

## TRADE SECRETS

# A Q&A with Anita Nador, partner at Gowling WLG (Canada) LLP

As trade secrets become increasingly important, companies need to know how to navigate this essential aspect of IP and business plans

## Q What is a trade secret?

It is a type of intellectual property, just like a patent, trademark, or copyright, with its own value and attributes. It can be bought, sold, or licensed. Any information (from any subject matter) could be a trade secret if it has economic value derived from it not being generally known and reasonable efforts have been used to maintain the secret. Trade secrets do not have territorial restrictions and are not subject to any registration or filing requirements. The term for trade secret protection ends when the “secret” ends. As such, the main duty of a company is to adopt policies and procedures to ensure the secret is kept.



## Q What are the most significant drivers when it comes to their increasing importance?

**Technology:** On the one hand, technology eases transmission and the ability to obtain/hack trade secrets remotely; on the other, it also provides an ability to better monitor and track information flow. As soon as a trade secret is out in public, it is no longer a secret, and its value is lost. Companies must be much more diligent in setting up systems, policies, and best practices to identify, monitor, and track their confidential information to prevent – or at least minimize – the effect of any breaches. If the formula and process for making Coca-Cola ever got out, the value of the \$200b+ company would be seriously compromised. Other IP enhances

the company’s value, but the “formula” and processes are its prized asset.

**Societal:** Some of the societal drivers were made apparent during the pandemic where companies had to control information flow in an increasingly decentralized global workforce. We must also consider natural tendencies to “chat” and be on social media. For a company to maintain an edge on its competitors, adopting directed policies, procedures, and best practices and educating all staff on them is essential.

**Legal:** There are two main legal drivers:

**1** Many companies have realized that their developed IP that gives them that edge is either not protectable by patents or the incremental added value of patent protection – which is term limited and

involves the invention being published – pales in comparison to the value of a trade secret, which extends to the terms of its secrecy and is of a nature that better lends itself to protection. For instance, processes that are not readily apparent from examining the end product are often easier to protect by a trade secret than other technologies.

**2** Laws have changed. Many countries such as the US and Canada have adopted criminal provisions for trade secret misappropriation. Civil trade secret litigation awards, especially in the US, have increased and are often in the hundreds of millions of dollars. People are noticing the value of these assets. However, to enforce its rights and be successful in the courts, a

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company needs to show that the information was treated as a secret and procedures were adopted to maintain it as such.

### **Q Do you predict this trend will continue?**

Yes. As a major source of trade secret breaches is employees, it is a universal issue that affects all businesses. Keeping track of workplace trends and employment law is key. For instance, in Ontario changes in employment law regarding non-compete clauses make it more important for employers to clearly identify their proprietary information to distinguish it from what employees need to know to do their jobs and might share with other employers. Technology is another important factor. As technology keeps evolving, systems and process also need to be updated, for what a court may consider to be “reasonable” measures to protect one’s trade secrets may change. There is a need to keep current.

### **Q What are you seeing in your practice?**

Companies are realizing that having good trade secret strategies and policies positively impacts their whole business. Many of the initiatives we are involved with are integral to best practices for cybersecurity, data protection, employment, and IP, and for best practices when companies are undergoing valuations/due diligence on corporate deals.

They are also realizing that global solutions are important. Technology and the workforce no longer have geographical barriers. If information is leaked in the UK and not in Canada, it is still leaked – and likely the information will soon be available globally. Our firm has expanded geographically for exactly that reason. Our offices in Canada, the UK, Europe, UAE, and China; our exclusive association with JurisAsia in Singapore; and our valued relationships with firms in other jurisdictions enable us to offer global solutions to clients.

As lawyers, the above highlights the bene-

fits of a full-service firm and the global trade secrets team at Gowling WLG, where we collaborate across disciplines to give clients the solutions they need where they need it.

We have had many of our traditional patent-only clients come to us (I have had at least two significant conversations this past month alone) to say they are increasingly relying on trade secrets or, in the case of pharma, data exclusivity, to protect their market position. In reality, they are moving to a more global IP strategy that incorporates and recognizes the value of trade secrets as integral to their business. Also, I am seeing more transactions involving valuable trade secret assets. In the last year, I closed a global \$100M+ deal where a significant part was the licensing of trade secrets. Those agreements need enhanced provisions to ensure the assets are protected.

### **Q How does Gowling WLG help companies navigate this essential aspect of IP and business plans?**

We developed a suite of services and professional expertise specifically targeted to helping clients identify, maintain, and enforce their trade secrets, which are broken down into four phases:

**1 Audit:** A due diligence exercise conducted by our industry experts is focused on a company’s trade secrets and related IP practices, policies, and procedures. We identify gaps and discuss next steps with clients.

**2 Creation:** We work with the client’s IT, legal and business teams to adopt beneficial systems and policies (SOPs) and create agreement templates.

**3 Implementation:** We implement the created products and training personnel and, in addition to in-person training, we develop self-training modules to keep

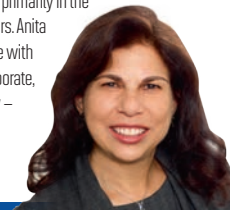
personnel up to date and to facilitate onboarding.

**4 Enforcement:** We develop an enforcement plan for monitoring information flow and for identifying and reporting potential breaches.

Each client is different. We work with clients to develop a reasonable, practical, business-centric approach that best suits their needs.

To supplement the above, we have a suite of webinars and articles on our website. In April, we launched GoXL, an online self-learning platform designed to guide users through the core elements of IP protection. Its intent is to give clients a resource to teach themselves about the basics of identifying and protecting their intangible assets and how to work more effectively with outside IP counsel. We will be adding modules about trade secrets shortly. It is currently accessible to all for free, and a customized version is available to in-house counsel and foreign associates. We also license a gated content feature of the platform (white labelled if desired) that is populated with custom-tailored modules created by us or by the licensee. **CLIP**

Anita Nador is a partner in Gowling WLG’s Toronto office and a member of the firm’s national Life Sciences Group. She is a lawyer and registered patent agent in Canada and the US, and a registered trademark agent in Canada. Recognized as a leader in her field by the world’s top legal and IP rankings organizations, Anita focuses her practice on IP, regulatory, and commercialization planning, primarily in the life sciences and chemical sectors. Anita pairs sophisticated IP experience with a nuanced understanding of corporate, transactional, and regulatory law – ensuring her clients’ commercial interests and IP strategies are strongly aligned.



Gowling WLG is an international law firm built on the belief that the best way to serve clients is to be in tune with their world, aligned with their opportunity, and ambitious for their success. Gowling WLG clients have access to in-depth capabilities in key global sectors and a suite of legal services. We’re well positioned to help clients achieve their commercial objectives – wherever their business takes them.