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Introduction¹

It is often thought that a sector as steeped in history as mining is unlikely to promise much innovation in its evolution. The following is an overview of five areas that represent the most important recent developments in the area in Canada, demonstrate the sector's continuing push to extend jurisdictional and legal frontiers. Responsibility is a touchstone concept in each of the five—whether it is making companies more responsible for their continuous disclosure, corporate social responsibility, new rules concerning scientific and technical disclosure of mineral information, taking the lead in establishing international environmental standards, or extending obligations to honor commitments of confidentiality.

The coming into force of Bill 198 in the Province of Ontario, which imposes civil liability for secondary market disclosure, has the effect of extending the statutory liability traditionally afforded investors in new issues to trades by any investors that are based on the misrepresentation or omission of information in a company's continuous disclosure documents. It is expected that Bill 198 will be adopted in various iterations by other provinces in the future, and thus it is a forerunner of the trend in Canada with respect to investor protection at the secondary market level. Since Ontario is one of the principal financing markets for mining issues in Canada, this legislation will have a significant impact on many companies.

Although the government is only in its initial stages of developing the paradigms that will likely result in a body of corporate social responsibility standards that will apply for Canadian entities operating internationally, actors in the sector would do well to contribute to the debate in this area and to continue to take initiative in establishing their own policies with respect to social responsibility in their spheres of operations.

Recent revisions by Canada's securities administrators to the rules for disclosure of scientific and technical information for mineral projects have taken into account some of the "lessons" learned from the

previous iteration of the rule, expanded the scope of the rule to apply to royalty interests, among other things, and recognized the South African regime for resource reporting.

Another key area in which Canada has demonstrated leadership is the environmental standards that have been established by the Prospectors and Developers Association of Canada ("PDAC"), which are recognized as industry-leading and are now being adopted or referenced internationally.

Finally, this article will summarize the extent of the confidentiality obligation, both under contract and under common law, as decided in one of the most important recent cases affecting the sector. This decision will have a far-reaching impact on the way in which companies exchange technical information among one another and the protection afforded the same.

Bill 198 – Civil Responsibility for Secondary Market Disclosure

Effective January 1, 2006, a securityholder who buys or sells securities of a public company that is a reporting issuer in Ontario in the secondary market, when the company's public continuous disclosure record is incorrect or incomplete, may have a right of action for damages.

The imposition of this statutory right of action is important because it removes the need for the plaintiff to prove that his or her decision to buy or sell securities was made in reliance on the misrepresentation or failure to disclose. An investor can still bring an action under common law, but to succeed he or she will have the additional burden of proving reliance.

Investors in the "primary" market—the market for new issues of securities from Treasury—have long enjoyed statutory rights of action. For example, if a prospectus contains a misrepresentation, an investor who purchased securities during the period of distribution has a right under the *Securities Act* (Ontario) against the issuer, underwriter and certain others for damages or rescission. The amendments contained in Bill 198 extend statutory rights of action to investors in the "secondary" market—the market for previously issued securities. Issuers that have public reporting obligations in Ontario (mostly companies with securities listed on the

Toronto Stock Exchange or the TSX Venture Exchange) are subject to the new rules, but any public company with a "real and substantial connection to Ontario" is also affected. A subject issuer is referred to as a "responsible issuer" ("RI") in the new rules.

In determining liability under the new rules, and, in particular, whether an investigation by a defendant was reasonable, the courts will consider all relevant circumstances, including (1) the knowledge, experience and role of the defendant; (2) the existence, if any, and the nature of any system to ensure an RI meets its continuous disclosure obligations; and (3) the role and responsibility of the defendant in the preparation and release of the disclosure containing the misrepresentation or in the decision not to disclose a material change.

A right of action for damages may exist against one or more of the company, its directors, officers or other experts.

All actions require leave of the Ontario court, which must be satisfied that there is good faith and reasonable possibility of success. The limitation period for commencing an action is the earlier of three years after the date of incorrect or incomplete disclosure, and six months after. Ontario court has granted leave to commence an action. The Ontario Securities Commission may intervene in an application for leave, and in the action itself. The Ontario court must approve a proposed settlement of an action, and the prevailing party is entitled to costs as determined by the court.

Documents forming part of the public disclosure record are divided into "core" and "noncore" documents. As their names suggest, core documents are subject to a different standard of liability due to their presumed relative importance in the continuous disclosure record as compared with "noncore" documents.

