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Lac Minerals Ltd. v. International Corona Resources Ltd.: Implications for the Minerals Industry In Kentucky

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INTRODUCTION

Exploratory and development work in the natural resources industry usually involves confidential information[1] and generally mining companies take measures to insure that such information is not revealed to competitors.[2] However, situations routinely arise in which a relatively small company possessing valuable geologic information lacks sufficient financial resources to act on the information.[3] In order to proceed with a project, many times a small company must disclose portions of information to attract investors.[4] This, in turn, can put smaller companies in a very vulnerable position.[5]

On August 11, 1989, the Supreme Court of Canada decided the case of *Lac Minerals Ltd. v. International Corona Resources Ltd.* (*Lac*).[6] The Court held that Lac breached an obligation of confidentiality when it acquired adjoining property based upon geologic information obtained by it during negotiations for a joint venture or mining partnership with International Corona Resources Ltd. (Corona).[7] The decision has "engendered much interest regarding the rights and obligations of parties with respect to trade secrets disclosed during negotiations for the acquisition or development of mineral properties."[8] Moreover, the

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[1] MALEY, HANDBOOK OF MINERAL LAW 83 (2d ed. 1979).

[2] *Id.*

[3] Erisman and McCarthy, *International Corona Resources Ltd. v. Lac Minerals Ltd.: Unathorized Use of Trade Secrets Acquired During Failed Negotiations*, 9 EASTERN MIN. L. INST. 1-1, 1-2 (1988).

[4] *Id.*

[5] *Id.* Erisman and McCarthy point out that often the investors will be "larger established exploration and development compan[ies] who may very well be . . . competitor[s]."

[6] [1989] 2 S.C.R. 574.

[7] *Id.* at 576. Subsequent to the outset of litigation, International Corona Resources Ltd. changed its name to Corona Corporation.

[8] Erisman and McCarthy, *supra* note 3, at 1-2.

case is of great importance for mining industry practices regarding the handling of confidential information in site visits and negotiations toward the joint development of mineral property.

This Note will review the *Lac* decision and discuss how Kentucky courts might resolve the issues of confidentiality and fiduciary duty between mining companies negotiating a prospective business relationship. Additionally, the Note will suggest a policy of business practice for negotiations and appropriate agreements regarding confidentiality of information revealed during negotiations.

I. LAC MINERALS LTD. V. INTERNATIONAL CORONA RESOURCES LTD.

A. The Facts

At the time of negotiations, Corona was a junior mining company[9] and Lac a senior mining company[10] operating a number of mines.[11] As of January, 1980, Corona held seventeen claims comprising an area of approximately 680 acres[12] in the Hemlo region of northern Ontario.[13] The Williams property consisting of eleven patented claims, laid contiguous to the west side of Corona's property.[14] Another piece of property, known as the Hughes property, surrounded the Corona property and all but the north side of the Williams property.[15]

In October of 1980, Corona hired a geologist consultant to thoroughly examine its property.[16] The results of the exploration "led Corona to believe that they had found a sizeable discovery

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[9] *Id.* at 1-3, n.6 (A junior mining company has been described as one which "often require[s] public financing to engage in special projects" and "therefore often make[s] public the results of [its] exploration efforts.").

[10] *Id.* (A senior mining company is one which "owns one or more properties in production, has extensive exploration capabilities and is listed on the major stock exchanges.").

[11] *International Corona Resources Ltd. v. Lac Minerals Ltd.*, (Corona I), 53 O.R.(2d) 737, 740 (1986).

[12] *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, 587.

[13] For a history of the development of the Hemlo area, see *Corona I*, 53 O.R.(2d) at 741-43.

[14] *Lac*, 2 S.C.R. at 587.

[15] *Id.*

[16] *Id.*

of gold distributed over a large area trending north and west"[17] into the Williams and Hughes properties.

