NO. S1510120
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT,*
R.S.C. 1985, c. C-36, AS AMENDED

AND

IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT,*
S.B.C. 2002, c. 57, AS AMENDED

AND

IN THE MATTER OF THE PLAN OF COMPROMISE AND ARRANGEMENT
OF NEW WALTER ENERGY CANADA HOLDINGS, INC.,
NEW WALTER CANADIAN COAL CORP., NEW BRULE COAL CORP.,
NEW WILLOW CREEK COAL CORP., NEW WOLVERINE COAL CORP.
AND CAMBRIAN ENERGYBUILD HOLDINGS ULC

PETITIONERS

BOOK OF AUTHORITIES OF THE UNITED MINE WORKERS OF AMERICA 1974 PENSION PLAN AND TRUST
(VOLUME 1)

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TAB 1

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***656925 B.C. Ltd. v. Cullen Diesel Power Ltd.,*** 2009 BCSC 260

Date: 20090227
Docket: S072618
Registry: Vancouver

Between:

656925 British Columbia Ltd.

Plaintiff

And

Cullen Diesel Power Ltd.

Defendant

Before: The Honourable Madam Justice Dardi

Reasons for Judgment

Counsel for Plaintiff	B. G. Baynham, Q.C. and R. Wu
Counsel for Defendant	D. T. Neave and J. Goheen
Date and Place of Hearing:	August 15, December 4 and 5, 2008 Vancouver, B.C.

Introduction

[1] This dispute concerns the commercial high-speed passenger ferry, the M.V. Harbourlynx ("Harbourlynx"), that operated between Vancouver and Nanaimo from approximately 2003 to February 2006.

[2] In 2003, the defendant, Cullen Diesel Power Ltd. ("Cullen Diesel"), and Nanaimo Harbour Link Corporation ("NHLC") entered into a contract (the "Contract") for the overhaul of two diesel engines (the "Engines") on the Harbourlynx.

[3] The plaintiff, 656925 British Columbia Ltd., as the assignee of the claims of the now bankrupt NHLC, asserts a claim against Cullen Diesel in breach of contract and negligence based on the failure of the Harbourlynx's starboard engine on February 1, 2006. The plaintiff claims that Cullen Diesel failed to adequately perform the overhaul of the Engines and the plaintiff or NHLC or both of them have suffered damages, expenses, and losses because of the failure of the starboard engine. The amount of the claim has not been quantified but is estimated to be in the two-million-dollar range.

[4] On this application, Cullen Diesel seeks an order pursuant to Rule 18A that the plaintiff's action be dismissed with costs.

[5] The plaintiff says that the summary trial application should be dismissed and its cross-application for an order that Cullen Diesel produce a supplemental list of documents, answers to interrogatories, and a representative for examination for

discovery should be granted. In turn, Cullen Diesel seeks an order for extension of time for filing answers to the interrogatories.

Defendant's Position

[6] Cullen Diesel submits that:

(i) the Contract included written limitation of liability terms (the "Exclusion Clauses"), which bar any and all claims brought by NHLC and the plaintiff, as assignee, can stand in no better a position than NHLC;

(ii) the plaintiff's claim that a direct duty of care is owed to it from Cullen Diesel cannot be sustained as a matter of law; and

(iii) this is an appropriate case to have determined by way of Rule 18A because there are no evidentiary issues in dispute.

Plaintiff's Position

[7] The plaintiff's position is that Cullen Diesel's summary trial application ought to be dismissed for the following reasons:

(i) the Exclusion Clauses do not form part of the Contract between NHLC and Cullen Diesel and, in any event, interpreted properly, do not protect Cullen Diesel against liability for negligence;

(ii) furthermore, the Exclusion Clauses ought not to be enforced because it would be unconscionable, unfair, or unreasonable to do so in light of Cullen Diesel's fundamental breach of the Contract; and

(iii) Cullen Diesel owes a separate duty of care to the plaintiff and the Exclusion Clauses do not apply to the plaintiff due to lack of privity of contract.

[8] In the alternative, the plaintiff submits that the issues of fundamental breach and relational economic loss are not suitable for determination under Rule 18A because the hearing of the issues requires more extensive evidence than that which is before the court on this application. The plaintiff has not had an opportunity to uncover all of the evidence that may be important to its case because it has not conducted examinations for discovery or had full disclosure of documents.

Background

[9] Cullen Diesel's business includes servicing, repairing, and overhauling marine diesel engines.

[10] Prior to January 1, 2007, Cullen Diesel was named Detroit Diesel-Allison British Columbia Ltd. and was frequently referred to as DDABC or Detroit Diesel.

[11] In November 2002, Mr. David Alan Spetch, the Vice President of Cullen Diesel, began meeting with representatives of NHLC concerning a planned overhaul of the Engines.

[12] On or about February 7, 2003, following some negotiations, Cullen Diesel provided NHLC a proposal (the "February Proposal") summarizing the work Cullen Diesel would perform in conducting an overhaul of the Engines. The February Proposal estimated the cost of the overhaul itself at $729,000, estimated other work,

and referred to a "New Parts and Workmanship Warranty 6 Months Unlimited Hours". Each page of the February Proposal makes reference to the "Terms and Conditions of Sale on Reverse Side" (the "Standard Terms").

[13] The portion of the Standard Terms that I have termed the Exclusion Clauses are as follows:

> 9. The warranty, if any, applicable to the **equipment** ordered is as set out in the statement of warranty policy delivered to the Purchaser, receipt of which is hereby acknowledged by the Purchaser. No other warranties are applicable or may be implied.
>
> 10. The purchaser agrees with Detroit Diesel-Allison British Columbia Ltd. that the applicable warranty is inconsistent with any warranty available to the Purchaser under the provisions of the Sale of Goods Act and the Purchaser hereby waives any and all rights with respect to such warranties as may be implied under the Sale of Goods Act. The Purchaser hereby further agrees that the applicable warranty, if any, in the nature of liquidated damages and in substitution for any damages to which the Purchaser might otherwise be entitled, at law or in equity and, in particular, the Purchaser hereby agrees that in lieu of an action for fundamental breach of contract or breach of a fundamental term of contract, the Purchaser will rely upon the provisions of the applicable warranty.
>
> 11. The liability of Detroit Diesel-Allison British Columbia Ltd. hereunder is limited to the replacement of defective parts and the cost of labour, to the extent indicated in the applicable warranty, if any, and Detroit Diesel-Allison British Columbia Ltd. shall not be liable for any personal injuries (including death) to any person or any other loss or damage, either direct, indirect, or consequential, whether to the equipment or to any other property, caused or contributed to by delivery, operation of repossession of the equipment or by any defect therein (whether latent or patent) or by any other cause or reason whatsoever. In addition, in no case shall Detroit Diesel-Allison British Columbia Ltd. be liable for loss of use of the **equipment** whether or not caused or contributed to by the negligence or default of Detroit Diesel-Allison British Columbia Ltd.
>
> [Emphasis added]

[14] On or about February 28, 2003, Cullen Diesel received a purchase order from Point Hope Maritime regarding the overhaul of the Engines. The purchase order confirmed, among other things, the price set out in the February Proposal and included the following:

> (a) new and rebuilt parts and workmanship is warranted for six months from date of installation with unlimited operating hours from date of installation; and
>
> (b) all other conditions regarding extra work as per your quote Dated November 22, 2002, revised February 7, 2003 [which is a reference to the February Proposal].

[15] On or about March 4, 2003, Cullen Diesel received a copy of the February Proposal executed by Mr. Edward Life on behalf of NHLC, indicating his acceptance of the terms of the February Proposal. The President of NHLC had delegated to Mr. Life the responsibility to oversee the overhaul. At the time Mr. Life signed the February Proposal, he had not received any separate documentation with respect to the warranty. NHLC did not receive legal advice regarding the February Proposal.

[16] On or about April 30, 2003, Cullen Diesel delivered to NHLC a letter enclosing the final version of a document entitled “Detroit Diesel–Allison British Columbia 16V 396 TE 74 L Remanufactured Engine Package” (the “Final Remanufactured Engine Package”). That document contained a detailed summary of the procedures that Cullen Diesel agreed to complete for NHLC in overhauling the Engines, the payment terms (that are consistent with the Purchase Order), and certain warranty terms that

were different from those in the February Proposal. The warranty terms in the Final Remanufactured Engine Package provide as follows:

> **Engine Warranty:**
>
> | | Parts Coverage | Labour Coverage |
> |---|---|---|
> | 0 – 2500 Hours or 6 Months which ever shall occur first | 100% | 100% |
>
> Warranty shall cover engine repairs required due to defective or malfunctioning Detroit Diesel parts that were supplied as new or deemed "rebuildable" at the time of complete overhaul by DDABC.
>
> **Optional Equipment Warranty**
>
> Warranty on optional equipment (starters, alternaters, and other items not supplied by Detroit Diesel) shall be set forth by component suppliers.
>
> …
>
> 7. Upon expiration of this warranty, all liability on the part of the DDABC Ltd. shall terminate.
>
> • This warranty is the only warranty applicable to Series 396 remanufactured engines by DDABC Ltd., and is expressly in lieu of any other warranties expressed or implied. DDABC Ltd. does not authorize any person to extend for it any other obligations or liabilities in connection with these rebuilt engines or optional equipment.
>
> [Emphasis added]

[17] While Cullen Diesel asserts these terms form part of the Contract, the plaintiff submits that the terms of the Final Remanufactured Engine Package do not form part of the Contract because there is no evidence of any agreement to vary the terms of the February Proposal. It is not, however, necessary for me to decide this issue on this application.

[18] In its reply to the notice to admit, Cullen Diesel set out that, in addition to the written terms for the overhaul as set out in the February Proposal (and the Final Remanufactured Engine Package), the oral terms for the overhaul were contained in "various discussions" between the representatives of Cullen Diesel and NHLC "at various times in 2002 and 2003."

[19] Mr. Spetch deposed that he did not have discussions with Mr. Life, or any NHLC representative, with respect to the warranty terms that Cullen Diesel agreed to provide for the work it performed on the Engines, including any discussion of the period of time or the number of operating hours of the Engines during which the warranty was to be in effect.

[20] Cullen Diesel overhauled the Engines from April 2003, through June 2003, inclusive. In or about July 2003, the Engines were reinstalled on the Harbourlynx.

[21] During the period from on or about August 29, 2003, to September 3, 2003, Cullen Diesel and NHLC completed sea trials of the overhauled Engines. After the sea trials were completed in September 2003, NHLC returned the Harbourlynx to commercial passenger ferry use.

[22] The alleged failure of the starboard engine on the Harbourlynx occurred on February 1, 2006. Thereafter, NHLC was unable to continue to provide ferry service and ceased operations.

Procedural History

[23] The plaintiff commenced this action on April 17, 2007. The plaintiff alleges that the failure of the starboard engine was caused by negligence and breach of contract of Cullen Diesel and that NHLC or the plaintiff or both of them suffered damages.

[24] On April 2, 2008, Cullen Diesel delivered its notice of motion under Rule 18A with the supporting affidavit of Mr. Spetch.

[25] On April 18, 2008, the plaintiff delivered a notice of motion dated April 17, 2008, seeking production of documents and the examination for discovery of a representative of Cullen Diesel.

[26] Cullen Diesel took the position that examinations for discovery were not necessary prior to the determination of this Rule 18A application because the proper scope and effect of the limitation of liability clauses was a distinct legal issue that ought to be determined as a preliminary matter. On July 10, 2008, Cullen Diesel offered to produce Mr. Spetch for the purpose of cross-examination on his affidavit with respect to "the limited matters related to the warranty issue that are described in Mr. Spetch's affidavit No. 1". On July 18, 2008, the plaintiff rejected that offer, maintaining its position that it should be entitled to conduct examinations for discovery prior to the 18A application and that discovery should extend to matters dealing with the work done on the Engines.

[27] There is no trial date scheduled.

Suitability for Rule 18A Determination

[28] Cullen Diesel contends that this is an appropriate case for determination by way of Rule 18A and that the plaintiff cannot frustrate the summary trial process by failing to take steps such as conducting the cross-examination of Mr. Spetch on his affidavit.

[29] The plaintiff's submission is that this application is inappropriate and, in the alternative, premature because the hearing of the issue requires a broader evidentiary basis than can be achieved at a Rule 18A application, particularly before there has been pre-trial discovery and full disclosure of documents.

[30] Rule 18A(11) sets out the applicable test, which is that the court may grant judgment in favour of any party, either on an issue or generally, unless the court is unable to find the facts necessary to decide the issues of fact or law, or it would be unjust to decide the issues on the application.

[31] In deciding whether a matter is appropriate for determination under Rule 18A, the court should consider the amount involved, the complexity of the matter, the cost of a conventional trial in relation to the amount involved and the course of the proceedings, and whether the application is an effective use of the court's time and will result in the efficient resolution of the proceedings: ***Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.*** (1989), 36 B.C.L.R. (2d) 202 (C.A.).

[32] In addition, the court must exercise considerable caution in determining whether Rule 18A should be invoked to try an issue rather than the whole case, to

avoid "litigating in slices": ***Bacchus Agents (1981) Ltd. v. Phillipe Dandurand Wines Ltd.***, 2002 BCCA 138, 164 B.C.A.C. 300.

[33] Mr. Justice Groberman in ***Coast Foundation v. Currie Architect Inc.***, 2003 BCSC 1781 at paras. 13, 15, and 18, summarized the governing principles on granting judgment on particular issues as follows:

> [13] The question of when the court ought to give judgment on an issue, as opposed to on the claim generally, is more complex. The court is justifiably reluctant to decide cases in a piecemeal fashion. In addition to all of the concerns that arise when the entire claim is before the court, there is a multitude of others. The result is that the court must exercise considerable caution before coming to the conclusion that it should grant judgment on an issue in a summary trial.
>
> …
>
> [15] The court must also be wary of making determinations on particular issues on a Rule 18A application when those issues are inexorably intertwined with other issues that are to be left for determination at trial: ***Prevost v. Vetter***, 2002 BCCA 202, 210 D.L.R. (4th) 649; inter-relatedness of issues is not always obvious, and caution is necessary whenever a party seeks judgment on an issue as opposed to judgment generally under Rule 18A: ***B.M.P. Global Distribution Inc. v. Bank of Nova Scotia***, 2003 BCCA 534, [2003] B.C.J. No. 2383.
>
> …
>
> [18] Second, the court must consider the efficiency of a partial determination from the standpoint of the litigation itself. Piecemeal decision-making is rarely an efficient manner in which to resolve a dispute. It raises the possibility of multiple appeals on individual issues, and this will generally impede rather than hasten the orderly determination of the action.

[34] For the reasons set out below, I am not satisfied that, on the evidence, I am able to find the facts necessary to decide the proper interpretation and enforcement of the Exclusion Clauses. Having made this determination and being mindful that

the court must be cautious to avoid “litigating in slices”, I am declining to decide the other issues on this application because to do so would not assist the efficient resolution of this proceeding. I have also considered that there is a significant amount of money involved and the complexity of the issues raised.

Analysis

[35] In order to succeed on this application, with respect to the claims made by the plaintiff, qua assignee of NHLC, Cullen Diesel must show that:

> (i) the Exclusion Clauses apply to exclude liability for the claims brought against it for its services in performing the overhaul; and
>
> (ii) it would not be unconscionable, unfair, or unreasonable to enforce the Exclusion Clauses.

Enforcement of Exclusion Clauses

[36] I address this issue first because if the Exclusion Clauses are held to apply to the services provided by Cullen Diesel, it is nonetheless necessary to consider whether the Exclusion Clauses should be enforced.

[37] With respect to the test for enforcing exclusion clauses, the Court of Appeal in ***Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)***, 2007 BCCA 592, 289 D.L.R. (4th) 647, stated the following at para. 17:

> [17] Enforcement of exclusion clauses is governed by two tests, which were propounded in minority judgments in ***Hunter Engineering Co. v. Syncrude Canada Ltd.***, [1989] 1 S.C.R. 426, 57 D.L.R. (4th) 321, reconciled in ***Guarantee Co. of North America v. Gordon***

> ***Capital Corp.***, [1999] 3 S.C.R. 423, 178 D.L.R. (4th) 1, and interpreted, correctly in my respectful view, by the Ontario Court of Appeal in ***Shelanu Inc. v. Print Three Franchising Corp.*** (2003), 64 O.R. (3d) 533, 226 D.L.R. (4th) 577. …

[38] The Court of Appeal in ***Tercon*** at para. 13, while reversing the trial judge on her interpretation of the clause at issue, approved the following analysis provided by the trial judge at para. 149 of her reasons:

> [149] Given this conclusion, it may not be necessary to address the enforceability of the exclusion clause. However, reason not to enforce the clause exists in the circumstances here. According to the approach in *Guarantee* and *Hunter* [both *infra*], whether the exclusion clause survives fundamental breaches depends on whether the result is unconscionable or unfair, unreasonable, or contrary to public policy (see also *Shelanu* [*infra*]). While it has been suggested that there may be no real difference between these approaches and both are to be used sparingly, it appears that fairness and reasonableness can be assessed at the time of the breach and not just at the time the contract is concluded (*Hunter* at 510-511; *MacKay* [*v. Scott Packing & Warehousing Co. (Canada)* (1995), [1996] 2 F.C. 36, 192 N.R. 118] at paras. 12-14; *Plas-Tex Canada Ltd. v. Dow Chemical of Canada Ltd.* (2004), 245 D.L.R. (4th) 650, [2005] 7 W.W.R. 419, 2004 ABCA 309 (Alta. C.A.) at para. 51). A party should not be allowed to commit a fundamental breach sure in the knowledge that no liability can attend to it and the court should not be used to enforce a bargain that a party has repudiated (*Hunter* at 509-510). While unconscionability is usually considered in situations of unequal bargaining power, there can be situations of equal bargaining power that still give rise to an unconscionable result (*Hunter* at 515-516).
>
> [Emphasis added]

[39] As a result, in the event that the Exclusion Clauses were found to apply to the services provided by Cullen Diesel, it is necessary to consider whether the result of the enforcement of the Exclusion Clauses would be unconscionable, unfair, or unreasonable. It emerges from the authorities that this may be assessed at the time

of the breach and not just at the time the contract is concluded: see also ***Romfo v. 1216393 Ontario Inc.***, 2008 BCCA 179.

[40] Even in the context of a purely commercial relationship, in determining whether a party may be permitted to rely on its limitation of liability clause, the court may consider the circumstances and the nature of the alleged misperformance of the breaching party. For example, if Cullen Diesel did not inspect or test the components of the Engines, would it be unfair, unreasonable, or unconscionable to enforce the Exclusion Clauses?

[41] The record does not disclose what work Cullen Diesel performed during the course of the overhaul. In its reply to the notice to admit dated April 1, 2008, Cullen Diesel admitted certain steps it did not take in performing the overhaul but it has not produced any documents as to what work was performed on the Engines. Cullen Diesel's conduct subsequent to the formation of the Contract (including the nature of the acts or omissions alleged to be negligent or in breach of the Contract) may be relevant to the determination of whether it would be unfair, unreasonable, or unconscionable to enforce the Exclusion Clauses.

[42] At this stage, there has not been full discovery of documents nor examinations for discovery. I am not satisfied that the plaintiff has had an opportunity to uncover or develop all of the evidence that may be important regarding this issue, nor am I persuaded that the plaintiff should be deprived of such an opportunity. While the plaintiff did not take steps prior to the delivery of the 18A application in April 2008, in the intervening months Cullen Diesel took the position

that further document production and an examination for discovery were not necessary pending a determination of this 18A application.

[43] Although the court rarely finds enforcement of an exclusion clause to be unfair, unreasonable, or unconscionable, the evidence on this application is insufficient to determine whether this is one of those rare cases. Therefore, it would be unjust to decide the issue on this Rule 18A application.

Interpretation of Exclusion Clauses

[44] I have considered whether I could make a finding on the applicability of the Exclusion Clauses and have declined to do so: firstly, because to do so may result in "litigating in slices"; and secondly, because I am not able to find the facts necessary to do so.

[45] The performance of the overhaul included the disassembling, inspecting, repairing, and testing of the various components of the Engines and the reassembling of the Engines. Cullen Diesel also replaced some engine parts with parts it supplied.

[46] Whether Cullen Diesel's liability for negligence or breach of contract in providing services is excluded by the Exclusion Clauses turns in part on the interpretation of the term "equipment" as it is used in the Contract. The applicable warranty and any potential exclusion for fundamental breach in para. 10 of the Contract refers back to the warranty for the "equipment ordered" in para. 9 of the

Contract. Further, in the last line of para. 11 of the Contract, the exclusion for economic loss is restricted to loss of use of the "equipment".

[47] The B.C. Court of Appeal summarized the principles of contract interpretation in ***Gilchrist v. Western Star Trucks Inc.***, 2000 BCCA 70, 73 B.C.L.R. (3d) 102 at paras. 17-18:

> [17] The goal in interpreting an agreement is to discover, objectively, the parties' intention at the time the contract was made. The most significant tool is the language of the agreement itself. This language must be read in the context of the surrounding circumstances prevalent at the time of contracting. Only when the words, viewed objectively, bear two or more reasonable interpretations, may the court consider other matters such as the post-contracting conduct of the parties: ***Delisle v. Bulman Group Ltd.*** (1991), 54 B.C.L.R. (2d) 343 (S.C.), approved by Chief Justice McEachern in ***Bramalea Ltd. v. Vancouver School Board No. 39*** (1992), 65 B.C.L.R. (2d) 334 (C.A.); ***Prenn v. Simmonds***, [1971] 3 All E.R. 237 (H.L.); ***Eli Lilly and Co. v. Novopharm Ltd.*** (1998), 161 D.L.R. (4th) 1, (S.C.C.).
>
> [18] The first inquiry, then, is to determine whether there is only one reasonable meaning to the words in the contract, or more than one. In this search one must look to the surrounding circumstances and the whole of the contract. The words of the contract must be looked at in their ordinary and natural sense and cannot be distorted beyond their actual meaning: ***MacMillan Bloedel Ltd. v. British Columbia Hydro & Power Authority*** (1992), 72 B.C.L.R. (2d) 273 (C.A.); ***Melanesian Mission Trust Board v. Australian Mutual Provident Society***, [1997] 1 N.Z.L.R. 391 (P.C.).

[48] Accordingly, the first step is to determine, by looking objectively at the surrounding circumstances and the whole of the Contract, whether there is only one reasonable meaning of the word "equipment".

[49] If "equipment" is properly construed as "the overhauled engines", Cullen Diesel contends that any liability for breach of contract and negligence in performing

the overhaul is excluded by the Exclusion Clauses. On the other hand, if "equipment" is properly construed as the parts Cullen Diesel supplied in the course of overhauling the Engines, the court may determine that such liability is not excluded.

[50] The plaintiff submits that the fundamental frailty with Cullen Diesel's submission lies in the attempt to employ wording designed for a contract of purchase and sale of goods to a contract for the purchase of services, such as those involved in providing an overhaul. It submits that when taken as a whole, the Standard Terms only make commercially reasonable sense in the context of a contract for purchase and sale of goods. Although this was not specifically addressed by the plaintiff, in the context of its submissions, "equipment" must be reasonably interpreted as the parts that Cullen Diesel supplied to NHLC during the overhaul. In other words, the Standard Terms, including the Exclusion Clauses, apply to the parts Cullen Diesel supplied but not to its services.

[51] The following clauses support an interpretation that "equipment" applies to the parts supplied:

> Clause 1: The customer is defined as a "Purchaser" rather than a Customer.
>
> Clause 2: This clause states that before delivery of the equipment (rather than completion of services), the Purchaser will deliver any promissory notes, contracts, and securities as may be required by Cullen Diesel to evidence the transaction, and/or "to reserve title to the equipment" in Cullen Diesel "until

the purchase price shall be paid in full". Cullen Diesel would not ordinarily have title over equipment that it is merely overhauling and therefore cannot "reserve title" although it would have title to equipment it is supplying.

Clause 3: This clause states that unless title in the equipment is transferred by Cullen Diesel to the Purchaser, and Cullen Diesel takes back a chattel mortgage, property in, title to, and right to possession of the equipment shall remain in Cullen Diesel until all indebtedness has been fully paid. Again, as with Clause 2, this suggests Cullen Diesel was supplying equipment it owned.

Clause 6: This clause states that the Purchaser is deemed to have "accepted" the equipment fifteen days after delivery of the equipment, unless Cullen Diesel is notified to the contrary in writing during that period. This clause is consistent with a contract of purchase and sale of goods, although it could also refer to the delivery of equipment that has received the benefit of Cullen Diesel's service.

Clause 7: This clause states that prices for equipment are subject to change without notice in accordance with increases in manufacturer's prices, adjustments in exchange rates, increases in freight duty or brokerage rates. The clause further states that the Purchaser agrees to pay the prices effective on the date of delivery to the Purchaser. This clause appears to relate to a contract of purchase and sale of goods.

Clause 9: This clause refers to the warranty applicable to the equipment "ordered". The plaintiff submits that a customer does not "order" equipment in an overhaul contract; and

Clause 10: This clause states that the applicable warranty is inconsistent with the provisions under the Sale of Goods Act. The Sale of Goods Act applies to the sale of goods, not to the provision of services like those necessary to overhaul an engine.

Clause 11: In examining Clause 11, the words "defective parts", "repossession", and "latent" defect would suggest that the parties intended the equipment to mean the parts that were supplied by Cullen Diesel. In the context of an overhaul, there should be no "defective parts" since part of the overhaul is that Cullen Diesel would to test components to ensure that they were not defective. Similarly, there should be no "latent" defects. The term "repossession" makes no sense in the context of an overhaul because services cannot be "repossessed", but reasonably could be applicable in the context of a sale or lease contract where Cullen Diesel may need to repossess goods upon default of payment by the purchaser.

Clause 20: This clause states that if the contract is a lease or rental contract, the terms above shall be read with such amendments as may be applicable thereto and, in particular, title to the equipment remains at all times with Cullen Diesel and the term "rental payments" is substituted for the word

"price". In this context, it is difficult to contemplate a lease or rental of engines that Cullen Diesel is overhauling for a customer.

[52] Cullen Diesel submits that the Contract was for the "sale" of goods and services, and that the word "equipment" is properly interpreted to mean the "overhauled engines". The evidence that supports this interpretation is as follows: The purchase order dated February 28, 2003, and the February Proposal that was accepted by Mr. Life on behalf of NHLC on March 4, 2003, both include the following reference: "If the equipment is available to ship prior to draw date, the payment due will be the balance remaining" (emphasis added).

[53] The parties did not make submissions focussing on the meaning of the word "equipment" in the Contract. However, on first blush, when viewed objectively and taking the written Contract as a whole, an ambiguity emerges because the word "equipment" is reasonably capable of more than one meaning; it is not plain and obvious what the word "equipment" means in the Contract. This term would make sense in the context of either a contract for providing solely goods or solely services, or a combination of the two.

[54] The Contract must be interpreted in the factual matrix at the time it was made. Evidence of the subjective intentions of the parties is not admissible. However, in order to assist in construing the Contract, the Court may consider certain extrinsic evidence such as the surrounding circumstances and factual background known to the parties at the time the Contract was made. Further, if "equipment" viewed objectively bears two reasonable interpretations or if an ambiguity emerges when it

is sought to apply the language of the document to the circumstances under consideration, the Court may consider other matters, provided such matters are relevant to the ambiguity: ***Ahluwalia v. Richmond Cabs Ltd.***, [1994] B.C.W.L.D. 1668 (S.C.).

[55] In this case, evidence of the factual background known to the parties at or before the date of the Contract, including evidence that the word “equipment” has by custom or usage in the business a peculiar sense, may also be relevant: ***Charbonneau v. Brawn***, 2002 BCSC 738.

[56] The record on this application did not include this evidence and I am not satisfied that I am able to find the facts necessary to interpret the word “equipment”. In addition, there was no evidence adduced regarding the oral terms of the Contract.

[57] As a result, it is not possible on this application to determine whether the Exclusion Clauses solely cover Cullen Diesel’s potential liability in negligence or breach of contract for providing services, or solely relate to providing parts, or both.

[58] I considered asking counsel for further submissions on the proper interpretation of the word “equipment” but in light of my determination of the enforceability issue, it was not necessary to make any findings regarding the Exclusion Clauses.

