IMA vs. Minera – thoughts on trial materials.

The Street doesn't like "lawsuit stories". Inscrutable to the naked eye and resistant to casual analysis, the sentiment seems to be: wait until the dust settles. This is probably fair. Any lawsuit that makes it all the way to trial is, having defied settlement, usually "a tight race" and likely mired in conflicting versions of "what happened." There is also the "judge factor" whose only redeeming feature is that it's one notch tighter than the "jury factor."

In respect of these generalizations, the case of IMA vs. Minera Aquiline stands somewhat apart. The critical facts of the case are generally agreed to; all that remains is to see where the fact pattern falls into established law. Confusion may have arisen out of the serendipitous nature of the events which gave rise to the action, in particular, the shares of the Plaintiff have changed hands twice over the critical time period. As well, the Defendant has not always shown the best business judgment. These two considerations may explain why this case did not settle before trial.

The prize that is being fought over is a silver deposit that, unencumbered by legal issues, might be deemed by markets to be worth somewhere between $200m and $600m. The deposit is big, rich and growing. Notwithstanding serious permitting issues, such a fresh discovery in a market climate as this would see it attract no small measure of interest.

The trial finished on December 9 and much of the trial material is now available. The following is based on is a reading of the closing arguments for both sides, including the Plaintiff's reply, the pleadings, and much of the raw testimony.

Background

In early 2002, Newmont Gold acquired Normandy Mining. Subsequently, sometime in mid-2002, Newmont decided to dispose of what were Normandy's Argentinean interests; (Newmont, disposed of ex-Normandy assets elsewhere in the world as well.) An information brochure was compiled and the sales process commenced. Several parties signed the Confidentiality Agreement and undertook due diligence.

The basic facts of the case are generally not contested by either side.

a) IMA expressed an interest in the project, signed the CA and received the information brochure.

b) On the first site visit, in the early fall of 2002, Lhotka, the IMA representative handling the process, notices a map on the wall showing the sample points of a regional geochemical survey; Lhotka asks if he could get this data;

c) On a second site visit, some weeks later, Lhotka asks for and receives the data for the regional geochemical survey;

d) Soon after the second site visit, IMA decides not to bid on the project;

e) About three weeks after the second site visit, in late November 2002, Lhotka opens the regional survey and sees a striking silver/lead anomaly. Within 24 hours, a decision is made to stake this anomaly;

f) Shortly thereafter, Lhotka dispatches a geologist to the site. Within hours, the geologist finds mineralized outcropping. Samples are taken. The property is christened "Navidad."

g) Around this time, Newmont's enters into an agreement to sell its Argentinean interests; the transaction is structured as a share purchase of the local subsidiary "Minera". Minera is the corporate entity through which all work in the country flowed, both when Normandy was the controlling shareholder and, if only briefly, when Newmont was the controlling shareholder.

h) In the spring of 2003, Minera geologists, on assignment by its new shareholder, Aquiline, undertake a review of Minera's data inventory and notice a striking silver/lead anomaly. They locate the anomaly on a claims map and see that the area has been staked.

i) Preliminary exploration results from Navidad indicate a high grade "bonanza" silver/lead deposit.

j) In the fall of 2003, Aquiline sends IMA a letter inquiring how IMA came to stake Navidad and if they had used any confidential information to do so. IMA responds by, among other things, threatening a lawsuit for defamation. CEO Joe Grosso comments publicly: "Their inquiry is groundless."

k) In early 2004, Minera files suit in a British Columbia court against IMA for breach of contract, breach of implied contract and breach of confidence.

The principle players are: Paul Lhotka, an IMA consulting geologist in charge of IMA's efforts in Argentina, Keith Patterson, VP Exploration for IMA, Joe Grosso, IMA's CEO and Gerry Carlson, Chairman of IMA.

The principle objects are the "Calcatreu claims", which may be taken to mean the staked ground at the time of the sale; the BLEG A data, which is the data Lhotka took and subsequently used to find Navidad; there is also another data set, the BLEG B data, which is similar to the BLEG A data except the sample points are confined to the claims. Reference to "the BLEG data" or even just "the data" is shorthand for the BLEG A data.