Corona communicated a portion of these results to the Vancouver Stock Exchange in the form of news releases, and to a daily Vancouver newsletter, the *George Cross News Letter*.[18] At the same time, Corona began attempts to acquire the Williams property.[19]

Lac representatives read of the Corona results in the March 20, 1981 issue of the *George Cross News Letter*.[20] On April 6, Lac arranged a site visit with Corona with a view towards making some kind of joint arrangement.[21] The property visit took place on May 6, at which time Lac geologists were shown core samples, sections, logs with assay results added, and a map revealing staking of claims in the area.[22] Lac representatives discussed the theory of the geology with Corona's geologist, and learned that the mineralized zone continued to the west on the adjoining Williams property, and that Corona was attempting to acquire the Williams property.[23] At the conclusion of the May 6 site visit, the two parties arranged a meeting for May 8, in Toronto, at Lac's headquarters.[24]

At the May 8th meeting, Lac and Corona representatives once again discussed the geology of the various tracts of land. They also discussed the terms of a possible agreement to develop the area as a joint venture.[25] The Williams and the Hughes properties were also discussed on May 8, however, once again, neither party mentioned confidentiality.[26]

The next significant meeting between Lac and Corona occurred on June 30, 1981. At this meeting, Corona made a full

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[17] Erisman and McCarthy, *supra* note 3, at 1-4.

[18] *Lac*, 2 S.C.R. at 587 (The results were published in an attempt to attract investors).

[19] *Id.* at 587-8.

[20] *Id.* at 588.

[21] *Corona I*, 53 O.R.(2d) at 745 (Whether Lac intended to negotiate a joint venture or partnership at this point is not clear).

[22] *Lac*, 2 S.C.R. at 588.

[23] *Id.* at 589 (The trial judge "found as a fact that there were no discussions regarding confidentiality during the May 6 property visit except in connection with an unrelated matter."). *See also Corona I*, 53 O.R.(2d) at 746.

[24] *Lac*, 2 S.C.R. at 589.

[25] *Corona I*, 53 O.R.(2d) at 749.

[26] *Id.*

presentation of its results to date[27] and again made mention of its efforts to acquire the Williams property.[28] Further discussions and an exchange of joint venture ideas followed, with Lac promising to submit a proposal to Corona within three weeks.[29]

On July 3, just three days after hearing Corona's first full presentation, Lac located the owner of the Williams property and made an offer to purchase the property.[30] At that time the owner also was considering Corona's offer which had been made on June 8, 1981.[31] On July 21, Corona again contacted the owner of the Williams property and was informed of the competing offer.[32] However, the identity of the competitor was not disclosed. Although Corona prepared another offer, which it delivered on July 27,[33] the owner of the Williams property accepted Lac's offer on July 28. Lac signed a formal agreement with the Williams property owner on August 25, 1981.[34] Upon discovering that Lac had successfully defeated Corona's attempt to purchase the property, Corona commenced legal proceedings against Lac on the theories of "contract, breach of confidence, and breach of fiduciary duty."[35] Undaunted by these legal developments, Lac proceeded to develop a very profitable gold mine on the Williams property which became the largest gold mine in Canada.[36]

Corona's claims succeeded during the initial phase of litigation. The trial court found that Lac had breached a duty of confidence to Corona by misusing the confidential information supplied by Corona under circumstances which imposed an obligation of confidence.[37] Additionally, the trial court found Lac in breach of fiduciary duty, holding that Lac and Corona owed

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[27] *Id.* at 753 (The results presented included a detailed drill plan, "'sections, general geology, longitudinal presentation location potential, etc.'. . . A copy of all of the material was left with Lac at the conclusion of the meeting.").

[28] *Lac*, 2 S.C.R. at 592.

[29] *Id.* According to a Corona representative, "no one from Lac ever told him that they would not acquire the Williams property and Lac was never told that the information given to it was private privileged, or confidential."

[30] *Id.*

[31] *Id.* (Corona's oral offer of June 8 was followed by a written offer).

[32] *Id.*

[33] *Id.* at 592-93 (Corona was apprised of Lac's competing bid on July 23.).

[34] *Lac*, 2 S.C.R. at 593.

[35] *Id.*

[36] *See Hemlo: A North American Gold Success Story*, ENGIN. & MINING J. 10 (June 1987).