[59] As a result, it is not necessary to address the other issues raised on this application, including whether Cullen Diesel owed a separate and direct duty of care to the plaintiff.

[60] For the reasons set out above, the summary trial application is dismissed.

Disposition of Interlocutory Motions

[61] As a result of the dismissal of the Rule 18A application, further pre-trial investigation is appropriate. The defendant must produce its supplemental list of documents and answer the interrogatories of July 17, 2008, within 30 days of the release of these reasons.

[62] Examinations for discovery can proceed pursuant to the ***Rules***.

Costs

[63] Unless either party delivers written submissions within 30 days, the usual rule will apply and the plaintiff will be entitled to its costs of this application on Scale B. In the event a party makes written submissions on costs, the other party shall deliver its submissions within a further 30 days.

Dardi J.

TAB 2

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Albert v. Politano,*
2013 BCCA 194

Date: 20130419
Docket: CA040131

Between:

Jegbefumere Bone Albert

Respondent
(Plaintiff)

And

Joseph Anthony Politano, Canadian Road Holdings Company, Irabor Norense, and 0565204 BC Limited

Appellants
(Defendants)

Before: The Honourable Madam Justice Saunders
The Honourable Mr. Justice Chiasson
The Honourable Mr. Justice Frankel

On appeal from: Supreme Court of British Columbia, July 3, 2012
(*Albert v. Politano*, Vancouver Registry No. M104190)

Oral Reasons for Judgment

Counsel for the Appellant:	A.M. Gunn, Q.C. and S.F. Hoyer
Counsel for the Respondents:	G. Hilliker, Q.C. and J.M. Cameron
Place and Date of Hearing:	Vancouver, British Columbia April 11, 2013
Place and Date of Judgment:	Vancouver, British Columbia April 19, 2013

[1] **SAUNDERS J.A.**: On July 12, 2012 a jury awarded Mr. Albert $1,023,000 in damages for injury arising from a motor vehicle accident on September 2, 2008. The award was broken into three components:

Non-pecuniary loss	$125,000
Past loss of income	$60,000
Loss of future earning capacity	$838,000
Total	$1,023,000

[2] Mr. Albert was a passenger in a vehicle driven by the appellant Mr. Norense and owned by the appellant numbered company, when it was sideswiped by another vehicle driven by the appellant Mr. Politano and owned by the appellant Canadian Road Holdings Company, causing the vehicle carrying Mr. Albert to strike a utility pole. Mr. Albert commenced his action alleging, as his primary injury, damage to his right hand. He also alleged upper body injuries that caused headaches, neck pain and back pain that resolved over time.

[3] Liability was admitted but the extent of damages to which Mr. Albert is entitled was vigorously contested. Mr. Albert was a boxer at the time of the accident. The defendants, now appellants, challenged the extent of Mr. Albert's injury, and sought to raise a pre-existing condition as the reason he could no longer box competitively. They challenged Mr. Albert's credibility and the extent of his loss of earnings. They said that he had not mitigated his losses and they were critical of his decision to cease boxing when he did. The appellants say the damages award, particularly the pecuniary damages for lost earnings as a boxer, cannot be sustained. They ask us to set aside the order and to order a new trial, or alternatively, to reduce damages they are required to pay.

[4] An issue before, and at, trial concerned criminal charges outstanding against Mr. Albert. In October 2009, Mr. Albert and seven others were charged on a 29-count indictment issued in Alberta, alleging criminal conspiracy to commit fraud, deceptive telemarketing and money laundering. At his examination for discovery, the

defendants questioned Mr. Albert about the charges but Mr. Albert's trial counsel instructed him not to answer the questions. On June 7, 2012 the appellants filed an application seeking, *inter alia*, an order to compel Mr. Albert to answer the questions at a continued examination for discovery. The Master who heard the application dismissed this element of the defendants' application. The defendants raised the issue in a *voir dire* addressing the degree of permitted questioning, if any, that would be allowed them on the matter of the outstanding criminal charges. By then counsel acting for Mr. Albert at the trial understood from counsel acting in respect to the criminal charges, that Mr. Albert's involvement in events leading to the indictment differed from the involvement of his co-accused, and that only one charge, conspiracy, was outstanding against Mr. Albert, and he so advised the judge. On the *voir dire,* counsel for Mr. Albert opposed questioning in respect to the outstanding criminal matter. The defendants said there were four charges outstanding. They submitted that the criminal proceedings were relevant to Mr. Albert's credibility and to the willingness of managers and coaches to associate with him, and they said that the prospect of conviction and consequent incarceration was a negative contingency that should be considered by the jury.

[5] Before I turn to the grounds of appeal, there is the matter of a fresh evidence application made by the appellants. As is our practice, we reserved our decision on the fresh evidence application until the end of the appeal.

[6] The appellants seek to adduce as fresh evidence, two affidavits. One is from a Crown Prosecutor in Alberta that includes, appended, Mr. Albert's recognizance, the terms of which require him to remain in British Columbia, and to surrender his passport. The Crown Prosecutor deposes that it is unlikely the prosecution service would have consented to modification of the terms to permit Mr. Albert to travel outside Canada. The other is an affidavit of a legal assistant to appellate counsel, who was not counsel at trial. In her affidavit the assistant deposes that she has been told by appellate counsel "that the Appellants (Defendants) did not become aware until the week of March 25, 2013 that [Mr. Albert] has been subject since 2009 to bail conditions that restrict him from travel outside of British Columbia".

[7] As is well known, the governing principle on the admission of fresh evidence is the interests of justice. The framework for consideration of the application is provided by *R. v. Palmer*, [1980] 1 S.C.R. 759. The *Palmer* test, derived from application of the *Criminal Code*, is applied as well in civil cases, see, for example, *Golder Associates Ltd. V. North Coast Wind Energy Corp.*, 2010 BCCA 263. In *Palmer,* the Supreme Court of Canada directed appellate courts, in determining the admissibility of fresh evidence in a conviction appeal, to consider whether: 1) with due diligence, the evidence could have been adduced at trial; 2) the evidence is relevant in the sense it bears upon a decisive or potentially decisive issue in the trial; 3) the evidence shown is credible in the sense it is reasonably capable of belief; and, 4) if believed, the evidence could reasonably, with other evidence, be expected to have affected the result.

[8] We are urged by the appellants to admit the fresh evidence. They say it is relevant because it fatally undermines the foundation of the damages award in respect to lost earnings. It establishes, they say, that boxing matches for significant sums were beyond Mr. Albert's geographical reach in that Mr. Albert would not have been able to travel outside Canada, or even British Columbia, to boxing matches and thus not able to earn the income awarded by the jury. The appellants refer to evidence at trial that Mr. Albert would have difficulty competing as a professional boxer if he did not travel outside British Columbia.

[9] In general terms, the appellants also say the fresh evidence is relevant to the appeal on an allegation of abuse of process. They say the affidavit of the legal assistant establishes that the appellants did not know about the term of Mr. Albert's recognizance restricting him to British Columbia. They say the Crown Prosecutor's affidavit shows that documents in Mr. Albert's control or possession not produced by him, being the recognizance, would have made a difference to the award of damages and establishes that an answer provided by Mr. Albert in cross-examination by their trial counsel was a deceit on the court.

[10] Mr. Albert opposes the application to adduce fresh evidence, saying it fails to meet the *Palmer* test.

[11] I will deal first with the application as it relates to the submission the evidence establishes an abuse of process, starting with the affidavit of the Crown Prosecutor. The appellants contend that the indictment, initial recognizance order and successor instruments were required to be listed pursuant to Rule 7-1(1) of the Supreme Court Civil Rules. They say that Mr. Albert's counsel should not have opposed questioning in respect to the criminal matter, and the judge ought not to have restricted questioning by reference to the collateral evidence rule. They also point to testimony of Mr. Albert in which he was asked whether he could travel outside of Canada because he had given up his passport after being charged with the criminal offences. Mr. Albert agreed that he did not have his passport and went on to make an explanation, which, on the appellants' interpretation, was untruthful. On the appellants' interpretation of the answer, Mr. Albert lied to the court by saying that he had been to other places and could travel if he provided his flight itinerary. They interpret the answer as Mr. Albert saying that he had worked outside the country since he had surrendered his passport, and they say the affidavit of the Crown Prosecutor demonstrates both that this is not true, and that Mr. Albert would be unlikely to be allowed to travel outside the country in the future to box in prize matches. All of this they say, amounts to procedural unfairness and an abuse of process that can only be remedied by admission of the fresh evidence.

[12] Mr. Albert says no substantial procedural unfairness is established by the fresh evidence. He notes the sequence of events prior to trial, and observes that counsel for the defendants at trial raised the matter with the judge. Over his (Mr. Albert's) objection, the trial judge ruled that evidence concerning the criminal charges was admissible at trial, and counsel for the appellants cross-examined him as to the fact of the criminal proceedings and in some respects, about the proceedings themselves, the identity of the other accused and the potential jeopardy he faced.

[13] On the issue of deceit, Mr. Albert disputes the appellants' interpretation of his answer to the passport question, points out that he is a new Canadian with some limited communication skills, and observes that he correctly said he did not have his passport. He urges on us an interpretation of the balance of his statement that stops short of a conclusion that he lied to the court. He says the question itself about the passport demonstrates that counsel for the defendants had some knowledge of the terms of the recognizance and knew that the passport had been surrendered. He observes that the appellants could have pursued this line of questioning further and in doing so would have obtained some clarity as to his understanding of his situation, but elected instead to move back from the passport question to their theory that he would not be an attractive athlete to manage or coach because of the fact of the charges. Mr. Albert says the restriction of living in British Columbia could have been the subject of an application to amend the terms of his recognizance to permit him to travel within Canada to earn income had he some boxing matches to travel to, and in practical terms was not as absolute as the appellants contend.

[14] Counsel for Mr. Albert observes that the points relied upon, non-disclosure of documents relating to the criminal charges, and the position taken by counsel at the examination for discovery, reflected his counsel's view, as to which there is no basis to doubt its sincerity, and show that the fact of the charges was well known to the appellants. Counsel for Mr. Albert says it was up to them, knowing his position on the issue, to use the available tools, including Rule 7-1 of the Supreme Court Civil Rules, to access the publicly available documents concerning the criminal charges, and to pursue the lines of enquiry they considered appropriate.

[15] I cannot agree with the appellants that the fresh evidence should be admitted because it demonstrates an abuse of process. It is clear that the essential facts of Mr. Albert's charges were known to the appellants, and it was apparent to all attending the trial, from Mr. Albert's very presence, that he was on judicial interim release and not in a jail. Further, counsel for the defendants told the judge she had spoken to Crown counsel in Alberta the day before the cross-examination of Mr. Albert. Her question concerning the passport demonstrates she had some

knowledge of the terms of bail, and she referred to her conversation with Crown counsel in Alberta, when discussing the number of outstanding charges. On the matter of his answer to the question concerning his passport, I would be loathe to conclude that he had lied, or in the appellants language, committed a deceit on the court, given that he acknowledged that he did not have a passport, and that counsel did not explore the details of Mr. Albert's rather confused answer, further.

[16] Nor do I accept the appellants' contention that, by itself, the term of recognizance requiring Mr. Albert to remain in British Columbia would justify admission of the fresh evidence on the basis of abuse of process because they did not know about the term. Apart from the possibility that the term he remain in British Columbia would be relaxed on an application to travel to earn income in Canada, I consider the significance of this term must be weighed in light of the minimal use made by the defendants at trial of the surrender of Mr. Albert's passport. With respect, it is making too much of the term requiring Mr. Albert to remain in British Columbia, to say it is so significant as to justify reopening the case

[17] In my view, the fresh evidence, if admitted, would not establish procedural unfairness amounting to abuse of process such that a new trial should be ordered or the damages reduced. On that conclusion, I consider it fails to meet the fourth criteria for its admission in respect to an abuse of process submission.

[18] While I agree that the documents relating to Mr. Albert's judicial interim release should have been disclosed because they bear upon Mr. Albert's ability to travel, in my view, sufficient information came to the knowledge of the defendants during the trial to alert them to the issues they now seek to explore. On the other hand, in these circumstances, in my view, admission of the fresh evidence would raise the spectre of procedural unfairness the other way, by allowing the appellants to re-work their theory of the case to meet an unfavourable result after a hard-contested trial.

[19] Further, I must comment on the affidavit of the legal assistant that is sought to be adduced. In the critical paragraph, she deposes that appellants' counsel has told

her that the appellants were not aware of the term requiring Mr. Albert to remain in British Columbia. This is hearsay upon hearsay: obviously the legal assistant has no firsthand knowledge of what was known by the appellants, and appellate counsel to whom she refers, also has no firsthand knowledge. The information is said to come from the appellants, but the person who gave the information is not identified. By s. 30 of the *Court of Appeal Act*, R.S.B.C. 1996, c. 77, and there being no Court of Appeal Rule dealing with the content of affidavits, Rule 22-2(13) of the *Supreme Court Civil Rules* applies. It is the modern version of the long standing rule laying out the parameters of permitted affidavit evidence:

> (13) An affidavit may contain statements as to the information and belief of the person swearing or affirming the affidavit, if
>
> (a) the source of the information and belief is given, and
>
> (b) the affidavit is made
>
> (i) in respect of an application that does not seek a final order, or ...
>
> [Emphasis added.]

[20] In *Scarr v. Gower* (1956), 18 W.W.R. 184 (B.C.C.A.) Mr. Justice O'Halloran stated at 188:

> ... failure to state the source of information and belief in an affidavit usable on motions of this kind is not a mere technicality. If the source of the information is not disclosed in other material on the motion the offending paragraphs are worthless and not to be looked at by the court.

[21] In *Meier v. C.B.C.* (1981), 28 B.C.L.R. 136 at 137-8 Mr. Justice McKenzie observed that "the word 'source' is equivalent to 'an identified person'". To the same effect is *Trus Joist (Western) Ltd. v. United Brotherhood of Carpenters and Joiners of America*, Local 1598, [1982] 6 W.W.R. 744, wherein Madam Justice McLachlin (now Chief Justice of Canada) said at 747: "The rule permits hearsay evidence, provided the source is given".

[22] The affidavit of the legal assistant does not meet Rule 22-2(13) because it does not identify the source of the information and does not attest to her belief in it. This is more than a mere technical deficiency; by failing to reveal the source, the

reliability of the information is put beyond the reach of the respondent. Any cross-examination on the affidavit, by definition, will not be of the foundational source of the information. This affidavit, in this paragraph critical to the application, fails to satisfy Rule 22-2(13), is inadmissible, and fails to meet the third *Palmer* criteria.

[23] Significantly, perhaps not unrelated to the observation just made, we have not been provided with an affidavit from trial counsel as to what she knew. There was, thus, no opportunity for the respondent to cross-examine her as to the extent of communications between her or the appellants, and Crown counsel in Alberta, or the extent of her knowledge of the criminal processes.

[24] In my view, it would be unsafe to upset the jury verdict for non-disclosure, absent direct evidence from trial counsel as to what she knew, and without providing the respondent a chance to cross-examine.

[25] In making these comments I do not suggest that counsel before us has not been forthright. It is simply that where a final order is sought to be upset, the best evidence is the standard that must be met. We have not been provided with that best evidence.

[26] As a second engine to their application, the appellants urge us to admit the evidence on the basis it is highly probative of the issue of past and future earnings. It is said that the compelling portions of the *Palmer* test are those relating to relevance and the degree to which the evidence could bear upon the order appealed. They say that the issue of due diligence is not absolute, but rather a criteria that bears on the interests of justice. The appellants say that it is an injustice to enforce an award against them when certain information that could bear upon the damages was not known to them, or the jury, and where it is established the respondent lied to the jury as to his ability to travel.

[27] I have largely addressed this submission in commenting on the abuse of process issue. This is a case, in my view, in which it is not in the interests of justice that the evidence be admitted at this late date. As I said earlier, I am not satisfied

that Mr. Albert is demonstrated to have lied, as contended. And while it might have been open to the appellants to challenge Mr. Albert's ability to travel to boxing matches at trial in a more comprehensive fashion than they did in the single question posed in relation to the passport surrender, they chose instead to deny that the injury to Mr. Albert's right hand in the accident caused him to give up professional boxing, to challenge his contention that a viable professional boxing career was open to him, and to challenge his credibility. It seems to me that this was very much a strategic choice, not wanting to give credibility to Mr. Albert's contention that but for the accident he could have won boxing matches that would have generated significant purses. Now, when the jury has decided against them, they seek a new trial. I consider that this is this sort of situation to which the due diligence criteria is meant to apply. In my view, the admission of the fresh evidence is not in the interests of justice.

[28] I turn to the appeal. The appellants agree that to the extent necessary, an appeal is taken on the view evidentiary conflicts are resolved in the respondent's favour: *Moskaleva v. Laurie*, 2009 BCCA 260, 94 B.C.L.R. (4th) 58.

[29] On that basis, it may be said that when the vehicles collided, Mr. Albert, riding in the back seat, raised his hands which then were struck by a television mounted on the headrest on the seat in front of him. Mr. Albert's head struck the roof of the vehicle and he was rendered unconscious for a brief time. The vehicle that Mr. Albert was in sustained damages that exceeded $30,000.

[30] Mr. Albert was a boxer who, by the time of the accident, had achieved a significant level of success. He was born in Nigeria, competed on behalf of Nigeria for some years, and was the Nigerian men's champion. He testified that for becoming the national champion, he received $50,000. Mr. Albert represented Nigeria in the All-Africa Games in 1999 and won a silver medal. In 2000, Mr. Albert represented Nigeria at the Olympic Games in Sydney, Australia and had success against a Canadian boxer. He rejected an offer to "go pro" in order to pursue an Olympic gold medal. Following the 2000 Olympics Mr. Albert moved to Edmonton

and began boxing throughout Western Canada. He won the British Columbia Provincial Championship in 2001, 2002 and 2003. In 2002 Mr. Albert represented Nigeria at the Commonwealth Games, winning a gold medal. He testified that on that occasion the Nigerian government rewarded him by giving him a house and $100,000 US.

[31] In 2004 Mr. Albert won the Canadian Senior Men's title. He did not obtain Canadian Citizenship in time to represent Canada in the 2004 Olympics and did not seek to represent Nigeria in those games.

[32] Mr. Albert testified that he turned professional in 2006. Mr. Albert is described as having had extremely fast reflexes and a hard hit. One Olympic teammate became Heavy Weight Champion of the World and fought for purses of $5 million to $10 million. Evidence was adduced that Mr. Albert 's record was superior to that teammate's at the time they were both boxing. Another teammate became the Number One World Boxing Commission contender in his weight class. Evidence was given by Mr. O'Shea, a former president of Boxing B.C. and Boxing Canada, an international referee, coach of the Canadian National Team, Canada's boxing representative for the Commonwealth Games and a member of the Canadian Olympic Committee. Mr. O'Shea testified that Mr. Albert was definitely world class and had the ability to win a world title. He predicted that Mr. Albert would become a world champion.

[33] Mr. Albert testified that as a result of the injury to his right hand in the right medial dorsal area, he was unable to sustain his boxing career. He claimed that his injury worsened over time and was the primary reason that he decided to end his career as a professional boxer. He testified that the injury to his hand took away his dream, that his dream of staying in the professional boxing arena was realistic and that the dream offered him opportunity to earn significant income, an opportunity that is now lost.

[34] The appellants contended at trial that Mr. Albert had a pre-existing injury. They said a doctor cleared Mr. Albert to fight nine months after the accident, and

from that argued the end of Mr. Albert's boxing career was for reasons other than the injuries sustained in the accident. They said, variously:

1) Mr. Albert had a pre-existing injury;
2) he did not do all he should have done to heal his injury;
3) he was not disabled from boxing because of his injury; and
4) his earnings were not negatively impacted by the injury or, if they were, the impact was minimal.

[35] Re-organizing the grounds of appeal somewhat, the appellants:

1) contend the judge, Mr. Justice Greyall, erred in not directing the jury on negative contingencies that should be applied to account for his risk of imprisonment on the criminal charges,
2) contend the learned judge erred by failing to direct the jury as to the need for present valuation of the jury's assessment of damages for future pecuniary loss;
3) the jury's assessments for past and future loss of income earning capacity are without evidentiary foundation or wholly out of proportion with the evidence in the case; and
4) the jury's award for non-pecuniary loss was inordinately high as to be wholly out of proportion to the loss suffered in the case.

[36] Before dealing with each of these grounds it is useful to first address our role in reviewing a jury award. The respectful view towards a jury award is discussed today in a decision released today by the Supreme Court of Canada in *R. v. W.H.*, 2013 SCC 22, albeit in a criminal law context, Justice Cromwell wrote:

> [2] ... the reviewing court must treat the verdict with great deference. The court must ask itself whether the jury's verdict is supportable on *any* reasonable view of the evidence and whether proper judicial fact-finding applied to the evidence *precludes* the conclusion reached by the jury.

[37] Our role has been summarized in *Moskaleva v. Laurie*, to which I have referred earlier. It contains a succinct summary of our role in reviewing a jury award of damages:

> [125] An appellate court cannot alter a damage award made at trial merely because on its view of the evidence it would have come to a different conclusion. Whether made by a judge sitting alone or by a jury, damage assessments are questions of fact or mixed fact and law and therefore awards of damages may only be set aside for palpable and overriding error (*K.L.B.* at para. 62; *M.B.* at para. 54; *Young* at para. 64; *Dilello* at para. 39).
>
> [126] It is a long-held principle that a jury's findings of fact are entitled to greater deference on review than findings of fact by a judge alone and, accordingly, "the disparity between the figure at which [the jury] have arrived and any figure at which they could properly have arrived must, to justify correction by a court of appeal, be even wider than when the figure has been assessed by a judge sitting alone" (*Young* at para 64 and *Dilello* at para. 39, both citing *Nance* at 614).
>
> [127] While palpable and overriding error may be found in respect of a judge alone award if the "amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage" (*Nance* at 613), in the case of a jury award, appellate interference is not justified merely because the award is inordinately high or inordinately low, but only in that "rare case" where "it is 'wholly out of all proportion'" (*Foreman* at para. 32 citing *Nance* at 614, and referred to with approval in *Boyd* at paras. 13-14, *White v. Gait* at paras. 10-11, and *Courdin* at para. 22; *Wade* at 1077-1078, Laskin C.J.C. dissenting, also citing *Nance* at 614) or, in other words, when it is "wholly disproportionate or shockingly unreasonable" (*Young* at para. 64).
>
> [128] Support for the view that in order to determine whether a jury award is "wholly out of all proportion" or "wholly disproportionate or shockingly unreasonable", it is appropriate to compare the award under appeal with awards made by trial judges sitting alone in "the same class of case" may be found in *Cory*, but that approach may not be in accord with *Lindal*. Criticism of that approach is found in Gibbs J.A.'s dissent in *Cory* at paras. 49-52; *Ferguson v. Lush*, 2003 BCCA 579, 20 B.C.L.R. (4th) 228 at paras. 33-43; and Finch C.J.B.C.'s dissent in *Stapley* at paras. 116-124.
>
> [129] The increased deference accorded to jury awards must be considered when a determination is made about whether an award of non-pecuniary damages must be altered. The award is not wrong simply because it does not conform with damage awards made by judges: *Cody* at para. 25; *Boyd* at para. 42; *Dilello* at para. 49.

[38] This general approach must be applied with particular sensitivity to the nature of the issues raised. For example, questions of credibility are particularly within a

jury's purview and, absent demonstrated error of principle, are not matters with which this court may interfere.

[39] I turn then to the first ground of appeal raised by the appellants, the judge's treatment of the risk of incarceration.

[40] The appellants say that the risk of incarceration is a negative contingency that must be applied to Mr. Albert's claim for loss of future income, else he may be remunerated for a period of incarceration for conduct that the criminal law determines is worthy of punishment. They say this would bring the integrity of our justice system into question. The appellants say the judge erred in failing to ensure a negative contingency was applied by telling the jury it must assign a specific contingency to the risk of incarceration and then reflect that contingency in its award.

[41] In his instructions to the jury, the judge told the jury it must take into account negative contingencies when assessing the respondent's loss of earning capacity, including "other events causing absence from boxing". Later in his instructions, at the request of the appellants, the judge directed the jury to consider the negative contingencies and added a further negative contingency instruction, namely "the loss of a promoter or manager and other reasons which may have affected the plaintiff's prospects even had there been no accident".

[42] I do not agree the judge erred as alleged. I reach this conclusion for three reasons. First, the judge was not asked to give the instruction now advocated, notwithstanding the opportunity given to counsel to comment on the proposed instructions. Second, there was no evidence upon which a jury could assess the value of such a contingency. Third, and most important, I do not consider it would have been appropriate for the jury to reduce the future damage award for the negative contingency of a possible future jail sentence, in the circumstances before the Court. Mr. Albert stood in the courts, and in the community, as innocent until proven guilty. Even if proven guilty, there was no certainty that he would receive a jail sentence. In my view, it would have been entirely speculative for the jury to reduce the damage award to reflect the chance that he might be convicted on the

outstanding charges. This is unlike the case relied upon by the appellants, *British Columbia v. Zastowny*, [2008] 1 S.C.R. 27, (2008) S.C.C. 4, wherein the Supreme Court of Canada, on appeal from this court, affirmed the appropriateness of a deduction in damages to take account of a period of incarceration that was established as a fact at the trial.

[43] In my view it cannot be said, in the circumstances, that the judge erred in the manner contended.

[44] Second, the appellants contend the judge erred in failing to instruct the jury that they should discount the award to reflect the present value of future pecuniary losses as is required by s. 56 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253.

[45] This issue requires review of the events at trial. The judge discussed the contents of his instructions to the jury with counsel, initially including in his list of proposed instructions a direction concerning present value from paragraph 12.9 of the CIVJI Instructions. Counsel for the appellants stated that the paragraph was "not applicable", referring to the claim for future pecuniary losses as being "a capacity claim". Counsel for Mr. Albert asked for time to think it over and the next morning counsel for the appellants presented the judge with a written list of proposed instructions from CIVJI. These did not include paragraph 12.9 or another paragraph dealing with present value, paragraph 12.11.3A.

[46] On the fifth day of trial counsel for Mr. Albert asked the judge about the present value instruction and was told it would not be included in the charge. Counsel for the appellants made no comment.

[47] I agree that a present value type of instruction should have been given, to conform to the legislation. However, that this did not happen is the result of the position of the appellants at trial. In that circumstance, in my view, the results of the trial should not be undone by ordering a new trial. In *Kennedy v. Mandarin Enterprises Ltd.* (1993), 20 C.P.C. (3d) 241 Mr. Justice Taylor, for this court, described a similar issue:

> [13] Mr. Harvey, who appeared before us for the appellant but had not previously been involved in the case, says that even though the objection raised on appeal was not taken at trial, and although the submissions were not made to the trial judge in this connection which, in his view, ought to have been made, the appeal should be allowed and a new trial ordered so as to correct what would otherwise be a miscarriage of justice. He says the manner in which the case went to the jury was such that Ms. Kennedy was effectively deprived of her right to have the central factual issue decided. He urges us not to concern ourselves with assigning responsibility for what happened at the trial.

[48] He then said:

> [16] I agree with Mr. Harvey that this case may not have gone to the jury as it would have done had questions been settled after proper submissions of counsel, and had counsel sought more appropriate instructions concerning the law. But does this mean that the plaintiff is entitled to a new trial?
>
> [17] In the Ontario case of *Kralj v. Murray*, [1954] O.W.N. 58 (C.A.), Hope, J.A., said (at p. 60):
>
> > I am of the opinion that while in certain circumstances a new trial should be ordered, nevertheless the principles set out on behalf of this Court by Meredith J.A. in *Caswell v. Toronto R.W. Co. (1911)*, 24 O.L.R. 339 at 350-1, are here applicable, namely:
> >
> > > A new trial is a hardship under any circumstances; and when granted upon insufficient grounds is a very grave injustice; to take away from any one that which has been fairly won, and to subject him to the delay and cost, and the mental and physical strain, of another trial, as well as to the uncertainty of its outcome, is something which fairly may be thought intolerable. New trials are, of course, occasionally necessary in order that justice may be done between the parties, but they are contrary to the public interests and may fairly be described as necessary evils, when necessary.
> > > . . .
> > >
> > > A strong case must, therefore, be presented before a new trial can properly be directed; so strong that even in some cases, where an injustice has been done to one of the parties at the trial a new trial is not granted unless the error was pointedly objected to at the time; and, all through the practice upon applications for new trials, the like reluctance in granting new trials is everywhere evident.
> > >
> > > It is, however, sometimes the right of a party to have a new trial; and sometimes the Court, exercising a discretion of its own, grants a new

> > trial, but seldom, and only when the interests of justice plainly require it.
>
> In the present case, no objection was taken at the trial to the learned trial judge's charge on the grounds now advanced by counsel for the appellant and I do not consider that any injustice has been wrought in the light, as I previously stated, of the answers of the jury to the questions submitted.
>
> I would, therefore, on all grounds, dismiss the appeal with costs, if demanded.

