Confidentiality agreements—part 2

A crisis of confidence in confidentiality

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Two recent Supreme Court of British Columbia decisions address the interplay of confidentiality and areas of interest clauses in mining-related agreements, and discuss the relationship between contractual confidentiality and common law confidentiality. These two decisions reach quite different conclusions and might make members of the mining industry run to review their outstanding agreements.

In *Novawest Resources Inv. v. Anglo American Exploration (Canada) Ltd. et al.,* 2006 BCSC 769, the parties, pursuant to a proposed transaction, entered into a confidentiality agreement containing a one-kilometre area of interest clause. Anglo later staked claims in the West Raglan Extension of the Cape Smith Belt in northern Quebec, three kilometres to 70 kilometres west of the area of interest. Novawest alleged the staking was based on confidential information provided to Anglo by Novawest and sought a constructive trust ordered in its favour over the staked area.

In the course of dismissing the case, the court looked at a confidentiality agreement used by Novawest on a different project. In that agreement, Novawest had explicitly reserved an open area that it intended to stake as part of the 'area of interest.' This indicated to the court that Novawest understood the necessity of including in the area of interest those areas it wished to protect. Furthermore, in the agreement at issue, Anglo specifically reserved the opportunity to stake outside the area of interest.

The trial judge found that the confidentiality agreement supplanted any common law obligation of confidentiality that Anglo owed Novawest, relating to land outside the area of interest, and hence looked only to the agreement. On such basis, it decided that there was no breach of the confidentiality agreement and Anglo was permitted to stake claims outside of the area of interest, regardless of whether in fact any confidential information was actually provided to it.

Novawest did not appeal this trial court decision.

In *Minera Aquiline Argentina SA v. IMA Exploration Inc. and Inversiones Mineras Argentinas S.A.,* 2006 BCSC 1102, the court looked at matters quite differently. Newmont Mining Corporation, through a subsidiary, Minera, was the owner of and inviting offers for an Argentinian mining property known as Calcatreu. IMA and Minera entered into a confidentiality agreement containing a two-kilometre area of interest clause. During a due diligence visit to Minera's offices, an IMA geologist noticed a map hanging on the wall at Newmont's offices that showed some stream sediment sampling results over a broad area including Chubat Province, located 40 kilometres from Calcatreu. IMA requested and was provided with this other data. IMA walked away from Calcatreu, but approximately four weeks later reviewed the other data and staked mineral claims in Chubat. Meanwhile, Aquiline acquired the shares of Minera from Newmont.

Aquiline sued IMA for breach of confidence alleging misuse of the other data by staking the Chubat claims. IMA argued that the other data was not covered by the confidentiality agreement because it did not relate to Calcatreu. The definition of "confidential information" as qualified by the words "concerning the Project" and "relating to the Project" was central to the issue

as to whether the other data was confidential information. The court held that all of the information provided by Minera to IMA in the context of its evaluation of Calcatreu, whether or not it concerned Calcatreau, was confidential information.

The trial judge held that the area of interest provision was an independent covenant or promise not to acquire any mineral claims within two kilometres of Calcatreu, and since it made no direct reference to the use of confidential information, did not apply to limit its use. IMA argued that any potential bidder on a project needs to know what is considered confidential information so as not to inadvertently breach a confidentiality agreement by carrying out its own exploration projects. The court ruled that the confidentiality agreement would not apply so long as the information used to make the decision to stake was developed independently or was available as public information.

Having decided the issue on the basis of construction of the contractual confidentiality provision, it was unnecessary for the court to consider whether common law obligations of confidentiality applied, but nonetheless the court chose also to explore this perspective and applied the *Lac Minerals Ltd. v. International Corona Resources Ltd.* three-pronged test of "confidential, communicated in confidence and misused" and found all three were met.

Now for the real kicker: the Chubat claims are part of the elephant now known as Navidad. The court held that Aquiline must be compensated by being put back in the position it would have been in but for the breach of the confidentiality agreement, and considered damages an inadequate remedy because it could not predict future metal prices, inflation, or exchange rates, and as Navidad was not fully explored, no one knew its full potential. Accordingly, it was ordered that IMA was holding its Navidad claims in constructive trust for Aquiline, the rationale being that but for IMA staking the claims, Aquiline likely would have. IMA was ordered to transfer the claims to Aquiline, subject to payment for IMA's development costs to date.

IMA has filed a Notice of Appeal and clarification is eagerly awaited.

In the meantime, while these decisions are being digested by the industry and its advisors, the importance of carefully drafting and understanding confidentiality agreements and area of interest clauses has been emphasized and likewise the value, for evidentiary purposes, in maintaining complete and accurate records of all confidential information both received and supplied. ■