[37] *Corona I*, 53 O.R.(2d) at 775-76.

each other a duty not to act to the detriment of the other during their negotiations toward a joint venture.[38] The trial court then ordered Lac to transfer the property to Corona, subject to the payment of development costs by Corona.[39] On appeal, the Ontario Court of Appeals upheld the lower court's judgment, relying primarily on fiduciary duty as the source of liability.[40]

B. The Holding of the Supreme Court of Canada

The Canadian Supreme Court affirmed the holding but on somewhat different grounds from the lower courts. The Court unanimously agreed to impose liability on the grounds of breach of confidence.[41] However a majority of the Court held that a constructive trust in favor of Corona was the proper remedy for the breach.[42] A different majority refused to find a breach of fiduciary duty by Lac.[43] A detailed look at each of these elements of the Canadian Supreme Court's holding follows.

1. *Breach of Confidence*

In finding that Lac breached a duty of confidence to Corona, the Court listed three elements which must be established to impose liability: "[1] That the information conveyed was confidential; [2] that it was communicated in confidence; and, [3] that it was misused by the party to whom it was communicated."[44]

The Court had little difficulty in applying the first two elements to Lac and Corona. Although the record showed that all of the information that Lac relied on was not confidential,[45]

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[38] *Id.* at 777.

[39] *Id.* at 789.

[40] *International Corona Resources Ltd. v. Minerals Ltd.*, 62 O.R.(2d) 1, 59 (1988) ("In our view, once the trial judge had found that a fiduciary relationship existed between the parties and that Lac breached its fiduciary obligation by purchasing the Williams property, it was open for him to hold that Lac was a constructive trustee for Corona for the Williams property").

[41] *See infra* text accompanying notes 44-49.

[42] *See infra* text accompanying notes 60-65.

[43] *See infra* text accompanying notes 50-59.

[44] *Lac*, 2 S.C.R. at 576.

[45] *See supra* text accompanying note 18. *See also Corona I*, 53 O.R.(2d) at 751 (Throughout the negotiations Corona openly continued to seek alternative financing. Corona released results on May 27 and June 2 to the Vancouver Stock Exchange which were ultimately published in the *George Cross News Letter*.).

the site visit and discussions with Corona provided a "spring board" that led to Lac's acquisition of the Williams property.[46] The Court noted that "Corona had communicated private, unpublished information . . . under circumstances giving rise to an obligation of confidence."[47]

Speaking to the third element, the Court held that Lac acted to Corona's detriment when it used the confidential information to acquire the Williams property.[48] As a result of the negotiations, "Lac was uniquely disabled from pursuing property in the area for a period of time. . . ."[49]

2. *Breach of Fiduciary Duty*

While the Court rendered a unanimous decision regarding breach of confidence, the issue of breach of fiduciary duty divided the justices.[50] Justice Sopinka, for the majority, took a restrictive view of fiduciary obligation, describing it "a blunt tool of equity," rarely if ever needed in arm's length negotiations.[51] In describing relationships imposing fiduciary obligations, Sopinka noted three general characteristics:

1) The fiduciary has scope for the exercise of some discretion or power;

2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests; and,

3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.[52]

The majority then held that the indispensable feature of vulnerability or dependency of the beneficiary on the fiduciary

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[46] *Lac*, 2 S.C.R. at 576.

[47] *Id.* (The Court seemed to be impressed by the fact that the two companies were diligently working toward an agreement).

[48] *Id.* at 577 (The Court noted that Corona would have acquired the Williams property but for Lac's misuse of confidential information).

[49] *Id.* The Court noted Lac could have negotiated a relationship with Corona regarding disclosure of confidential information or it could have pursued property in the area based on publicly available knowledge. *Id.*

[50] Justices Sopinka, McIntyre, and Lamer found no fiduciary duty existed between the two parties. On the other hand, Justices La Forest and Wilson found, for different reasons, that a fiduciary duty did exist. *See Lac*, 2 S.C.R. at 578, 580.

[51] *Id.* at 595 (Sopinka, J. dissenting in part).