Breach of contract

In order for IMA to "prevail" it must win on two counts: once on the contract and again on breach of confidence. First, the contract. The critical clause in the contract (the CA) is as follows:

> Reviewer is interested in reviewing certain confidential information in relation to exploration and mining rights at Newmont's Calacatreu Project in the Rio Negro and Chabut provinces, Argentina, which are further described on the attached Exhibit "A", for the purpose of

> evaluating a possible transaction concerning such project (the "Project").
>
> In connection with Reviewer's review of the Project, Newmont may provide to Reviewer certain financial, technical, geological and other information (the "Confidential Information") concerning the Project. Confidential Information in this Agreement will include all communications, whether written, electronically stored or delivered, or oral, of any kind, between the Participants relating to the Project, any observations made by Reviewer during site visits or yours, and any and all information, reports, analyses, studies, compilations, forecasts or other materials prepared by Reviewer relating to the Project which contains or otherwise reflects such information.
>
> …
>
> 1. **Use of Confidential Information**. The Participants agree that the Confidential Information provided by Newmont [on behalf of Minera] to Reviewer shall be used by Reviewer or Reviewer's Representatives only for the purpose of the Project and the Confidential Information will otherwise be kept confidential by Reviewer and their Representatives.

Disputes over contracts are disputes over words. The critical words in this contract are: "Project" and "relate to" or "concerns." Essentially, IMA wants these to be interpreted narrowly while Minera wants them interpreted more broadly.

IMA first argues that by "Project" it is meant the claims referenced in an appendix to the contract (Exhibit "A"). Minera counters that by "Project" it is meant "evaluation of a possible transaction" and that only this broader meaning makes sense within the context of the contract:

> 24. However, the defendants do not address Clause 1 which contains the requirement that Confidential Information will be used only for the "purpose of the Project". It is difficult to read "purpose of the Project" in this clause as meaning the geographical boundaries of the property rights. Rather, the expression must be referable to the evaluation of a possible transaction concerning Calcatreu. [Plaintiffs reply.]

Furthermore, only this broader reading would square with the agreement's "business purpose which was to permit interested parties to have access to confidential information of the vendor to allow them to evaluate a possible acquisition of Calcatreu while, at the same time, protecting the confidentiality of the vendor's proprietary information." [Plaintiff's closing.]

Was the BLEG data "related to the evaluation of a possible transaction"? Insofar as Lhotka *asked* for the data while doing due diligence for the purpose of evaluating a possible transaction (a non-contested fact), and, moreover, Lhotka assumed he was getting the data for this purpose and only this purpose (admitted to on discovery), the answer seems self-evident.

However, if the court accepts IMA's narrow reading of the word "project", IMA still must convince the court that the BLEG data was not related to, or did not concern, the claims. It does so as follows:

> 27. We will submit on the facts the BLEG A data is not "related to" or "concerning" the Project because:
>
> (i) it was not referenced in the Information Brochure
> (ii) it was not provided to any other bidders;
> (iii) it does not cover the Calcatreu Project;
> (iv) it covers an extensive area outside the area of interest;
> (v) Lhotka didn't review the data as part of his due diligence;
>
> [Defendant's closing]

As to (i), information supplemental to that in the IB was given to many parties; as to (ii), no one else asked for the BLEG A data; and as to (v), who cares. IMA's main argument, as suggested by (iii) and (iv), is that the meaning of "Confidential Information" is limited by geography. In other words, IMA argues "relate to" means "of" the claims, or "from" the claims.

Minera counters mainly by saying that the word "relate" is, by its nature, intended to convey the even weakest of connections:

> 70. In *R. v. Nowegijick*, [1983] 1 S.C.R. 29, Dickson J. (as he then was) said, in an oft-quoted passage:
>
> > The words "in respect of" are, in my opinion, words of the widest possible scope. They import such meanings as "in relation to", "with reference to" and "in connection with". The phrase "in respect of" is probably the widest of any expression intended to convey some connection between two related subject matters. [Plaintiff's closing.]

In this context, then, was the regional data "related" to the claims? Minera shows that the data was generated to expand the resource on the claims, that the data surrounded the claims and that some data points were even included within the claim boundaries. It provided expert witness testimony to the effect that a prospective buyer of the claims would be interested in knowing about the exploration potential in the vicinity of the claims. Lhotka himself, in testimony, conceded that exploration potential is a factor when considering a mining acquisition. Even more damning, Lhotka referred in an email to the data as being "part of the BLEG database of Calcatreu." It seems difficult to argue that the BLEG A data, being part of the BLEG database of Calcatreu, is *entirely* unrelated to the Calcatreu, is it not?

