punitive damages may be awarded in situations where the defendant's misconduct is so malicious, oppressive and high-handed that it offends the court's sense of decency. Punitive damages bear no relation to what the plaintiff should receive by way of compensation. Their aim is not to compensate the plaintiff, but rather to punish the defendant. It is the means by which the jury or judge expresses its outrage at the egregious conduct of the defendant. They are in the nature of a fine which is meant to act as a deterrent to the defendant and to others from acting in this manner. It is important to emphasize that punitive damages should only be awarded in those circumstances where the combined award of general and aggravated damages would be insufficient to achieve the goal of punishment and deterrence.

[57] The appellant says the trial judge missed the mark by relying on *Hill*, as opposed to the more refined guidance given in later judgments, notably *Whiten*. It submits that the correct approach to a claim for punitive damages has been set out recently by this Court in *National Bank*, *supra*.

[58] With respect to the appellant's assertion the trial judge considered irrelevant factors, this is explained in its written submissions:

> 76. The trial judge considered the following irrelevant factors (see Trial Decision, supra at paras 259-263):
>
> > (a) Whether Ms. Flam and Mr. MacDonald acquired, or were motivated by, any personal benefit;
> >
> > (b) Whether the Province's misuse of information caused TDC's bankruptcy;
> >
> > (c) Whether TDC's information was patented or copyrighted;
> >
> > (d) Whether the Province's misuse disclosed the most valuable aspects of TDC's delivery system; and
> >
> > (e) Whether the Province was responsible for TDC's business woes.
>
> 77. The judge's consideration of the above factors for punitive damages reflects a fundamental misunderstanding of the underlying principles. As Justice Saunders explained in *National Bank, supra* at para 439: "Punitive damages 'are directed to the quality of the defendant's conduct, not the quantity (if any) of the plaintiff's loss' ". Also, the defendant in this case is the Province, not Ms. Flam and Mr. MacDonald in their personal capacities.
>
> 78. The judge went on to consider whether the province acted with malice, but he did so in the context of the Province's decision not to award TDC with the Pilot RFP, which is entirely irrelevant (see *Trial Decision, supra* at para 264). The Court must look to the Province's conduct in the breach of its duty of good faith performance. Furthermore, while it is a factor, malice is not a prerequisite for an award of punitive damages. (Citation omitted)

[59] In considering the appellant's arguments, it is first helpful to set out several relevant passages from *National Bank*. I would note that although relied upon by the appellant on appeal, that decision was not referenced by either party in their post-trial submissions to the trial judge. (*National Bank* was released in May 2015 after the conclusion of the trial, but before post-trial written submissions were filed.)

[60] In *National Bank*, Saunders, J.A. highlighted the principles to be considered firstly to determine whether an award of punitive damages was warranted and, secondly, the assessment of the award itself. With respect to whether punitive damages ought to be awarded, he wrote:

> [438] The legal principles to be considered when deciding whether to award punitive damages may be gleaned from a series of cases from the Supreme Court of Canada starting with **Whiten v. Pilot Insurance Co.**, 2002 SCC 18; **Fidler v. Sun Life Assurance Co. of Canada**, 2006 SCC 30; and **Honda Canada Inc. v. Keays**, 2008 SCC 39.

> [439] From these and other leading authorities we know that the discretion to award punitive damages "should be most cautiously exercised" and courts "should only resort to punitive damages in exceptional cases". Punitive damages require proof of conduct that amounts to "an independent actionable wrong", typically seen as so shocking as to "depart markedly from ordinary standards of decency … so malicious and outrageous (to be) … deserving of punishment on their own". Punitive damages "are directed to the quality of the defendant's conduct, not the quantity (if any) of the plaintiff's loss". The aim of punitive damages "is not to compensate the plaintiff, but rather to punish the defendant". They are "the means by which the jury or judge expresses its outrage at the egregious conduct of the defendant". Punitive damages are intended to punish the wrongdoer, express the court's clear denunciation and serve as a deterrent not only to the wrongdoer, but others who may be inclined to follow the same example.

[61] With respect to assessing a quantum, Justice Saunders noted:

> [441] Justice Binnie said the key to any award of punitive damages is that they must be "rationally required to punish the defendant's misconduct" and they must be proportionate to the blameworthiness of the defendant's conduct. He said:
>
> > [111] I earlier referred to proportionality as the key to the permissible quantum of punitive damages. Retribution, denunciation and deterrence are the recognized justification for punitive damages, and the means must be rationally proportionate to the end sought to be achieved. A disproportionate award overshoots its purpose and becomes irrational. A less than proportionate award fails to achieve its purpose. Thus a proper award must look at proportionality in several dimensions ...
>
> [442] Justice Binnie went on to provide a list of the types of factors which might influence the level of blameworthiness assigned to the wrongdoer. As one would expect, the more egregious the conduct, the greater the potential award. He said:
>
> > [112] The more reprehensible the conduct, the higher the rational limits to the potential award. The need for denunciation is aggravated where, as in this case, the conduct is persisted in over a lengthy period of time (two years to trial) without any rational justification, and despite the defendant's awareness of the hardship it knew it was inflicting (indeed, the respondent anticipated that the greater the hardship to the appellant, the lower the settlement she would ultimately be forced to accept).
> >
> > [113] The level of blameworthiness may be influenced by many factors, but some of the factors noted in a selection of Canadian cases include [I have included the factors but omitted the case references]:
> >
> > (1) whether the misconduct was planned and deliberate:
> >
> > (2) the intent and motive of the defendant:

> (3) whether the defendant persisted in the outrageous conduct over a lengthy period of time:
>
> (4) whether the defendant concealed or attempted to cover up its misconduct:
>
> (5) the defendant's awareness that what he or she was doing was wrong:
>
> (6) whether the defendant profited from its misconduct:
>
> (7) whether the interest violated by the misconduct was known to be deeply personal to the plaintiff

[443] Later at ¶123 of his reasons Binnie, J. added:

> [123] … The key point is that punitive damages are awarded "if, but only if" *all* other penalties have been taken into account and found to be inadequate to accomplish the objectives of retribution, deterrence, and denunciation. …

[62] With respect, I do not accept the trial judge made an error of law as alleged by the appellant. I say this for a number of reasons.

[63] I find no fault in the trial judge's statement of legal principles, as set out earlier herein at paragraph [56]. They mirror closely those articulated in *Whiten*, and as endorsed by this Court in *National Bank*. In deciding whether to award punitive damages, I see no error in principle on the trial judge's part. The asserted "irrelevant" factors he considered all go to whether the conduct was "malicious", "outrageous" and "egregious". They are also directly in response to the appellant's post-trial submissions in which it argued the "high-handed, dishonest and deliberately harmful" conduct of Nancy Flam triggered the need for punitive damages.

[64] Also, the trial judge can hardly be faulted for failing to consider the factors for assessing the quantum of an award of punitive damages in circumstances where no such award was found to be warranted.

[65] As noted earlier, awards for punitive damages, or the failure to so award as in this case, attract a deferential standard of review. There being no clear error of law on the trial judge's part, I would dismiss this ground of appeal.

Disposition

[66] For the reasons set out herein, I would dismiss the appeal. At the hearing, the parties advised that costs had yet to be determined in the court below. As such, the Court cannot apply a percentage of trial costs as is often done. We are not in a position to speculate as to what costs the trial judge may ultimately find appropriate.

[67] In the circumstances, I would order the appellant to pay costs on appeal, inclusive of disbursements, in the amount of $6,000 to the respondent.

Bourgeois, J.A.

Concurred in:

Bryson, J.A.

Van den Eynden, J.A.