Action No.: 1501-03776 E-File No.: CVQ16BEAUMONT Appeal No.:

IN THE COURT OF QUEEN'S BENCH OF ALBERTA JUDICIAL CENTRE OF CALGARY

BETWEEN:

BEAUMONT RESOURCES LTD.

Plaintiff

and

CARDINAL ENERGY LTD.

Defendant

PROCEEDINGS

Calgary, Alberta January 22, 2016

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fee was lost as a result of what it claims was a breach of contract by Cardinal. Cardinal says that it never agreed to pay such a fee and that it is not responsible for such a fee and that the action ought to be dismissed.

1 2

Beaumont made some initial inquiries with Falcon Resources Corporation, which I will refer to as Falcon, regarding a possible acquisition from Falcon. In that regard, Falcon and Beaumont entered into a confidentiality agreement dated June 27, 2012. The agreement included definition of what constituted confidential information. It appeared that the material forwarded by Falcon to Beaumont fit within the definition. The Falcon/Beaumont confidentiality agreement was executed. It contained the following terms, among others, and bear with me as I go through some of these: (as read)

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

1 party. 2 3 Beaumont then approached the defendant, Cardinal. It indicated that it hoped to either put 4 together a transaction to purchase the assets of Falcon or, alternatively, place itself in a 5 position to claim a broker fee as a result of another entity purchasing Falcon or its assets. 6 On or about October 1, 2012, Beaumont entered into a confidentiality agreement with 7 Cardinal. It contained, among others, the following terms, and again please bear with me: 8 (as read) 9 10 4 Without limitation and in addition to any rights of Beaumont 11 against the recipient arising by reason of any breach thereof, the 12 recipient shall: 13 14 (a) be liable to Beaumont for all losses, costs, damages, and 15 expenses whatsoever which Beaumont may suffer, sustain, pay, or 16 incur and in addition; 17 18 (b) indemnify Beaumont against all actions, proceedings, claims, 19 demands, losses, costs, damages, and expenses whatsoever which 20 may be brought against or suffered by Beaumont or which it may 21 sustain, pay or incur. 22 23 And then the agreement has a numbering error because it goes on to five while it's still 24 within the paragraph four and it says: (as read) 25 26 5 Resulting from a breach of this agreement or the unauthorized 27 use or disclosure by the recipient or any of its representatives of 28 all or any part of the confidential information. 29 30 6 The restrictions set forth in paragraph 2 shall not apply to any 31 part of the confidential information which the recipient can 32 establish was: 33 34 (a) at the time of the disclosure or thereafter generally available to 35 the public other than as a result of disclosure by the recipient or 36 its representative or; 37 38 (b) at the time of the disclosure already in its possession on a 39 lawful basis or; 40 41 (c) subject to disclosure required by law, rule or regulation

1 provided that Beaumont has given ten days written notice prior to 2 such disclosure or; 3 4 (d) lawfully acquired by the recipient from a third party under no 5 obligation of confidence to Beaumont or; 6 7 (e) heretofore disclosed to the recipient by Beaumont on a 8 non-confidential basis. 9 10 And then paragraph 12: (as read) 11 12 The recipient shall not initiate or arrange, directly or indirectly, or 13 maintain contact regarding Falcon business operations, prospects or finances except as contemplated herein and for those contacts 14 15 made in the ordinary course of business with any officer, director, 16 employee, consultant, or any other representative of Falcon or with any customer, supplier, sales representative, or competitor of 17 Falcon except with the express prior written permission of 18 19 Beaumont to Falcon. Any such permission granted by Beaumont 20 and/or Falcon is revokable at any time. 21 22 And then paragraph 14: (as read) 23 24 This agreement shall supercede all prior understandings and 25 agreements, whether written or oral, between Beaumont and the 26 recipient with respect to matters provided herein. 27 28 In procuring the confidentiality agreement with Cardinal, Glen Tarrant (phonetic) of 29 Beaumont wrote an email dated September 25, 2012, to Tawnya Pipsey (phonetic) of 30 Cardinal: (as read) 31 32 Please find attached the draft copy of the confidentiality 33 agreement. Just to clarify, I am not a shareholder or interest holder 34 in the assets of the company. Ideally, I am trying to raise money 35 to buy it or, plan b, broker it out for a fee. Thank you, Glenn. 36 37 After the confidentiality agreement was signed, Mr. Tarrant emailed a short package of 38 material to Cardinal. The package of material consisted of a PowerPoint presentation 39 prepared by Falcon and production summaries by Falcon Well. The materials were 40 prepared by Falcon rather than Beaumont and they consisted of approximately 14 pages 41 when printed. In doing so, Beaumont may well have breached its confidentiality