A Newmont witness testified that he approved the disclosure of the data because he assumed it would be covered by the contract; IMA counsel admitted its client would not have received the data had it not signed the agreement. In sum, then, it would appear that a fair reading would see that the CA was designed in general and broadly worded in particular to protect the confider (Minera) against precisely the sort thing that happened here, namely, someone coming in and using the cover of due diligence to obtain and use data for its own benefit. This seems plain and obvious.

Breach of Confidence

If IMA succeeds on the contract, it must still contend with the charge that it breached its duty of confidence to Minera, this *a la* Lac-Minerals. Interpretation of individual words has no bearing in breach actions; rather, generally speaking, if one comes to acquire confidential information in a manner that a reasonable man would feel obligated to keep the information confidential, than a duty of confidence is owed to the confider. In this way, the net is cast much wider.

The tests for an action to succeed here are mature and well established. They are as follows:

1. The data must be confidential;

2. The data must be communicated in confidence; and

3. The data must be put to unauthorized use to the detriment of the confider.

(An accessible elaboration on this topic can be found in the article "Breach of confidence in the mining industry" (although we note the section on remedies in incomplete.))

As to (1), it is common ground that the BLEG data was confidential – no one argues this. As to (3), it was obviously put to unauthorized use. The question is then: was it communicated in confidence? The classic phrasing of this test is from "***Coco vs. A N Clark (Engineers) Ltd.***":

> "...It seems to me that if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realized that upon reasonable grounds the information was being given to him in confidence, then this should suffice to impose upon him the equitable obligation of confidence. In particular, where information of commercial or industrial value is given on a business-like basis and with some avowed common object in mind, …, I would regard the recipient as carrying a heavy burden if he seeks to repel a contention that he was bound by an obligation of confidence…"

There are a raft of reasons as to why a "reasonable man" would have realized that the BLEG data was being passed to him in confidence. The two parties were there on a business-like basis with an avowed common object in mind (namely, a transaction.) The recipient was in a data room doing due diligence sifting through "a pile" of information that is readily conceded to have been communicated in confidence. We could go on and on, but suffice it to say that Lhotka is on record as conceding he assumed he was being given the data for the purposes of evaluation, i.e. a limited purpose. This "meeting of minds" is critical and should be sufficient to convince a judge the data was received in confidence.

Things are complicated by the IMA's contention that British Columbia law should not apply to an incident that took place in Argentina between two Argentinean companies. (This is not an issue with the contract as the contract specifies its own governing law.) In particular, it argues that one Argentinean statute, "Article 3", governed the transaction, and Article 3 states that the recipient must

be warned that the information is confidential. IMA was not explicitly warned of the BLEG data's confidential nature and therefore, it was not in breach.

Minera counters that in order for Article 3 to apply the two parties must be in some sort of existing relationship, such as an employee-employer relationship. It also argues that the warning need not be explicit. It furthermore argues that Article 3 is redundant as "Article 1" states clearly that "judicial persons shall be able, in respect of information lawfully under its control, to restrain its … use by third parties in a manner contrary to honest commercial practices." But before all this, Minera contends that Argentinean law should not apply at all, as IMA's obligations arose "in connection with pre-existing contractual relationship" in which case the governing law of the contract is to be applied.

IMA's conduct

It would be fair to say that IMA's conduct following the initial discovery did not help its cause. The company seemingly went out of its way to "bury the truth" about how it found Navidad. In particular, it told the public, analysts, directors, investment bankers, and security regulators in two countries that, more or less, that Navidad was found by a geologist walking a fence line. "There was no evidence of prior prospecting or sampling activity anywhere despite the area being inhabited" was a phrase oft-repeated in brochures, filings and press releases. Counsel for Minera summarizes its view:

> 25. It is submitted that IMA's position has the stench of dishonesty or, to use a phrase in Argentine law, dishonest commercial practices. This is made manifest by its conduct in 2003 in seeking to mislead the mining analysts, the investing public and regulatory agencies in describing how Navidad was found. [Plaintiff's close.]

The effect here may be twofold: a) The credibility of IMA witnesses is likely to be undermined and b) this sort behaviour speaks to IMA's state of mind, something the judge may find helpful in determining what IMA's understanding of its own obligations were.