This passage was adopted with approval by Esson, J.A., (as he then was) in the majority judgment of this Court in *Rendall v. Ewert* (1989), 38 B.C.L.R. (2d) 1 (at p. 10).

> [18] ... The civil jury system requires citizens to give their time, often at significant personal cost, to resolve the problems of others, and litigants who wish to avail themselves of this process must, of course, make every reasonable effort to ensure that the problem they wish resolved is put to the jury in a way in which the jury can properly deal with it. When eight jurors have given five working days to the resolution of a business dispute such as the present an appeal court should, in my view, be most reluctant to grant a second trial on grounds which counsel did not raise at the first trial.

[49] Those comments are apt to the complaint now levelled at the judge's instruction. I would not grant a new trial on this basis. Should we then, make our own adjustment? Neither counsel called evidence on the issue, and one cannot discern from the evidence a relationship between time and the amount awarded by the jury. That is, one cannot determine how the jury viewed the number and timing of the boxing matches that must found the damages award. More so than most cases, this case required crystal ball gazing. In this circumstance, I see no basis upon which we could make a principled adjustment to the damages awarded. Accordingly I would not interfere with the award on this basis.

[50] This brings us to the assessment of damages itself. The appellants say that each of the heads of damages assessed is wholly out of proportion to the evidence before the Court.

[51] Damages are a question of fact and we may interfere with the quantum, absent an error of law or principle, only if there is a palpable and overriding error.

[52] I deal with the loss of earning capacity first. I conclude, from the fact the jury awarded a significant sum, that the jury rejected the appellants' submission that Mr. Albert would have withdrawn from a boxing career, soon after the accident, in any event. Clearly Mr. Albert had boxing ability. The jury must have considered that his boxing ability was diminished as the result of the injuries from the accident. It is true that Mr. Albert did not earn very much money from boxing prior to the accident. It is also true that there was not a great deal of evidence about the size of the purses available in professional boxing. Nonetheless there was some evidence. Witnesses from the world of boxing did testify to some extent as to the purses won in certain matches, particularly in Canada. There was evidence, therefore, before the jury from which they could conclude that Mr. Albert had the skills to fight for, and win, purses in the time between the accident and the trial, amounting to $60,000. The period of past loss is close to four years. The sum awarded is well within the range of the purses that were discussed in the evidence as available, in Canada, over that period of time. Given the positive evidence as to Mr. Albert's abilities, one cannot say the award of $60,000 for past income loss is unsupported by the evidence, disproportionate, or wholly erroneous.

[53] I have come to the same conclusion in respect to the award for future loss. That sum may be a small portion of what Mr. Albert otherwise would have earned, or it may be more than he would have earned. We do not know. There was, however, evidence of his considerable abilities and evidence of the purses available in the boxing world, even in Canada, that would support an award of $838,000. I would not interfere with the award for future loss of earnings.

[54] This brings me to the last head of damages, non-pecuniary damages, awarded in the amount of $125,000. That is a significant award. Nonetheless, although higher than similar awards in cases of loss of fine athletic capacity, can it be said to be so high as to be wholly erroneous? It was, after all, the jury that saw and listened to Mr. Albert and the other witnesses, and bringing their worldly knowledge which is the hallmark of juries, could assess the pain, suffering and loss of enjoyment of life caused by the injury sustained in the accident, and its effect

upon his distinguishing characteristic as a high level boxer. I cannot say, in these circumstances, that the award of non-pecuniary damages meets the level that would permit this court to interfere. I would not accede to this ground of appeal.

[55] I would dismiss the appeal.

[56] **CHIASSON J.A.**: I agree.

[57] **FRANKEL J.A.**: I agree.

[58] **SAUNDERS J.A.**: The application to adduce fresh evidence is dismissed. The appeal is dismissed.

"The Honourable Madam Justice Saunders"

TAB 3

Citation: ***Bacchus Agents (1981) Ltd. v. Philippe Dandurand Wines Limited*** 2002 BCCA 138

Date: 20020227
Docket: CA028120
Registry: Vancouver

COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN:

BACCHUS AGENTS (1981) LTD.

PLAINTIFF
(APPELLANT)

AND:

**PHILIPPE DANDURAND WINES LIMITED,
PHILIPPE DANDURAND and
VINS PHILIPPE DANDURAND INC.**

DEFENDANTS
(RESPONDENTS)

Before: The Honourable Madam Justice Southin
The Honourable Madam Justice Ryan
The Honourable Madam Justice Saunders

Gregory S. Pun and Judy A. Rost	Counsel for the Appellant
John H. Shevchuk	Counsel for the Respondents
Place and Date of Hearing:	Vancouver, British Columbia 31st January, 2002
Place and Date of Judgment:	Vancouver, British Columbia 27th February, 2002

Written Reasons to follow by:
The Honourable Madam Justice Southin

Concurred in by:
The Honourable Madam Justice Ryan
The Honourable Madam Justice Saunders

Reasons for Judgment of the Honourable Madam Justice Southin:

[1] At the end of the hearing of this appeal, I said,

concurred in by my colleagues:

> [1] SOUTHIN J.A.: This appeal arises out of an order made on an application under Rule 18A. We are all of the view that the nature of the issues raised in the court below was such that it was not in the interests of justice that an order should be made on the applications.
>
> [2] For that reason this appeal is allowed. The applications under Rule 18A that were before the learned judge are dismissed without prejudice to rights of the parties in the rest of the litigation.
>
> [3] We shall deliver written reasons in due course explaining this matter more fully because we think that the profession requires some guidance in these matters.

[2] These are those reasons.

[3] This is the judgment in issue:

> THE APPLICATION of the Plaintiff, Bacchus Agents (1981) Ltd., for the determination of an issue pursuant to Rule 18A, coming on for hearing at the Courthouse at 800 Smithe Street, in the City of Vancouver, in the Province of British Columbia, on the 22nd and 23rd day of June, 2000, and on hearing Judy A. Rost, counsel for the Plaintiff, and John H. Shevchuk, counsel for Defendants:
>
> AND JUDGMENT being reserved to this date:
>
> THIS COURT ORDERS that:
>
> 1. The Plaintiff is not entitled to claim as damages the losses suffered by the Plaintiff's undisclosed principal, McLean Beverages Inc.

> and the Plaintiff will not be entitled to an award for damages inclusive of the McLean Beverages Inc. losses, if otherwise successful in this action.

[4] Although, in this case, it makes no matter because the nature of the questions before us was such that we had no need to know which of the affidavits, extracts from discovery, and so forth, were adduced by which side, nevertheless it would be helpful if orders on Rule 18A applications recited that information. The order would then tell us, on appeal from a judgment after an ordinary trial, what comes from a perusal of the transcript and appeal book. We cannot force the court below to adopt practices intended to simplify our task but its doing so would be appreciated.

[5] By Rule 18A:

> 18A(1) A party may apply to the court for judgment, either on an issue or generally, in any of the following:
>
> (a) an action in which a defence has been filed, ...
>
> * * *
>
> (8) On or before the hearing of an application under this rule, the court may
>
> (a) adjourn the application, or
>
> (b) dismiss the application on the ground that
>
> (i) the issues raised by the notice of motion are not suitable for disposition under this rule, or
>
> (ii) the application will not assist the efficient resolution of the proceeding.

* * *

> (11) On the hearing of the application, the court may
>
> (a) grant judgment in favour of any party, either on an issue or generally, unless
>
> (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
>
> (ii) the court is of the opinion that it would be unjust to decide the issues on the application, ...

[6] This is a useful rule intended to shorten litigation, thereby lessening its cost to the parties and to the public treasury and reducing delays in the process, it being an axiom, at least since Bacon's time, that justice delayed is justice denied.

[7] When, however, as in this case, the rule is invoked to try "an issue" rather than the whole case - what I have often characterized as "litigating in slices" - it may become a hindrance to the "just, speedy and inexpensive determination" of the dispute "on its merits".

[8] This action was brought in 1997. By its amended statement of claim filed in 1999, the appellant pleaded, in part:

> 2. The Plaintiff brings this action on its own behalf and as agent for and on behalf of McLean Beverages Inc., a corporation duly incorporated pursuant to the laws of the province of Alberta.

* * *

6. On or about January 9, 1997, Bacchus and PDW [the defendant, Philippe Dandurand Wines Limited] entered into a letter agreement for, inter alia, the purchase of Bacchus for the price of $1,300,000 excluding retained earnings, capital assets and inventory.

* * *

9. On or about March 3, 1997, Bacchus and PDW entered into an agreement in writing executed by Bacchus and PDW for the purchase and sale of assets from Bacchus to PDW (the "Agreement"). The effective date of the Agreement was January 9, 1997 and replaced the letter agreement referred to in paragraph 5 [sic] above.

* * *

12. The Agreement provides, inter alia, that Bacchus would sell and PDW would purchase the assets of Bacchus for the purchase price of $1,570,000 payable as follows:

a. $100,000.00 by non-refundable deposit paid by PDW to Bacchus on January 9, 1997;
b. $388,181.00 payment due on Closing Date;
c. $270,454.75 payment due August 1, 1998;
d. $270,454.75 payment due August 1, 1999;
e. $270,454.75 payment due August 1, 2000;
f. $270,454.75 payment due August 1, 2001.

13. The purchase price is subject to adjustment to the extent the value of the inventory is greater or lesser than $900,000.

14. The Agreement specifies a closing date of April 1, 1997.

* * *

18. In preparation for the closing of the Agreement, Bacchus incurred significant time and expense in securing an orderly transition of Bacchus' suppliers and customers to PDW, some particulars of which include the following:

a. Introduction of PDW's President, Dandurand, to customers and briefing on same;
b. Introduction of PDW's President, Dandurand, to sales force and briefing on same;

c. Introduction of PDW's President, Dandurand, to customers and briefing on same;
d. In some instances, Bacchus conducted presentations for PDW on Dandurand's behalf to obtain lines for PDW;
e. Termination of all Bacchus' employees;
f. Requesting and obtaining written confirmation from virtually all suppliers of Bacchus that PDW would become that supplier's agent;
g. Early termination of Bacchus' lease premises.

19. Further, PDW, prior to the date of closing:
a. Took out advertisements confirming the purchase of assets of Bacchus;
b. Represented to the industry that PDW had purchased the assets of Bacchus and was taking over its operations;
c. Wrote Bacchus' employees promising continued employment with PDW.

20. As at April 1, 1997, Bacchus was ready, willing, and able to close the Agreement and had taken all steps necessary pursuant to the Agreement to facilitate the closing.

21. On April 3, 1997, PDW advised Bacchus that it was not prepared to close the Agreement in accordance with the written provisions of the Agreements. PDW requested a postponement of the closing.

22. On April 7, 1997, PDW advised Bacchus that it had not yet obtained financing for the closing Agreement. PDW's financing was not a condition to closing in the Agreement.

23. On April 11, 1997, PDW advised Bacchus that it would not close the Agreement.

* * *

32. Further, or in the alternative, Bacchus states that the blatant and intentional breach of the Agreement by PDW, at the specific direction of Dandurand, constitutes high-handed conduct and

Bacchus claims punitive damages against Dandurand and PDW.

* * *

WHEREFORE THE PLAINTIFF CLAIMS AS AGAINST THE DEFENDANTS JOINTLY AND SEVERALLY:

a. A declaration that the Plaintiff was at all material times the agent for its undisclosed principal, McLean Beverages Inc.;
b. A declaration that the Defendants are in breach of the Agreement;
c. A declaration that the Plaintiff is entitled to retain the $100,000 non-refundable deposit paid by the Defendants January 9, 1997;
d. Damages for breach of contract;
e. Damages for the following:
    i. loss of good will;
    ii. decrease in assets' fair market value;
    iii. loss of bargain;
    iv. loss of suppliers;
    v. loss of employee services necessitating retraining with a resulting cost and loss of productivity;
    vi. loss of ability to effectively market and sell the assets of the corporation;
    vii. legal expense incurred in the preparation and execution of the Agreement;
f. damages for breach of duty of good faith;
g. damages for misrepresentation;
h. damages on a quantum meruit basis;
i. punitive and aggravated damages;
j. general damages;
k. special damages;
l. interest pursuant to the Agreement, or alternatively, interest pursuant to the *Court Order Interest Act*;
m. costs on a solicitor and his own client indemnity basis; and
n. such further and other damages or relief as this court deems proper and equitable.

[9] By their amended statement of defence, the defendants pleaded, in part:

> 2. In response to paragraph 2 of the Amended Statement of Claim, the Defendants deny that there was an agency relationship, either express or implied, between the Plaintiff and McLean Beverages Inc. ("MBI") as alleged or at all.
>
> 3. In the alternative, the Defendants say that if there was an agency relationship between the Plaintiff and MBI, the agency relationship was not created for the purpose of selling, and did not authorize the Plaintiff to sell, any of the assets of MBI.
>
> 4. In the further alternative, the Defendants say that if there was an agency relationship between the Plaintiff and MBI, the agency was created after any alleged agreement between the Plaintiff and any of the Defendants and, therefore, cannot have any effect as against the Defendants.
>
> 5. Further, the allegation by the Plaintiff that there was an agency relationship between it and MBI is evidence which is contrary to and inconsistent with the terms of the agreements the Plaintiff alleges its entered into with the Defendants and any [of] the evidence adduced by the Plaintiff in support of the allegation is inadmissible under the parol evidence rule.
>
> * * *
>
> 16. If there is an Agreement as alleged or at all, which is not admitted but denied, PDW was induced to make the Agreement by representations made by the Plaintiff to PDW. Those representations are as follows:
>
> a. financial arrangements were available to facilitate the purchase;
> b. the Plaintiff had a good relationship with its clients;
> c. the "Governments" would guarantee to buy back inventory;

d. the Plaintiff's Agency Lines, which were to constitute the bulk of the assets of the intended purchase and sale, were in good standing;
e. the Plaintiff had achieved a certain level of market penetration pertaining to the Agency Lines;
f. the Plaintiff's previous earnings were of a certain amount; and
g. the Financial Statements presented to PDW were a reliable indicator of the performance of the Plaintiff.

(the "Representations")

17. The Plaintiff knew or ought to have known that PDW would rely on the Representations and be induced to enter into the Agreement.

18. The Representations were false, inaccurate or misleading in the following ways:

a. the financial arrangements were not available to the Defendants to facilitate the purchase;
b. the strength of the relationships between the Plaintiff and its clients were considerably weaker than claimed by the Plaintiff;
c. the Governments would not guarantee to buy back the inventory;
d. several of the Plaintiff's Agency Lines were not in good standing;
e. the Plaintiff's market penetration pertaining to the Agency Lines was below that which was represented;
f. the Plaintiff's true earnings for the immediate proceeding years were below those amounts represented to PDW; and
g. the Financial Statements presented to PDW reflected inflated revenue figures and understated expense figures.

19. The Plaintiff was negligent in making the Representations in that it knew or ought to have known that the Representations were false, inaccurate or misleading.

> 20. If there is an Agreement as alleged or at all, the fact that the Representations were negligent misrepresentations releases PDW from its obligation to complete the Agreement.

[10] So far as the appeal book discloses, no reply was delivered. Thus these allegations are deemed to be denied.

[11] On the 24th November, 1999, the appellant brought a notice of motion thus:

> ... for an order pursuant to Rule 18A of the *Rules of Court* for the determination of an issue, namely, that the Plaintiff is entitled to claim as damages the losses suffered by the Plaintiffs undisclosed principal, McLean Beverages Inc. and the Plaintiff will be entitled to an award for damages inclusive of the McLean Beverages Inc. losses if successful in this action.

[12] In its outline, the appellant stated that the relevant facts were these:

> 1. The Bacchus Group of Companies are wholesalers of wines, spirits and malt beverages in British Columbia and Alberta. They sell wines, spirits and malt beverages on a commission basis in Saskatchewan and Manitoba. The right to purchase and distribute specific lines of products from suppliers (known in the industry as "Agency Lines") is one of the main assets of the Bacchus Group of Companies. There are two companies which hold the Agency Lines, the Plaintiff Bacchus Agents (1981) Ltd. ("Bacchus") and McLean Beverages Inc. ("MBI"). The separation of Agency Lines between Bacchus and MBI was done for Income Tax purposes.

2. On or about January 9, 1997, the Bacchus Group Inc. and the Defendant Philippe Dandurand Wines Ltd. ("PDW") entered into a letter agreement for, inter alia, the purchase of shares of the Bacchus Group Inc. for the price of $1,300,000 excluding retained earnings, capital assets and inventory, subject to formal documentation.

3. During the negotiations that followed, the parties decided that PDW would purchase assets from Bacchus rather than shares of the Bacchus Group Inc. As Bacchus did not hold all of the Agency Lines and inventory, MBI gave Bacchus the authority to enter into an agreement with PDW in Bacchus' name for and on behalf of MBI with respect to MBI's assets.

4. On or about March 3, 1997, Bacchus and PDW entered into an agreement in writing executed by Bacchus and PDW for the purchase and sale of assets from Bacchus to PDW (the "PDW Agreement"). The effective date of the PDW Agreement was January 9, 1997 and it replaced the letter agreement referred to above. The PDW Agreement was executed by both parties in early March of 1997. The schedules listing the Agency Lines being sold under the PDW Agreement included those owned by MBI. The fact that these Agency Lines were owned by MBI was not disclosed to PDW and MBI is not a signatory to the PDW Agreement.

5. On or about March 24, 1997, MBI and Bacchus entered into an agreement in writing (the "MBI Agreement") whereby Bacchus would acquire the Agency Lines and merchantable inventory of MBI for the purpose of sale by Bacchus to PDW on the same day that the PDW Agreement between Bacchus and PDW closes. Under the MBI Agreement at clause 4.2, no amount is payable by Bacchus to MBI until Bacchus receives the corresponding payment from PDW. In addition, Bacchus acknowledges and agrees at clause 6 that MBI is entitled to a pro-rata share of the rights and entitlements of Bacchus under the PDW Agreement and Bacchus agrees to enforce its

> rights under the PDW Agreement, including guarantees on behalf of MBI.
>
> 6. The PDW Agreement was scheduled to close on April 1, 1998. After exchanging correspondence regarding closing, on April 11, 1998, PDW advised Bacchus that it would not close. Consequently, the MBI Agreement did not close either. No attempt was made to close the MBI Agreement as the whole purpose of that agreement was to facilitate the sale of assets to PDW. As part of its claim for damages, Bacchus has included the loss of certain Agency Lines. Two of those Agency Lines were held by MBI, namely Langguth and Heinikin [sic]. The estimated three year loss for each of these lines is $150,000.00 and $660,000.00 respectively.

[13] The respondents riposted with their own notice of motion, seeking an order:

> ... pursuant to Rule 18A of the *Rules of Court* for the determination of an issue, namely, that there was no undisclosed agency relationship between the Plaintiff and McLean Beverages Inc. at any time relevant to the matters in this action....

[14] They said, as their basis for seeking relief:

> The Defendants say that the evidence adduced in this Action does not support the position that there was an undisclosed agency relationship between the Plaintiff and McLean Beverages Inc.
> a. The Defendants say there is no relationship on the following basis:
> i. The agreement between the Plaintiff and the Defendant Philippe Dandurand Wines Limited expressly and impliedly indicates that the Plaintiff was contracting on its own behalf and not as agent for another

party. The parol evidence rule prevents the admission of evidence contrary to the agreement.
[citations omitted]

ii. There is insufficient evidence to establish an agency relationship between McLean Beverage Inc. and the Plaintiff prior to the March 24, 1997 agreement between McLean Beverage Inc. and the Plaintiff.
[citations omitted]

iii. The March 24, 1997 agreement came too late to create an undisclosed agency relationship that would affect the Defendants.
[citations omitted]

[15] To the respondents' motion, the appellant, in its outline in response, replied:

2. Basis for opposing relief:

* * *

1. The Parol Evidence Rule

(i) The parol evidence rule prevents parties from introducing evidence to add to, subtract from, vary or contradict the terms of a contract which has been reduced to writing. The Plaintiff in this case is not seeking to introduce evidence to add to, subtract from, vary or contradict the terms of the contract.

(ii) The Plaintiff brings its application, in anticipation of a defence being raised by the Defendants that the damages claimed by the Plaintiff are not its own damages. The Defendants may take the position that the Plaintiff cannot claim the loss of agency lines owned by MBI. The Defendants evidence in this regard may conflict with the terms of the contract relating to the ownership of the agency lines. If the

parol evidence rule applied to the introduction of any evidence, no matter what the purpose, then the Defendants would be precluded from introducing evidence to relating to the ownership of the agency lines. However, the parol evidence rule does not extend that far. The parol evidence rule is a guide to be applied to the interpretation of contracts but it is not to be applied to the admissibility of evidence generally. As such, the parol evidence rule will not prevent either the Defendants or the Plaintiff from introducing evidence relating to the question of damages.

* * *

2. The Agency Relationship

(v) There is sufficient evidence to establish an agency relationship between McLean Beverages Inc. prior to the execution of the PDW Agreement. Roger Marion indicates at paragraph 7 of his Affidavit that during the discussions that followed the execution of the Letter Agreement, Bacchus was given express authority from MBI to sell MBI's assets along with its own. He further states that specifically, Bacchus was authorized by MBI to enter into an agreement with PDW in Bacchus' name for and on behalf of MBI with respect to MBI's assets, in particular, MBI's inventory and agency lines.

* * *

3. Material to be relied on:

(a) Affidavit of Femina Fidai sworn the 8th day of November, 1999;
(b) Affidavit of Roger Marion sworn the 7th day of October, 1999;
(c) Supplemental Affidavit of Roger Marion sworn November 16, 1999;
(d) Affidavit of Jim Marion sworn November 18, 1999;

(e) Affidavit of Ann Hewlett sworn the 22nd day of October, 1999;
(f) Examination for Discovery of Roger Marion on May 1, 1998, Questions 520, 524, 530, 547, 550, 551, 554-568 and 832-836; and
(g) Examination for Discovery of Roger Marion on August 19, 1999, Questions 853-858, 878, 905-920, 1000, 1203-1208, 1227-1230, 1239-1242, 1245-1247, 1320-1323 and 1338-1358.

[16] I note that Roger Marion was an officer of the appellant and it is a peculiar thing for a party to adduce and to be permitted to adduce in evidence part of the transcript of the discovery of its own witness. I appreciate that Rule 18A(3) is capable of being so construed, but the practice is at such variance with the practice under Rule 40(27) that it seems improbable the framers so intended.

[17] As matters developed during the hearing of this appeal, it became apparent that critical to the dispute between the parties are these terms of the agreement referred to in the amended statement of claim:

BACKGROUND

A. Bacchus is the owner of certain assets as more particularly described in this Agreement;

B. Bacchus has agreed to sell, and PDW has agreed to purchase, those assets.

> In consideration of the mutual covenants and conditions contained in this Agreement, Bacchus and PDW agree as follows:
>
> 1. Definitions
>
> Unless otherwise stated, the words used in this Agreement will have the following meanings:
>
> 1.1 "Agency Lines" means the agency lines with suppliers of the wine, spirits and malt beverages that are acquired and distributed by Bacchus as listed on Schedule "A" to this Agreement.

[18] Schedule "A", the Agency Lines, lists 29 purveyors of various potables, 21 of which were held by McLean Beverages Inc. and 8 by the appellant. Among the 21 held by McLean Beverages Inc., as I understood counsel, was that of Heineken which had been up to the time of the agreement of substantial value to McLean Beverages Inc. As the purchase price was allocated in the agreement, the "Schedule 'A' Agency Lines" had a purchase price of $630,000.00 of a total purchase price of $1.57 million.

[19] Without in any way holding either party to my understanding from counsel as to the root of this litigation, I infer that at some relevant time, some of the agency lines decided either not to remain with McLean Beverages Inc. or not to go to the respondents.

[20] If the reader will now return to paragraphs 16-18 of the amended statement of defence, he or she will appreciate, to the ultimate outcome of the litigation, the significance of the lack of constancy, if that is what it should be called, of the agency lines.

[21] If there were misrepresentations, whether innocent or negligent - I note the respondents appear to be avoiding the word "fraudulent" - this action may fail on its facts.

[22] If, however, that defence fails, the case may raise the important, rare and unsettled questions of law identified in the outlines of the parties:

1. The right of a party to a contract, who himself has suffered no loss, to recover for the breach by the other side the damages that breach has caused to a third party (a question addressed by Lord Diplock in the ***The Albazero***, [1977] A.C. 774 at 846-47 (H.L.), and by Lord Brown-Wilkinson in ***Linden Gardens Trust Ltd. v. Lenesta Sludge Disposals Ltd.***, [1994] 1 A.C. 85 at 112 *et seq*.);
2. The right of an undisclosed principal to sue on a contract made by his agent.

[23] I include in the word "unsettled", questions which may attract the doctrine of "incremental change".

[24] In the case at bar, McLean Beverages Inc., if it is an undisclosed principal, has not sued, apparently because it considers authority precludes it from doing so. Perhaps in light of the colloquy between counsel and the bench at the hearing of this appeal, it will reconsider its absence from the style of cause.

[25] The orderly development of the common law is not enhanced by this Court addressing issues of law of the nature of these issues unless the case at hand, in all its aspects, requires it to do so.

[26] To put all this in other terms, demurrers were abolished because, although they honed the pleader's skill, they were considered to add unnecessary complexity and cost to litigation. To revive them, therefore, by invoking the words in Rule 18A, "an issue", to determine serious questions of law may more often than not prolong rather than resolve litigation.

[27] This action was brought on the 8th July, 1997. By now it ought to have gone to trial.

[28] In the case at bar, I infer that both parties were entranced by these questions of law and thus the learned chambers judge considered he ought to address them, but, with

respect, the judge before whom a proceeding of this kind comes must not think of himself or herself as a puppet in the hands of the litigants. Under subrule (8), the court may dismiss an application when it will not assist the efficient resolution of the proceeding or when the issues are not suitable for disposition under the rule.

[29] Both these considerations applied here. A trial judge should bear in mind, as must we, that the loser in this Court has a right to seek leave to appeal to the Supreme Court of Canada. That court ought not to be faced, in deciding whether to grant or refuse leave, with a court of appeal having made pronouncements, allegedly erroneous, on important questions of law in an action which may ultimately fail on its facts.

"THE HONOURABLE MADAM JUSTICE SOUTHIN"

I AGREE:

"THE HONOURABLE MADAM JUSTICE RYAN"

I AGREE:

"THE HONOURABLE MADAM JUSTICE SAUNDERS"

TAB 4

BANK OF BRITISH COLUMBIA v. ANGLO-AMERICAN CEDAR PRODUCTS LIMITED

Supreme Court, Macdonald J. [In Chambers]

Heard — September 27, 1984.
Judgment — October 2, 1984.

Judgments and orders — Summary judgments — Decisions of provincial courts — British Columbia — Action for guarantee — Summary judgment denied where some evidence with "prima facie plausibility" meriting further investigation and defendant possibly able to bolster defence through discovery.

The plaintiff applied under RR. 18 and 18A of the Rules of Court for summary judgment on a guarantee signed by the defendant. The defendant contended that the guarantee was null and void on the grounds that the plaintiff had breached certain express or implied collateral terms and had induced the execution of the guarantee by fraudulent or negligent misrepresentation.

Held — Application dismissed.

The court is given a wide discretion under R. 18A which anticipates prompt determination of disputed issues of fact and law. The obligation of the chambers judge, if there is some evidence with "prima facie plausibility" that merits further investigation, is to decide the issues of fact or law raised by that evidence, unless the court is unable on the whole of the evidence before it to find the necessary facts or unless it would be unjust to decide the issues without trial.