agreement with Falcon in several respects. It forwarded materials without the consent of Falcon. It allowed copies to be made and it commenced an effort to try and position itself for a broker fee when its permitted uses of the information included its own efforts to purchase.

1 2

While, of course, Cardinal cannot enforce Falcon's agreement without privity, the status of Beaumont's conduct and agreement with Falcon is relevant to the damages which it claims. It can only claim that to which it is entitled and had rights in relation to the information which it claims was misused. The Beaumont/Cardinal confidentiality agreement was stated to be in effect for one year from October 1, 2012. There was very little, if any, interaction between Beaumont and Cardinal thereafter. Beaumont says there were at least four breaches of the Beaumont/Cardinal confidentiality agreement by Cardinal. It says that the first breach was when Falcon's outside counsel sent an email to Scott Ratushny of Cardinal on April 19, 2013, which said: (as read)

Hi, Scott. Further to our discussion last Saturday, please find attached a copy of the Falcon Resources Corp. business plan, March 1, 2013, for your review. Should there be any interest in this private company, or should you require further information, please let me know and I would be delighted to introduce you directly to Eric Falborn (phonetic), the president of Falcon. Thanks, Bill. William DeJong, Q.C., Partner Dentons Canada LLP.

There is no evidence as to what or who initiated that exchange. Although there appears to have been a brief discussion of some sort on the previous Saturday prior to Mr. DeJong's email, there is no evidence as to exactly what happened in that exchange. Matters pertaining to the email are contained in Mr. Ratushny's questioning at pages 19 to 22.

Beaumont next says that it was a breach of the Beaumont/Cardinal confidentiality agreement when Falcon and Cardinal had discussions about entering into a confidentiality agreement of their own in approximately -- prior to September 3, 2013.

Beaumont next says that the act of entering into a confidentiality agreement between Cardinal and Falcon, on or about September 3, 2013, was a breach of the Beaumont/Cardinal confidentiality agreement.

Finally, it says that subsequent ongoing discussions regarding a purchase of the Falcon assets by Cardinal, and an eventual closing of the transaction, were breaches of the Beaumont/Cardinal confidentiality agreement. The actual Cardinal/Falcon agreement was signed on January 22, 2014, but the evidence is that there may have been an agreement in

principle earlier. There was clearly discussions earlier.

Prior to those events, in early 2013, Mr. Tarrant of Beaumont, through a corporation named Alder Ridge Resources Limited, attempted to negotiate a transaction with Falcon, but those discussions were unsuccessful.

Of course, a confidentiality agreement is not a catch-all agreement to create rights and remedies which were not bargained for. If the cause of action is based upon the agreement, the rights and remedies sought must be found either expressly, or at least implicitly, in the agreement.

The issue in this case is whether the act of emailing material that had been prepared by Falcon to Cardinal with the backing of the Beaumont/Cardinal confidentiality agreement was sufficient to form the basis of a \$1,305,000 broker fee or some other amount, although Beaumont makes no attempt to prove some other amount in its materials. For that matter, it makes no attempt to prove that the fee that it claims would be a standard fee in the industry or for whom such -- or, from whom such a fee is typically claimed.

Beaumont refers to *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 SCR 142, 1999 CanLii 705 (SCC). At paragraph 85, Binnie, J.J. held that: (as read)

The law would lose its deterrent effect if defendants could misappropriate confidential information and retain profits thereby generated subject only to the payment of compensation if, as and when they are caught and successfully sued.