IMA defends its disclosure (or lack thereof) by saying that a) it did not want to tip off competitors as to the means it used to discover Navidad and b) it did not want to embarrass Newmont. In a lovely parry to these "excuses", Minera counsel noted in closing that Patterson concealed the role of the BLEG data in the discovery process not only to Newmont, the public, the analysts, the various security regulators, but also to his own Board. Minutes from a directors' meeting in February '03 indicate that Patterson told the Board "High grade boulders propping up a fence post lead the geologist to make the discovery." Minera counsel reasons:

> 34. The Patterson statement to the IMA directors on February 20, 2003 puts a lie to the suggestion that IMA misled the public and the regulators in order to avoid embarrassing Newmont. Those on the "inside" at IMA were quite prepared to mislead those directors who did not know the truth. And the reason is obvious – this was regarded as a potential Voisey's Bay discovery, an exploration property of world class stature, and no potential qualms about legality or propriety should stand in the way of this bonanza. [Plaintiff's close.]

Another example of "misleading" characterizations of the discovery occurred at the 2003 AGM. But in this instance, we actually hear the truth about how the deposit was found – as a direct result of a geochem program. Problem was, of course, it wasn't IMA's geochem program. From the plaintiff's closing:

> 214. At the AGM in June 2003, Carlson misled the public by asserting that it was IMA's geochemical sampling that led to the discovery of the Navidad Project:
>
> > The focus of that initial work in Patagonia was to pick up known projects. There had been a number of juniors down in the area in the mid-90's and for a short time identified a lot of projects and then left. And so there was a lot of cherry picking to be done. **But at the same time as well as picking up these known prospects, the company did carry out some grassroots work. And one of these projects was in northern Chubut province, a regional geochem program that was targeted at gold.** And unfortunately there was no gold at all that came up in the samples. But our country manager, Paul Lhotka, based in Mendoza reviewing the data noticed a very strong bulls-eye in base metals and silver. And of course we're not really, we prided ourselves as being a pure gold company at the time and a lot of our investors were proud of that as well so we're a little leary about going after something but it was such an obvious target. And we sent our prospector in and within two hours he'd made the discovery. It's very close to the side of the main highway. So it's a grassroots discovery. It had never before been seen or sampled by another geologist. As you can see though, the high grade boulders were there for all who wanted to come and have a look.

Even after a letter was sent to IMA, in the fall of 2003, asking about how they staked Navidad, IMA did not come clean. From the Plaintiff's closing:

> 222. IMA did not admit its use of the BLEG A data by responding publicly with the truth. It would have been a simple matter for IMA to state: We used the BLEG A data to discover Navidad but our view is that the use was lawful. IMA left the investing public not knowing whether IMA had used the BLEG A data to stake Navidad. In this regard, Patterson testified:
>
> > Q You understood after Aquiline issued its letter on October 2nd that it raised a factual question; namely, did IMA use the BLEG data to make the discovery? That was clear to you; correct?
> >
> > A That's correct.
> >
> > Q All right. And IMA did not answer that question publicly, did it?

A I don't believe we did. I don't believe we were under any obligation to.

Q So you knew that investors would be out in the marketplace not knowing the answer to that factual question; correct?

A Uhm, I suppose, certainly, there were investors out there, and they would not have known the answer to that question; that's true.

Q Buying and selling shares in IMA; correct?

A People do it every day, yes.
[Patterson, Day 19, p. 8, ll. 20-36]

In aggregate, the evidence of IMA's "guilty behaviour" just builds and builds. Minera counsel reasons that:

> 225. IMA's conduct after November 2002 demonstrates its "guilty" mind and is only consistent with its knowledge that the BLEG A data was confidential data of Minera and that its intention was to conceal its use of that confidential data. Its explanations for misleading the public and failing to disclose the truth are not credible and should be rejected. [Plaintiffs' close.]

IMA's Challenge

Typically, defenses against breach of confidence charges and breach of contract charges involving confidential information involve either a) the contention that the data was already in the public domain or b) the information was "of no great help." These defenses are not open to IMA. It is conceded by all parties that the information had been maintained in confidence and was not in the public domain. Moreover, it has been established that the data in question led IMA directly to the Navidad discovery. This leaves IMA a tall order.

To summarize, in order for IMA to "win", it first must convince the court that the CA be interpreted narrowly; this involves a) convincing the court that the word "Project" be taken to read "the claims" as per Exhibit "A" and b) that the words "relate to" be taken to mean "of" or "from" as in "only 'information of/from the claims' is confidential information." In addition, apart from the semantic challenges, it must reconcile this narrow interpretation with the business purpose of the contract. Even then, insofar as the BLEG data overlapped the claims, IMA still must convince the court that the regional data was not "Confidential Information" in the most narrow of senses.