[52] *Id.* at 599 (presence of all elements will not invariably identify the existence of a fiduciary relationship).

did not exist between Lac and Corona.[53] Sopinka stated that to the extent Corona was vulnerable to Lac, "this dependency was gratuitously incurred."[54]

In contrast, the minority, made up of Justices La Forest and Wilson, concluded that vulnerability should not be the touchstone for the imposition of a fiduciary relationship.[55] One of the more interesting aspects of the minority's opinion was its emphasis on industry practice. While experts in the case failed to give evidence of the existence of fiduciary duties, they did give evidence of an industry practice not to act to the other's detriment during serious negotiations.[56] In the minority's view, the industry practice allowed Corona to rely on Lac to observe the implied duties.[57]

In response to the majority's fear that introducing fiduciary obligations to the commercial law setting would "result in ad hoc morality determining the rules of commercial conduct,"[58] La Forest and Wilson argued that fiduciary obligations in commercial law settings did not provide uncertainty to the rules of commercial conduct.[59]

3. *The Remedy*

After holding Lac liable for breach of confidence the Court turned to the issue of an appropriate remedy. Justice La Forest, writing for the majority, determined that under the circumstances, a constructive trust would most fully compensate Corona.[60]

The justices recognized some disagreement among themselves as to circumstances under which a constructive trust should be imposed.[61] However, the Court reached a consensus in applying

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[53] *Id.* at 601. Sopinka opined that the trial court and the Court of Appeals erred by not giving enough weight to the "essential ingredient of dependency or vulnerability" and too much weight to factors such as the fact that Lac sought out Corona, that Corona had divulged confidential information to Lac, that the parties were negotiating towards a common objective, and that industry practice supported the existence of a fiduciary relationship. *Id.*

[54] *Id.* at 607 (intimating that Corona was remiss for not having protected itself with a confidentiality agreement before showing its information to Lac officials).

[55] *See Lac*, 2 S.C.R. at 578.

[56] *Id.* (describing the practice as "neither vague nor uncertain").

[57] *Id.*

[58] *Id.* at 579.

[59] *Id.*

[60] *See Lac*, 2 S.C.R. at 579.

[61] *Id.*

a two step analysis. The first step involved determining whether a claim for unjust enrichment was established.[62] Where such a claim was established, the Court next evaluated whether in the circumstances a constructive trust was the appropriate remedy to redress that unjust enrichment.[63] The Court emphasized that no finding of a special relationship between the parties is a prerequisite to the imposition of a constructive trust. In addition, a pre-existing property right need not necessarily exist before a constructive trust is ordered.[64]

Several factors influenced the Canadian Supreme Court to order a constructive trust in favor of Corona. First, the Court noted the uniqueness of the Williams property. Second, it found that but for Lac's breach of confidence Corona would have acquired the property. Finally, the virtual impossibility of valuing the Williams property militated in favor of the constructive trust.[65]

II. HOW WOULD KENTUCKY'S COURTS APPROACH A *LAC* SITUATION?

A. Breach of Confidence

The most striking feature of the *Lac* litigation is the fact that the negotiations between Lac and Corona never culminated in a recognizable contractual relationship.[66] Because of this, details of meetings, discussions, and correspondence between them took on added evidentiary value. The creation of a contractual relationship is a pivotal point upon which Kentucky courts have imposed a duty of confidentiality.[67]

In *O'Bryan v. Bickett*,[68] Kentucky's highest Court stated that "a partnership agreement or joint adventure agreement, to deal

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[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *Id.* at 580.

[66] Lac Minerals Ltd. v. International Corona Resources Ltd., [1989] 2 S.C.R. 574, 575 (*Lac*).

[67] O'Bryan v. Bickett, 419 S.W.2d 726 (Ky. 1967) (action to require purchaser of timberland to convey one-half interest in land because purchase violated duty of confidence).

[68] 419 S.W.2d 726 (Ky. 1967).

in land for profit, creates a confidential relationship. . . ."[69] In arriving at this conclusion, the Court placed great reliance on the earlier cases of *Stewart v. Stovall*,[70] and *Appleby v. Buck*.[71] From this line of cases it appears that once two parties enter into an agreement, Kentucky courts have no difficulty imposing a duty of confidentiality. However, in a situation where no agreement was reached, such as in *Lac*, Kentucky courts would be forced to look to the nature of the relationship.

