


PENALTIES PROVISIONS AND CONFIDENTIALITY CLAUSES IN THE FOREST INDUSTRY

When it comes to contracts, TLA members often have a lot on their minds. We have been asked to answer two contract questions that have been posed by the TLA membership, one relating to financial penalties and one relating to confidentiality provisions.

There are financial penalties in my contract—are these enforceable?

TLA members have identified a trend of licensees adding financial penalties in contract terms relating to matters such as environmental performance or safety. The main question when looking at penalty provisions is whether or not they are enforceable.

The primary remedy for breach of contract in Canadian law is damages. Damages compensate the injured party for the losses suffered as a result of the breach. "Liquidated damages" clauses are clauses providing for payment of a predetermined sum estimated to sufficiently compensate an injured party in the event of a breach in order to avoid the risk of litigation. "Penalty" clauses, on the other hand, are designed to deter parties from breaching a contract by penalizing poor performance. Unlike liquidated damages clauses, penalty clauses are not a genuine pre-estimate of damages that a party to a contract might suffer if the other side does not perform.

The law in Canada is that liquidated damages clauses are generally enforceable, but penalty clauses are not. This means that if you are asking for a penalty clause or being asked to accept one, you should always ask whether the clause is truly a penalty (and unenforceable) or liquidated damages (and enforceable). Also remember that with all things to do with contracts, there is no magic in a name—just because you label something a liquidated damages clause, if it requires payment of an amount that exceeds the likely damages caused by breach, it could be unenforceable as a penalty as well. Ultimately, all that matters is whether the clause is intended to function as a genuine pre-estimate of damages or an oppressive tactic compelling performance.

Are confidentiality clauses reasonable for businesses with a small customer base?

Despite being a major driver behind the British Columbia economy, the customer base for many of the TLA's members is remarkably small. This is primarily a result of the fact that much of the annual cut is held by a handful of major licensees and private timberland companies. We have been asked whether confidentiality clauses are reasonable in such a small industry.

It is important to understand that while most confidentiality obligations arise under a contract, a written contract is not required for confidentiality obligations to exist. Even if there are no obligations on paper, you could be liable for a "breach of confidence" if: i) you have been given information that has "the necessary quality of confidence about it" (legal speak for something that looks like it should be confidential); ii) the information has been imparted in circumstances importing an obligation of confidence (legal speak for someone giving it to you in a way that should make you assume it's confidential); and iii) there must be an unauthorized use of that information to the detriment of the party communicating it (legal speak for sharing it when you shouldn't and someone suffers damage as a result).

There are two issues about confidentiality from a contractor's perspective, whether or not the confidentiality requirements arise under a written contract.

First, the negative: confidentiality provisions can prevent the sharing of information about contract terms so that it is difficult to understand what "market" is. These provisions also make it more difficult to understand where other service providers have struggled in terms of compliance—which is useful information if you are a believer in not learning things the hard way. On the other hand, licensees automatically have much more information on contract terms and compliance issues simply because they deal with a number of service providers and can collect data from multiple contracts without breaching confidentiality requirements. All of this means that confidentiality provisions in service agreements can mean that contractors suffer in contract negotiations because of an imbalance of information.

Second, the positive: confidentiality provisions can ensure that your business information is protected from your competitors. In a highly competitive market with a small customer base, any competitive advantage that one company has over its competitors can be the difference between profitability and failure—and companies that are succeeding often jealously guard their confidential information. Confidentiality provisions in your contracts are critical to ensuring that sensitive information about your business practices does not make its way into your competitor's hands.

The bottom line is that it is unlikely that confidentiality provisions are going anywhere. Licensees will continue to insist on these provisions because it helps protect their data from the prying eyes of their competitors, and because it gives them more "knowledge power" in negotiations. In addition, many successful contractors will see a need to protect information about their business practices and guard their competitive advantage. This means that everyone in the forest industry should be aware of the benefits of confidentiality provisions to their business, and ensure that wording of confidentiality clauses maximizes these benefits.

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