If the contract issues can be disposed of, IMA then must convince the judge that the governing law on the breach of confidence charge is that of Argentina and not that of the contract out of which its obligations arose. (IMA is defenseless should the governing law be deemed to be that of British

Columbia.) If it succeeds here, it must convince the judge that "Article 1", the article that speaks to the use of confidential information "in a manner contrary to honest commercial practices", somehow does not apply to them. Finally, it must convince the judge that IMA and Minera were in a relationship *as per* Article 3 and that an implicit warning would not suffice.

IMA must convince the judge on *all* of these things in order to prevail. And it must convince the judge on *all* of these things is through the prism of its evasive conduct following the discovery.

IMA's Defense

Sometimes a defense speaks more to the plaintiff's case than the plaintiff's case does. For example, when the person charged with rolling over the liquor store claims it's all because he listened to too much Nordic death metal in junior high, you know the poor bloke is in trouble.

One of IMA's central problems is to provide the court with an alternative context to the disclosure of the BLEG data. In other words, if the data wasn't disclosed under the CA, or under circumstances obligating the recipient to maintain a duty of confidence, then under what context *was* it disclosed? IMA's narrative has Newmont disclosing the data to IMA so as to "curry favour" with them. To this the defense responded:

> 114. There is no evidence to support the contention or a belief by IMA that Newmont caused Minera to provide the BLEG A data as a "gift" to curry favour with IMA. There is no document which could support that view and no evidence that it was even considered at any time prior to the commencement of this action. The historical relationship between the parties was not one of "gifting" or "currying favour" but one of treating data as confidential and only providing access to it under cover of confidentiality agreements. Moreover, the proposition of a multi-national currying favour with IMA, while at the same time refusing to grant a period of exclusivity, is absurd. {Plaintiff's closing.]

The central theory of the defense might be considered, in the least, tenuous. Its arguments are often no less so. This is how the Defendant began its closing:

> 3. In ***Expert Travel Financial Security (E.T.F.S) Inc. vs. BMS Harris & Dixon Insurance Brokers Ltd.,*** 2005 BCCA 5, in speaking of the facts in the Lac Minerals decision, Madame Justice Southin posed a useful question:
>
> > On the facts of that case, one can pose this question: Would Corona have communicated their geographical findings and so forth to Lac if it had known Lac would itself go out and acquire the Williams property to Corona's exclusion? The answer is patently 'no'.
> >
> > When the answer to such a question is "no", the information can be fairly be called "confidential."

> 4. In our submission, the answer to that question on the present facts is that Newmont, if asked prior to the discovery of Navidad, would not have had a concern of IMA's use of the BLEG A data. …

The question that immediately springs to mind is: *Well, then why didn't IMA counsel* ask *Newmont if they would have had such a concern?* They was plenty of opportunity to do so – two Newmont employees involved in the matter took the stand – and, as they say, it is a simple question. But this question was never asked. Why not? Given that Newmont adamantly testified that (to paraphrase) a) They don't "freely" give away data; and b) they never disclose data without a CA (or other contract) governing its usage, I think it is fair to suggest that IMA did not ask this question because it feared it would get the wrong answer. To lead your closing arguments with a lemon like this must have been dispiriting for the author.

Another example:

> 108. The defendants submit that the majority of the evidence that bears on this issue is uncontroversial. The evidence as a whole compels the conclusion that a reasonable man standing in the shoes of Mr. Lhotka would not have realized that the BLEG A data was transferred for a limited purpose. [Defendant's close]

Yet the evidence has Lhotka admitting that he assumed he was getting the data for a limited purpose. He said so on discovery and admitted as much on cross-examination. How can they then argue that a "reasonable man" would have assumed otherwise? Is Lhotka not a reasonable man?

Perhaps the most telling example of the lack of material IMA counsel had to work with was their citing of the ***BCTV vs. Hollingsworth*** case. Here, a videotape was made of a certain Mr. Hollingsworth receiving a hair transplant. The video found its way into the film archives of a communications company. Some time later, BCTV approached the communications company and asked if they had any material on hair transplants. Needless to say, Mr. Hollingsworth was shocked to see himself on the six o-clock news, so to speak. He sued for breach of confidence. The court ruled against him, as per:

> 101. … the circumstances were such that it was not reasonable to assume that they [BCTV] should have known that confidentiality was being maintained. This conclusion was based on the fact that BCTV made inquiries of the person who had custody of the tape and assured them that there were no bars to the use of the tape. [Defendant's closing.]