In an action for incorrect disclosure in a core document, a securityholder need only prove that it purchased or sold securities of the company at a time when the company's public continuous disclosure record was incorrect.

In an action for incorrect disclosure in a noncore document or public oral statement, the securityholder must also prove that the defendant knew of the misrepresentation, deliberately avoided

acquiring knowledge, or committed gross misconduct.

In an action for incomplete disclosure against the company or an officer, a securityholder need only prove that it purchased or sold securities of the company at a time when the company's public continuous disclosure record was incorrect or incomplete.

In an action for incomplete disclosure against any other defendant, the securityholder must also prove that the defendant knew of the change, and that it was material, or that the defendant deliberately avoided acquiring the knowledge, or committed gross misconduct.

Note that there is no liability for incomplete disclosure if a company makes a confidential disclosure filing. Nor is there liability in forward-looking information if the company uses reasonable cautionary language and states material factors and assumptions, and there is a reasonable basis for the same.

Defendants have a variety of possible defenses including:

- plaintiff knew of incorrect/incomplete disclosure;
- due diligence;
- reliance on experts; and
- incorrect/incomplete disclosure occurred without the knowledge or consent of the defendant and, when it became aware of the incorrect or incomplete disclosure, the defendant took prescribed corrective action.

Defendants can be liable for any loss in value of the securities purchased or sold yet each defendant will only be liable for its proportionate share of the loss as determined by the court. However, if a defendant has knowingly made incorrect or incomplete disclosure, the defendant may be fully liable for the entire loss. The following are the limits on liability:

- **the company or a corporate influential person:** the greater of C\$1 million and 5% of the defendant's market capitalization;
- **an individual:** the greater of C\$25,000 and 50% of the individual's compensation from the company or the influential person and its affiliates for the 12 months preceding the violation; and
- **an expert:** the greater of C\$1 million and the expert's revenues from the company and its affiliates for the 12 months preceding the violation.

Amendments to NI 43-101

National Instrument 43-101 — Standards of Disclosure for Mineral Projects ("NI 43-101") establishes standards for all oral and written disclosure made by an issuer concerning mineral projects and requires that all disclosure be based on information prepared by, or under the supervision of, a "qualified person." NI 43-101 also requires that disclosure of mineral resources and mineral reserves be made in accordance with industry standard definitions approved by the Canadian Institute of Mining, Metallurgy and Petroleum, and requires certain disclosure to be supported by a written technical report prepared and certified by a qualified person, who in certain cases must be independent.

On October 7, 2005, the Canadian Securities Administrators published a new version of NI 43-101. The main objectives of the amendments were to reflect changes in the mining industry, correct errors in the previous rule, simplify drafting, provide new exemptions, and generally make NI 43-101 more user-friendly and practical. The new NI 43-101 came into force in every province and territory of Canada on December 30, 2005.

Several of the principal changes made to NI 43-101 are summarized below.

Historical estimates: A definition for the term "historical estimate" has been added to NI 43-101. "Historical estimate" means an estimate of mineral resources or mineral reserves prepared prior to February 1, 2001. An issuer may disclose a historical estimate using the historical terminology of the estimate provided that the issuer complies with the conditions set out in NI 43-101. However, an issuer will trigger the filing of a technical report if it makes disclosure of the historical estimate as if it is a current estimate.

Royalty interests: The definition of "mineral project" has been revised to include an explicit reference to "royalty interest or similar interest" in any exploration, development or production activity. As a result, issuers whose only interest in a mineral project is a royalty interest are subject to NI 43-101 in the same manner and to the same extent as other mining issuers (i.e., if that royalty interest is material to the issuer). Limited relief from this requirement is provided under section 9.2 of the rule. This represents a significant change from the previous iteration of the

rule and will require parties who negotiate rights to royalties to specifically contract for access rights to the property and to data in order to enable them to prepare technical reports from time to time as required by the rule, or, alternatively, to permit the royalty holder to be included as an addressee of, and have the benefit of, any technical report prepared by other holders of interest in the property.

Foreign issuers: NI 43-101 no longer provides for an exemption from the application of the rule to a foreign issuer that met specified criteria since, according to the CSA, over the past two years no issuer has sought this type of relief. This type of relief will now be dealt with on a case-by-case basis by means of an application for exemptive relief.