The nature of a partnership relationship was evaluated in *Stephens v. Stephens*.[72] There the court held that the relationship of partners imposes an obligation of loyalty, integrity, and utmost good faith and fairness with regard to partnership affairs.[73] Furthermore, the court held that these obligations begin with "*preliminary* negotiations."[74] The *Stephens* partnership was created when two cousins joined together for the purpose of acquiring and developing oil and gas leases. Although there was no agreement in *Stephens*, the court held that the two parties understood that appellant Stephens should procure the leases and contracts for the sale of the production, and that appellee Stephens would furnish the operating equipment.[75] Both parties were to share in the profits and losses equally.[76]

Before drilling actually commenced, however, appellee Stephens engaged in a contract with his brother in an effort to avoid certain portions of his agreement with the appellant. The court held that the appellee's maneuvers constituted a breach of his obligation to act in the best interest of the partnership or joint venture.[77] The court concluded, "[n]o undue advantage of

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[69] *Id.* at 728. The word "agreement" will be used to refer to either a partnership or joint venture agreement unless otherwise noted. Kentucky law treats the two similarly. *See* Drummy v. Stern, 269 S.W.2d 198 (Ky. 1954).

[70] 230 S.W. 929 (Ky. 1921) (involving a partnership for the purchase and operation of a farm).

[71] 351 S.W.2d 494 (Ky. 1961) (action for enforcement of an agreement to obtain certain oil and gas leases).

[72] 183 S.W.2d 822 (Ky. 1944) (oil and gas lease case).

[73] *Stephens*, 183 S.W.2d at 824; *see also* Stephens v. Allen, 237 S.W.2d 72, 74 (Ky. 1951). A mining partnership has been defined as "an association of joint owners of mineral property in which, by express stipulation or by implication . . . they unite and agree to develop the premises or operate the lease in order to extract the minerals."

[74] *Stephens*, 183 S.W.2d at 824 (emphasis added).

[75] *See id.* at 823 (D.C. Stephens, appellee, had bought the equipment, but title to it was in his brother, Jerry. The understanding provided that the appellee should not receive any compensation for the use of the equipment.).

[76] *Id.*

[77] *See Id.* at 824.

one [partner] over another by misrepresentation or concealment will receive the approval of the law."[78]

Applying Kentucky law in the more recent case of *Amadio v. Ingle*,[79] the Sixth Circuit Court of Appeals considered the duties owed parties in a proposed joint venture.[80] The court found that a proposed joint venture imposes upon the parties thereto "the obligation of loyalty to the joint concern and of the utmost good faith, fairness, and honesty in their dealings with each other. . . ."[81] In *Amadio*, the appellant failed to make a material disclosure to the appellee, Ingle, and sought to take advantage of knowledge he was concealing from his proposed partner.[82] Just as the Kentucky court had in *Stephens*, the Sixth Circuit Court of Appeals required negotiating parties to deal with each other in a fair and honest manner.

Although neither the *Stephens* nor the *Amadio* courts described the duties of negotiating parties to include confidentiality, there can be little doubt that "loyalty, integrity, good faith, and fairness"[83] embody the same concerns as a duty of confidence. Given courts' willingness under Kentucky law to impose a duty of confidentiality on parties to an agreement, it appears that they would probably extend this duty to negotiating parties. However, there are difficulties inherent in predicting what a Kentucky court might do in a *Lac* situation, primarily because no Kentucky court has ever specifically defined "confidentiality" or "breach of confidence."[84] Furthermore, Kentucky has yet to recognize breach of confidence as an independent cause of action. Nevertheless, in a *Lac* situation, it is possible that Kentucky

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[78] *Id.*

[79] 216 F.2d 22 (6th Cir. 1954).

[80] Joint venture in Kentucky has been described as "an informal association of two or more persons, partaking of the nature of a partnership, usually, but not always, limited to a single transaction. . ." Eubank v. Richardson, 353 S.W.2d 367, 369 (Ky. 1962).

[81] *Amadio*, 216 F.2d at 23.

[82] *Id.* (case involving a proposed oil and gas agreement).

[83] *Stephens*, 183 S.W.2d 822.