In other words, it was reasonable for BCTV to have assumed they could use the tape because they *asked* if they could use the tape and they *were told* they could. In stark contrast, IMA did not ask Minera if they could use the BLEG data, this even after Lhotka had expressed doubt over the propriety of its use. Indeed, that was a question that hung over the trial: *If you weren't sure if you could use it, then why didn't you just phone up Newmont and ask?* (This question was put to Lhotka who said it was management's responsibility to make the call, not his.) Instead of making enquiries, IMA did the opposite – it went out of its way to prevent knowledge of the data's usage from becoming known. The difference in respective behaviours is striking. Why would you want to draw attention to this fact?

Remedy

It is felt by many that the real fight here is over remedy. IMA argues that the most it should pay is the market value of the database, which was set at something less than cost. Minera is asking that a constructive trust (or some equivalent remedy) be imposed on the Navidad claims for Minera's benefit. Practically, this would be enforced by transferring the shares of IMA's Argentinean subsidiary into Minera's account.

A principle behind a constructive trust is that it restores the wronged party to the position that it would have been in "but for" the breach. Counsel cites *Lac* in its closing:

> 406. What ultimately underscored the court's analysis of the appropriate remedy in *Lac Minerals* was the finding of fact in the court below that, but for Lac Mineral's breach of confidence, Corona would have acquired the mining rights. La Forest J. stated (para183-184):
>
> > 183 The issue then is this. If it is established that one party, (here Lac), has been enriched by the acquisition of an asset, the Williams property, that would have, but for the actions of that party been acquired by the plaintiff, (here Corona), and if the acquisition of that asset amounts to a … breach of a duty of confidence, what remedy is available to the party deprived of the benefit? In my view the constructive trust is one available remedy, and in this case it is the only appropriate remedy.

It may be wondered, how the loss of "mere" data can effect the return of a mineral deposit, a valuable one at that. Counsel for Minera cites this passage from *Lac*:

> … More important in this case is the right of the property holder to have changes in value accrue to his account rather than to the account of the wrongdoer. … [Plaintiff's closing, para 413]

Citing the same passage in *Lac*, other considerations for awarding a constructive trust (i.e. a "proprietary measure"):

> The moral quality of the defendants' act may also be another consideration in determining whether a proprietary remedy is appropriate. Allowing the defendant to retain a specific asset when it was obtained through conscious wrongdoing may so offend a court that it would deny to the defendant the right to retain the property. [Plaintiff's closing, para 413]

Minera is also seeking monetary damages in the alternative. Its expert valued the property at somewhere between $85 and $200m IMA, ironically, valued the property at much higher levels.

These vast discrepancies in valuation are another reason, Minera argues, to apply a constructive trust. Counsel for Minera cites the views of the Appeals Court *Lac* decision:

> …there is no question but that gold properties of significance are unique and rare. There are almost insurmountable difficulties in assessing the value of such a property in the open market. The actual damage which has been sustained by Corona is virtually impossible to determine with any degree of accuracy. … [Plaintiff's closing, para 385.]

Although not cited by the counsel for Minera, the following passage from *Lac* also underscores the rationale for applying a constructive trust against Lac Minerals in lieu of a monetary award:

> Since the result of Lac's breach of confidence or breach of fiduciary duty was its unjust enrichment through the acquisition of the Williams property at Corona's expense, **it seems to me that the only sure way in which Corona can be fully compensated for the breach in this case is by the imposition of a constructive trust on Lac in favour of Corona with respect to the property.** Full compensation may or may not be achieved through an award of common law damages depending upon the accuracy of valuation techniques. … **The imposition of a constructive trust also ensures, of course, that the wrongdoer does not benefit from his wrongdoing,** an important consideration in equity which may not be achieved by a damage award. [*Lac minerals ltd. v. International corona resources ltd.*, [1989] 2 S.C.R. 57] [Emphasis added.]