Independence requirement for qualified persons: The independence criteria for a qualified person have been amended in the rule. A qualified person is considered independent of an issuer if there are no circumstances that could, in the opinion of a reasonable person aware of all relevant facts, interfere with the qualified person's judgment regarding the preparation of a technical report. NI 43-101 now also includes several examples of situations in which the qualified person would not be considered independent.

Acceptable foreign codes: The CSA has added the *South African Code for Reporting of Mineral Resources and Mineral Reserves* ("SAMREC Code") and replaced USGS Circular 831 with SEC Industry Guide 7 as acceptable foreign codes for reporting mineral resources and mineral reserves. As a result, issuers incorporated outside of Canada are able to file a technical report that uses the mineral resource and mineral reserve categories of the JORC Code, the SEC Industry Guide 7, the IMMM System or the SAMREC Code, provided that a reconciliation to the mineral resource and mineral reserve categories set out in NI 43-101 is disclosed in the technical report.

Corporate Social Responsibility of the Canadian Extractive Sector with Operations Abroad

In response to a parliamentary report calling for the Canadian federal government (the "Government") to take measures to ensure that Canadian mining companies operating in developing countries conduct

their activities in a socially and environmentally responsible manner, the Government is currently holding roundtable discussions (the "Roundtable") across Canada to determine how to strengthen corporate social responsibility² ("CSR") of Canadian mining companies with operations abroad. The Roundtable accepted submissions, both oral and written, from relevant industry associations, nongovernmental organizations ("NGOs") and experts.

Throughout the Roundtable discussions, several problems pertaining to the implementation of CSR standards became evident. One of the most prevalent issues was the lack of any "hard" definition for CSR. Rather, there is a plethora of standards, guidelines, tools and good practice guidance documents that exist at national and international levels. Within the Canadian context, three potential sources of CSR standards were identified: (1) legal instruments; (2) policies and practices adopted by the Government; and (3) policies and practices voluntarily adopted by the Canadian extractive industries. From the legal perspective, aside from the *Corruption of Foreign Public Officials Act (1999)*, which was enacted to prevent corruption in transnational commercial transactions, there is no Canadian legislation currently in place that affects the social and environmental obligations of Canadian companies with operations abroad. It was acknowledged at the Roundtable discussions that Canadian mining companies had been proactive in developing and implementing CSR policies and practices. However, it was further acknowledged that it was difficult to measure how effective such policies are and to what extent they are implemented given that there is no accepted Canadian or international benchmark by which to measure.

A second issue identified by the Roundtable pertained to incentives that could be used to implement CSR standards, once such standards were defined. Broadly speaking, there exist three categories with which the Government could encourage and/or enforce CSR standards on Canadian mining companies with operations abroad: (1) restrictions for access to credit, insurance and other financial services; (2) market-based incentives; and (3) legal norms and liability. At the

Roundtable discussions, NGOs and various special interest groups representing developing countries were supportive of the implementation of a Canadian legal framework that would hold mining company executives responsible under Canadian law for any human rights violations by Canadian mining companies abroad. Significant hurdles to implementing such a framework were identified, however, including issues of extraterritoriality and providing a real and substantial link between foreign operations and Canada.

Overall, it became apparent throughout the Roundtable discussions that in order to properly implement CSR standards, such standards must first be defined and developed on a general level. These general standards must be accompanied by guidance and tools that would allow Canadian mining companies to tailor the general principles to the specific circumstances of their foreign operations. Once the latter has been accomplished, the challenges associated with reporting and enforcement can be addressed. In the meantime, the interpretation and implementation of CSR standards is left to individual companies and industry groups such as the PDAC. Some of the leading work to date has been done by these market participants,³ but certainly look for CSR to continue to be a list topic in the industry—in fact, it is the "corporate governance" of the new millennium for the sector, in this author's view.

Environmental Excellence in Exploration ("e3")⁴

Environmental Excellence in Exploration ("e3") is an online resource, launched in 2003 by the PDAC. E3 provides users with up-to-date and comprehensive information on proven guidelines for exploration activities, community engagement and environmental activities, supplied by industry leaders. The idea for e3 originated from a consortium of leading mining companies, who then approached the PDAC to coordinate the project.

The purpose of e3 is to provide support for environmental stewardship in the exploration stage of global mineral development by encouraging the implementation of sound environmental management practices by the exploration community, its contractors and subcontractors. In addition, e3

is attempting to increase the environmental awareness of all stakeholders. The underlying reasoning for this is that mineral exploration companies act as ambassadors for the global mining community. As such, it is crucial to manage the environmental aspects of exploration properly in order to demonstrate the international mining sector's commitment to environmentally responsible exploration and mining.