[84] While Kentucky courts have not defined "confidentiality" or "breach of confidence," they have described "confidential relation." In Security Trust Co. v. Wilson, 210 S.W.2d 336, 338 (Ky. 1948), the court described "confidential relation" as existing "where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence."

courts would recognize a cause of action based upon breach of confidence on the part of one of the negotiating parties.

B. *Breach of Fiduciary Duty*

While Kentucky courts would most likely find a breach of confidence in a *Lac* situation, it is less clear that they would find a fiduciary relationship to exist between parties whose relationship is based solely upon negotiations toward a partnership or joint venture. Kentucky has recognized that "[t[he relationship between joint venturers, like that existing between partners, is fiduciary in character. . . ."[85] Additionally, it has been stated that a fiduciary relationship exists when a party is "under a duty to act for or give advice for the benefit of another upon matters within the scope of the relation."[86] Thus, under Kentucky law once parties to a partnership or joint venture have entered into an agreement, a fiduciary relationship results.[87] In the foregoing Kentucky cases, however, the parties had entered into contractual relations and were not merely negotiating toward a more definite relationship as were the parties in *Lac*.[88]

In Henkin, Inc. v. Berea Bank & Trust Co.,[89] Kentucky's Court of Appeals explored many familiar forms of fiduciary relationships including attorney and client, trustee and beneficiary, physician and patient, business partners, promoters and a corporation, and employer and employee.[90] It appears that the *Lac* situation, one in which two parties are negotiating towards a more definite relationship, does not seem to fit within this set of relationships. However, the *Henkin* court noted, "[t]he [fiduciary] relationship is not confined . . . to these and similar situations, for the circumstances which may create a fiduciary relationship are so varied that it would be unwise to attempt the formulation of any comprehensive definition that could be uniformly applied in every case."[91] Rather than applying an exclusive definition in Kentucky to determine the existence of a

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[85] Jones v. Nickell, 179 S.W.2d 195, 197 (Ky. 1944).
[86] Lappas v. Barker, 375 S.W. 2d 248, 251 (Ky. 1963).
[87] *See id.* This is especially true for joint purchases of property.
[88] *See supra* note 66 and accompanying text.
[89] 566 S.W.2d 420 (Ky. Ct. App. 1978).
[90] *Id.* at 423.
[91] *Id.*

fiduciary relationship in a particular case, courts must examine all the relevant facts.[92]

In *Henkin*, the appellant owned and operated a radio broadcasting station. As part of the purchase price, Henkin gave a note for $160,000.00, payable in installments to the grantor. The grantor offered to accept a discount on the note if Henkin would pay the note in full. Henkin then applied to the appellee bank for a loan with which he proposed to pay off the obligation.[93] "In connection with the loan application, Henkin revealed to the [officers of the] bank the opportunity he had to obtain a substantial discount from the face value of the note."[94] The bank subsequently turned down Henkin's application and purchased the Henkin note from the grantor, but failed to reveal to the grantor that Henkin was attempting to negotiate a loan with the bank to accomplish the same purpose.[95]

In characterizing the relationship between Henkin and the bank as fiduciary in nature, Kentucky's Court of Appeals stated that the information given by Henkin to the bank was furnished in confidence in order to allow the members of the committee to determine whether the requested loan should be granted.[96] The court also found that "the defendant, *impliedly at least*, understood the terms upon which the information was given and voluntarily undertook to comply with those terms."[97] After the court found an implied confidential relationship between the bank and Henkin, it refused to allow the bank the benefit of its sharp dealing. In so ruling, the court attempted to uphold "the public confidence in such institutions."[98]

In comparing *Henkin* to *Lac*, one can quickly define the similarities. Both cases involve parties negotiating for an agreement. In both instances, one party confided information in the other on the assumption that the party so confided in would not use the information to the provider's detriment. At the same time, however, some very real differences exist. First, the stature of the parties involved differs. In *Lac*, there was no element of dependency as both parties were mining companies who were

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[92] *See id.*

[93] *Henkin*, 566 S.W.2d at 422.

[94] *Id.* (Henkin was, then and in the past, a customer of the bank).

[95] *Id.*

[96] *Id.* at 423.

[97] *Id.* (emphasis added).