On the facts, it would have been unjust to decide the issues between the parties on this application. Although, at the time of the application, the plaintiff's case was a strong one and that of the defendant relatively weak, there was a real possibility that the defendant could bolster its defence by discovery of documents and examinations for discovery and there was a triable issue disclosed in the material then before the court.

Cases considered

C.I.B.C. v. Nandhra (1977), 31 B.C.L.R. 242 (C.A.) — referred to.

Hawrish v. Bank of Montreal, [1969] S.C.R. 515, 66 W.W.R. 673, 2 D.L.R. (3d) 600 — referred to.

Hughes v. Sharp (1969), 68 W.W.R. 706, 5 D.L.R. (3d) 760 (B.C.C.A.) — referred to.

Memphis Rogues Ltd. v. Skalbania (1982), 38 B.C.L.R. 193, 29 C.P.C. 105 (C.A.) — referred to.

Stucki v. Reed (1967), 62 D.L.R. (2d) 535 (B.C.C.A.) — referred to.

Yong v. Letchumanan, [1980] A.C. 331 (P.C.) — applied.

Rules considered

Supreme Court Rules, RR. 18, 18A.

[Note up with 20 C.E.D. (West. 3rd) *Judgments and Orders,* VIII, 1; P3 Can. Abr. (2d) *Judgments and Orders,* VII, 5, b.]

APPLICATION under RR. 18 and 18A for summary judgment on guarantee.

J. F. Dixon, for plaintiff.
C. Harvey, for defendant.

(Vancouver No. C834163)

2nd October 1984. MACDONALD J.:— The plaintiff applies for summary judgment under RR. 18 and 18A of the Rules of Court. This action is based on a guarantee signed by the defendant on 14th March 1983. The obligation of the principal debtor, Cedar Industries Ltd., exceeds the amount which the guarantor can be called upon to pay.

The defence alleges that the guarantee is null and void because the plaintiff is in breach of certain express or implied collateral terms thereto and because it induced the execution thereof by fraudulent or negligent misrepresentations. The plaintiff responds that the form of the guarantee on which it relies precludes the existence of any collateral terms. It concedes that there may have been such collateral obligations in connection with an earlier guarantee, but that the 14th March 1983 guarantee on which it now sues was a "new deal". The plaintiff denies the misrepresentations alleged.

Were this an application under R. 18 alone, it would be dismissed. Since *Hughes v. Sharp* (1969), 68 W.W.R. 706, 5 D.L.R. (3d) 760 (B.C.C.A.), it has been well established that a litigant is not to be deprived of a trial under R. 18 unless it is manifestly clear that he is without a defence that deserves to be tried or that his case discloses no facts which could provide him with a defence. The question, under R. 18, is whether there is a bona fide triable issue. That position was reconfirmed in *Memphis Rogues Ltd. v. Skalbania* (1982), 38 B.C.L.R. 193 at 202, 29 C.P.C. 105 (C.A.):

> The question has been stated in a number of ways: Is there no real substantial question to be tried? Is there no dispute as to facts or law which raises a reasonable doubt? Is it manifestly clear that the appellants are without a defence that deserves to be tried? Although cast in different terms, all point to the same inquiry, namely, is there a bona fide triable issue?

Under R. 18, the chambers judge must not try disputed issues of fact or law: see *C.I.B.C. v. Nandhra* (1977), 31 B.C.L.R. 242 at 244 (C.A.). Under R. 18A, however, the situation is different. Subrule (3) of R. 18A reads:

> (3) On the hearing of the application, the court *may* grant judgment in favour of any party upon an issue or generally, *unless*

> (a) the court is *unable* on the whole of the evidence before the court on the application, *to find the facts necessary* to decide the issues of fact or law, or
>
> (b) the court is of the opinion that *it would be unjust* to decide the issues on the application . . . (The italics are mine.)

Rule 18A anticipates the prompt determination of disputed issues of fact or law. It is a summary trial procedure rather than a summary judgment procedure. The court has a wide discretion under R. 18A. The plaintiff referred to *Yong v. Letchumanan,* [1980] A.C. 331 (P.C.), to suggest an approach which should be adopted by a chambers judge under R. 18A. While that decision is concerned with the removal of a caveat and its facts have no parallel to this case, I agree that the following statement at p. 341 is applicable to these proceedings:

> Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit, however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be. In making such order on the application as he "may think just" the judge is vested with a discretion which he must exercise judicially. It is for him to determine in the first instance whether statements contained in affidavits that are relied upon as raising a conflict of evidence upon a relevant fact have sufficient prima facie plausibility to merit further investigation as to their truth.

The obligation of the chambers judge under R. 18A goes even further. If there is some evidence with "prima facie plausibility" that merits further investigation, there is an obligation under R. 18A to decide the issues of fact or law raised by that evidence unless the court is unable, on the whole of the evidence before it, to find the facts necessary or unless it would be unjust to decide the issues without a trial. Even though the chambers judge may not be prepared to decide the issues on the application, those proceedings may serve to clarify the issues and lead to directions under R. 18A(5) designed to expedite the trial.

Where the issues are decided by the chambers judge on affidavit and documentary evidence, the appeal court will be in as good a position as the chambers judge to determine credibility. Where the application is dismissed, the chambers judge should refrain from extensive comment on his view of the facts. In the latter case, the same issues will be tried in due course before another judge who will have the benefit of viva voce evidence and cross-examination.

After consideration of the able arguments addressed to me, I have concluded that it would be unjust to decide the issues between the parties on this application. At this time, the plaintiff's case is a strong one and that of the defendant relatively weak. But the defendant is correct when it alleges that, in a case of this kind, the defendant's case will in large part be made, if it is made at all, out of the plaintiff's own documents and the explanations of the plaintiff's witnesses in connection therewith. There is some possibility of a real factual base being developed to support the contentions of the defendant. My view of the strength of that possibility is reflected in the order which I propose to make regarding the costs of this application.

The plaintiff argued that it was not sufficient for the defendant to simply verify, by general statements in an affidavit, the allegations in the amended statement of defence. The plaintiff suggested that such practice was subject to the same criticism as the "vague and shadowy allegation of loss" mentioned in *Stucki v. Reed* (1967), 62 D.L.R. (2d) 535 (B.C.C.A.). I do not accept that proposition as having universal application. The result depends in large part on the form and particularity of the statement of defence. Here, the verification by affidavit of the detailed allegations in the defence is as effective as if those same allegations were reproduced in affidavit form.

On the facts as they now appear, I have grave doubts of the defendant's ability to successfully defend this action. The guarantee of 14th March 1983 purports not to be "subject to or affected by any promise or condition affecting or limiting . . . liability". It also states that no representation or promise on the part of the bank which is not set out in the document shall form part of the contract or affect liability thereunder, even if it induced the making thereof. *Hawrish v. Bank of Montreal,* [1969] S.C.R. 515, 66 W.W.R. 673, 2 D.L.R. (3d) 600, holds that such a provision may be a difficult one for a guarantor to overcome. The "new deal" argument of the plaintiff has considerable force, even in the face of its letter of 3rd March 1983 confirming that "all terms as cited in the Guarantee dated October 20th, 1981 shall remain in full force and effect". For the reasons expressed earlier, I do not propose to set out in any greater detail my view of the issues of fact on the material before me.

Including prejudgment interest to this date, the plaintiff's claim exceeds $700,000. Where there is a real possibility that the defendant can bolster its defence by discovery of documents and examinations for discovery, and where there is a triable issue disclosed on the material now before the court, it would be unjust to decide the issues on this application.

However, the plaintiff was justified in proceeding with this application (first under R. 18 and when that was adjourned to permit the filing of an amended defence, then under R. 18A). Despite its dismissal, the costs of this application will be costs in the cause.

Application dismissed.

FIRST CITY CAPITAL LTD. v. PRICE WATERHOUSE LIMITED

Supreme Court, Oppal L.J.S.C.

Heard — June 27, 1984.
Judgment — July 30, 1984.

Conditional sales — Statutory formalities — Registration — Hydraulic boom crane installed on truck not an accessory to motor vehicle under Sale of Goods on Condition Act — Crane not required to be registered under Act.

The plaintiff leased a hydraulic boom crane on a conditional sales basis to C.B.P. Ltd., who installed the crane on one of their trucks. The lease was registered in the office of the Registrar of Companies but not in the office of the Registrar General. The defendant, as receiver-manager of C.B.P. Ltd., took possession of the crane and sold it to a third party. The plaintiff brought action for conversion. The defendant contended that the boom crane fell within the definition of "motor vehicle" as being an accessory "belonging to and kept with" that motor vehicle and was required to be registered with the Registrar General pursuant to s. 4 of the Sale of Goods on Condition Act.

Held — Judgment for plaintiff.

Applying any of the accepted tests for determining whether an accession had occurred, the boom crane was not an accessory of the truck so as to bring it within the definition of "motor vehicle" in the Sale of Goods on Condition Act. The most appropriate test in this case was the test of destruction of utility and the evidence was that the utility of the truck would not be destroyed by removal of the boom crane. The crane was sold as a separate unit and could be attached to another truck in the future. It was common practice to remove the crane for purposes of repairs to the truck and this could be done without injury to the crane. As the crane was not an accessory of the truck, there was no requirement that the lease be registered with the Registrar General pursuant to the Sale of Goods on Condition Act.

Cases considered

Firestone Tire & Rubber Co. of Can. Ltd. v. Indust. Accept. Corp., [1970] S.C.R. 357, 75 W.W.R. 621, 17 D.L.R. (3d) 229 — considered.

Goodrich Silvertown Stores v. McGuire Motors Ltd., [1936] 4 D.L.R. 319 (Ont. Co. Ct.) — referred to.

TAB 5

CITATION: Barrick Gold Corporation v. Goldcorp. Inc., 2011 ONSC 3725
COURT FILE NO.: CV-10-8539-00CL
DATE: 2012-06-26

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
BARRICK GOLD CORPORATION	)	*Chris G. Paliare*, *Gordon Capern, Odette Soriano*, *Karen Jones, Tina Lie* and *Alysha Shore*, for the Plaintiff
	)	
Plaintiff	)	
	)	
– and –	)	
	)	
	)	
	)	
	)	
GOLDCORP INC., NEW GOLD INC.,	)	
DATAWAVE SCIENCES INC.,	)	*Benjamin Zarnett, Jessica Kimmel* and *Melanie Ouanounou*, for the Defendants New Gold Inc., Datawave Sciences Inc. and Inversiones El Morro Limitada
INVERSIONES EL MORRO LIMITADA,	)	
XSTRATA COPPER CHILE S.A.,	)	
XSTRATA CANADA CORPORATION,	)	
XSTRATA QUEENSLAND LIMITED	)	
AND SOCIEDAD CONTRACTUAL MINERA EL MORRO	)	*Mark A. Gelowitz, Allan D. Coleman* and *Geoffrey Hunnisett*, for the Defendants Goldcorp Inc. and Sociedad Contractual Minera El Morro
	)	
Defendants	)	
	)	
	)	*David I.W. Hamer*, *Harry C.G. Underwood, Junior Sirivar* and *Brendan Brammall*, for the Defendants Xstrata Copper Chile S.A., Xstrata Canada Corporation and Xstrata Queensland Limited
	)	
	)	
	)	**HEARD:** June 6, 7, 8, 9, 10, 13, 14, 15, 16, 20, 21, 24, 27, 28, 29 and 30, 2011; October 12, 13, 14, 17, 18, 19, 20, 21, 24, 25, 26, 27, 28 and 31, 2011; January 30 and 31, 2012; February 1, 2 and 3, 2012

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REASONS FOR JUDGMENT

WILTON-SIEGEL J.

[1] In this action, Barrick Gold Corporation alleges that Xstrata Copper Chile S.A. breached an agreement to sell Barrick a 70% interest in a Chilean mining project referred to as the "El Morro Project". The 70% interest of Xstrata Copper Chile S.A. was instead sold to Datawave Sciences Inc., a subsidiary of New Gold Inc., pursuant to the exercise of a right of first refusal set out in a shareholders agreement between Datawave Sciences Inc. and Xstrata Copper Chile S.A. In turn, Datawave Sciences Inc. immediately sold the Xstrata 70% interest to a subsidiary of Goldcorp Inc. by means of a sale of the shares of a subsidiary of Datawave Sciences Inc., which was created to acquire the Xstrata 70% interest. This transaction, which is referred to in these Reasons as the "Goldcorp Transaction", was set out in an agreement among New Gold Inc., Datawave Sciences Inc. and Goldcorp Inc. referred to as the "Goldcorp Agreement" that was entered into prior to Datawave's exercise of its right of first refusal.

[2] Barrick Gold Corporation seeks specific performance of its agreement with Xstrata Copper Chile S.A. and, to this end, has also joined, among others, New Gold Inc., Datawave Sciences Inc. and Goldcorp Inc. Alternatively, Barrick Gold Corporation seeks damages for the loss of the opportunity represented by the Xstrata interest in the El Morro Project, which it calculates to be Cdn. $747 million.

Overview

[3] The principal Barrick claim in this action is summarized as follows. The Goldcorp Agreement provided for the sale of the 70% interest by Datawave to Goldcorp conditional upon Datawave exercising the right of first refusal and purchasing the 70% interest of Xstrata Chile S.A. The Goldcorp Agreement further contemplated that Datawave would use funding provided by Goldcorp by way of a loan to purchase the 70% interest. Barrick Gold Corporation's position is that the Goldcorp Agreement constituted a transfer by Datawave Services Inc. to Goldcorp Inc. of Datawave's right to purchase the 70% interest of Xstrata Chile S.A. Barrick says that this transfer contravened the provisions of the shareholders agreement between Datawave Services Inc. and Xstrata Chile S.A. because it was not accompanied by a sale of the 30% interest of Datawave Sciences Inc. in the El Morro Project. Barrick says that the right of first refusal provided Datawave with only two options: (1) acquire the 70% interest in its own right; or (2) allow Barrick to acquire the 70% interest. Barrick says that allowing a right of first refusal to be exercised in the manner provided in the Goldcorp Transaction would significantly undermine the ability of a joint venture partner to maximize the value of its interest if it wishes to sell some or all of its interest in the joint venture.

[4] In these Reasons, I reach the following conclusions:

1. neither the execution of the Goldcorp Agreement nor the exercise of the right of first refusal by Datawave Sciences Inc. resulted in a breach of the shareholders agreement pertaining to the El Morro Project given the structure of the Goldcorp Transaction as described above;

2. as a consequence, Barrick's principal claim for breach of contract is dismissed on the basis that the agreement between Barrick Corporation and Xstrata Chile S.A. terminated upon the exercise of the right of first refusal;

3. certain additional claims of breach of contract against Xstrata Chile S.A. also fail for the same reason; and certain other additional claims of breach of contract fail on legal and factual grounds;

4. certain tort claims against New Gold Inc. and Goldcorp Inc. are also dismissed as a consequence of the determination that the exercise of the right of first refusal by Datawave Sciences Inc. did not result in a breach of the shareholders agreement and on other grounds;

5. claims against New Gold Inc. and Goldcorp Inc. for breach of a duty of confidence based on an alleged misuse of confidential information are dismissed on legal and factual grounds;

6. a claim of unjust enrichment against Goldcorp Inc. is dismissed as a necessary consequence of the foregoing determinations; and

7. if the court had held that Datawave Sciences Inc. had breached the shareholders agreement upon the exercise of its right of first refusal, the appropriate remedy would have been an order of specific performance directed against Xstrata Chile S.A. and Goldcorp Inc.

[5] In this trial, the parties presented their evidence in two stages. The first stage dealt with liability issues. The second stage dealt with issues pertaining to remedies in favour of Barrick in the event that any of the defendants are found to have breached obligations owed to Barrick. I have followed this approach in addressing the evidence and the legal issues in this proceeding. In addition to the descriptions of the relevant provisions in the various agreements between the parties set out in these Reasons, I have set out the relevant contractual provisions in their entirety in Schedule "A" to these Reasons for ease of reference.

[6] These Reasons are therefore organized in the following order. In Part I of these Reasons I set out the evidence regarding the circumstances giving rise to this action. Part IIA of these Reasons addresses Barrick's principal claim of breach of contract against Xstrata Chile S.A. based on its failure to complete the sale of its 70% interest in the El Morro Project to Barrick Corporation. Part IIB of these Reasons addresses the additional claims against the defendants. Part III of these Reasons summarizes the considerable evidence introduced by the parties

pertaining to Barrick's claim for specific performance or damages. In Part IV of these Reasons, I set out the basis for the conclusion that the appropriate remedy in the present circumstances would be an order for specific performance directed against Xstrata Chile S.A. and Goldcorp.

General Factual Background

The Parties

[7] Barrick Corporation ("Barrick") is the world's largest gold producer. It is a public company that is incorporated pursuant to the laws of Ontario, has its head office in Toronto and carries on business in Canada and internationally.

[8] Xstrata plc is a global diversified mining company. It carries on business through five commodity business units, one of which is the Xstrata Copper business unit (referred to as "Xstrata Copper"). Xstrata Copper is the fourth largest copper producer in the world. The principal corporate entity of Xstrata Copper is Xstrata Queensland Limited ("Xstrata Queensland"), which is incorporated in Australia and has its headquarters in Brisbane, Australia. Xstrata Queensland indirectly owns Xstrata Copper Chile S.A. (referred to as "Xstrata Chile" or, where the context does not call for any distinction between Xstrata Copper and Xstrata Queensland, "Xstrata"), a corporation incorporated in the Republic of Chile that has at all material times carried on business exclusively in Chile.

[9] As a matter of formal inter-corporate structure, Xstrata Chile is owned by two Bermuda companies, one of which is owned directly and the other indirectly by Xstrata Canada Corporation ("Xstrata Canada"), a corporation incorporated under the laws of Ontario with head offices in Toronto which in turn is indirectly owned by Xstrata plc. However, Xstrata Canada did not give any business direction to Xstrata Chile that is relevant to this action. In these Reasons, Xstrata Canada and Xstrata Queensland are collectively referred to as the "Xstrata Parent Entities".

[10] New Gold Inc. is an intermediate gold producer. It is a public company that is incorporated pursuant to the laws of Ontario, has its head office in Vancouver, has its registered office and principal place of business in Toronto, and has assets in the United States, Mexico, Australia, Canada and Chile. New Gold Inc. is the successor corporation pursuant to an amalgamation dated June 30, 2008 among New Gold Inc., Peak Gold Ltd. and Metallica Resources, Inc.

[11] Datawave Sciences Inc. ("Datawave") is a wholly-owned direct subsidiary of New Gold Inc. formed under the laws of the British Virgin Islands. Datawave is the vehicle through which New Gold Inc. holds its interest in the El Morro Project. In these Reasons, the terms "New Gold" or "New Gold/Datawave" and "Datawave" are used interchangeably to refer to New Gold, Datawave and Finco, collectively, except where the context otherwise requires.

[12] Inversiones El Morro Limitada ("Finco") is a wholly-owned subsidiary of Datawave. It is a limited liability company under the laws of Chile that was formed for the purposes of

receiving carried funding and providing shareholder funding to the El Morro Mining Company (as defined below) on Datawave's behalf pursuant to the Carried Funding Loan Agreement (as defined below).

[13] Inversiones Subco SpA ("DataSub"), a further subsidiary of Datawave, is a corporation incorporated under the laws of Chile on February 2, 2010 to which Datawave assigned its right to close the purchase of the Xstrata Interest (as defined below) under section 10.3 of the El Morro Shareholders Agreement and section 16.1 of the Datawave Purchase Agreement (each as defined below).

[14] Goldcorp is also one of the world's leading gold producers. It is a public company that is incorporated pursuant to the laws of Ontario, has its head office in Vancouver and its registered office in Toronto, and carries on business in Canada and internationally.

The El Morro Mining Project

[15] The El Morro mining project is comprised of 487 mining claims covering an area of approximately 80,000 hectares (excluding overlapping) located in north-central Chile, approximately 650 km north of Santiago and 20 km west of the Argentinean border (the "El Morro Project"). Included in this property is an advanced stage copper and gold mining development project comprising approximately 3,600 hectares referred to as "El Morro".

The El Morro Mining Company

[16] The El Morro Project is owned by Sociedad Contractual Minera El Morro (the "El Morro Mining Company" or the "Company"), a contractual mining company incorporated under the laws of Chile. Prior to the closing of the Goldcorp Transaction (as defined below) on February 16, 2010, all of the employees of the El Morro Mining Company were seconded from Xstrata Chile but paid by the El Morro Mining Company.

[17] Prior to the events giving rise to this action, the shares of the Company were owned as to 70% by Xstrata Chile and as to 30% by New Gold, through its ownership of Datawave. New Gold continues to own its 30% interest in El Morro through Datawave's interest in the Company. As a result of the Goldcorp Transaction, however, Goldcorp has replaced Xstrata as the owner of the remaining 70% interest in El Morro through its acquisition of DataSub.

BHP Royalty

[18] The BHP Royalty is a 2% net smelter return royalty in respect of certain mining concessions covering portions of the El Morro Project, including El Morro. The BHP Royalty is owned by Xstrata Chile, as to 70%, and by Datawave/New Gold, as to 30%. Xstrata Chile's 70% interest in the BHP Royalty was not included in the assets comprising the Xstrata Interest (as defined below) that were sold pursuant to the Goldcorp Transaction.

Fluor Feasibility Study

[19] In early 2006, a predecessor of Xstrata Chile entered into an agreement with the Chilean subsidiary of Fluor Corporation, an engineering company, for a comprehensive feasibility study of El Morro (the "Fluor Feasibility Study"). The purpose of the Fluor Feasibility Study was to assess whether El Morro should be advanced to the final engineering and construction stage ─ that is, whether the mineral deposit could be mined profitably. The Fluor Feasibility Study included a mine design, a production schedule, a detailed process flow sheet, product recoveries, a detailed plant design, a consideration of the environmental issues, detailed capital and operating costs estimates, and an economic model of the project. The final report of the Fluor Feasibility Study was issued on March 31, 2008.

[20] The legal ownership of the Fluor Feasibility Study was disputed between Xstrata Chile and New Gold/Datawave, but was ultimately resolved in the circumstances described below shortly before the announcement of the Goldcorp Transaction.

The El Morro Contractual Arrangements

[21] The following describes the main agreements between Xstrata Chile and New Gold/Datawave pertaining to the El Morro Project prior to completion of the Goldcorp Transaction, including the most relevant provisions therein for this action.

The El Morro Shareholders Agreement

[22] The respective rights and obligations of the shareholders of the Company are governed by a written shareholders agreement (the "El Morro Shareholders Agreement" or the "Shareholders Agreement") made initially among Xstrata Chile, Datawave, Finco and the El Morro Mining Company as of November 5, 2008. In form and content, the El Morro Shareholders Agreement is a typical mining joint venture agreement used in mining transactions by Canadian and international mining companies based in the English-speaking world. Although written in English, the El Morro Shareholders Agreement is governed by the laws of the Republic of Chile.

[23] Under the Shareholders Agreement, the majority owner has the right to control the management and business of the El Morro Mining Company, subject to certain provisions contained in that agreement requiring 'super majorities' of the board of directors of the Company to approve some business decisions.

[24] The Barrick claims asserted in this proceeding are based on several provisions of Article 10 of the Shareholders Agreement, which deals with the Transfer of Rights or Interests by a Shareholder (as such terms are defined therein, which definitions are set out in Schedule "A" to these Reasons).

[25] Section 10.1 provides that no Shareholder shall have the right to Transfer (as defined in the Agreement) all or any portion of its Rights or Interests, except as specifically provided in Article 10.

[26] Section 10.2(1)(a) further provides that any permitted Transfer of Rights or Interests shall be subject to the limitation that no shareholder shall Transfer any Rights or Interests except in conjunction with the Transfer of all, or a proportionate interest in all, of its Rights and Interests.

[27] Section 10.3 permits a Transfer by a shareholder of all or any portion of its Rights or Interests to an Affiliate (as defined in the Agreement).

[28] Lastly, and most importantly, section 10.4 provides that in the event that any Shareholder wishes to accept an offer from any arm's length person (a "Third Party Offer") to purchase all, or any part of, a shareholder's Rights and Interests (the "Offered Interest"), the other shareholder is entitled to receive notice of the Third Party Offer in accordance with the provisions of section 10.4 and has a right of first refusal to purchase all of the Offered Interest at the same price and upon the same terms and conditions as are contained in the Third Party Offer.

[29] Section 10.4 operated in an asymmetrical fashion. Section 10.5(a) provided that the right of first refusal in section 10.4 did not operate in respect of any Transfer by Xstrata of its interest in the El Morro Project, provided such interest exceeded 50% of the total interests, at any time after a decision was made to proceed with Development (as defined in the Agreement). This provision did not apply to Transfers by New Gold of its Rights or Interests in the El Morro Project.

Parent Entities Addendum

[30] Xstrata Canada and New Gold were also parties to a "Parent Entities Addendum" to the El Morro Shareholders Agreement in which they agreed that the limitations on the Transfer of Rights or Interests and the related right of first refusal provided for in Article 10 of the Shareholders Agreement could not be avoided by the direct or indirect Transfer of shares of Xstrata Chile or Datawave. To this end, Xstrata Chile and New Gold agreed that: (1) Article 10 of the Shareholders Agreement would apply to any Transfer of the shares of such entities or the shares of any entity (other than New Gold, Xstrata Canada or any entity that controls Xstrata Canada) holding, directly or indirectly, shares in such entities; and (2) they would undertake to ensure compliance with the above by any of their respective Affiliates that might from time to time own, directly or indirectly, any shares of such entities. In addition, Xstrata Canada and New Gold agreed to take all steps necessary to ensure that Xstrata Chile and Datawave, respectively, complied with their respective obligations under the Shareholders Agreement. It is my understanding that the parties are proceeding on the basis that the Parent Entities Addendum is also governed by the laws of Chile.

The Carried Funding Loan Agreement

[31] Under section 9.1 of the El Morro Shareholders Agreement, Xstrata Chile assumed an obligation to fund, by way of loans to Finco, 70% of Datawave's program funding commitments in respect of the development of El Morro to the time of commencement of commercial production. The net effect of this commitment was that Xstrata Chile was obliged to fund 91% of the total program funding commitments pertaining to El Morro (i.e., Xstrata Chile's 70% of total program funding commitments, plus an additional 21%, representing 70% of Datawave's 30% of the total program funding commitments).

[32] This arrangement was implemented by a further agreement among Xstrata Chile, Datawave, Finco and the El Morro Mining Company dated March 12, 2009 (the "Carried Funding Loan Agreement" or "CFLA"). The CFLA is written in English but is also expressed to be governed by the laws of the Republic of Chile.

[33] Xstrata Chile made a number of advances pursuant to the CFLA prior to the events giving rise to this action. Prior to repayment, such loans under the CFLA were to bear interest at the Xstrata Cost of Financing (as defined in the CFLA) plus 1%. The CFLA provided that such loans were to be repaid out of 80% of all Distributions (as defined therein, but for present purposes being essentially all cash flow paid to Datawave or Finco by the Company).

[34] Section 10.A of the CFLA provides that Datawave and Finco may make Permitted Transfers, which are defined to be transfers of all or a portion of their Rights and Interests to an Affiliate subject to the requirements therein.

[35] To secure the loans made by Xstrata Chile under the CFLA, Xstrata Chile was granted first ranking priority security over, among other things, Datawave's shares in the Company, Datawave's equity interest in Finco, and other Rights or Interests that Datawave and Finco held in respect of the El Morro Mining Company, including shareholder loans, and their entitlement to Distributions.

[36] It should be noted that subsection 9.4(1) of the Shareholders Agreement provided that Xstrata's obligations to provide carried funding were personal to Datawave and would cease upon Datawave or Finco ceasing to be an Affiliate of New Gold. Subsection 9.4(2) further provided that if Datawave or Finco made any Transfer of Rights and Interests to a non-Affiliate of New Gold or ceased to be an Affiliate of New Gold, such Transfer or transaction would be conditional on the repayment in full of the outstanding balance of any outstanding carried loans.

[37] In these Reasons, capitalized terms that are defined in the Shareholders Agreement have the meanings ascribed to them in that agreement unless the context otherwise requires. Xstrata's interest in the El Morro Project other than its interest in the BHP Royalty, comprising 70% of the outstanding shares of the Company, its interest under the El Morro Shareholders Agreement and its interest under the CFLA, including all loans extended thereunder and all security for such loans, is referred to as the "Xstrata Interest" or the "70% Interest", as the context requires.