IMA does not want a constructive trust awarded. A monetary award, even a really big monetary award, would be manageable for IMA, (and quite lucrative for its brokers!) But a constructive trust is the end of the party. Turn off the music, turn on the lights, send everyone home. Its arguments against such an award are threefold. 1) It argues that because Minera never owned Navidad it did not suffer a deprivation that would correspond to IMA's disgorgement of Navidad; 2) It argues that Argentinean law applies on remedy and Argentinean law does not allow for constructive trusts; 3) Lastly, it argues that a Canadian court cannot enforce an "*in rem*" order on foreign soil; that is, it cannot affect title of a property on foreign soil.

As to (1), this argument is in discord with other recent judgments, not least of all *Lac.* What Minera lost was not title to the property, but the opportunity to acquire title to the property. There was compelling evidence that Minera would have staked Navidad had IMA not staked it first. A just remedy would restore Minera to this former position. As for the second argument, we get back to the governing law question. Even if, however, the courts decide that Argentinean law is applicable, Minera argues that a constructive trust or other proprietary measure is consistent with Argentinean laws. In particular, Minera cites Section 1083 of this country's Civil Code which reads in part: "The compensation of damages shall consist of returning goods to its previous situation, …". On cross-examination, *IMA's* expert witness on Argentinean law seemed to agree with Minera counsel:

> 378. In cross examination, Bianchi agreed with the nature of compensation "in kind". His evidence clearly demonstrated the breadth and flexibility of the remedy under s. 1083 of the

Civil Code. Bianchi was given a hypothetical, the facts of which are helpful in analysing the compensation that an Argentine court could award on the facts of this case. He gave this evidence:

> Q All right. In those circumstances the court would award a monetary compensation of $10 million to the plaintiff company. Would you agree?
>
> A Okay, sir.
>
> Q And the loss of profits that are awarded to the company would put the company in the position it would have been in if it had bought the property and earned the profit. Will you agree with that?
>
> A Yes, I can agree with that, sir.
>
> Q And you would refer to that as the status quo ante?
>
> A That would be the remedy that a court could grant according with our assumption, sir.
>
> Q I want to suggest to you that if the court required by way of compensation in kind the employee to transfer the property to the company, it would have the same effect; namely, putting the company in the position it would have been in if it had purchased the property. Will you agree with that?
>
> A Yes, sir.
>
> Q And that is what you describe as the status quo ante, then?
>
> A I would say that would be -- that would be the remedy granted by the court.
>
> Q All right.
>
> A Sir, there is no -- if I may add something in this respect. There is no legal limitation, no restriction for a court on the remedy the court may grant, provided that this remedy has been asked for by the plaintiff and provided that the general principles are respected. The public policy in this respect would be that no compensation should be granted above the extent of the damage, otherwise we would have an enrichment without cause for the plaintiff. With this proviso, a court would be free to award any remedy.

[Bianchi Cross-Examination, Day 24, p. 3, ll. 21 to p. 4, l. 11]

As for enforcement, Minera argues that by transferring the shares of IMA's Argentinean subsidiary would be consistent with years of case law:

> The defendants assert that the order cannot be made because the court will have to supervise a transfer of foreign land. (Para. 68) Well established authority for 200 years says otherwise. Orders for specific performance of obligations to sell or purchase foreign land are regularly made. [Plaintiff's closing, para 98.]

Minera seems to be swinging for the fences on remedy. In the alternative to this measure, it asks the court for a monetary award at the *low* end of the range its expert provided (US $85m), as though it were daring the judge to go that route. Their point is further sharpened in the final paragraphs of its reply [paras 123 & 124]:

> There is only one Navidad. This is a dispute between two parties over a single property, in a effect a zero-sum game, and the issue for the Court is: who should have it *as between these two parties*. …
>
> It is submitted that the evidence clearly establishes, on the balance of probabilities, [but for the breach,] that Minera would have staked Navidad in advance of IMA.

Ambient case law

It may be helpful to locate this case with reference to other "similar" cases. The case of Lac Minerals v. Corona has been referred to many times, not because it's a "mining case", but rather because this judgment by Canada's Supreme Court now stands as an authority on breach of confidence in the common law world. That said, the similarities are striking. Counsel directly compares the two cases *as per* :

> 408. … the causal link between the defendant's breach and the acquisition of the Navidad property is much stronger than it was in *Lac Minerals*. In *Lac Minerals*, Corona's geologist (Bell) developed a theory that source of the zone of gold mineralization on Corona's property was volcanogenic, rather than existing in specific veins, and therefore "could be" spread over a large area with "pools" of ore throughout. The theory did not point to any specific area or property. However, the defendant relied partly on this theory and partly on public information in obtaining the Williams property, leading to the conclusion that but for the use of this confidential information, it was "not likely" the defendant would have acquired the property. In contrast, in this case, there can be no doubt that the only reason IMA acquired the Navidad Project was through its deliberate use of confidential information which led it directly to the claim. [Plaintiff's close.]