[98] *Id.* at 424.

well aware of industry practices.[99] In *Henkin*, however, as between the established lending institution and Henkin there was clearly an inequity in the stature of the parties. Further, the Henkin case was ultimately decided on the theory of malicious interference with known contractual rights of another.[100] The court noted that they "doubt[ed] that an actual contract existed between Henkin and [the grantor] for the sale of the note at a discount."[101] Nonetheless, the court determined that the "purchase of the note by the bank interfered with a *prospective* advantage of Henkin."[102]

The trend in Kentucky case law remains unclear with regard to the outer limits in which a fiduciary duty would be imposed upon negotiating parties. On one hand, a specific case cannot be identified in which a Kentucky court has imposed a fiduciary duty on two parties negotiating toward a partnership or joint venture. On the other hand, as the *Henkin* court stated, "[t]he fact that no case has been found in which relief has been granted under similar circumstances is not a controlling reason for refusing it; otherwise, the court would often find itself powerless to grant adequate relief, solely because the precise question had never arisen."[103]

III. CONFIDENTIALITY AGREEMENTS AS A MEANS OF PROTECTION IN KENTUCKY

Even after reviewing Kentucky law pertaining to breach of confidence [104] and breach of fiduciary duty,[105] the outcome of a *Lac* case in Kentucky is uncertain. As indicated in *Lac*, however, Corona could have protected itself from such breaches by executing a confidentiality agreement with Lac.[106] Had such an agreement been undertaken prior to negotiation, Corona and Lac could have avoided the expense and uncertainty of subsequent litigation.

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[99] The lack of the element of dependency was the key to the majority's opinion in *Lac*. *See supra* notes 52-54 and accompanying text.

[100] *See Henkin*, 566 S.W.2d at 425.

[101] *Id.*

[102] *Id.* (emphasis added).

[103] *Id.* at 423.

[104] *See supra* notes 66-84 and accompanying text.

[105] *See supra* notes 85-103 and accompanying text.

[106] *See* Lac Minerals Ltd. v. International Corona Resources Ltd. [1989] 2 S.C.R. 574, 608 (*Lac*).

In general, a contract which purports to limit, in any way, the right of parties to work or transact business, whether as to the character of the work or business, or the manner in which it shall be done, is a contract in restraint of trade.[107] For the most part, such contracts are "regarded with disfavor by the courts and will be strictly construed so as to limit the restrictions imposed."[108] To a certain extent, confidentiality agreements could be regarded as contracts in restraint of trade.

While contracts in unreasonable restraint of trade have been declared illegal and void in Kentucky,[109] to say that all contracts in restraint of trade are illegal and void would be a misstatement. In the case of *Vaughan v. General Outdoor Advertising*,[110] Kentucky's highest court stated "restrictive covenants in partial restraint of trade are enforceable if they are not unreasonable. . . ."[111]

Thus, it is clear that Kentucky courts do acknowledge the beneficial use of restrictive covenants in partial restraint of trade. The test of reasonableness as stated in *Johnson v. Stumbo*,[112] is "whether the restraint considering the particular situation and circumstances, is such only as to afford a fair protection to the legitimate interests of the party in favor of whom it is given and not so extensive as to interfere with the interests of the public."[113]

In the recent case of *Central Adjustment Bureau, Inc. v. Ingram Associates, Inc.*,[114] the Court of Appeals of Kentucky upheld a covenant not to compete signed by an employee after the date of his employment.[115] In *Central Adjustment*, the appellant, Central Adjustment Bureau, Inc. (Central Adjustment), a national company providing collection services, sought to enforce covenants not to compete signed by several of its employees. The covenants provided that during the term of employment, and for a period of two years thereafter, employees would not

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[107] *See generally* 17 C.J.S. *Contracts* § 238 (1963).

[108] *Id.*

[109] *See, e.g.*, Jackson v. Sullivan, 124 S.W.2d 1019, 1020 (Ky. 1939) (holding contracts in unreasonable restraint of trade or tending to destroy or restrict competition are void as against public policy).

[110] 352 S.W.2d 562 (Ky. 1961) (restrictive covenant in lease).

[111] *Id.* at 564.

[112] 126 S.W.2d 165 (Ky. 1938).