The decision of Justice Martin in Scott & Associates Engineering Ltd. v. Finavera Renewables Inc., 2013 ABQB 273, is very instructive partly in relation to the applicable law, but also in relation to its facts and how they compare to this case. Her decision was affirmed on appeal at 2015 ABCA 51. Scott & Associates was a case where the claim was expressly made on the basis of a cause of action founded upon an alleged breach of confidentiality in the common law and equity sense. The claim was expressly not made on the basis of a breach of contract claim. The present case is precisely the opposite. The claim is made on the basis of an alleged breach of the confidentiality agreement, on a contract basis and on no other basis. Nevertheless, Scott & Associates is of assistance in identifying the type of claim being made and in -- and in identifying some of the basic principles relating to the use of confidential information. At paragraph 68, Justice Martin held: (as read)

Similarly, the suggestion by Sopinka, J., dissenting in Lac Minerals Ltd. v. International Corona Resources Ltd., that the

foundation for an action of breach of confidence is a *sui generis* hybrid of contract, equity and property theories has not been widely followed by Canadian courts. Thus, the prevalent modern view in Anglo-Canadian jurisprudence is that a claim for breach of confidential business information is based in either contract or equity. See Justice Julie A. Thorburn and Keith G. Fairbairn, *Law of Confidential Business Information*.

While admittedly commenting on a breach of confidence action generally, as opposed to a contractual action, Justice Martin held at paragraph 100: (as read)

It seems to me a logical starting point that a plaintiff alleging a breach of confidence only has a right over information which he or she has created, in a very general sense, with some measure of his or her own time, skill and effort. There is no obligation of confidence, for example, where the party asserting the right had no part in creating the information, but merely summarized the information made public by a third party. See *Ridgewood Resource Ltd. v. Henuset*, 1982 ABCA 79, at paragraph 27, 35 AR 493, leave to appeal to the Supreme Court of Canada refused, [1982] 1 SCR 12.

And further, at paragraph 105, Justice Martin held: (as read)

Scott claims a breach of confidence over information which is primarily Penn West's. The person suing must be someone to whom a duty of confidence is owed; as with *Ridgewood Resources Ltd*, Scott had no part in creating most of the information in the case at bar, but merely passed it along or summarized it. Therefore, there is no obligation of confidence owed by Finavera to Scott for Penn West's information. Neither can Scott establish that it had the sole right to benefit from the use of the Penn West information.

Ultimately, the plaintiff in *Scott & Associates* succeeded on only one of its claims. That claim was a constructive trust monetary claim based on the fact that Scott & Associated had created for itself a preferred position in negotiations for the sale of an asset by a third party and the defendant used that preferred position to further its own interests and to enter into a transaction directly with the third party. While much of the material covered by the confidentiality agreement in *Scott & Associates* was created by the third party, there was some not insignificant information which had been created, or at least

processed, through the skill an expertise of the plaintiff, Scott & Associates. The combination of the use of that information with the use of the preferred position in the negotiations that had been created by Scott & Associates was sufficient to impose the constructive trust remedy. Monetary damages were awarded while a proprietary constructive trust remedy was rejected.

No constructive trust remedy is sought or proven here. In addition, the facts of this case are far weaker from the remedial point of view than those is *Scott & Associates*. Quite apart from that, cause of action is different as well. In the end, although the cause of action in *Scott & Associates* was based upon a breach of confidentiality, Justice Martin awarded a monetary amount to the plaintiff before her based upon what it had been promised and not paid. In other words, even to award damages on a non-contractual basis, Justice Martin based her award on the non-fulfilment of a promise. Promises are an important part of reasonable expectation and that is particularly true in a claim that is expressly framed in contract.

In this case, the evidence is that Beaumont had negotiated no exclusive right to market the Falcon assets. Beaumont created no information that would typically be regarded as confidential itself and it simply passed on Falcon created materials to Cardinal. Beaumont claims that it had the right to do so because it was allowed to provide material to its bankers. Beaumont filed a subsequent affidavit saying that in the oil and gas context 'bankers' often means other resource companies that would be part of a purchase. Even if that is true, it is doubtful that it would extend to broker opportunities. In this action, Beaumont seeks to create a broker fee opportunity for itself for which it did not negotiate. Furthermore, it attempts to gain significant financial advantages for itself from information in which it had little or no proprietary interest. At best, its interest in the information which it relies upon was a right to use that information for putting together its own transaction to purchase the Falcon assets.