Similarly, New Gold's interest in the El Morro Project other than its interest in the BHP Royalty, comprising 30% of the outstanding shares of the Company held by Datawave, together with Datawave's interest under the El Morro Shareholders Agreement as well as Finco's interest under the CFLA, is referred to as the "New Gold Interest" or the "Datawave Interest". In addition, I have used the terms "joint venture party", "joint venture partner" and "shareholder" interchangeably.

PART I – THE EVENTS GIVING RISE TO THE BARRICK CLAIMS AGAINST XSTRATA, NEW GOLD AND GOLDCORP

The Sale of the Xstrata Interest

[38] In or around February 2009, Xstrata Chile began looking for a potential arm's length purchaser of the Xstrata Interest in the El Morro Project. The following summarizes the developments resulting in Barrick's agreement to buy the Xstrata Interest on October 11, 2009 and the extent of involvement of New Gold in that process.

The Xstrata Auction Process

[39] After preliminary discussions with prospective purchasers, in late March 2009, Xstrata Chile began a formal auction process, which it conducted internally. The general manager of business development for Xstrata Copper, Andrew Greville ("Greville"), was responsible for the auction process, with assistance from Justin McConnachy ("McConnachy"), the legal manager of Xstrata Copper.

[40] The Xstrata Chile auction process envisaged two stages. In the first phase, interested potential purchasers were provided with a "teaser" document containing preliminary non-confidential information. If still interested, they were required to sign a confidentiality agreement in order to receive a confidential information memorandum describing the El Morro Project (the "Xstrata Confidential Information Memorandum"). In this phase, prospective purchasers were required to submit indicative (non-binding) bids by June 26, 2009.

[41] A certain number of prospective purchasers were invited by Xstrata to participate in the second phase of the auction based on their indicative bids. They were given access to considerably greater disclosure regarding the El Morro Project in a virtual data room, in management presentations and in site visits. They were required to submit binding offers by August 28, 2009 (which was later extended to September 2, 2009). The form of confidential agreement executed by the prospective purchasers provided that the confidential information disclosed by Xstrata could only be used for the purposes of evaluating a potential purchase of a part of Xstrata Chile's interest in the Company and/or the El Morro Project.

[42] On or about March 26, 2009, pursuant to a requirement in section 12.11(2) of the El Morro Shareholders Agreement, Xstrata Chile notified New Gold of its intention to disclose such confidential information to one or more prospective purchasers, subject to execution of confidentiality agreements with such parties. This notice alerted New Gold to the Xstrata Chile

auction process and prompted New Gold to consider a sale of the New Gold Interest in the same process in order to maximize the value of the New Gold Interest.

[43] Barrick chose to participate in the Xstrata Chile auction process. Accordingly, on May 22, 2009, Barrick entered into a confidentiality agreement with Xstrata Chile. On May 28, 2009, Barrick received a copy of the Xstrata Confidential Information Memorandum and a financial model.

[44] Barrick has interests in two other development properties in Chile, being the Cerro Casale mining project (located approximately 80 km to the northeast of the El Morro Project) and the Pascua-Lama mining project (located approximately 80 km to the south). In addition to its interest in the El Morro Project in its own right, Barrick believed that it could realize corporate, construction and tax synergies if it were able to develop and operate El Morro as well as these two other mining projects.

[45] Darren Blasutti ("Blasutti"), the senior vice-president of corporate development at Barrick at the time, was principally responsible for the negotiations with Xstrata for the Xstrata Interest and, subsequently, with New Gold for the New Gold Interest (as defined below). Alistair Baker ("Baker"), a vice-president of corporate development at Barrick, had responsibility for management of Barrick's assessment of the El Morro Project and, in this capacity, had day-to-day contact with Greville at Xstrata.

[46] Seven other entities also signed confidentiality agreements with Xstrata Chile in order to participate in the auction process. Goldcorp had no other mining projects in Chile at the time of the events giving rise to this action. It chose not to participate in the Xstrata Chile auction process as it considered that its time and financial resources were best spent pursuing other opportunities at the time.

[47] By letter dated June 1, 2009, Xstrata Chile advised NewGold/Datawave of its proposed disclosure of confidential information to the eight parties who were participating in the Xstrata Chile auction process, including Barrick. This prompted an informal conversation, on or about June 12, 2009, between Blasutti and Hannes Portmann, the vice-president of corporate development at New Gold ("Portmann"), regarding a possible exchange of the New Gold Interest for an operating asset of Barrick. Blasutti considered these proposals premature as Barrick had not yet acquired the Xstrata Interest.

[48] Barrick submitted an indicative bid of U.S. $400-$600 million on June 25, 2009 and was invited to participate in the second phase of the Xstrata Chile auction process, in which it reviewed, among things, copies of the Shareholders Agreement and the CFLA.

[49] In a telephone call on June 16, 2009, Xstrata and New Gold discussed the possibility of a New Gold involvement in the Xstrata Chile auction process, as certain parties participating in that process had expressed an interest in acquiring 100% of the El Morro Project. This raised the

possibility of an increased value for 100% of the Project, although if such a transaction proceeded the parties would need to negotiate the allocation of the purchase price.

[50] In the same conversation, Xstrata advised that, although the Xstrata Confidential Information Memorandum described the operation of the right of first refusal in favour of New Gold in the Shareholders Agreement, in its view, the right no longer operated. In correspondence dated June 17, 2009, Xstrata Chile stated in writing its position that the right of first refusal did not apply because "a decision to proceed with Development" had been made which triggered the provisions of section 10.5(a) of the Shareholders Agreement. New Gold responded advising Xstrata that it did not agree that "a decision to proceed with Development" had occurred. No agreement was reached between Xstrata and New Gold on this issue. Meanwhile, however, New Gold's unwillingness to confirm that the right of first refusal no longer operated became bound up with the issue of whether Xstrata Chile would agree to include the New Gold Interest in its auction process.

[51] Ultimately, by letter dated August 5, 2009, Xstrata Chile advised New Gold that it was not prepared to proceed with an auction process for the 100% combined interest in the El Morro Project for the reason that it considered that it was too late in its own auction process to sort out the details of an acceptable joint process. However, the issue of the operation of the right of first refusal did not go away. In the same letter, Xstrata Chile reiterated its position that the right of first refusal had ceased to operate pursuant to the provisions of section 10.5(a) of the Shareholders Agreement. Xstrata Chile also restated an earlier view that both parties should contribute their respective interests in the BHP Royalty to the El Morro Mining Company.

[52] New Gold responded by letter dated August 11, 2009, in which it advised: (1) that it was of the view that the right of first refusal continued to operate; and (2) that it was not prepared to contribute its interest in the BHP Royalty to the Company.

[53] In a "Bidder Update letter" dated August 17, 2009, Xstrata Chile advised all bidders participating in its auction process (including Barrick) of its position that Datawave's right of first refusal would not apply in the event of a sale of some or all of the Xstrata Interest and that Datawave did not agree and was insisting that the right of first refusal continued to apply. Xstrata Chile also provided the bidders with a copy of a letter dated July 15, 2009 to Datawave in which Xstrata Chile set out its position on the issue.

[54] In a second "Bidder Update letter" dated August 19, 2009, which was prompted by queries from certain bidders, Xstrata provided a copy of New Gold's letter dated August 11, 2009 setting out New Gold's position on this issue. For its part, Barrick was not prepared to proceed on the basis that Datawave's right of first refusal was no longer available, and specifically addressed the issue in the offers Barrick submitted to Xstrata Chile, as will be described below.

[55] On September 1, 2009, Barrick submitted a binding offer to purchase the Xstrata 70% Interest, together with the Fluor Feasibility Study and Xstrata Chile's interest in the BHP

Royalty (the Fluor Feasibility Study and Xstrata Chile's interest in the BHP Royalty being referred to as the "Unrelated Assets"), for an aggregate purchase price of U.S. $400 million to be payable according to a conditional payment structure. Along with its binding offer, Barrick enclosed a draft sale agreement that required Xstrata to deliver, as conditions of closing the transaction, (1) a waiver of the right of first refusal in favour of New Gold that would arise upon acceptance of Barrick's offer, and (2) executed deeds of assignment acknowledged by Datawave for the El Morro Shareholders Agreement and the CFLA.

[56] Barrick's bid was the lowest of the three bids received by Xstrata Chile. However, Xstrata Chile advised Barrick that it could become Xstrata's preferred bid if the price were increased to the middle of the range in its indicative offer and the conditional payment structure were removed. Xstrata Chile also wanted the condition removed that required a New Gold waiver of its rights under the right of first refusal.

[57] On September 29, 2009, Barrick submitted a second binding offer letter respecting the purchase of both the Xstrata Interest and the Unrelated Assets for a total of U.S. $465 million. This offer deleted the conditional payment provision but retained the condition regarding New Gold's waiver of its right of first refusal. On the same day, Xstrata Chile entered into an exclusivity agreement with Barrick by which Xstrata Chile agreed to deal exclusively with Barrick until October 11, 2009 regarding the potential sale of the Xstrata Interest.

The Barrick Agreement

[58] On October 11, 2009, Xstrata Chile and Barrick agreed upon a transaction by which Barrick would acquire the Xstrata Interest and the Unrelated Assets for U.S. $465 million (the "Barrick Transaction"). The Transaction was set out in an agreement between the parties dated the same date (the "Barrick Agreement"). The Barrick Agreement contains provisions, including representations and warranties, covenants and conditions of closing, that are typically found in purchase agreements used in corporate transactions in Canada and the United States. Although drafted in English, the Agreement is expressed to be governed by Chilean law. The following provisions of the Agreement are relevant for this action.

[59] First, the purchase price was allocated as follows: (1) U.S. $462,999,900 for the Xstrata Interest, which thereby became the exercise price of the Right of First Refusal (as defined below); (2) U.S. $2,000,000 for Xstrata Chile's 70% interest in the BHP Royalty; and (3) U.S. $100 for the Fluor Feasibility Study.

[60] Second, sections 4.1(a) and (b) contained conditions requiring the consent of Datawave, Finco, Barrick and Xstrata Chile to deeds of assignment in form satisfactory to Barrick, among others, amending the Shareholders Agreement and the CFLA to reflect Barrick's assumption of Xstrata Chile's rights under those agreements and releasing Xstrata Chile from its obligations under such agreements. Such agreements are herein referred to as the "Assignment Agreements".

[61] Third, section 4.1(c) contained a condition to the effect that Datawave shall have failed to exercise the Right of First Refusal within the time period provided for in the Shareholders Agreement, or otherwise waived the right or confirmed its expiry. There is, therefore, no doubt that, at all material times, Barrick was aware that Datawave could exercise the Right of First Refusal.

[62] In these Reasons, the conditions in section 4.1(a), (b) and (c) are collectively referred to as the "Conditions Precedent". As a legal matter, Barrick's offers dealt with the matters addressed in these sections as conditions of closing. However, as finalized, these conditions are expressed to be conditions precedent and the Barrick Agreement is expressed to be conditional on satisfaction of each of these conditions. Xstrata requested the language of conditions precedent to avoid adverse tax consequences to it if the Barrick Transaction were determined to be unconditional before November 6, 2009. While this unusual language might suggest that the Barrick Agreement was not intended to be binding until all of the Conditions Precedent were satisfied, it is my understanding that the parties have proceeded on the basis that the Barrick Agreement became a binding agreement as of November 6, 2009. In any event, it does not appear that this question is material to the issues in this action and it is therefore not necessary to determine whether this is the correct interpretation of the legal effect of the Conditions Precedent.

[63] Fourth, section 4.2 contained a provision obligating each party to "use its reasonable endeavours to obtain the satisfaction of the Conditions Precedent" and to keep each other informed of any circumstances that may result in a failure of a condition precedent.

[64] Lastly, paragraph 8.6(h) addressed the possibility of a right of first refusal arising in favour of Xstrata Chile prior to closing the Barrick Transaction in the event New Gold agreed to sell the New Gold Interest to Barrick or to a third party.

The Right of First Refusal

[65] In accordance with section 10.4 of the Shareholders Agreement, by letter dated October 11, 2009, Xstrata Chile provided a written notice to Datawave of Barrick's agreement to acquire the Xstrata Interest and the Unrelated Assets (the "Xstrata Chile Notice"). Among other things, Xstrata Chile provided New Gold with the Barrick offer, which contained the key terms of the proposed transaction, an unexecuted copy of the Barrick Agreement (which was executed by the parties thereafter), and evidence to establish that Barrick had the power and capacity to complete the transaction, all as required by the Shareholders Agreement.

[66] In these Reasons, the right of Datawave to acquire the Xstrata Interest (but not the Unrelated Assets) on the same terms and conditions as the Barrick Agreement, which arose pursuant to section 10.4 of the Shareholders Agreement, is referred to as the "Right of First Refusal".

[67] On October 12, 2009, each of Xstrata Chile and Barrick announced publicly that they had entered into the Barrick Agreement and that Barrick had agreed thereunder to acquire the Xstrata Interest as well as the Unrelated Assets for U.S. $465 million, subject to customary closing conditions and the Right of First Refusal.

[68] Under the Shareholders Agreement, the time period for New Gold to provide notice of its desire to exercise the Right of First Refusal (the "Exercise Period") began to run on October 12, 2009. Barrick initially calculated the expiry date of the Exercise Period to be January 11, 2010. However, in an email dated December 2, 2009 which is discussed further below, New Gold subsequently agreed with Xstrata that the Right of First Refusal expired at the end of the day on Thursday, January 7, 2010 and proceeded accordingly without any objection from Barrick.

Developments During the Exercise Period

[69] Between October 11, 2009 and January 7, 2010, (the date of the announcement of the Goldcorp Transaction (as defined below) giving rise to this action), the narrative becomes more complicated because of the concurrent progress of two interrelated matters on a basis that was not transparent to the parties: (1) Barrick pursued the acquisition of the New Gold Interest in negotiations with New Gold directly; and (2) New Gold conducted a marketing exercise directed toward maximizing the value of the New Gold Interest, which culminated in the Goldcorp Transaction. In addition, while of a lesser order of significance, the nature and extent of communications between Xstrata and New Gold and between Xstrata and Barrick are also relevant to the claims advanced by Barrick. I propose to address each of these developments in turn after setting out some preliminary comments.

Preliminary Comments

[70] This litigation results from the frustration of Barrick's efforts to acquire both the Xstrata Interest and the New Gold Interest as a result of New Gold's agreement with Goldcorp by which Goldcorp acquired the Xstrata Interest. As mentioned, the narrative below describes the principal developments in the negotiations between Barrick and New Gold respecting the New Gold Interest separate from the developments in the New Gold value maximization process that resulted in the Goldcorp Transaction. To a certain extent, this distinction is artificial. As described below, the New Gold value maximization process was prompted by, and pursued in response to, offers from Barrick that New Gold considered too low.

[71] I have, however, set out these concurrent processes separately in order to bring out more clearly the motives of each of the parties as well as the process by which New Gold's marketing of the New Gold Interest resulted instead in a transaction by which Goldcorp acquired the Xstrata Interest and frustrated Barrick's agreement with Xstrata Chile.

[72] It is also important, at the outset, to note the economic conditions that made the Goldcorp Transaction feasible. The Barrick Transaction involved the sale of the Xstrata Interest for cash at a price fixed on October 11, 2009. Subsequent to that date, copper and gold prices rose

materially. As a result, the Xstrata Interest and the New Gold Interest increased in value and, because the Barrick Transaction sale price was fixed, the Right of First Refusal also became valuable in its own right.

Barrick's Efforts to Acquire New Gold's 30% Interest in El Morro

Barrick's Negotiations with New Gold

[73] Barrick had been interested in acquiring 100% of the El Morro Project for some time before the commencement of the Xstrata Chile auction process. To this end, in mid-June 2009 as mentioned above and at the end of July 2009, it held preliminary conversations with New Gold regarding Barrick's interest in purchasing the New Gold Interest for cash if Barrick acquired the Xstrata Interest. Barrick's interest intensified as it was reaching an agreement with Xstrata regarding its 70% Interest.

[74] On October 2, 2009, Xstrata Chile consented to Barrick discussing with New Gold the fact that Barrick was in negotiations with Xstrata Chile for the sale of the Xstrata Interest. On the same day, Barrick met with New Gold to discuss the possibility of a transaction between them, at which time Barrick verbally offered U.S. $135 million for the New Gold Interest with a view to announcing a purchase of 100% of the El Morro Project if its negotiations with New Gold were successfully concluded. As mentioned, while Barrick offered to acquire the New Gold Interest, it did not, at this meeting or at any time thereafter, offer New Gold any amount for a waiver of New Gold's rights in respect of the Right of First Refusal as an alternative in the event the parties were unable to agree on a transaction for the New Gold Interest.

[75] New Gold viewed Barrick's offer of U.S. $135 million as "low ball". Although consistent with the value placed on the asset by a number of analysts who followed New Gold, New Gold recognized immediately that the price offered was less than 30% of the implied value for 100% of the El Morro Project based on what Barrick indicated it was paying for the Xstrata Interest. New Gold communicated this view to Barrick on October 7, 2009, by which time it had learned from Xstrata that the price for the Xstrata Interest in the Barrick Transaction was U.S. $463 million rather than U.S. $400 million as Barrick had advised (which was explained by Barrick to be the result of a reduction in the amount attributed to the Fluor Feasibility Study in the Barrick Transaction). Barrick's position reinforced New Gold's decision to run its own value maximization process for the New Gold Interest as described below.

[76] On November 12, 2009, after BMO Capital Markets ("BMO") was engaged as New Gold's financial advisor, as described below, Egizio Bianchini ("Bianchini") of BMO telephoned Blasutti to advise of BMO's retainer. He advised Blasutti that the Barrick offer was too low and that New Gold's preferred transaction was an exchange of the New Gold Interest for a producing asset. Barrick did not, however, participate in New Gold's value maximization process as it considered that it had all the information it required on the El Morro Project and did not want to be subject to the restrictive covenants in the confidentiality agreement that New Gold required from each of the participants in its process.

[77] On or about November 19, 2009, Blasutti met Randall Oliphant, the executive chairman of New Gold ("Oliphant"). Blasutti indicated that Barrick was not interested in an asset swap but was prepared to offer U.S. $199 million for the New Gold Interest (bringing Barrick's offer up to the implied value in the Barrick Transaction). They also discussed, without agreement, Blasutti's proposal that an early waiver of the Right of First Refusal would allow Barrick to do further drilling before the winter.

[78] Blasutti spoke to Bianchini again on December 3 and December 14 to get a reaction to Barrick's increased offer. Bianchini was very guarded about the status of New Gold's value maximization process on each occasion but reiterated New Gold's preference for an asset swap.

[79] On December 21, 2009, Bianchini proposed that Barrick consider an agreement under which New Gold would waive the Right of First Refusal early in return for Barrick's agreement to: (1) amend the Shareholders Agreement to assume an increased proportion of New Gold's funding costs; and (2) commit to dates for commercial production for El Morro. Acceptance of this proposal would have terminated New Gold's value maximization process in return for arrangements that would have increased the value of the New Gold Interest. Barrick did not respond to this proposal. Bianchini also stated that any Barrick cash offer would have to exceed $200 million. A further call from Bianchini on December 24, 2009 did not progress the matter, although Bianchini did say that New Gold "had started to get some traction" in its value maximization process.

[80] In a further telephone call on or about December 31, 2009, Bianchini told Blasutti that New Gold would be looking for an offer significantly higher than U.S. $250 million for the New Gold Interest, which was the amount for which Blasutti was seeking authority at the time from Barrick. Blasutti asked Bianchini to provide him with justification for seeking a much higher cash offer from Barrick. Bianchini's response was vague regarding the status of the New Gold value maximization process but he did mention that there were offers for the New Gold Interest.

[81] On January 2, 2010, Bianchini and Blasutti spoke again by telephone. Bianchini said "things are happening". Blasutti indicated to Bianchini that Barrick did not see sufficient downside to warrant an increased offer to New Gold and reiterated that it was prepared to accept a new partner in the El Morro Project for the reason that it would terminate Barrick's obligations to provide carried funding in respect of El Morro under the CFLA set out above. On January 3, 2010, in another call, the parties ruled out the possibility of an asset swap due to the lack of time to complete due diligence on any Barrick asset that could be proposed.

[82] On January 5, 2010, Bianchini contacted Blasutti to advise Barrick for the first time that there was a possible transaction that contemplated New Gold exercising the Right of First Refusal, such that Barrick was at risk of losing the Xstrata Interest. In response to Blasutti's question as to how New Gold could exercise the Right of First Refusal, Bianchini said that he did not know but a team of lawyers was working on it. Bianchini advised Blasutti that the New Gold board of directors was meeting the next afternoon. He told Blasutti that, if Barrick did not want

to lose the Xstrata Interest, Barrick needed to make an offer significantly higher than U.S. $250 million.

[83] Blasutti reported to Aaron Regent ("Regent"), the president and chief executive officer of Barrick, and Barrick's chief financial officer about the call with Bianchini in an email, from which it is clear that Barrick understood that the competing offer involved a purchase of either the Xstrata Interest alone, which would involve the exercise of New Gold's Right of First Refusal, or of both the Xstrata Interest and the New Gold Interest.

[84] The following day, January 6, 2010, Bianchini met first with Blasutti and then with Regent. Bianchini stated that New Gold and BMO were evaluating each of the Barrick offer and the third party offer for presentation to the New Gold board meeting. At the meeting with Regent, Bianchini voiced his opinion that a Barrick offer of at least U.S. $300 million was required and that at U.S. $325 it was a "slam dunk".

[85] Minutes prior to the New Gold board meeting on the same day, Barrick presented New Gold with a revised offer of U.S. $300 million for the New Gold Interest (the "Barrick Offer"). The Barrick Offer was subject to the approval of Barrick's board of directors but Regent advised Bianchini that board approval would not be a problem as the Barrick Offer also had the approval of the chairman of the board of directors, Peter Munk. Barrick believed that Oliphant would understand that the offer was effectively unconditional given Oliphant's previous association with Barrick, including as its president and chief executive officer from 1999 to 2003.

Barrick's Perspective on New Gold's Actions During the Exercise Period

[86] Before proceeding, I think it is useful to provide an overview of the principal reasons why, in my assessment, Barrick and New Gold were unable to reach a deal for the New Gold Interest during this period.

[87] First, the parties had different objectives. Throughout this period Barrick sought a cash deal because it was unwilling to part with a producing asset for an interest in a development project while New Gold sought a transaction, as described below, that would increase its current gold production.

[88] Second, Barrick considered the likelihood of another buyer emerging for the New Gold Interest to be low, in view of the extensive canvass of potential buyers previously conducted by Xstrata Chile as well as the short exercise period for the Right of First Refusal, among other factors. Further, because of Barrick's size and technical expertise, its involvement in other Chilean mining projects and the possibility of synergies not available to other mining companies related to those projects, Barrick considered that it was the "natural" purchaser of the New Gold Interest according to Regent. It also considered that the prospects of a higher bid for the New Gold Interest were significantly reduced after the Barrick Agreement was concluded.

[89] Therefore, Barrick saw no reason to bid against itself by raising its offer price. Moreover, it was prepared to accept a new 30% joint venture partner because the carried funding

arrangements under the CFLA would terminate pursuant to section 9.4 of the Shareholders Agreement. Conversely, it considered itself to be an attractive majority partner/developer of the project and, therefore, did not consider that it was necessary to address New Gold's concerns that it might defer development of El Morro in favour of Barrick's Pascua-Lama or Cerro Casale projects.

[90] Third, for several reasons, Barrick also did not consider the likelihood of a New Gold exercise of the Right of First Refusal to acquire the Xstrata Interest to be very high. New Gold had previously indicated that it did not regard its interest in the El Morro Project to be a core asset and expressed a desire to sell the New Gold Interest. In addition, Barrick was aware that New Gold lacked the funding and was unlikely to get institutional financing for a mining project of this scale and nature. Further, New Gold lacked the financial, technical and operational resources necessary to develop the El Morro Project on its own. Given these considerations, Barrick considered that New Gold was more likely to sell the New Gold Interest than to increase its interest in the El Morro Project.

[91] Barrick also considered a third party investment in New Gold (by way of equity or a loan) to fund the exercise of the Right of First Refusal to be unlikely for a number of reasons. The short exercise period for the Right of First Refusal made it difficult for a third party to conduct extensive due diligence, structure a transaction, negotiate the necessary documentation and receive the necessary corporate approvals prior to expiry of the Right of First Refusal. Barrick considered any such transaction to be increasingly unlikely as the expiry date approached without receiving any intelligence of any significant third party involvement. In addition, Barrick considered that most potential purchasers of a large stake in the El Morro Project were prevented from participating in New Gold's process by the use restrictions in the confidentiality agreements that they signed in order to participate in Xstrata's process, although it did not know which parties had signed such agreements. Further, Barrick considered the scale of the development project, in addition to the purchase price of U.S. $465 million for the Xstrata Interest, was likely to be a deterrent for most potential purchasers, particularly in view of the fact that New Gold would be expected to require that a purchaser carry New Gold's funding obligations.

[92] Accordingly, as Regent acknowledges, Barrick's actions in relation to New Gold were informed by Barrick's view that the New Gold auction process was primarily directed toward "trying to put pressure on Barrick to increase its offer for the New Gold 30% interest". Further, as the purchaser of the majority stake in El Morro carrying control over the development of the project, Barrick expected to be contacted by any prospective purchaser of the New Gold Interest prior to execution of any such transaction and would, therefore, have a stronger position in any competitive situation.

[93] As a consequence, Barrick was inclined to interpret the limited information that it received concerning Goldcorp's activity in late December skeptically. In Barrick's eyes, it was at least as likely that New Gold was attempting to give the impression of an alternative transaction to force Barrick's hand as it was that New Gold was seriously negotiating a

transaction with a third party. Similarly, when Barrick first learned in late December 2009 of the dispute regarding the ownership of the Fluor Feasibility Study described below, Barrick interpreted New Gold's position on the issue through the same lens. It was inclined to view this issue as a strategy designed to force Xstrata and Barrick to renegotiate the terms of the Barrick Agreement and thereby re-set the expiry date for the Right of First Refusal to permit further marketing activity by New Gold (and thus as a further sign of New Gold's lack of success to that point).

New Gold's Value Maximization Process

[94] In August 2009, having been excluded from the Xstrata Chile auction process and having no guarantee that Barrick would talk to it even if Barrick were successful in that process, New Gold began consideration of its own process to maximize the value of the New Gold Interest.

Preliminary Considerations and Developments

[95] The following considerations motivated New Gold in conducting its value maximization process and influenced the structure of the Goldcorp Transaction.

[96] First, from the start, the process was conceived more broadly than a cash sale of the New Gold Interest, particularly because, with improving metal prices, New Gold had become less concerned by the autumn of 2009 about its ability to meet its funding obligations with respect to the development of El Morro if it retained the New Gold Interest, and, correspondingly, more interested in exchanging a producing asset for the New Gold Interest.

[97] New Gold's preferred option therefore became an exchange of an operating asset for the New Gold Interest, rather than a cash transaction. New Gold was also prepared to consider, as an alternative, remaining in the joint venture if the joint venture arrangements were improved in its favour by increasing the size of its interest, or by restructuring the New Gold Interest to increase its entitlement to the gold production of El Morro. Either of these options would have involved exercising the Right of First Refusal and selling a large interest in the El Morro Project to a new partner. Accordingly, by the autumn of 2009, New Gold's least preferred alternative was a cash transaction for the New Gold Interest.

[98] Second, while New Gold says its value maximization process was not designed simply to put pressure on Barrick to better its offer for the New Gold Interest, that was clearly a motivation for New Gold in view of Barrick's obvious interest.

[99] Barrick, however, had certain limitations as a transaction partner. As mentioned, Barrick resisted the New Gold invitation to negotiate the exchange of a producing asset for the New Gold Interest. Further, because of Barrick's other development projects in Chile, New Gold was concerned that Barrick might defer development of El Morro in favour of one or both of its Pascua-Lama and Cerro-Casale projects. This was not unreasonable. On its own evidence, Barrick intended to conduct further exploratory drilling and to complete the permitting stage for

El Morro and then defer a development decision until it was possible to assess Barrick's optimal strategy for all three projects.