[113] *Id.* at 169.

[114] 662 S.W.2d 681 (Ky. Ct. App. 1981).

[115] *Id.* at 685.

compete with Central Adjustment either directly or indirectly.[116] Among the specific clauses of the agreements was one restricting an employee from "divulging or making use of information about [Central Adjustment]'s business which he has acquired."[117] This particular section of the agreement was in the nature of a confidentiality agreement.

In upholding the use of the covenant not to compete, the court noted the highly specialized and competitive nature of Central Adjustment's business and its interest in preventing employees from pirating secret information.[118] Indeed, the court recognized that the use of such covenants was one of the few protections available to Central Adjustment, and held that the covenant in question constituted a reasonable restriction of trade "affording [Central Adjustment] fair protection for its legitimate business interests."[119]

Synthesizing Kentucky law with regard to covenants in partial restraint of trade, it appears that such contracts will be upheld, provided they are limited in scope and duration, and do not unduly interfere with the interests of the public. For a company attempting to protect valuable information, such as is often involved in the mineral industry, a confidentiality agreement could prove invaluable.

Several guidelines should be followed in order to achieve optimum protection through the use of such agreements. First, the agreement should be entered into at the time negotiations commence. Second, the agreement should specifically and clearly identify the subject matter to be kept confidential.[120] Third, the agreement should expressly state that the information conveyed constitutes confidential information.[121] Fourth, the agreement should obligate the recipient of the information not to disclose the information or use it to the detriment of the party making the disclosure.[122] Fifth, a time limit should be placed on the obligation of confidentiality.[123]

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[116] *Id.* at 683.

[117] *Id.*

[118] *Id.* at 686.

[119] *Id.*

[120] *See* MacDonald, "Acquisition and Control of Confidential Information", *Oil and Gas Agreements* 1-1 (Rocky Mtn. Min. L. Fdn., 1983) (MacDonald suggests that the subject matter be specifically defined, not simply a definition such as "geologic information.").

[121] *Id.*

[122] *See id.*

[123] As MacDonald states, it is not always practicable to keep something secret

Although the use of confidentiality agreements can prove beneficial, such use is not free of all problems. As one commentator has noted, one problem is the potential "chilling effect they might have on the free flow of information in the natural resource industry."[124] For example, smaller companies might hesitate to require a confidentiality agreement before disclosing information regarding a valuable discovery for fear of alienating potential investors.[125] While this may be a valid concern, it appears that a confidentiality agreement may simply place in writing the rights and obligations which courts will impose on negotiating parties anyway. For this reason, it seems that mining companies embarking on negotiations regarding confidential information would be well-advised to enter into a confidentiality agreement before disclosing confidential information.

CONCLUSION

Lac Minerals Ltd. v. International Corona Resources Ltd.[126] has generated great interest among lawyers and non-lawyers alike in the natural resources industry. "The interdependence and participation of various unrelated parties from many specialized disciplines required to explore and develop mineral properties often necessitates the disclosure of valuable information to a relatively large number of people."[127] As a result, breaches of confidence, conflicts of interest and other ethical conflicts may arise regarding the use of confidential information.[128]

In Kentucky, a *Lac* situation would be a case of first impression and the outcome of such a case is now uncertain. To date, Kentucky has not recognized breach of confidence as an independent cause of action[129] and the issue of fiduciary relations between negotiating parties is unclear.[130] With this in mind, natural resource companies would be well-advised to enter into a confidentiality agreement before entering into negotiations for

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[123] As MacDonald states, it is not always practicable to keep something secret forever. *See id.* Furthermore, Kentucky courts would be reluctant to uphold an agreement unrestricted in duration. *See supra* note 113 and accompanying text.

[124] Erisman and McCarthy, *supra* note 3, at 1-39.

[125] *Id.*

[126] [1989] 2 S.C.R. 574.

[127] Erisman and McCarthy, *supra* note 3, at 1-25.

[128] *Id.*

[129] *See supra* notes 66-84 and accompanying text.

[130] *See supra* notes 85-104 and accompanying text.

the joint development of a mineral property, especially where a company knows the successful negotiation of a partnership or joint venture agreement will require the disclosure of confidential information.

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