In July of 2006, the home page was published in French, Spanish and Portuguese, with content continuously being translated and added. Currently, there are over 1,400 users, comprised of exploration and mining companies, communities, governments, aboriginal organizations, environmental consultants, NGOs, universities and individuals.

It is anticipated by the PDAC that e3 will become the preferred environmental guide for use in the planning and execution of exploration programs. It is also expected to serve as a management and training tool for companies, their employees and contractors, and as a valuable source of information about industry practices for the public.

Confidentiality Agreements: The Decision in IMA/Aquiline

Confidentiality agreements, often entered into in the mining industry in "standard form" without much thought, are at the heart of one of the most significant decisions affecting the industry.

Background

IMA Exploration Inc. ("IMA") staked claims covering a property (the "Navidad Project") as a result of reviewing data obtained from Newmont Mining Corp. ("Newmont") during a due diligence site visit. IMA was a potential purchaser of mining property ("Calcatreu") owned by Newmont, which was ultimately purchased by Minera Aquiline Argentina SA (the "Plaintiff"). In 1989, the Supreme Court of Canada ordered Lac Minerals to hold a billion-dollar mine in trust because it unlawfully used confidential information.⁴ In this case, the Plaintiff alleged that IMA also unlawfully used confidential information.

Potential buyers signed a confidentiality agreement permitting access to confidential information necessary to evaluate the possi-

ble acquisition of Calcatreu. The data package, which did not contain the data that was at the center of the lawsuit (the “Data”), was distributed only after the signing of the agreement. Interested buyers could then arrange for a site visit and would be permitted unconstrained access to all data.

The Law of Contract as Applied to Confidentiality Agreements

The court recognized that private business information is by its nature confidential; moreover, private business information is not available to anyone outside the company.⁵ In addition, the nature of the Data was conceded to be proprietary data and inherently confidential.⁶ Since the Data was not expressly referenced in the confidentiality agreement or in the information brochure, the first issue for the court was whether the confidentiality agreement covered the Data.

The court held that the confidentiality agreement should be viewed through the lens of its business purpose, permitting interested parties access to confidential information when evaluating a possible acquisition, while at the same time protecting the confidentiality of proprietary information. The confidentiality agreement stated that confidential information (“Confidential Information”) would only be used for the purpose of the project, and would otherwise be kept confidential.

Aquiline’s position was that the confidentiality agreement covered the Data by necessary implication, because it was made available during the site visit and because it related to the evaluation of the Calcatreu project. In addition, it claimed that information provided in response to any request is confidential within the meaning of the agreement when it could be reasonably viewed as relating to the Calcatreu project. The position of IMA, the defendant, was that the confidentiality agreement should not apply to any data not specifically listed or referenced within, as this would undermine the mining exploration business.

The court focused on the words “relating to” and “concerning the project,” stating that authorities generally consider these words to be of broad interpretation, and nothing in the agreement compelled a more narrow reading. In addition, the term “confidential information” was defined broadly in the agreement and there was no

ambiguity in the contract with regard to the meaning and scope of Confidential Information. Even if there was an ambiguity, the court found that the parties understood and acted upon the Data as confidential information to be used solely for the purpose of evaluating Calcatreu.

The court held that the Data was confidential information and was covered by the confidentiality agreement, thus the use of the Data by IMA to find and stake Navidad was a breach.

Common Law Breach of Confidentiality

Although the court found that the confidentiality agreement applied to the Data, it decided to comment on the alternate claim based on the breach of common law confidentiality. The court recognized that the confidentiality agreement specifically excluded all other relationships of confidence other than as provided in the agreement. However, the court held that the exclusion clause within the confidentiality agreement could not operate to exclude a common law duty of confidentiality in respect of data received outside the agreement.

The issue for determination was whether the defendant was permitted to use data conceded to be “confidential in nature,” but not specifically covered by the confidentiality agreement, to further exploration efforts. The plaintiff submitted that IMA owed the plaintiff a duty of confidence at common law, and it breached it in causing its subsidiary to stake the Navidad claims in reliance on data provided to it during the Calcatreu due diligence.