[100] Third, there was a practical problem pertaining to the sale of the New Gold Interest that came into focus in December 2009 and is discussed further below. The right of first refusal in the Shareholders Agreement was reciprocal. Therefore, Xstrata Chile or Barrick would have a right of first refusal in respect of any transaction for the sale of the New Gold Interest that New Gold might enter into with a third party. This was reflected in the provisions of section 8.6(h) of the Barrick Agreement. Therefore, it was unlikely that a third party would be prepared to offer to purchase the New Gold Interest alone given Barrick's obvious interest in acquiring the New Gold Interest.

[101] More significantly, it also meant that a third party could not acquire 100% of the El Morro Project in one transaction by contracting to purchase both the Xstrata Interest and the New Gold Interest at the same time. Any prospective purchaser with that objective would have to proceed initially to purchase the Xstrata Interest on a standalone basis that did not constitute a sale of the Right of First Refusal by New Gold. Only after such a transaction had been completed could such purchaser acquire the New Gold Interest. Accordingly, as a practical matter, a prospective purchaser had only two options ─ the New Gold Interest, which would give rise to a right of first refusal in favour of Xstrata Chile or Barrick, or the Xstrata Interest, which would require the Right of First Refusal to be exercised.

New Gold's Conduct of its Value Maximization Process

[102] In September 2009, New Gold began contacting, and soliciting interest from, potential purchasers in Asia who it thought might be interested in acquiring the New Gold Interest. In early November 2009, New Gold engaged BMO Capital Markets to act as its financial advisor in connection with a more formal value maximization process.

[103] BMO prepared a "teaser" document for prospective parties. In this document, BMO invited offers to purchase under three scenarios: (1) 100% of the El Morro Project, "through the exercise of [New Gold's] right of first refusal … to acquire Xstrata's 70% stake plus tender of [New Gold's] 30% stake"; (2) 70% of the El Morro Project "through the exercise of the [Right of First Refusal]"; and (3) New Gold's 30% stake of the El Morro Project.

[104] New Gold's president and chief executive officer, Robert Gallagher ("Gallagher"), advised Xstrata of New Gold's process and its engagement of BMO in early November 2009. New Gold did not disclose to Xstrata or Barrick the basis on which it was inviting offers under its value maximization process at this time, or in any subsequent communication. At this stage, it also appears that the practical problem pertaining to a purchase of 100% of the El Morro Project in one transaction had not surfaced. However, from this time forward, Xstrata knew that New Gold was in discussions with third parties for the possible sale of New Gold's Interest in the El Morro Project.

[105] On November 10, 2009, pursuant to the requirement in section 12.11(2) of the Shareholders Agreement, New Gold wrote to Xstrata Chile and the El Morro Mining Company to advise generally of its intention to disclose confidential information to one or more third parties, subject to execution of confidentiality agreements with such parties, "in connection with the possible negotiation and due diligence of a Transfer of New Gold's Rights and Interests under the Agreement" (the "November 10 New Gold Letter").

[106] This was reinforced by an email dated November 18, 2009 from Gallagher to Xstrata that referred to New Gold's sales process for its 30% interest in the El Morro Project and requested copies of certain documentation for its data room (the "November 18 New Gold Letter"). As discussed below, this letter raised the issue of the ownership of the Fluor Feasibility Study.

[107] Subsequently, as New Gold identified particular potential purchasers with whom it intended to sign a confidentiality agreement, Xstrata sent letters similar to the November 10 New Gold Letter but containing the names of such third parties on November 17, 2009, November 26, 2009, November 30, 2009 and December 8, 2009. However, until early December 2009, New Gold's process did not attract any serious potential purchasers. The New Gold Letter of December 8, 2009 (the "December 8 New Gold Letter") identified Goldcorp as a potential recipient of confidential information. The identities of the other parties to whom New Gold proposed to give confidential information are not relevant to this action.

Goldcorp Enters the Process

[108] Goldcorp expressed no interest in participating in New Gold's value maximization process when it was initially contacted by BMO on or about November 12, 2009. Goldcorp's position changed as a result of a discussion of El Morro at a meeting of Goldcorp's board of directors held over three days between November 30 and December 2, 2009. At the board meeting, a Goldcorp director raised the El Morro Project as a potential acquisition opportunity, as Goldcorp had decided that it was interested in becoming more active in South America. The particular Goldcorp director, Ian Telfer ("Telfer"), was also a director of New Gold. In that capacity, Telfer had previously received confidential information pertaining to the El Morro Project in June 2009, which he forwarded to Charles Jeannes, the president and chief executive officer of Goldcorp ("Jeannes"). In addition, Telfer had received confidential information pertaining to New Gold's value maximization process at the time of this three-day board meeting. These circumstances have given rise to Barrick's claims for breach of confidence that are addressed later in these Reasons.

[109] Goldcorp says that its interest in the El Morro Project resulted from a recognition that the fixed cash price in a rising metal price environment represented an opportunity and its assessment that it was not likely to succeed in acquiring another unrelated investment opportunity it had been pursuing for some time.

[110] The ensuing discussions considered two options: (1) a purchase of 100% of the El Morro Project; and (2) a purchase of 70% of the El Morro Project. Each of these options proceeded on

the basis that New Gold would exercise its Right of First Refusal. Because Goldcorp had not participated in the Xstrata Chile auction process, it was not prevented from transacting with New Gold for the New Gold Interest by the restrictions in the confidentiality agreement used in the Xstrata Chile auction process.

[111] On December 4, 2009, Jeannes wrote to Oliphant to express an interest in the "possibility of acquiring your ROFR and therefore the 70% from Xstrata, and acquiring your 30% in trade for an operating asset". The next day, Goldcorp contacted BMO to express its interest in the El Morro Project. I am satisfied that, from the outset, Goldcorp had no interest in purchasing the New Gold Interest alone and thereby becoming a junior partner to Barrick (which, in any event, Barrick would, in all likelihood, have pre-empted through the mechanism of the right of first refusal in favour of Xstrata Chile in section 10.4 of the Shareholders Agreement).

[112] Goldcorp's objective is reflected in an email from Jeannes sent internally on December 5, 2009 which included the following:

> Acquiring New Gold's interest means both acquiring its 30% interest AND its right of first refusal on the Xstrata – Barrick agreement. Thus we would enter an agreement with New Gold to acquire all of its interest, and concurrently exercise the ROFR and pay Xstrata $465m in cash. The ROFR expires on Jan 11, so we need to move quickly. New Gold has stated that they want an operating asset in return for their interest – if they can't get gold production they will just keep the 30% for the time being and be Barrick's partner as they don't have an immediate need for cash.
>
> The dynamics this deal sets up are very interesting. Barrick and Xstrata have set the price and so Barrick cannot come back and compete on the purchase of the Xstrata interest. If we acquire the ROFR, we simply pay the $465m and there is nothing Barrick (or Xstrata) can do to stop it. But there will be competition based on what we offer New Gold for their interest versus what Barrick offers them. To date, New Gold has asked for an operating asset and Barrick is having a hard time giving anything up. But our discussions will not happen in a vacuum, and I fully expect New Gold to maximize the value of their interest in discussion with each of us (and any others that may be active looking at the asset). Because they want gold production, we should be thinking about San Dimas or Marigold. Marigold will likely be a non-starter as Barrick has a ROFR on the transfer of our own interest.

[113] In this memorandum, Jeannes used the phrase "acquire the ROFR" in the context of acquiring the New Gold Interest including the Right of First Refusal as part of an acquisition of

100% of the El Morro Project. At the time, Jeannes was not aware of the complication presented by the right of first refusal in favour of Xstrata Chile in respect of the New Gold Interest.

[114] On December 6, 2009, Jeannes spoke with Bianchini at BMO. In that call, Jeannes learned, among other things, of the practical problem described above ─ that Xstrata Chile also had a right of first refusal that it could exercise if Goldcorp offered to purchase the New Gold Interest. In a subsequent email sent internally the same day, Jeannes referred to a "long talk" he had just had with Bianchini, and stated as follows:

> I didn't realize that Xstrata "probably" has a [Right of First Refusal] on [New Gold]'s 30% interest. So we would have to effectively buy the [New Gold] ROFR and exercise it before making a deal for the remaining 30%, because if we agree to buy the 30% up front it triggers a ROFR for Xstrata. So we have to be careful - we can have an understanding as to what we would pay/trade for the 30% but nothing in place, and I think we'll have to pay something -- $1m?, $5m -- for the ROFR in order to keep the lawyers happy.

[115] In addition to describing the possible practical problem described above, this email also reflects Goldcorp's understanding that any transaction for the purchase of the Xstrata Interest would involve a payment to New Gold in addition to payment of the purchase price of U.S. $463 million.

[116] In his emails of December 5 and December 6, 2009, Jeannes describes the contemplated transactions in terms of "acquiring the New Gold ROFR". In the earlier email, this was associated with buying the New Gold Interest. In the later email, it can only be a reference to the Right of First Refusal independent of an acquisition of the New Gold Interest. Jeannes says that the continued to use of such language was shorthand for a transaction in which New Gold would exercise the Right of First Refusal and acquire the Xstrata Interest after which Goldcorp would acquire the Xstrata Interest from New Gold. Given the fact that this terminology originated before Jeannes had any firm legal advice regarding the structure of any proposed transaction, as well as Jeannes' business, rather than legal, involvement in the transaction, I accept his evidence that he did not intend such language, and similar language that was used later and is not set out in these Reasons, to be understood in a legally significant manner. The issue of whether it has any further legal significance despite Jeannes' intention is addressed later.

[117] On December 9, the day after New Gold's delivery of the December 8 New Gold Letter to Xstrata Chile, Goldcorp signed a confidentiality agreement in favour of New Gold and commenced its due diligence process respecting the El Morro Project by accessing the New Gold confidential information.

[118] Goldcorp and New Gold representatives commenced negotiations at a meeting held on December 11, 2009. At that meeting, among other things, New Gold confirmed its interest in

acquiring an operating asset in exchange for the New Gold Interest and identified a particular property of Goldcorp in which it was interested. New Gold commenced due diligence on this property on or about December 14. By December 16, 2009, Goldcorp had retained its own financial advisor in connection with a possible transaction. On December 21 and 22, 2009, to Barrick's knowledge, Goldcorp representatives conducted a site visit of the El Morro Project.

[119] On December 18, 2009, New Gold wrote to Xstrata Chile and the El Morro Mining Company to advise that it intended to disclose the Barrick Agreement to Goldcorp and one other party who had also signed a confidentiality agreement (the "December 18 New Gold Letter"). The relevant portion of this letter is set out below.

[120] On or about December 24, 2010, New Gold advised Goldcorp that the Goldcorp asset that was being considered in exchange for the New Gold Interest was not suitable to New Gold. In order to keep the possibility of a transaction alive in the face of the practical impossibility of agreeing on another asset by January 7, 2011, on the same day, Goldcorp proposed that the parties concentrate on a transaction for the Xstrata Interest with "sweeteners" to enhance the value of the New Gold Interest and a commitment to talk in good faith about an exchange of the New Gold Interest for an asset of Goldcorp after the transaction closed. Although not mentioned, this approach was also consistent with the practical problem described above regarding any sale of the New Gold Interest in exchange for an operating asset of Goldcorp. New Gold accepted this proposal on the same day.

[121] After Christmas, matters moved quickly as the parties negotiated the terms of the Goldcorp Transaction on the basis of the foregoing understanding. On December 30, 2009, BMO wrote to Goldcorp setting out New Gold's desired enhancements to the shareholder and carried funding arrangements. By January 4, 2010, the parties had narrowed the terms under consideration for the proposed transaction to: (1) a Goldcorp commitment to commence commercial production by a certain date backed by a cash penalty in the event of a default or delay; (2) Goldcorp commitments to carry all of New Gold's development costs (versus the 21% under the CFLA) to the commencement of commercial production, to increase New Gold's entitlement to cash flow during the payback period (which was subsequently dropped), and to lower the interest rate on the New Gold loans under the CFLA; and (3) a Goldcorp payment of an amount to be negotiated.

[122] This proposed transaction was considered and approved by the Goldcorp board of directors on January 4, 2010, subject to negotiation of the final terms within certain parameters. Jeannes then contacted Oliphant to settle the remaining business terms of the proposed transaction. In conversations that day and the following day, Jeannes and Oliphant narrowed the outstanding business terms of the transaction ─ principally relating to the terms of the construction guarantee, the carried funding arrangements, the interest rate on the carried loans, and the size of Goldcorp's payment on closing.

[123] In the evening of January 5, Goldcorp's general counsel delivered an indicative term sheet to New Gold and BMO. The reference in this term sheet to an "Acquisition and Funding

Agreement" reflects the fact that, concurrently with these negotiations, external legal counsel for Goldcorp and New Gold had already addressed the structure of the proposed transaction at least on a preliminary basis.

[124] Negotiations continued in the evening of January 5 and the morning of January 6. Ultimately, the parties agreed to a transaction set out in a revised term sheet sent by Goldcorp to New Gold on January 6, 2010 (the "Goldcorp Offer"). The Goldcorp Offer described the form of the Goldcorp Transaction as follows:

> Datawave Sciences Inc. ("Datawave"), a wholly-owned subsidiary of New Gold, will exercise its right of first refusal to acquire a 70% interest in [the El Morro Mining Company] from Xstrata Copper Chile SA ("Xstrata Chile"). Datawave will enter into a sale agreement (the "Datawave-Xstrata Sale Agreement") with Xstrata Chile on the same terms and conditions as the sale agreement dated October 11, 2009 between Xstrata Chile and Barrick Gold Corporation. Datawave will assign its rights and obligations as buyer under the Datawave-Xstrata Sale Agreement to a wholly-owned subsidiary of Datawave ("Datawave Subco"). Goldcorp will agree to loan Datawave Subco the purchase price of $462,999,900 payable to Xstrata and to acquire Datawave Subco following the completion of Datawave Subco's acquisition of Xstrata Chile's 70% interest in [the El Morro Mining Company] on the terms set out in a definitive acquisition and funding agreement (the "Acquisition and Funding Agreement") to be entered into among Datawave, New Gold and Goldcorp prior to the exercise of the right of first refusal. Prior to completion of the acquisition of Datawave Subco by Goldcorp, the loan will be secured by a pledge of the shares of Datawave Subco and an assignment of all intercompany indebtedness owing by Datawave Subco to Datawave.

[125] The principal terms of the Goldcorp Offer were as follows:

> 1. a cash payment to New Gold of $50 million upon completion of the acquisition of Datawave Subco by Goldcorp;
>
> 2. a positive construction decision and commencement of construction within sixty (60) days following receipt of all necessary permits and approvals, with a penalty of $1,500,000 per month until the construction decision is made and announced (the "construction guarantee");
>
> 3. an amendment to the El Morro Shareholders Agreement and the CFLA providing for a Goldcorp commitment to carry 100% of the necessary funding for the El Morro Mining Project and to reduce the interest rate payable on the carried funding loans

to a rate to be fixed later according to a specific formula (the "enhancements");

4. acquisition by the El Morro Mining Company of the Fluor Feasibility Study from Xstrata for $100; and

5. New Gold was to use commercially reasonable efforts to acquire, or cause a subsidiary of New Gold to acquire, Xstrata Chile's 70% interest in the BHP Royalty for $2 million, or such other amount at which Xstrata Chile was willing to sell the 70% interest to New Gold, subject to Goldcorp's prior approval, and to transfer such royalty to Goldcorp, or a subsidiary of Goldcorp, for the same consideration.

The New Gold Decision

[126] New Gold's board of directors met at 3:00 pm on January 6, 2010 in Toronto. The board considered both the Goldcorp Offer and the Barrick Offer. The directors unanimously approved the proposed transaction contemplated by the Goldcorp Offer, which they assessed as more attractive than the Barrick Offer both on financial grounds and for the reason that it maintained New Gold's interest in a future producing asset.

[127] Following the board meeting, Oliphant and Portmann called Xstrata to advise Xstrata that New Gold intended to exercise the Right of First Refusal. There was, however, no discussion of the specifics of the Goldcorp Transaction.

[128] Oliphant also called Blasutti and, in a short conversation, told him that the Barrick Offer had not been accepted and that the New Gold board preferred the other offer, without identifying Goldcorp as the offeror. Blasutti then called Bianchini who told him, using more direct language, that New Gold would not do a deal with Barrick even at a higher price, which Blasutti indicated he had authority to offer in the telephone call.

[129] Concurrently, New Gold, Datawave, Finco and Goldcorp entered into an agreement dated January 6, 2010 referred to as the "Acquisition and Funding Agreement" (herein the "Goldcorp Agreement") providing for the proposed transaction contemplated by the Goldcorp Offer (the "Goldcorp Transaction"). The principal terms of the Goldcorp Agreement are described in detail below.

[130] On January 7, 2010, New Gold and Goldcorp announced the Goldcorp Transaction before the opening of the market in Toronto. Shortly before, New Gold/Datawave provided Xstrata Chile with a notice of its intention to exercise the Right of First Refusal under section 10.4 of the Shareholders Agreement (the "New Gold Notice"). The New Gold Notice also confirmed Datawave's desire to acquire Xstrata Chile's interest in the BHP Royalty on the same terms as set out in the Barrick Agreement if Xstrata was prepared to sell this asset. The New Gold Notice did not describe any details of the Goldcorp Transaction.

[131] Also, on January 7, 2010, Jeannes provided an interview to the Business News Network in which he described the transaction in the following manner:

> New Gold had a contractual Right of First Refusal to acquire Xstrata's interest in the El Morro Joint Venture, a 70% interest in this project. And we contracted with New Gold to fund the exercise of that Right of First Refusal and then acquire the asset from them.

It appears that Barrick's first information respecting the structure of the Goldcorp Transaction came from watching this interview.

Communications Between Xstrata and New Gold and Between Xstrata and Barrick During the Exercise Period

[132] By way of overview, communications between Xstrata and New Gold addressed two general areas during the Exercise Period. First, Xstrata wished to book the sale of the Xstrata Interest in 2009, although it did not make this clear until mid-December 2009. In order to do so, Xstrata required the consent of New Gold and Barrick to the closing documentation for the Barrick Transaction, in particular the Assignment Agreements contemplated by sections 4.1(a) and 4.1(b) of the Barrick Agreement. As described below, this resulted in leverage in New Gold's favour which it used to settle the issue of the ownership of the Fluor Feasibility Study. Second, by virtue of various communications from New Gold, Xstrata received some information regarding the status of New Gold's value maximization process. The extent of such disclosure, and the timing of Xstrata's disclosure of such information to Barrick, are issues in this action. I will address each category of disclosure separately as the evidence indicates that these were discrete and unrelated matters.

Communications Between Xstrata and New Gold Resulting in the Feasibility Study Agreement

Overview

[133] In the November 10 New Gold Letter advising of New Gold's value maximization process, Gallagher also indicated that New Gold intended to disclose certain documents to potential purchasers, including the Fluor Feasibility Study. This appears to be the first time that the issue of the ownership of the Fluor Feasibility Study surfaced between the parties in the context of the events pertaining to this action.

[134] Ultimately, on or about December 31, 2009, New Gold and Xstrata agreed concurrently to: (1) the form of the Assignment Agreements, to allow Xstrata Chile to book the sale transaction in 2009; and (2) an agreement by which Xstrata would transfer the Fluor Feasibility Study to the Company for U.S. $100 in the event New Gold exercised the Right of First Refusal (the "Feasibility Study Agreement"). These matters were documented separately, with the result that Barrick did not learn of the Feasibility Study Agreement until after the announcement of the

Goldcorp Transaction. However, it is clear that New Gold was only prepared to consent to the form of the Assignment Agreements, which contained a release of Xstrata Chile's obligations that was not contemplated by the Shareholders Agreement, if Xstrata agreed to the Feasibility Study Agreement.

The Negotiations Regarding the Assignment Agreements and the Feasibility Study Agreement

[135] The following is a summary of the principal developments pertaining to these matters.

[136] In an email response dated November 18, 2009 to the November 10 New Gold Letter, Xstrata Chile stated its position that the Fluor Feasibility Study did not belong to the El Morro Mining Company and that Xstrata Chile had sold it to Barrick pursuant to the Barrick Agreement. The Xstrata response also speculated that New Gold might need Barrick's approval to release the document to other parties. On the same day, Xstrata Chile provided New Gold and Barrick with draft versions of the Assignment Agreements.

[137] On November 20, 2009, New Gold advised Xstrata Chile of its view that the Fluor Feasibility Study belonged to the Company, and that it was entitled to disclose the Fluor Feasibility Study to potential bidders as part of its value maximization process (subject to compliance with the confidentiality provisions of the Shareholders Agreement).

[138] On November 23, 2009, Xstrata Chile advised that it accepted that New Gold was entitled to disclose the Fluor Feasibility Study in the New Gold dataroom under the terms of the Shareholders Agreement. However, in a further email dated November 26, 2009, Xstrata clarified that it continued to assert full ownership of the Fluor Feasibility Study.

[139] In the same email, Xstrata referred to the draft Assignment Agreements prepared for the closing of the Barrick Transaction and requested that New Gold review the documentation in order that Xstrata Chile could complete the sale as quickly as possible after the waiver or expiry of the Right of First Refusal. The draft Assignment Agreements included provisions releasing Xstrata Chile from its obligations under the Shareholders Agreement and the CFLA. These provisions were contemplated by the Conditions Precedent in the Barrick Agreement. However, New Gold was not required to consent to these terms as they were not specifically provided for in the Shareholders Agreement or the CFLA. Therefore, this issue became the subject of negotiations between the Xstrata Chile and New Gold.

[140] Nothing appears to have happened regarding the Fluor Feasibility Study ownership issue for several weeks, during which time the internal lawyers of Xstrata Chile, New Gold and Barrick negotiated the terms of the Assignment Agreements. As discussed below, the possible sale of the Fluor Feasibility Study if the Right of First Refusal were exercised was raised in a telephone conversation between Xstrata and New Gold on December 8, 2009. The Fluor Feasibility Study issue then resurfaced in an email on December 15, 2009, when Xstrata Chile reiterated its position that Xstrata Chile owned the Fluor Feasibility Study and advised New Gold

of its view on the limited use and disclosure of the Fluor Feasibility Study that was permitted under the Shareholders Agreement. On the same day, Xstrata Chile sent New Gold revised draft Assignment Agreements and indicated that it wished to finalize the documents within a few days. In the email, Xstrata took the position that it was entitled to a release from its obligations under the CFLA as it was exiting the project. For the first time, Xstrata stated that it wanted to recognize the sale in its financial statements for 2009 and that, to do so, Xstrata needed the approval of New Gold/Datawave and Barrick to the form of the draft Assignment Agreements.

[141] On December 21, 2009, New Gold emailed Xstrata Chile restating its position on the ownership of the Fluor Feasibility Study, suggesting a conference call to discuss the matter and advising that it would consider referring the dispute to arbitration under the terms of the Shareholders Agreement if the matter could not be resolved (the "December 21 Feasibility Study Letter"). This raised the possibility of a postponement of the closing of the Barrick Transaction if Barrick insisted upon receiving title to the Fluor Feasibility Study in that Transaction.

[142] A conference call on December 24, 2009 between Xstrata and New Gold proved fruitless. However, on December 25, 2009, New Gold wrote to Xstrata Chile suggesting a resolution of the Fluor Feasibility Study ownership dispute. New Gold proposed that Xstrata Chile enter into a conditional agreement that required the transfer of the Fluor Feasibility Study to the El Morro Mining Company for U.S. $100 in the event that New Gold exercised its Right of First Refusal. New Gold suggested that Xstrata draft an agreement reflecting these terms. Xstrata prepared a draft which was forwarded to New Gold by email on December 29, 2009.

[143] On December 28, 2009, Xstrata Chile wrote to New Gold to advise again of Xstrata Chile's eagerness to have the form and substance of the Assignment Agreements settled in order to book the sale in 2009, irrespective of whether the Right of First Refusal was subsequently waived, expired or exercised. Xstrata Chile requested New Gold's confirmation by email by December 29, 2009 of New Gold's agreement to the form and substance of the Assignment Agreements.

[144] Internally, New Gold considered that resolution of the two issues of the ownership of the Fluor Feasibility Study and of the form of the Assignment Agreements should be tied together. However, this did not become clear to Xstrata Chile until a December 29 email from New Gold to Xstrata Chile confirming that the form of its draft agreement with respect to the Fluor Feasibility Study was satisfactory to New Gold. In that email, New Gold also advised Xstrata Chile that "while [New Gold] still take[s] the position that [it is] not required to release Xstrata from the obligations of the [CFLA], [New Gold is] prepared to do so as a gesture of cooperation and in exchange for Xstrata's agreement to assign the Fluor Feasibility Study which we are already working toward". New Gold went on in the email to indicate that, on this basis, New Gold agreed that the form and substance of the Assignment Agreements previously forwarded on December 17, 2009 were acceptable.

[145] From this email, Xstrata appears to have recognized for the first time that New Gold was only going to agree to the draft Assignment Agreements, including the release of Xstrata Chile,

if Xstrata agreed to the proposed Feasibility Study Agreement. Consequently, on December 31, 2009, Xstrata Chile forwarded an executed copy of the Feasibility Study Agreement to New Gold for Datawave's execution that day.

[146] On December 30, 2009, Xstrata Chile confirmed to Barrick that New Gold had approved the form and substance of the Assignment Agreements. On this basis, and without knowledge of the agreement between Xstrata Chile and New Gold regarding the Fluor Feasibility Study, at Xstrata Chile's request, on December 31, 2009, Barrick confirmed that it understood that New Gold had agreed to the form and substance of the Assignment Agreements and that Barrick would "use [its] best efforts to finalize the agreements as quickly as possible with both New Gold and Xstrata". This confirmation from Barrick was apparently sufficient for Xstrata Chile's auditors to permit the booking of the Barrick Transaction in 2009 although it did not constitute agreement to the form of the Agreements.

Communications Between Xstrata and Barrick During the Exercise Period Respecting the New Gold Maximization Process

[147] This section addresses the nature and timing of information that Xstrata and Barrick received during the Exercise Period concerning developments in New Gold's value maximization process. While most of the conversations described below involved either or both of Greville and Baker, I have only referred to them personally in these Reasons where it is relevant to an understanding of the particular events.

Overview

[148] During this period, as mentioned above, Xstrata's main objective was to settle the closing documentation for the Barrick Transaction prior to December 31, 2009 in order to book the transaction in the 2009 calendar year. For its part, Barrick also wanted to finalize the closing documentation to be in position to close the Barrick Transaction as soon as the Right of First Refusal was waived or expired in order to shut down the New Gold value maximization process, although Barrick was not driven by a December 31, 2009 deadline. Barrick also had a second objective ─ to maximize the likelihood that it could acquire the New Gold Interest at a satisfactory price and, therefore, to minimize the likelihood that anyone else would outbid it to the extent possible. To this end, it sought whatever information it could get from any source regarding the status of New Gold's value maximization process.

Principal Developments

[149] On November 11, 2009, Xstrata Chile advised Barrick that Gallagher had told Xstrata earlier that day that New Gold was considering an early waiver of the Right of First Refusal in mid-December. Despite subsequent requests for an update on this issue, Xstrata heard nothing further from New Gold regarding a waiver of the Right of First Refusal, undoubtedly because, by the beginning of December 2009, New Gold had two parties potentially interested in a transaction with it.

[150] As mentioned above, in late November and early December, Xstrata Chile received a number of letters from New Gold indicating that it intended to disclose confidential information to identified potential purchasers of New Gold's Interest. Xstrata did not advise Barrick of these letters at the time of their receipt as it considered the names of the third parties to be governed by the confidentiality provisions in the Shareholder's Agreement.

[151] On December 2, 2009, New Gold arranged for a conference call with Xstrata Chile representatives. During the call, Xstrata asked about the prospect of an early waiver of the Right of First Refusal. New Gold indicated that Datawave would not be waiving the Right of First Refusal at that stage. The New Gold representatives asked a number of questions about the mechanics of the Right of First Refusal. As the Xstrata Chile representatives had not anticipated these questions, they terminated the telephone call and asked the New Gold representatives to put their requests in writing. New Gold provided Xstrata Chile with its inquiries about the Right of First Refusal in an email later that same day, which also confirmed New Gold's agreement with Xstrata's calculation that the Right of First Refusal expired on January 7, 2010. New Gold's questions related to the time frame for closing, the need for a separate sale agreement, and the assets that would constitute the "Offered Interest" for purposes of the Shareholders Agreement.