It is hard to envision how generating brokerage opportunities is something that was envisioned by the Falcon/Beaumont confidentiality agreement as a permitted use. Such a use is certainly not contemplated in the wording of the Falcon/Beaumont confidentiality agreement.

In my view, Falcon had the right to deal with whoever it wanted with respect to the sale of its assets, as indicated by the exchange of Mr. DeJong in April, of 2003 (sic). Beaumont did not bargain with Falcon for any restrictions on Falcon's ability to do so. Beaumont bargained for a narrow set of rights with Falcon. Its rights were to use the information with its bankers in attempting to raise financing for a transaction. It did not bargain for the right to try and generate a broker fee.

In its confidentiality agreement with Beaumont, Cardinal agreed not to make any improper use of any Beaumont confidential information. While it is difficult to conceive as to exactly what Beaumont confidential information was provided, when it simply forwarded a brief package of materials that had been prepared by Falcon, giving the benefit of the doubt to Beaumont that the parties can agree upon whatever they deemed to be confidential information, there is still a question as to what damages would flow from a breach if there was one. Beaumont had not acquired for itself a right to a broker fee on a Falcon transaction.

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Beaumont argues that had Cardinal not dealt directly with Falcon, it would have been in a position to approach Falcon and negotiate a broker fee. The difficulty is that Beaumont had negotiated, at best, the right to use the Falcon confidential information for trying to put together its own purchase transaction. It was likely in breach of its Falcon confidentiality agreement in using that information in other ways to its own advantage and to attempt to create a broker fee and it is unlikely that any successful claim could be argued for a broker fee then or now. The probability of negotiating one then, in my view, is the same as the probability of obtaining one now, minimal. It would have to be based upon the rights that Beaumont had to profit from materials, which did not belong to it, and those were minimal.

Confidentiality agreements, at least the ones before me, have two purposes, one is to indemnify the owner of the confidential information about any loss arising from its information losing its confidentiality, the other is to give a right to damages arising from the loss of confidentiality. The damages still need to be proven. Paragraph 16, of the statement of claim, alleges: (as read)

As a result of Cardinal's flagrant breach of the agreement Beaumont is entitled to a broker fee in the amount of 6 percent of the acquisition price payable by Cardinal to Beaumont in the amount of \$1,350,000.

It appears there is a transposition of the figures in the statement of claim. (as read)

Alternatively, Beaumont is entitled to a broker fee at fair market rates. Beaumont has not received payment of the broker fee or any portion thereof from Cardinal. The full broker fee remains due and owing from Cardinal to Beaumont.

On the facts of *Scott & Associates*, Beaumont would not meet the test for success on a claim based upon a confidential information cause of action, presumably that is why this claim is based upon a breach of contract basis. Unfortunately for Beaumont, the contract

which it sues upon does not provide for a broker fee and it is not in any way connected to broker activities, whether that is in the confidentiality agreement between Beaumont and Cardinal or whether it is in the original confidentiality agreement between Falcon and Beaumont. Beaumont obtained a confidentiality agreement from Cardinal, not an agreement for a broker fee.

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In all of the circumstances, in my view, it takes more than forwarding a small package of Falcon information, that was prepared by Falcon, to earning a \$1,305,000 broker fee. The matter might be different if Beaumont actually had the Falcon information in the circumstances where it had been given consent to use the information for the purpose of trying to generate a broker fee for its own gain, but it did not. In *Hryniak v. Mauldin*, [2014] 1 SCR 87, 2014 SCC 7 (CanLii) the Supreme of Canada held at paragraphs 49 and 50: (as read)

There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

These principles are interconnected and all speak to whether summary judgment will provide a fair and just adjudication. When a summary judgment motion allows the judge to find the necessary facts and resolve the dispute, proceeding to trial would generally not be proportionate, timely or cost effective. Similarly, a process that does not give a judge confidence in her conclusions can never be the proportionate way to resolve a dispute. It bears reiterating that the standard for fairness is not whether the procedure is as exhaustive as a trial, but whether it gives the judge confidence that she can find the necessary facts and apply the relevant legal principles so as to resolve the dispute.