In *Lac Minerals Ltd.*, the Supreme Court of Canada adopted a test for breach of confidence containing the following three elements:

- the information conveyed was confidential;
- it was communicated in confidence; and
- it was misused by the party to whom it was communicated.

The Court found that the test had clearly been met. With respect to the first condition of confidentiality, the defendants conceded at trial that the Data was by nature confidential information. In addition, the Court implied that information should be considered “confidential” if a person would not release it when he or she

has knowledge that the recipient would use it for another purpose.

With respect to the second condition of confidentiality, the Court implied that an equitable obligation of confidence should be imposed on a recipient of information who realizes, on reasonable grounds, that it was given to him in confidence. In addition, the recipient carries a heavy burden to repel the obligation of confidence where information of commercial or industrial value is given in a business setting and with some common object in mind. The Court went on to determine that “value” in this context means any relative value as proprietary information. Despite evidence that the plaintiff placed relatively little value in the Data, the court found the Data to have some relative value, since it cost hundreds of thousand of dollars to develop and there was no evidence that it was of no value.

With respect to the third condition, the Court agreed with the past practice and shifted the burden of proof to the defendants to demonstrate that their use of the information was permitted. The Court found that the parties both knew and understood that IMA was entitled to use the Data for the sole purpose of evaluating the purchase of Calcatreu.

The Court found that IMA failed to discharge its burden, that it used the data to “discover” and stake the Navidad project, and that its use was in breach of its common law duty of confidence to Newmont (and through Newmont to the plaintiff). The Court concluded that claims should be held pursuant to a constructive trust in favor of Aquiline and granted a mandatory injunction, as damages were not a reasonable alternative in this case.

In light of the numerous properties examined and the volumes of data reviewed by exploration and mining companies on an ongoing basis, such companies must now be extremely sensitive to the scope of the confidentiality agreements into which they enter and, conversely, vigilant about the information provided in connection with due diligence reviews whether or not formal confidentiality agreements are in place. It will be interesting to observe the evolution of the doctrine of confidentiality in this area in light of the global nature of the business and, in particular, whether a defense similar to “mosaic theory” begins to emerge in situations

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where companies are privy to information from a variety of sources and piece together a hypothesis that results in the acquisition of property.

Conclusion

Tying together the above five areas, what is clear is that the trends in recent Canadian legislative, judicial and policy initiatives all recognize the global nature

of the mining sector and grapple with balancing the extraterritorial imposition of standards on Canadian companies with the need to make such companies increasingly accountable for their actions, be they with respect to continuous disclosure or “soft” issues such as social and environmental responsibility in foreign jurisdictions. There is often also a hint that in light of Canada’s extensive history and

experience in mining matters, Canadian actors on the international scene should be key participants in the development and imposition of high international standards in the sector. Whether law, precedent and policy can be effectively generated locally to encompass the myriad of situations in which Canadian companies find themselves internationally remains to be seen. ■

- ¹ The assistance of Kristyn Annis, Neal Hewitt and Ari Katz are gratefully acknowledged.
- ² No single definition for CSR exists; however, the Roundtable referred to CSR as “the way firms integrate social, environmental and economic concerns into their values, culture, decision making, strategy and operations in a transparent and accountable manner and thereby establish better practices within the firm, create wealth and improve society.”
- ³ On environmental standards, for example, arguably the “world standard” was developed by the PDAC and is available to anyone as discussed in this paper. It is currently being translated into a number of languages.
- ⁴ Web site: <http://www.e3mining.com>
- ⁵ *International Corona Resources Ltd. v. Lac Minerals Ltd.* [1989] 2 S.C.R. 574, 59 B.C.L.R. (3d) 1 (S.C.C.) [*Lac Minerals*].
- ⁶ *Minera Aquiline Argentina SA v. IMA Explorations Inc.*, 2006 BC 1776, 2006 BCSC 1102 (B.C.S.C., Jul 14, 2006) at para. 64 [*Aquiline*].



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Carmen’s practice is focused on international corporate finance, mergers and acquisitions and natural resources. Carmen also enjoys working for clients in the industrial, technology and biotechnology sectors. She advises Canadian and international clients in connection with a wide range of public and private equity and debt offerings, as well as international project financing. Fluent in English, French and Spanish, Carmen also has considerable experience in Africa and South America, where she has assisted clients in structuring and implementing acquisitions and projects and working with emerging market governments. Carmen has acted for public and private companies at all stages of development and has advised agents, underwriters as well as venture capitalists and merchant bankers.