[152] In response to these inquiries from New Gold, by email dated December 4, 2009, Xstrata advised, among other things: (1) with respect to the completion date, Xstrata would expect that, should New Gold exercise the Right of First Refusal, completion would be required within 15 business days after completion of the last Condition Precedent (with a sunset date of 30 January 2010 for such Conditions Precedent to be completed); (2) Xstrata would expect a sale agreement would be necessary in the same form as agreed with Barrick (with any necessary amendments for context such as a change in the name of the purchaser; and (3) neither the Fluor Feasibility Study nor the BHP Royalty formed part of the Offered Interest. Xstrata did not disclose the earlier telephone conference or this email exchange to Barrick.

[153] On or about December 3, 2009, Barrick learned from a contact at Mitsui Co. Ltd. that Oliphant had discussed two preferred transactions with him: (1) an exchange of the New Gold Interest for a producing asset of Barrick; and (2) an exercise of the Right of First Refusal for Xstrata's 70% interest with a major partner, perhaps Asian, who would take the bulk of the copper revenue leaving New Gold with a larger proportion of the gold revenue. Barrick did not advise Xstrata Chile of this intelligence.

[154] In a telephone call on December 8, 2009 that followed up the December 2, 2009 call and was held at the request of New Gold's external counsel, New Gold asked if Xstrata Chile was willing to sell the Fluor Feasibility Study and its interest in the BHP Royalty at the price in the Barrick Agreement if New Gold were to exercise the Right of First Refusal. Xstrata indicated that these assets were not part of the Offered Interest and the rest of the discussion focused on issues pertaining to the draft Assignment Agreements. Xstrata also did not disclose this conversation to Barrick.

[155] On December 18, 2009, a lawyer from a Vancouver law firm emailed Barrick's then general counsel, Patrick Garver ("Garver"), seeking clearance from Barrick for the law firm to advise New Gold respecting the Right of First Refusal. Garver gave this clearance but did not tell anyone else at Barrick about this inquiry. Consequently, Barrick did not tell Xstrata Chile of this development.

[156] On December 18, 2009, Barrick also learned from the general manager of the Company that Goldcorp and a third party were planning site visits of the El Morro Project. Later the same day, Greville (Xstrata) and Baker (Barrick) spoke by telephone. This is the first information that Barrick received regarding Goldcorp's involvement in the New Gold value maximization process. Greville advised Baker that Goldcorp was involved in discussions with New Gold. Greville also advised that New Gold was contesting Xstrata's ownership of the Fluor Feasibility Study but Xstrata believed the claim to be spurious and would go away. While Baker also understood from this conversation that New Gold had told Xstrata that it was willing to waive the Right of First Refusal when the Assignment Agreements were executed in order to permit Xstrata to book the transaction in 2009, Baker noted at the time that this was an odd statement, and there is no evidence in the record that New Gold made such a commitment.

[157] On December 18, 2009, New Gold sent the December 18 New Gold Letter to Xstrata Chile advising that it intended to disclose the Barrick Agreement to Goldcorp and another third party. There are three noteworthy aspects of this letter.

[158] First, in that letter, New Gold stated that it was contemplating disclosing confidential information "… as part of a competitive process in connection with (1) the possible sale of New Gold's interest in the Company and its rights under the [El Morro Shareholders] Agreement or (2) the possible acquisition of Xstrata Copper Chile S.A.'s 70% in the Company through the exercise of New Gold's right of first refusal...". This is the first written statement that contemplated a possible acquisition of the Xstrata Interest by the exercise of New Gold's Right of First Refusal.

[159] Second, in addition to referring to section 12.11(2)(e) of the El Morro Shareholders Agreement as the basis for disclosure of confidential information, as all previous letters of Xstrata and New Gold had done, the December 18 Notice Letter also refers for the first time to section 12.11(2)(d):

> As referenced in our previous notice, New Gold intends to disclose the Sale Agreement dated October 11, 2009 between Xstrata Copper Chile S.A. and Barrick Gold Corporation (the "Sale Agreement") to Goldcorp Inc. and [a third party] pursuant to Sections 12.11(2)(d) and (e) of the Agreement.
>
> Both parties may provide financing to New Gold in connection with the exercise of the ROFR. As such, the disclosure of the Sale Agreement is permitted under Section 12.11(2)(d) of the Agreement.

> Both parties may also acquire New Gold's interest in the Company. As such, the disclosure of the Sale Agreement is permitted under section 12.11(2)(e) of the Agreement in connection with the negotiation and due diligence relating to such possible acquisition.

Paragraph 12.11(2)(d) permits disclosure as may be required by a financial institution or other similar entity in connection with financing required by a party for purposes of the El Morro Shareholders Agreement. Paragraph 12.11(2)(e) permits disclosure to the extent reasonably required by a third party in connection with the negotiation and due diligence relating to a Transfer of any Rights and Interests to the extent permitted by the Shareholders Agreement.

[160] Third, the December 18 New Gold Letter went on to state that New Gold intended to start preparing a draft agreement for the possible acquisition of the Xstrata Interest through the exercise of the Right of First Refusal. Referring to the telephone call of December 2, 2009, New Gold stated that it intended to use the Barrick Agreement as the template for an agreement between Xstrata Chile and New Gold and that it intended to disclose this draft sale agreement to Goldcorp and the third party "pursuant to the same provisions of the [El Morro Shareholders] Agreement and for the same reasons as set out above".

[161] Xstrata Chile received this correspondence on Saturday, December 19 (Brisbane time), and reviewed it on Monday, December 21. On that day, Baker (Barrick) telephoned Greville (Xstrata) to get an update on developments since December 18 regarding the Fluor Feasibility Study issue. Greville also gave him an update on the business of the Company over the preceding few weeks and then asked Baker to put Barrick's request in writing, including a request for any relevant correspondence between Xstrata Chile and New Gold.

[162] The reason for this request remains unclear but it was done immediately. Xstrata Chile then forwarded to Barrick copies of the December 18 Notice Letter and the December 21 Feasibility Study Letter that had been received earlier that day. At the same time, Xstrata Chile provided Barrick copies of the earlier letters dated November 17, November 26, November 30 and December 8, 2009, in which New Gold had advised of its intention to disclose confidential information in connection with its value maximization process to identified potential purchasers. On the same day, Xstrata also advised Barrick by email, in response to a question raised by Baker in a telephone conversation on December 19, 2009, that Goldcorp had not executed a confidentiality agreement with Xstrata Chile in respect of the Xstrata Chile auction process.

[163] Also on December 23, 2009, Barrick emailed Xstrata Chile asking the following question:

> [G]iven that New Gold would have to exercise the [Right of First Refusal] on substantially the same terms and conditions as the Barrick offer, how would Xstrata view a "follow-on" arrangement where a third-party provides financing to New Gold for the exercise?

The email then referred to New Gold's cash position as much less than U.S. $465 million and suggested that a New Gold offer that was contingent on financing from a third party would be considered inferior to the Barrick Transaction. Apart from this query, Barrick did not react to the correspondence provided by Xstrata on December 21, 2009.

[164] Xstrata replied to the Barrick email a week later on December 30, 2009, as follows:

> With regard to your query below regarding the possible exercise of the [Right of First Refusal] by New Gold, ultimately any view by Xstrata will depend exactly on how, if at all, New Gold looks to proceed in this regard.

[165] On December 31, 2009 or January 1, 2010, New Gold wrote to Xstrata Chile to ask for copies of certain schedules to the Barrick Agreement. In responding on January 3, 2010 to Xstrata's question about why the schedules were needed, New Gold's internal legal counsel advised that it was "...looking for the info to assist in preparing a draft purchase agreement in connection with the possible exercise of our [Right of First Refusal]. I just want to ensure that we have all the necessary documents to allow us to prepare what is required in the event of a possible exercise of the [Right of First Refusal]". Xstrata Chile provided copies of certain of the requested schedules on January 4, 2010. Xstrata Chile did not advise Barrick of this New Gold request. At the time, Xstrata Chile's principal concern appears to have been whether the failure to provide these schedules together with the Xstrata Chile Notice constituted non-compliance with section 10.4 of the Shareholders Agreement, which New Gold might use as a basis for an extension of the Exercise Period to continue its value maximization process.

[166] Lastly, there were direct discussions between Barrick and New Gold on December 18, 2009 and December 23, 2009. However, these conversations were limited to certain matters pertaining to the draft Assignment Agreements, particularly Barrick's cost of financing for purposes of the CFLA in order that New Gold could assess the financial impact to it of Barrick becoming a 70% shareholder in the El Morro Project.

Developments After the Goldcorp Agreement

[167] Following the communication of the New Gold board decision to Xstrata and Barrick, the actions of the parties reflect the very different relationships and objectives flowing from the agreement between New Gold and Goldcorp regarding the Goldcorp Transaction.

[168] In summary, Barrick's pre-eminent objective was to preserve the Barrick Transaction, which required that it identify a basis for de-railing the Goldcorp Transaction. For its part, Xstrata Chile adopted an essentially neutral posture. While it may have preferred the Barrick Transaction for business reasons related to other relationships with Barrick, it also had a relationship with Goldcorp and, above all, it wished to avoid becoming a party to any litigation between Barrick and New Gold/Goldcorp. New Gold and Goldcorp focused primarily on closing the Goldcorp Transaction, which, in the case of New Gold, required taking actions to ensure that Xstrata Chile had no basis for refusing to close that Transaction.

[169] I propose to set out separately the principal communications between Xstrata Chile and New Gold and the principal communications between Barrick and each of Xstrata Chile and New Gold. These communications are relevant to Barrick's claim that Xstrata Chile breached its contractual obligations to Barrick in the Barrick Agreement once the Goldcorp Transaction was announced, as addressed later in these Reasons.

Xstrata Chile's Communications with New Gold

[170] On January 6, 2010, in the evening following the calls that Oliphant made as described above, Barrick representatives held a conference call with Xstrata representatives. Barrick and Xstrata discussed the information that each had just received from New Gold. At this time, New Gold and Goldcorp had not yet publicly announced the Goldcorp Transaction and, therefore, the structure of that deal was not known to either Barrick or Xstrata. In the telephone conversation, among other things, Barrick raised an issue about whether or not the proposed transaction might give rise to a "mirror" right of first refusal in favour of Xstrata Chile in respect of either the New Gold Interest or the Xstrata Interest, and requested that Xstrata Chile raise the issue with New Gold.

[171] Blasutti joined this telephone call after it had started, having discussed the situation with Regent and Barrick's chief financial officer. With authority from them, Blasutti offered to increase the price under the Barrick Transaction to U.S. $525 million for the Xstrata Interest or U.S. $800 million for 100% of the El Morro Project, if Xstrata Chile had the ability to determine which transaction proceeded. In raising its offer price by U.S. $60 million, Barrick's aim was to remove a possible price bias in favour of the Goldcorp Transaction, which did not include Xstrata Chile's 70% interest in the BHP Royalty, by paying an additional amount for that 70% interest, which Blasutti valued quickly at U.S. $60 million. Barrick considered it likely that the Barrick Transaction, being unconditional, might be preferable to the as yet unseen Goldcorp Transaction if the latter contained any material condition, particularly a financing condition. This increase in the Barrick Transaction price, while perhaps misguided in terms of the likelihood that it could be effective, does not have any significance in this action.

[172] Following this conference call, McConnachy (Xstrata) had a telephone call with Portmann (New Gold) in which he raised the possibility of a "mirror" right of first refusal in favour of Xstrata Chile as requested by Barrick. To this point, Xstrata Chile, and probably Barrick, were proceeding on the basis that the Goldcorp Transaction was for 100% of the El Morro Project. Portmann advised McConnachy that the Goldcorp Transaction was for only 70% of the Project and that the Transaction structure did not trigger a right of first refusal in Xstrata Chile's favour. McConnachy (Xstrata) relayed this advice to Baker (Barrick) in an email on the morning of January 7, 2010 which also attached the New Gold Notice.

[173] Shortly afterward, Xstrata Chile received the New Gold Notice from New Gold, as mentioned above. The New Gold Notice also included an offer to purchase Xstrata's interest in the BHP Royalty for U.S. $2 million. In the covering email, among other things, New Gold confirmed its position, in response to the earlier telephone conversation with McConnachy and a

subsequent email from him re-stating the issue, that a right of first refusal had not been triggered in favour of Xstrata Chile for the Xstrata Interest. A draft press release that accompanied the New Gold Notice gave Xstrata its first information regarding the Goldcorp Transaction.

[174] McConnachy responded by email to New Gold's request for confirmation of receipt of the New Gold Notice. In that email, he also stated that Xstrata Chile was "considering further whether we believe that your proposed structure should trigger a requirement to give us a [Right of First Refusal] notice and would appreciate any further details on why you believe such is not the case". The email then stated, among other things, that Xstrata Chile was "reserv[ing] [its] position on the sale of [BHP Royalty] and presume, if we proceed, that such offer remains open".

[175] New Gold responded to Xstrata Chile by letter dated January 7, 2010, sent by email. In that letter, New Gold set out its position that a binding agreement existed between Datawave and Xstrata with respect to the Xstrata Interest as a result of Datawave's exercise of the Right of First Refusal. The letter dealt with the form of sale agreement and a proposed timing for closing. It also acknowledged Xstrata Chile's wish to reserve on a decision regarding a sale of its interest in the BHP Royalty. The letter concluded with a rejection of Xstrata's suggestion that the Goldcorp Transaction could give rise to a right of first refusal in Xstrata Chile's favour:

> Finally, with respect to any suggestion that our proposed transaction with Goldcorp may trigger a right of first refusal in your favour over your own 70% interest, we confirm our position that no such ROFR exists. Based on a plain reading of section 10.4 of the Shareholders Agreement, the 70% Xstrata interest is not part of Datawave's "Rights and Interests" and is therefore not subject to any ROFR obligations of Datawave as a "Selling Shareholder".
>
> The intent of the ROFR is to allow the Selling Shareholder to exit the Company and the remaining shareholder the opportunity to acquire that interest, not to give the Selling Shareholder a subsequent right of first refusal to repurchase its own interest, nor to allow the Selling Shareholder to re-impose itself or its choice or purchaser on the other party. Any other interpretation of the ROFR provisions is illogical and we can see nothing in the Shareholders Agreement, nor are we aware of any case law, which would support such a suggestion. If you have a different perspective, please provide it for our consideration.

[176] On January 8, 2010, McConnachy emailed New Gold asking for a copy of the "proposed Sale Agreement" and further details and an explanation of the specifics of the agreement that Datawave/New Gold had entered into with Goldcorp, including details of the subsidiary (i.e., DataSub) that was proposed to be sold to Goldcorp as part of the Goldcorp Agreement, in order "to assist [Xstrata's] analysis of our ability to accept the exercise of the

Right of First Refusal". McConnachy indicated that Xstrata Chile was willing to accept any exercise of the Right of First Refusal provided it was on the basis that (1) the sale was in accordance with the terms in the Barrick Agreement; and (2) Xstrata Chile received any applicable notice of offer that may be triggered by any agreements between Datawave and Goldcorp.

[177] New Gold replied by email on January 8, 2010 stating the New Gold position as follows:

> There is no legal requirement for you to "accept" our exercise of the ROFR because by delivering the notice of acceptance of the ROFR, a legally binding agreement of purchase and sale exists between Datawave and Xstrata pursuant to the Shareholders Agreement.

New Gold attached a draft sale agreement "with substantially the same terms and conditions as the 'substantially agreed Sale Agreement' with Barrick", marked up to reflect a Datawave transaction. It also confirmed that Datawave "has not received any other offers to purchase its interest in El Morro which would trigger a right of first refusal in [Xstrata Chile's] favour, and accordingly no other Notices of Offer are required". McConnachy did not make any further inquiries regarding the Goldcorp Agreement and did not receive a copy of the Goldcorp Agreement from New Gold.

[178] On January 11, 2010, Xstrata commenced a new internal valuation of the BHP Royalty, which did not form part of the Xstrata Interest and was therefore not something that Datawave had a right to acquire by exercising the Right of First Refusal. By this time, Xstrata had concluded internally that the New Gold exercise of the Right of First Refusal appeared to be valid. The valuation was conducted for purposes of any negotiation that might occur with New Gold for the purchase of Xstrata's 70% interest in the BHP Royalty. In carrying out the valuation, Xstrata obtained assistance from the general manager of the El Morro Mining Company, who had undertaken the original valuation that had valued Xstrata's 70% interest in the BHP Royalty at U.S. $2 million. The general manager concluded that Xstrata's 70% interest in the BHP Royalty currently had a value of approximately U.S. $28 million, which was subsequently increased to U.S. $62 million under an "'ultra' optimistic pricing scenario".

[179] At some point prior to January 29, 2010, under circumstances not in evidence, Xstrata Chile advised Datawave that it had decided not to sell its 70% interest in the BHP Royalty to New Gold or Datawave for $2 million.

[180] On February 1, 2010, in response to a January 29, 2010 email of New Gold, Xstrata Chile advised Datawave and the El Morro Mining Company that (i) it was of the view that no further sale agreement was required between Xstrata Chile and Datawave, and (ii) Xstrata Chile was ready, willing and able to complete the sale of the Xstrata Interest to Datawave in accordance with the terms set out in the form of sale agreement that was attached to the Xstrata Chile Notice, *mutatis mutandis*.

Barrick's Communications with Xstrata and New Gold

[181] On January 7, 2010, upon receipt from New Gold, Xstrata Chile provided Barrick with a copy of the New Gold Notice. From the New Gold Notice, Barrick also learned for the first time of the Feasibility Study Agreement between Xstrata Chile and New Gold. In a telephone conversation later that day, Barrick requested a copy of that agreement, which was provided later that evening.

[182] On January 11, 2010, Xstrata Chile advised Barrick by telephone that it had been advised by Chilean counsel and had determined that it could not proceed with the Barrick Transaction because the New Gold Notice was unconditional and complied with the Shareholders Agreement. At the time of this advice, Xstrata Chile had not yet received a copy of the Goldcorp Agreement.

[183] By letter dated the same date, Garver advised Xstrata Chile of Barrick's position that Xstrata Chile was obligated to complete the transaction with Barrick and could not lawfully enter into any transaction with Datawave with respect to the El Morro Mining Project. In the letter, Garver made the following additional assertions: (1) Datawave had, in substance, attempted to sell its Right of First Refusal to Goldcorp for U.S. $50 million plus other consideration; (2) such a transaction was in breach of the provisions of the Shareholders Agreement restricting transfers of Rights or Interests; (3) Datawave's purported exercise of the Right of First Refusal was invalid; (4) the Right of First Refusal had expired; (5) Datawave's disclosure of confidential El Morro information to Goldcorp under the guise of Datawave selling the New Gold Interest was improper; (6) Xstrata Chile's execution of the Feasibility Study Agreement with New Gold was likely in breach of Xstrata Chile's obligations to Barrick; and (7) all of the Conditions Precedent under the Barrick Agreement had been satisfied. At the time this letter was delivered, Barrick had not yet received a copy of the Goldcorp Agreement. However, Barrick has continued to assert this position throughout these legal proceedings.

[184] The next day, on January 12, 2010, Barrick advised in writing that it was satisfied with the form and substance of the Assignment Agreements.

[185] On January 13, 2010, Barrick commenced proceedings against New Gold, Datawave, Finco and Goldcorp (the "Original Barrick Claim") in which it sought, among other things, an interlocutory injunction and other interim relief to stop the Goldcorp Transaction. Barrick did not pursue this relief with the result that, as described below, the Goldcorp Transaction closed on February 16, 2010.

[186] On the same day, Xstrata Chile wrote to Barrick to advise that Xstrata Chile was of the view that the Right of First Refusal had been validly exercised by Datawave under section 10.4 of the Shareholders Agreement. Xstrata Chile then stated that, in its view: (1) the Barrick Agreement was frustrated or expired on January 7, 2010 (upon the exercise of the Right of First Refusal by Datawave) as, from that date, the Conditions Precedent in clause 4.1 of the Sale Agreement could not be satisfied; or (2) the Barrick Agreement remained conditional until

January 30, 2010 (or such earlier time if terminated by Barrick under clause 4.4 of the Barrick Agreement) but the Condition Precedent in clause 4.1(c) could no longer be satisfied.

[187] Later the same day, Garver responded to Xstrata's letter forwarding a copy of the Original Barrick Claim.

[188] On January 22, 2010, Barrick gave Xstrata Chile formal notice of a claim under the Barrick Agreement by way of adding Xstrata Chile and Xstrata Canada as defendants in the Original Barrick Claim.

[189] On January 26, 2010, Barrick provided Xstrata Chile with a copy of the Goldcorp Agreement, after obtaining it from the SEDAR website. New Gold had filed the Goldcorp Agreement with SEDAR on or about January 18, 2010 and it was publicly available on the SEDAR site commencing January 19, 2010.

[190] By letter dated January 28, 2010, Barrick reiterated to Xstrata Chile that Barrick was ready, willing and able to close the Barrick Transaction and that it intended to close the Transaction with Xstrata Chile on February 3, 2010, being the completion date in the Barrick Agreement.

[191] On February 1, 2010, Xstrata Chile wrote to Barrick referring to Xstrata's earlier letter of January 13, 2010 and, for completeness, notifying Barrick that, in its view, the Barrick Agreement had terminated.

[192] On February 2, 2010, Barrick wrote to Xstrata Chile to reiterate Barrick's position that Datawave's purported notice of its desire to exercise the Right of First Refusal was unlawful, invalid and ineffective under the Shareholders Agreement and the laws of Chile. Barrick also asserted that, to accept the New Gold Notice, Xstrata Chile would have to waive, amend, release or otherwise ignore a variety of provisions in the Shareholders Agreement which it could not properly do under the Barrick Agreement. Barrick confirmed its position that Xstrata Chile was legally obliged to complete the transaction with Barrick, and confirmed that Barrick was ready, willing and able to fulfill its completion obligations under the Barrick Agreement.

[193] On February 5, 2010, Barrick notified Xstrata Chile of Barrick's position that Xstrata was in default under the Barrick Agreement and was required to cure its alleged default and complete the Barrick Transaction seven days later, on February 12, 2010.

[194] Barrick asserts that, both on February 3, 2010 and on February 12, 2010, it remained ready, willing and able to satisfy its completion obligations under the Barrick Agreement, and had the full amount of the purchase price available in funds that were transferrable upon demand. There is no evidence to the contrary.

The Structuring and Completion of the Goldcorp Transaction

[195] The Goldcorp Transaction closed on February 16, 2010. The following describes the principal agreements between New Gold and Goldcorp, and transactions implemented pursuant to those agreements, that established the structure of the Goldcorp Transaction.

The Goldcorp Agreement

[196] As mentioned above, immediately after the New Gold board of directors meeting on January 6, 2011, New Gold, Datawave, Finco and Goldcorp entered into the Goldcorp Agreement. This Agreement is a relatively short umbrella agreement that establishes the structure for the Goldcorp Transaction by setting out the principal steps and the respective obligations of the parties in respect of the Goldcorp Transaction. The following summarizes the Transaction as set out in this Agreement.

[197] The Goldcorp Agreement begins with four unconditional obligations of Datawave. Datawave agreed to exercise the Right of First Refusal advising Xstrata of its intention to acquire the Xstrata Interest, confirming its desire to acquire the Fluor Feasibility Study, and offering to acquire the BHP Royalty. Next, Datawave covenanted to settle and execute a form of purchase agreement for the Xstrata Interest substantially in the form of the Barrick Agreement (the "Datawave Purchase Agreement"), incorporate a new subsidiary (DataSub), and assign to DataSub all of Datawave's rights in the Datawave Purchase Agreement.

[198] Goldcorp agreed to loan DataSub U.S. $465 million, or U.S. $463 million, if as transpired, Xstrata was not prepared to sell its interest in the BHP Royalty, immediately prior to the closing of DataSub's purchase of the Xstrata Interest. The proceeds of such loan were to be paid by Goldcorp directly to Xstrata Chile pursuant to a written direction from DataSub. Goldcorp's obligation to make the loan to DataSub was, however, conditional on Datawave taking certain additional steps which were not the subject of specific covenants of Datawave. These included: (1) providing Goldcorp with payment instructions from Xstrata for the closing of DataSub's purchase of the Xstrata Interest; (2) causing DataSub to execute a demand promissory note in the principal amount of the loan to be made in a scheduled form; (3) guaranteeing DataSub's obligations under the promissory note on a limited recourse basis; and (4) providing Goldcorp with a first pledge of the shares of DataSub and a first priority security interest on all of DataSub's assets.

[199] Subject to completion of the foregoing, including registration of the Xstrata shares in the El Morro Mining Company in the name of DataSub, Datawave and Goldcorp agreed to enter into a further agreement respecting the purchase of the shares of DataSub (the "DataSub Share Purchase Agreement"). Pursuant to the DataSub Share Purchase Agreement, Datawave would sell and assign all of the shares of DataSub to Goldcorp or a designated subsidiary together with all intercorporate debt of DataSub at a purchase price of U.S. $100. Contemporaneously with this transaction, Goldcorp would pay U.S. $50 million to an entity designated by New Gold, such payment to be structured in a mutually acceptable manner, enter into the construction guarantee

in a scheduled form and amend the Shareholders Agreement to give effect to the enhancements agreed to by Goldcorp.

[200] The Goldcorp Agreement also contained traditional representations and warranties of both parties as well as positive and negative covenants of Datawave in sections 4.1 and 4.2, respectively, that are addressed below. The Goldcorp Agreement provided that (1) the transaction structure could be amended for two specific purposes (tax planning and ensuring DataSub's rights to Xstrata's representations in the Datawave Purchase Agreement); and (2) the DataSub purchase of the Xstrata Interest and the Goldcorp purchase of the shares of DataSub were to be completed as consecutive transactions on the same day.

[201] It should be noted that, unlike the Shareholders Agreement and the Barrick Agreement, the parties to the Goldcorp Agreement agreed that it would be governed by the laws of Ontario.

The Flow of Funds Agreement

[202] On February 12, 2010, each of New Gold, Datawave, DataSub, Goldcorp, Goldcorp (Barbados) Inc. ("GBI"), and Goldcorp Tesoro Inc. ("Goldcorp Tesoro") executed a further agreement and direction (the "Flow of Funds Agreement") that described the following sequence of payments starting on February 12, 2010 and ending on February 17, 2010 that were to be made in connection with Goldcorp's funding of the purchase price payable by DataSub to Xstrata Chile for the purchase of the Xstrata Interest (omitting certain non-material transactions pertaining to the payment of applicable Chilean taxes):

1. Goldcorp would cause Goldcorp Tesoro to be funded via other Goldcorp subsidiaries with U.S. $513,231,516;

2. Goldcorp Tesoro would loan Datawave U.S. $50 million (the "$50 Million Loan") to be evidenced by a promissory note of Datawave payable to Goldcorp Tesoro in the same amount (the "Datawave Promissory Note");

3. Datawave would use the loan proceeds of U.S. $50 million to subscribe for 50 million common shares to be issued by DataSub;

4. DataSub would pay Datawave U.S. $50 million as consideration for the assignment by Datawave to DataSub of the Datawave Purchase Agreement;

5. Goldcorp Tesoro would loan DataSub U.S. $462,981,516 (the "$463 Million Loan") to be evidenced by a promissory note of DataSub in the same amount payable to Goldcorp Tesoro (the "DataSub Promissory Note"); and

6. DataSub would purchase the Xstrata Interest from Xstrata Chile paying Xstrata Chile U.S. $462,999,900 (this amount to be comprised of the $463

> Million Loan, which would be paid by Goldcorp directly to Xstrata Chile by way of a written direction from DataSub, plus U.S. $18,384 to come from New Gold via DataSub).

[203] GBI is a wholly-owned subsidiary of Goldcorp. Goldcorp Tesoro was incorporated under the laws of Barbados as a wholly-owned subsidiary of GBI. Goldcorp Tesoro was the subsidiary designated by Goldcorp to participate in the Goldcorp Transaction.

Completion of the Goldcorp Transaction

[204] In accordance with the Goldcorp Agreement, the Datawave Purchase Agreement was executed between Xstrata Chile and Datawave on February 12, 2010 and assigned to DataSub on February 15, 2010.

