

January 2, 2018

Confidentiality Agreements and Brokerage Opportunities in the Context of the Sale of Oil and Gas Properties

By: Nigel Bankes

Case Commented On: *Beaumont Resources Ltd. v Cardinal Energy Ltd.*, [2017 ABCA 416 \(CanLII\)](#), aff'g [unreported reasons for judgment](#) of Justice Anderson, September 26, 2016, aff'g [unreported reasons for judgment](#) of Master Farrington, January 22, 2016

In 2012 Beaumont Resources made some preliminary inquiries of Felcom Resources about a possible acquisition of some oil and gas properties. In the course of those inquiries Beaumont and Felcom entered into a confidentiality agreement (the Felcom CA) with respect to information provided by Felcom to Beaumont. The agreement included the following terms:

2(a) The recipient agrees that the confidential information will be used solely for the purpose of evaluating and facilitating the negotiation of the potential transaction between the recipient and the disclosing party and not in any manner detrimental to the disclosing party, its representatives or its joint venture partners.

2(b) It is understood that neither this agreement nor the disclosure of the confidential information to you shall be construed as granting to you, or any of your representatives, any licence or right in respect of any part of the confidential information.

3(a) The recipient agrees that the confidential information will be kept confidential by the recipient and will not be disclosed by the recipient to any other person or other entity without the prior written consent of the disclosing party except that;

- (i) any such information may be disclosed to the recipient's representatives or any bank or any professional consultant retained by such bank that is financing the recipient's participation in the potential transaction and will need to know such information for the purpose of facilitating the transaction, it being understood that such representatives shall be informed by the recipient of the confidential nature of such information and shall be directed the recipient to treat such information confidentially to the same extent as if they were parties to this agreement.

3(b) The recipient will not make or permit to be made copies of or otherwise reproduced any of the confidential information in any manner unless otherwise agreed to in writing by the disclosing party.

Beaumont in turn approached Cardinal Energy Limited indicating that it was interested either in putting together a deal to purchase the Felcom assets or putting itself in a position in which it could earn a brokerage fee by interesting another party in purchasing the Felcom assets. Beaumont and Cardinal also entered into a confidentiality agreement (the Beaumont CA) on or about October 1, 2012. This agreement included a liability and indemnity clause pursuant to which Cardinal agreed to indemnify Beaumont for any losses it might sustain or incur as a result of a breach. It also contained a clause pursuant to which Cardinal undertook not to

.... initiate or arrange, directly or indirectly, or maintain contact regarding Felcom business operations, prospects or finances except as contemplated herein and for those contacts made in the ordinary course of business with any officer, director, employee, consultant, or any other representative of Felcom or with any customer, supplier, sales representative, or competitor of Felcom except with the express prior written permission of Beaumont to Felcom. Any such permission granted by Beaumont and/or Felcom is revocable at any time.

The agreement had a one year term. Once the agreement was signed, Beaumont forwarded Cardinal a short package of information consisting of a powerpoint prepared by Felcom and production summaries. There was little interaction thereafter between Beaumont and Cardinal but there was some interaction between Cardinal and Felcom because by about September 3, 2013 these parties had entered into their own confidentiality agreement. Ongoing discussions after that led Cardinal to buy an asset or assets of Felcom by an agreement signed January 22, 2014. It is not clear from the record who initiated these discussions.

Beaumont commenced this action against Cardinal alleging breach of the agreement seeking a brokerage fee in the amount of \$1.3 million calculated on the basis of 6% of the value of the transaction between Felcom and Cardinal; or, in the alternative, damages in that amount on the basis that Cardinal's breach denied it the opportunity to earn a brokerage fee. This was said to be the standard brokerage fee in oil and gas transactions although Master Farrington notes that there was no evidence in the record that this was the standard fee and who would be responsible for paying such a fee. Cardinal applied for summary dismissal.

Master Farrington granted Cardinal's application on the basis that he was in a position to adjudicate the issue between the parties based on the existing record. The Beaumont CA was a confidentiality agreement and not a brokerage agreement. Even if Cardinal were in breach of the agreement there could be no reasonable expectation that Beaumont would be in a position to earn a brokerage fee since the Felcom CA only permitted Beaumont to use the information for the purpose of evaluating and facilitating the negotiation of a potential transaction between these parties. The banker exception in that agreement gave it the right to share information with its bankers in attempting to raise financing for a transaction. It did not allow Beaumont to share information to generate brokerage opportunities and neither did Beaumont bargain for the right to try and generate a broker fee. All of this meant that it was not likely that Beaumont could create a brokerage opportunity; and therefore it could not show that any breach of the Beaumont confidentiality agreement by Cardinal had caused Beaumont damage.

Justice Anderson dismissed the appeal. Even assuming that Cardinal was in breach she agreed with Master Farrington that the possibility of Beaumont negotiating a brokerage fee was minimal. In assessing that chance the Master was entitled to have regard to the Felcom CA since it was relevant to assessing Beaumont’s chances of negotiating a fee. Speculation that better evidence might emerge in the course of questioning and exchange of documents was insufficient.

A further appeal to the Court of Appeal was equally unsuccessful. In a short note the Court (Justices Berger, Martin and McDonald) concluded that “We are in substantial agreement with the thrust and content of the reasons for judgment of both the Master and the Queen’s Bench judge sitting on appeal. We are not persuaded that the proffered grounds of appeal to this Court alleging reversal of the burden of proof, misapprehension of the evidence, or adoption of mistaken legal principles, are made out.”

With thanks to Robert J Hawkes QC, of Jensen Shawa Solomon Duguid Hawkes LLP, counsel to Beaumont Resources Ltd for providing me with the transcripts for the two unreported reasons for judgment and also for advising me that the vendor company was Felcom. The transcript of Master Farrington’s reasons refers throughout to “Falcon”; I have amended all of those references to refer to Felcom.

This post may be cited as: Nigel Bankes “Confidentiality Agreements and Brokerage Opportunities in the Context of the Sale of Oil and Gas Properties” (2 January, 2018), online: ABlawg, http://ablawg.ca/wp-content/uploads/2018/01/Blog_NB_Confidentiality_Agreements.pdf

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