The cases generally award damages on lost opportunity matters where the disclosing party has shown that it has established itself in a real position of opportunity. That is not the case here. There was no opportunity lost as a purchaser. That avenue was attempted and it failed. There was no reasonable expectation of a broker fee based upon the position that Beaumont had negotiated for itself with Falcon. This is a case where a fair and just adjudication can be made on the existing record.

I find that this is an appropriate case for summary judgment. There are very few facts in dispute and it is unlikely that the evidence would be significantly different at trial. There are no potentially dispositive facts in dispute. Furthermore, *Windsor v. Canadian Pacific Railway Ltd.*, 2014 ABCA 108, reminds at paragraph 15: (as read)

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The theory that disputes eventually "went to trial" was always something of a legal fiction. Even when the Court implied that a trial was called for, and declined to grant summary judgment, or declined to strike pleadings, it was well known that trials were a rarity. Hryniak v. Mauldin refers several times to the need for a change in culture. In other words, the myth of trial should no longer govern civil procedure. It should be recognized that interlocutory proceedings are primarily to "prepare an action for resolution", and only rarely do they actually involve "preparing an action for trial". Interlocutory decisions that can resolve a dispute in whole or in part should be made when the record permits a fair and just adjudication. Hryniak v. Mauldin rejected the ruling by the Ontario Court of Appeal to the effect -- to the effect that the old test for summary judgment should continue to apply the face -- even in the face of the newly amended Ontario rule.

Windsor also reminds, at paragraph 21, that a plaintiff facing a summary dismissal application is "bound to put its best foot forward" in response to that application. Beaumont provides no evidence of actual damages and no evidence that the 6 percent fee that it claims is a standard fee in the industry for what it did. At paragraph 21, of Windsor, the Court of Appeal held: (as read)

A party faced with an application for summary judgment must put its best foot forward, and present evidence to show sufficient "merit" to establish a genuine issue requiring a trial with respect to the outstanding issues: *Lameman* at paragraph 19. Speculating that evidence might be available at a trial is not sufficient to create a genuine issue requiring a trial.

I find that the probability of success of Beaumont's claim for a broker fee or damages in lieu thereof at trial is minimal and that this is an appropriate case for summary dismissal. In light of the approach required by *Hryniak*, I dismiss Beaumont's claim.

Now, costs. Anyone wish to speak to costs?

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| 2 | MR. MCDONALD: | My friend and I are agreed, Master, on costs |
| 3 | being tabled under schedule 'C', column | 4, for all steps in the application and the action. |
| 4 | | |
| 5 | THE MASTER: | That sounds reasonable. |
| 6 | | |
| 7 | MR. MCDONALD: | Okay. |
| 8 | | · |
| 9 | Ruling (Costs) | |
| 10 | - | |
| 11 | THE MASTER: | I'll confirm that. |
| 12 | | |
| 13 | MR. MCDONALD: | Okay. Thank you, Sir. |
| 14 | | |
| 15 | THE MASTER: | Thank you. Thank you, all. It was well-argued. |
| 16 | It was helpful. | |
| 17 | | |
| 18 | MR. HAWKES: | Thank you. |
| 19 | | |
| 20 | THE MASTER: | Thank you. |
| 21 | | |
| 22 | MS. BAKER: | Thank you, Sir. |
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| 24 | | |
| 25 | PROCEEDINGS CONCLUDED | |
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1 Certificate of Record

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I, Brett Default, certify that this recording is the record made of the evidence in the proceedings in the Court of Queen's Bench, held in courtroom 904, at Calgary, Alberta, on the 22nd day of January, 2016, and that I was the court official in charge of the sound-recording machine during the proceedings.

1 Certificate of Transcript I, Penny Best, certify that (a) I transcribed the record, which was recorded by a sound-recording machine, to the best of my skill and ability and the foregoing pages are a complete and accurate transcript of the contents of the record, and (b) the Certificate of Record for these proceedings was included orally on the record and is transcribed in this transcript. Digitally Certified: 2016-01-26 16:43:24 Penny Best, Transcriber Order No. 1503-16-1 35 Pages: 36 Lines: 37 Characters: 38 — 39 File Locator: 2178f58ec47c11e5a18f0017a4770810 40 Digital Fingerprint: 6a6570bd068509f3e404a11d354b360a19ca5c6654209584fa2f2bf7ffc0ab89 41 —

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