Of course, in the end, Corona was awarded a constructive trust over the Williams property and tongues wagged.

In another breach of confidence case heard by the Supreme Court of Canada, *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, put a finer point on the Lac decision (think: "Lac, Unplugged.") Here, Cadbury sued FBI Foods for using Cadbury's Clamato juice recipe to develop a competing juice drink. FBI conceded liability on the breach and the dispute turned to remedy. Cadbury wanted a permanent

injunction imposed while FBI offered to pay a "consulting fee." The trial judge sided with FBI and awarded Cadbury a monetary award equal to what FBI would have had to pay an expert to come up with its competing juice drink. In an opinion that speaks directly to IMA's offer of a licensing fee, the Supreme Court averred: "With respect to financial compensation, the Court of Appeal was correct to reject the trial judge's "consulting fee" approach in this case, since the confidential information was not for sale. Its "market value" was thus not a proper measure."

What remedy the court eventually decided on is also germane to the case "at bar":

> The respondents' "lost opportunity" was that the appellants, using these confidential production techniques, entered the marketplace with Caesar Cocktail a year earlier than would otherwise have been the case. … Juice formulation is not rocket science. A consultant skilled in the art and deploying a variety of techniques could have come up with a plausible clam-free copycat product within 12 months to bring the respondents' commercial "opportunity" to a close. … The respondents' entitlement is to no more than restoration of the full benefit of this lost but time-limited opportunity.

This would seem to reinforce the principle that an appropriate remedy is one that restores the plaintiff to its position "but for" the breach. No more, no less.

Resource disputes tend to loom large in breach of confidence case law. In Visagie vs. TVX Gold, which concerned a dispute over the Kassandra gold deposit in Greece, the court found TVX to be in breach of confidence and breach of contract (there was a CA here as well) to Visagie even though much of Visagie's information was arguably in the public domain and arguably owned by Visagie's former employer. TVX contended that the "confidential information" was in fact in the public domain, which may have been partly true. The judge reasoned that Mr. Visagie nonetheless "did have some new and novel contribution to make to the *existing* information and perspective on Kassandra and that it had *some* value" [emphasis added] and awarded Visagie its 12% carried interest back. The appeal court commented: "It is the best remedy available to restore [Visagie] to the position in which it would have been if no wrong had been committed."

Murphy Oil sued a partnership over an alleged breach of confidence relating to the Ladyfern gas deposit; it claimed that agents of the partnership landed a helicopter by their drill rig and took confidential pressure readings that showed evidence of its big new gas find. The partnership is then alleged to have used this information to outbid Murphy in subsequent land auctions. Notwithstanding that there is evidence that news of the find had already been at least partially disseminated to the public, the majority partner folded for costs. Thus, without a trial, Murphy was restored to its previous position, at least over 75% of the project. (The residual partner continues to fight.)

The cases where a breach of confidence action does not succeed are also instructive in determining "where the line is." In BCTV v. Hollingsworth, cited above, the defendant prevailed because he sought and received permission to use the data. In Summex v. Farallon, the Plaintiffs failed not because a data compilation containing largely public domain information was deemed to be not confidential, but rather because "Farallon could, on the basis of [other] publicly available information, have pursued the property on its own behalf. Further still, almost two years had elapsed from the time the initial confidential information was given .. to the time Farallon concluded its acquisition…" Two

years compares starkly with the 24 hours it took for IMA to decide to stake on the basis of anomaly in Minera's BLEG survey data.

Conclusions

The fair question to ask is not: What portion of Navidad shall Minera recover? but rather: What portion shall IMA retain? The facts are largely agreed to. The law seems clear. It will be a challenge for IMA to retain any portion of Navidad. The court will announce its decision sometime early next year.

References

The following material can be found online:

Amended Statement of claim
Plaintiff closing, part 1
Plaintiff closing, part 2
Plaintiff closing, part 3
Plaintiff's reply.

Defendant's statement of defense
Defendant's closing, part 1
Defendant's closing, part 2.