[205] Pursuant to paragraph 2.1.3(e) of the Goldcorp Agreement, Datawave delivered three pledge agreements to Goldcorp Tesoro dated February 12, 2010, February 15, 2010 and February 16, 2010 respecting 100, 50,000,000 and 50,100,000 shares of DataSub, respectively (collectively, the "Pledge Agreements"). Each of the pledge agreements contained, among other provisions, a covenant of Datawave that, during the currency of the pledge, it would "exercise its voting right for all and every one of the pledge shares in the Shareholders Meetings of [DataSub] in the manner indicated to it by Goldcorp Tesoro Inc. by instruction given in advance and in writing".

[206] The Goldcorp Transaction was closed on February 16, 2010 in two separate closings.

[207] In the first closing, DataSub acquired the Xstrata Interest. The structure of this part of the Goldcorp Transaction reflected the arrangements set out in the Flow of Funds Agreement.

[208] Immediately after the DataSub purchase of the Xstrata Interest was completed, the parties completed the second closing in which Datawave sold the DataSub shares to Goldcorp Tesoro in the following manner. First, Datawave sold to Goldcorp Tesoro the 100 common shares of DataSub that it received on the incorporation of DataSub. Then Datawave sold Goldcorp Tesoro the remaining 50,000,000 common shares that it received on the subscription for shares in DataSub contemplated by item #3 in the description of the Flow of Funds Agreement. The consideration for this sale was the cancellation of the Datawave Promissory Note contemplated by item #2 in the description of the Flow of Funds Agreement.

[209] The Goldcorp Transaction was therefore completed in accordance with a structure that was substantially similar to the structure contemplated by the Goldcorp Agreement with one modification that represented the incorporation of an agreed structure for Goldcorp's payment of U.S. $50 million to an entity designated by New Gold. The parties revised the structure of the transaction described in the Goldcorp Agreement to provide for the $50 Million Loan to fund DataSub's acquisition of the Datawave Purchase Agreement for U.S. $50 million, which was presumably its market value for tax and other purposes. As this loan remained outstanding at the end of the transaction by which DataSub purchased the Xstrata Interest, it was repaid by

cancellation of the Datawave Promissory Note upon the sale of the 50,000,000 common shares of DataSub acquired as described above.

[210] . It is understood that, on or about March 17, 2010, after completion of the Goldcorp Transaction, Goldcorp Tesoro converted the $463 Million Loan into equity of DataSub by subscribing for additional shares in DataSub and tendering the DataSub Promissory Note, which had remained outstanding in favour of Goldcorp Tesoro at the time of the completion of the Goldcorp Transaction.

PART II – ANALYSIS AND CONCLUSIONS REGARDING THE LIABILITY OF XSTRATA CHILE, NEW GOLD AND GOLDCORP

Overview of Barrick's Claims

[211] In this proceeding, Barrick asserts breach of contract claims against Xstrata Chile, tort claims against New Gold, Goldcorp and the Xstrata Parent Entities, breach of confidence claims against New Gold and Goldcorp pertaining to alleged misuse of confidential information and a restitutionary claim of unjust enrichment against Goldcorp. I will address each of these categories of claims in order.

[212] As mentioned above, in these Reasons, defined terms have the meanings ascribed to them in the Shareholders Agreement, including in particular the term "Offered Interest" which in this context refers to the subject matter of the Barrick Agreement, the New Gold Notice and the Datawave Purchase Agreement. To be clear, the terms "70% Interest" and "Xstrata Interest" refer to the 70% interest in the El Morro Project that was the subject of the Datawave Purchase Agreement, whether held by Xstrata Chile, DataSub or Goldcorp.

PART IIA – BARRICK'S PRINCIPAL ALLEGATION – INVALID EXERCISE OF THE RIGHT OF FIRST REFUSAL

[213] Barrick's principal claim in this action is asserted by way of breach of contract against Xstrata Chile.

[214] Barrick claims that Xstrata Chile was contractually obligated to complete the Barrick Transaction pursuant to the Barrick Agreement after January 7, 2010, by which date it says all of the Conditions Precedent were satisfied. This claim turns on a determination that Datawave failed to exercise the Right of First Refusal validly on or before January 7, 2010 by virtue of alleged breaches of the Shareholders Agreement. These claims are dealt with in this Part of the Reasons.

[215] As mentioned earlier, the principal issue in this litigation is whether the execution of the Goldcorp Agreement or Datawave's exercise of the Right of First Refusal resulted in a breach of the Shareholders Agreement. Barrick says that the result of these actions was a transfer to Goldcorp of Datawave's "right to purchase the Offered Interest". It says that such Transfer was a prohibited Transfer under Article 10 of the Shareholders Agreement because Datawave failed

to Transfer the New Gold Interest at the same time in order to comply with paragraph 10.2(1)(a), which would have given rise to a right of first refusal in favour of Xstrata Chile. Accordingly, Barrick says that the Datawave exercise of the Right of First Refusal was invalid.

[216] On Barrick's theory, Datawave was not entitled to enter into any agreement to sell the 70% Interest acquired on the exercise of the Right of First Refusal until after it had completed the purchase of the 70% Interest pursuant to the Datawave Purchase Agreement. In effect, Barrick says that Datawave had only two options upon receipt of the Xstrata Chile Notice: (1) acquire the Offered Interest in its own right before committing to any further transaction involving the 70% Interest; or (2) allow Barrick to acquire the Offered Interest. The defendants say that there is no such restriction in the language of the Shareholders Agreement or, more generally, in the nature of a right of first refusal. Accordingly, they argue that Datawave validly exercised the Right of First Refusal thereby terminating the Barrick Agreement.

[217] In order to address Barrick's principal claim, the court is required to address three general issues: (1) the facts pertaining to the Goldcorp Transaction as set out in the Goldcorp Agreement ─ that is, the nature of the legal commitments established by the Goldcorp Agreement under the laws of Ontario; (2) the contractual interpretation of the Shareholders Agreement under the laws of Chile ─ specifically, the manner in which the Transfer restrictions in Article 10 operate; and (3) the question of whether a breach of the Shareholders Agreement occurred as a result of the execution of the Goldcorp Agreement ─ by applying the relevant provisions of the Shareholders Agreement, as so interpreted, to the facts, as established by the court.

[218] Barrick also asserts further claims for breach of contract based on Xstrata Chile's alleged failure to act diligently and in good faith in accordance with the Chilean law standard of care and with certain contractual provisions of the Barrick Agreement. In particular, Barrick says that, upon receipt of the New Gold Notice, Xstrata Chile had a duty to inquire and a duty to assess and analyze all relevant information available to it in respect of the Goldcorp Agreement. These claims, and other claims against Xstrata Chile, will be addressed in Part IIB of these Reasons below, together with the claims asserted by Barrick against New Gold and Goldcorp.

Preliminary Matters to be Addressed

[219] Before addressing these claims I propose to address the following two matters: (1) the applicable law, including applicable principles of contractual interpretation; and (2) the legal relationships created by the right of first refusal in section 10.4 of the Shareholders Agreement.

Applicable Law and Applicable Principles of Contractual interpretation

[220] A distinctive feature of this action is that it involves a complicated intersection of the laws of Chile and of the Province of Ontario. In respect of the breach of contract claims, however, there is no dispute between the parties regarding the law that applies to each of the principal contracts and the proper domain of the laws of Chile and of Ontario.

[221] Each of the Shareholders Agreement, the Parent Entities Addendum, the CFLA and the Barrick Agreement are governed by the laws of Chile. The Goldcorp Agreement is expressed to be governed by the laws of Ontario.

[222] Accordingly, the laws of Ontario establish the legal effect of the Goldcorp Agreement. The laws of Chile govern all issues pertaining to the other four agreements, including whether, given the legal effect of the Goldcorp Agreement under the laws of Ontario, the execution and implementation of the Goldcorp Agreement has resulted in a breach of the other agreements.

Principles of Contractual Interpretation Under the Laws of Ontario

[223] It is trite law that the purpose of contractual interpretation is to determine the intentions of the parties to the contract. The principles of contractual interpretation applicable in Ontario have recently been set out by the Court of Appeal in *Salah* v. *Timothy's Coffees of the World Inc.*, 2010 ONCA 673, [2010] O.J. No. 4336, at para. 16, as follows:

> When interpreting a contract, the court aims to determine the intentions of the parties in accordance with the language used in the written document and presumes that the parties have intended what they have said. The court construes the contract as a whole, in a manner that gives meaning to all of its terms, and avoids an interpretation that would render one or more of its terms ineffective. In interpreting the contract, the court must have regard to the objective evidence of the "factual matrix" or context underlying the negotiation of the contract, but not the subjective evidence of the intention of the parties. The court should interpret the contract so as to accord with sound commercial principles and good business sense, and avoid commercial absurdity. If the court finds that the contract is ambiguous, it may then resort to extrinsic evidence to clear up the ambiguity. Where a transaction involves the execution of several documents that form parts of a larger composite whole -- like a complex commercial transaction -- and each agreement is entered into on the faith of the others being executed, then assistance in the interpretation of one agreement may be drawn from the related agreements. [Citations omitted.]

These principles govern the interpretation of the Goldcorp Agreement below. However, as described further below, the issues pertaining to the Goldcorp Agreement do not involve significant issues of contractual interpretation under the laws of Ontario.

Principles of Contractual Interpretation Under the Laws of Chile

[224] The court has had the benefit of expert testimony from four Chilean lawyers regarding the principles of contractual interpretation in that jurisdiction that apply to the interpretation of the Shareholders Agreement, the Parent Entities Addendum, the CFLA and the Barrick Agreement.

[225] The following lists the experts who testified on this subject and their respective reports:

1. Guillermo Morales Errázuriz ("Morales"), Barrick's expert, who provided a report dated April 11, 2011 and a supplementary report dated May 27, 2011 (collectively, the "Morales Report");

2. Carlos Peña González ("Peña"), New Gold's expert, who provided a report dated May 11, 2011 (the Peña Report");

3. Fernando Barros Torconal ("Barros"), Goldcorp's expert, who provided a report dated May 11, 2011 (the "Barros Report"); and

4. Rodrigo Ochagavia ("Ochagavia"), Xstrata's expert, who provided a report dated May 11, 2011, a supplementary report dated May 26, 2011, a report dated September 26, 2011 in relation to issues pertaining to remedies, and a report dated September 30, 2011 in relation to Chilean tax matters. Ochagavia's reports dated May 11, 2011 and May 26, 2011 are collectively referred to as the "Ochagavia Report".

Based on this evidence, the following summarizes my findings with respect to the principles of contractual interpretation under Chilean law that are relevant for the issues in this proceeding.

[226] The "golden rule" of contractual interpretation is set out in Article 1560 of the Chilean Civil Code (the "Civil Code"), which provides that "[O]nce the intention of the parties to a contract is clearly known, this intention shall prevail over the literal words thereto". Accordingly, Chilean law doctrine is unanimous that the general rule of interpretation is to seek the actual will of the parties. By way of overview, I am satisfied that the applicable principles in Chile to be applied in determining that intention are substantially similar to the principles applicable in Ontario as set out in *Salah*.

[227] The starting point for the contractual interpretation of the Shareholders Agreement is the plain meaning of the words agreed to by the parties thereto. This approach is reinforced by section 1.2(1) of the Shareholders Agreement which provides that its terms must be construed in accordance with their "usual and customary meaning". However, if it is demonstrated that the parties' intention differs from the plain meaning of the words used, the parties' intention will prevail.

[228] The Civil Code also contains a number of provisions following Article 1560 which form the basis of more specific principles or rules that are available to a court as guides for determining the intention of the parties where circumstances warrant their application. The experts referred to a number of such principles or rules that are relied upon by the parties in this litigation.

[229] These rules include: (1) that the clauses of a contract are to be interpreted so as to give the meaning that best suits the entire contract (the "Rule of Intrinsic Harmony") (found in the first paragraph of Article 1564); (2) that the meaning of a clause that can produce a legal effect is to be preferred to those which cannot produce it (the "Rule of Utility") (found in Article 1562);

(3) that in cases where no contrary will appears, the interpretation that better suits the nature of the contract shall be preferred (the "Rule of the Nature of the Contract") (found in Article 1563); and (4) that contracts are to be interpreted according to the actual manner of performance of the contract by the parties or by one of them with the approval of the other (the "Authentic Rule") (found in the third paragraph of Article 1564).

[230] In addition, Article 1546 of the Civil Code provides for obligations of good faith:

> Contracts must be performed in good faith, and therefore they oblige not only to what is expressed therein but also to anything that derives precisely from the nature of the obligation or that, according to law or custom, is part of their nature.

It is agreed that this provision implies good faith obligations in both the interpretation of contracts and their performance.

[231] There are, however, three matters on which the parties disagree as to how the rules of contractual interpretation operate.

[232] First, Barrick submits that there is a rule that substance prevails over form. The circumstances, if any, under which a Chilean court will have regard to a distinction between the substance of a transaction as opposed to the form, in the sense of what was agreed between the parties, was not clearly established. Taking into consideration all of the testimony relied upon by Barrick, I am not persuaded that the circumstances under which a Chilean court will interpret the effect of a multi-stage transaction differ in any material respect from the case by case approach of Ontario courts. In any event, however, for the reasons set out below, I do not think that the application of this principle in respect of the particular issues of interpretation raised by Barrick is legally meaningful in this proceeding. Instead, I conclude that the extent to which the court should have regard to the Goldcorp Agreement as a whole is dependent upon the contractual interpretation of the relevant provisions of the Shareholders Agreement.

[233] Second, Barrick submits that Chilean law principles require that exceptions to general rules be interpreted restrictively so as to apply to the smallest number of circumstances. On this basis, Barrick submits that the provisions of section 10.4 respecting the right of first refusal in favour of each party should be interpreted restrictively. This issue is addressed below.

[234] Third, the defendants rely on the Authentic Rule as described above. This last rule is relevant to a larger issue that pertains to the extent, if any, of the interrelationship between the Shareholders Agreement, specifically section 10.4, and the Barrick Agreement.

[235] The issue may be expressed generally in the following manner: if Barrick and the parties to the Shareholders Agreement have different interpretations of the plain wording of section 10.4, they will differ as to whether the Right of First Refusal was validly exercised. Is Barrick bound by the interpretation agreed upon by the parties to the Agreement, or can Barrick insist on its interpretation of the plain wording of section 10.4 as between itself and Xstrata Chile?

[236] The relationship between the Shareholders Agreement and the Barrick Agreement is not straightforward. On the one hand, the two agreements are separate instruments having different parties. Barrick does not dispute that it is a third party to the Shareholders Agreement and cannot assert rights under that agreement as if it were a party to it. One consequence of this relationship is that, during the exercise period of the Right of First Refusal, as between themselves, Xstrata Chile and New Gold/Datawave were free to amend the provisions of the Shareholders Agreement, including section 10.4, without any requirement to obtain Barrick's consent. This result is in conformity with a further fundamental principle of Chilean law referred to as the "Relative Effect of Contracts", which was recognized by all of the experts. This principle provides that a contract grants rights to, and is a source of obligations for, only the parties to that contract. As a consequence, there is no rule under Chilean law that grants a legal person the power to interfere or intervene in any way in a contract to which it is not a party.

[237] However, Barrick has contractual rights against Xstrata Chile under the Barrick Agreement that it is entitled to enforce against Xstrata Chile without regard to any amendment agreed to between Xstrata/Chile and Datawave. Accordingly, Xstrata Chile's agreement with New Gold/Datawave to any amendment to the Shareholders Agreement could, as between itself and Barrick, give rise to a Barrick claim for breach of the Barrick Agreement ─ for example, by way of a claim for breach of a duty of good faith or breach of the pre-completion obligations in paragraphs 8.6(e) and (g).

[238] In response to any such claim, the defendants rely on the Authentic Rule to exclude Barrick's interpretation of the right of first refusal provisions in section 10.4. They take the position that the common intention of the parties regarding the interpretation of section 10.4 is determined by the fact that Xstrata Chile and Datawave, as the parties to the Shareholders Agreement, agreed that the Right of First Refusal was validly exercised.

[239] There is, however, a subtle but important difference between common action as evidence of the common intention of the parties regarding the interpretation of the Agreement ─ the domain of the Authentic Rule ─ and an amendment of the Shareholders Agreement. At what point does common action (in this case, agreement that the New Gold Notice was valid) cross the line and become an amendment? The issue is also complicated by the possibility that any common action of Xstrata Chile and Datawave was influenced by self-interest in avoiding litigation and, in Xstrata Chile's case, in retaining its interest in the BHP Royalty. Given these latter considerations, I have confined use of the Authentic Rule in the interpretation of the Shareholders Agreement to common action in which Barrick participated or to which it expressly or implicitly consented.

[240] Lastly, I note that, in support of Barrick's position that its understanding of the plain meaning of section 10.4 of the Shareholders Agreement should govern, Morales proposed or articulated what he termed the "doctrine of reliance on appearance", which he summarized in the Morales Report at paras. 17 and 18 as follows:

> The following elements have to occur if a Third Party in Interest may claim that the legal situation originally apparent to it has to prevail over an alternative legal construction subsequently advanced by other party or parties: (i) a material element, which is the external fact or situation that is apparent and can be objectively observed by any third party, and (ii) a psychological element, which is the "wrongful belief" on the part of the third party that what is being presented corresponds to reality; provided, however, that the Third Party in Interest is acting in good faith and is diligent. Indeed, the ignorance about the real situation must qualify as an excusable ignorance.
>
> If these elements are verified and this principle applied, the main effect will be that the ostensible situation, act or contract that was relied upon by the Third Party in Interest will be deemed as the actual or real situation, act or contract for legal purposes. It will follow then that any rights acquired by a third party in reliance, pursuant to and based upon the apparent legal situation will validly vest in and become the property or claim of such Third Party in Interest. In contrast, the party who created the ostensible or apparent situation, act or contract shall be nevertheless bound by the legal consequences thereof.

According to Morales, in the present circumstances, both Xstrata Chile and Datawave, as parties to the Shareholders Agreement, were subject to the operation of this principle so that neither could advance an interpretation of the Shareholders Agreement that was "inconsistent with the objective ordinary meaning" of the relevant terms of that Agreement "to the detriment of or the prejudice to Barrick as a Third Party in Interest to the [Shareholders Agreement]".

[241] Morales did not cite any authority for this principle. Instead, he infers, or derives, this principle from more general principles under Chilean law, including, among other provisions, Article 1707 of the Civil Code which deals with a different situation, and Article 1546, which deals with good faith obligations. Morales also suggested that this principle overrode the rules of interpretation in Articles 1561 to 1565 of the Civil Code described above that are otherwise available to a judge to determine the intentions of the parties to a contract.

[242] I accept the evidence of the other experts that this is not a recognized principle of contractual interpretation in Chilean law. I also note that Barrick did not rely on this principle in its closing submissions in support of its position regarding the correct interpretation of section 10.4 of the Shareholders Agreement.

[243] Accordingly, I have not considered this principle in addressing the contractual interpretation of the agreements governed by the laws of Chile. I would note, however, that while expert witnesses are not always capable of excluding all partisanship, in this case, Morales' proposal of this principle, as well as the absence of any support for his interpretation of section 10.4 of the Shareholders Agreement discussed below, did, to a certain extent, diminish his reliability as an independent expert.

The Legal Relationships Created by the Right of First Refusal in Section 10.4 of the Shareholders Agreement

[244] In order to assist in the interpretation of section 10.4, I propose to describe the legal relationships established by that provision. There are four separate concepts to be analyzed: (1) the inchoate right under section 10.4; (2) the right that arises under section 10.4 upon delivery of a notice of offer by a selling shareholder; (3) the contract that arises under section 10.4 upon exercise of the right of first refusal; and (4) the subject matter of the right referred to in (2) and (3). I will describe each in turn with reference to the operation of the provisions respecting a Transfer of Rights and Interest under the Shareholders Agreement.

[245] First, section 10.4 provides for an inchoate or contingent right in favour of each joint venture party to acquire the other party's interest if the first party proposes to accept an offer from a third party for some or all of its Rights and Interests. As described below, this is not a symmetrical right as New Gold's right would expire if a decision were taken to proceed to Development. I have, however, concluded that there is no legal significance to be inferred from this asymmetry for the purposes of the issues in this action.

[246] By virtue of the provisions of section 10.2(1)(b) of the Shareholders Agreement, which require that a new joint venture party assume the obligations of the departing party under the Agreement, this inchoate right under section 10.4 is a right that a non-departing joint venture party continues to enjoy, notwithstanding the Transfer of the departing party's interest to the new joint venture party. New Gold continues to have the benefit of this right in respect of any future sale of the 70% Interest notwithstanding completion of the Goldcorp Transaction, although it is now enforceable against Goldcorp.

[247] In principle, such a right could be assigned or sold to a third party, such that the third party would have a right to acquire any departing party's interest in the El Morro Project (other than the New Gold Interest) for as long as New Gold remains a joint venture partner. However, in this case, such an assignment or sale is clearly prohibited by section 10.2(1)(a) of the Shareholders Agreement if it is not accompanied by a sale of the New Gold Interest.

[248] The second concept contemplated under section 10.4 is the right which arises after delivery of a "Notice of Offer" under section 10.4(1) by a selling shareholder. This is, of course, an incident of the right described above but is no longer inchoate or contingent. This is the right that arose when Xstrata Chile delivered the Xstrata Chile Notice. It is the "Right of First Refusal" as defined in these Reasons.

[249] Such a right is a contractual right. It can be conceptualized as an option in favour of the non-selling joint venture party, the terms of which are set out in the Third Party Offer. In the present proceeding, it was a right to call for delivery of the Xstrata Interest upon the terms and conditions of the Barrick Agreement.

[250] In principle, the option could also be assignable in its own right at any time prior to delivery to the holder of the underlying security. However, in this case, all of the parties are proceeding on the basis that, under the Shareholders Agreement, this option, once it came into existence, could not be sold, assigned or otherwise transferred to a third party otherwise than in compliance with Article 10 of the Shareholders Agreement.

[251] The third concept is the contract that arises between the selling and the non-selling joint venture parties when the non-selling party delivers its notice of intention to purchase the Offered Interest pursuant to section 10.4(2), in this case the New Gold Notice. The terms of this contract are the terms set out in the Third Party Offer pertaining to the Offered Interest and any applicable rights under section 10.4 of the Shareholders Agreement. The option is executed and subsumed by this contract when it is formed.

[252] While the parties may subsequently execute a sale agreement between them, the execution of that agreement, in this case the Datawave Purchase Agreement, does not create a new right. The only effect of that action is to express the operative terms of the agreement in a document executed by the buyer and the seller. However, for ease of reference in the present circumstances, the term "Datawave Purchase Agreement" refers to both the agreement formed upon delivery of the New Gold Notice as well as the document executed between Xstrata Chile and New Gold on or about February 12, 2010, except where the context otherwise requires.

[253] The Shareholders Agreement provided that a shareholder was entitled to assign its Rights and Interests to an Affiliate without triggering the right of first refusal in section 10.4. The parties dispute whether the Datawave Purchase Agreement was included in the Rights and Interests of Datawave. The Datawave Purchase Agreement was expressed to be assignable to a wholly-owned subsidiary of Datawave pursuant to the provisions of section 16.1 of that Agreement. The issue of compliance with these provisions in the context of the Goldcorp Transaction is addressed below.

[254] I would also note that both the option constituted by the Right of First Refusal and the right to purchase the Offered Interest under the Datawave Purchase Agreement are referred to herein as Datawave's "right to purchase the Offered Interest where I consider it necessary to properly describe Barrick's position.

[255] The fourth concept, as mentioned, is the subject matter of the Right of First Refusal and the Datawave Purchase Agreement. In the present case, it is comprised of all of the shares and other securities and rights comprising the 70% Interest in the Project.

The Barrick Claim Against Xstrata Chile Based on its Failure to Complete the Barrick Transaction

[256] I turn now to Barrick's principal claim against Xstrata Chile for breach of contract, which is based on Xstrata Chile's failure to complete the Barrick Transaction in accordance with the Barrick Agreement. This claim turns on Barrick's allegation that Datawave breached the

Shareholders Agreement by entering into the Goldcorp Agreement on January 6, 2010 with the result that Datawave's exercise of the Right of First Refusal was invalid and therefore that the Conditions Precedent in the Barrick Agreement were satisfied as of January 7, 2010, making the Barrick Agreement a binding obligation of Xstrata Chile.

[257] Barrick alleges that Datawave's execution of the Goldcorp Agreement resulted in at least seven breaches on the part of Datawave of the Transfer restrictions in the Shareholders Agreement, the CFLA and Datawave's obligations of good faith. As the parties to the Shareholders Agreement were Xstrata Chile and Datawave, the question raised in this section is the following: did Datawave breach the Shareholders Agreement in one or more of the ways alleged by Barrick by entering into the Goldcorp Agreement given the legal effect of the Goldcorp Agreement as between Datawave and Goldcorp? This question must be answered by an interpretation of the Shareholders Agreement in accordance with Chilean principles of contractual interpretation. However, in addressing this question, it is first necessary to establish the legal effect of the Goldcorp Agreement as between New Gold/Datawave and Goldcorp, the parties to that Agreement, in order to determine the commitments made by Datawave.

Approach to the Determination of Whether the Shareholders Agreement Has Been Breached

[258] At this stage, I wish to set out in greater detail, the approach adopted in these Reasons to the exercise of contractual interpretation as it informs a number of the conclusions reached below in respect of Barrick's submissions.

[259] The exercise of contractual interpretation involves three steps: (1) a determination of the facts that are alleged to have given rise to an alleged breach; (2) a contractual interpretation of the relevant provisions of the contract involved to determine the scope of the provisions; and (3) application of the contractual provisions, as so interpreted, to the facts to determine whether a breach has occurred.

[260] These three steps are reflected in the dictum of Iacobucci J. in *Canada (Director of Investigation and Research)* v. *Southam Inc.*, [1997] 1 S.C.R. 748, at para. 35, where he addressed the related exercise of the standard of review on an appeal:

> Briefly stated, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests.

In the context of an alleged breach of contract, the correct legal test is established by the contractual provision involved. Whether a breach has occurred will depend on whether the facts satisfy that legal test.

[261] In this case, there are two factors that complicate but do not change the ultimate exercise: (1) the alleged breach of the Shareholders Agreement is said to have occurred as a result of the

execution of another agreement between one of the parties to the Shareholders Agreement and a third party, i.e., the Goldcorp Agreement; and (2) the Shareholders Agreement is governed by the laws of Chile.

[262] With respect to the former, to determine whether a breach has occurred, a court must apply the provisions of a shareholders agreement to certain facts that take the form of the legal obligations established in another agreement between one of the shareholders and a third party. In the present case, the court must apply the provisions of the Shareholders Agreement to the legal obligations that are established in the Goldcorp Agreement. This exercise is well illustrated by the decision of Blair J. (as he then was) in *GATX Corp.* v. *Hawker Siddeley Canada Inc.*, [1996] O.J. No. 1462 (Gen. Div.), even though the result reached in that decision is the opposite of the result reached in these Reasons.

[263] There are two important features of this exercise to identify at the outset. First, unless the covenants in the third party agreement are unenforceable under the governing law or do not represent the actual agreement between the parties, the covenants in the third party agreement establish the legal relations that are to be considered in relation to the operation of the shareholders agreement. Second, the extent to which a court looks to the result of the covenants in the third party agreement, or has regard to the whole transaction contemplated therein, is determined by the scope of the applicable provisions in the shareholders agreement as interpreted by the court. This examination takes place in the third step of the exercise ─ applying the test, i.e., the applicable provisions of the shareholders agreement, to the facts which in this case are the legal obligations in the third party agreement. Whether or not such an approach is mandated in determining whether a breach of the shareholders agreement has occurred depends upon the scope of the provisions of the shareholders agreement as determined in the second stage of the exercise by the court.

[264] The second complicating factor in the present case is that the Shareholders Agreement is governed by the laws of Chile. Accordingly, in order to interpret the contractual provisions of the Shareholders Agreement to establish the relevant test, it is necessary, among other things, to receive evidence of Chilean legal experts and to make a finding of fact as to the proper contractual interpretation of Article 10, i.e. as to the test.

[265] This exercise does not change the nature of the three-step process of determining whether a breach of the Shareholders Agreement has occurred. It does, however, make it important to distinguish the law that applies at each stage. To establish the facts to which the test is applied, the court has regard to the legal relationships between Datawave and Goldcorp, as established by the Goldcorp Agreement, which is governed by the laws of Ontario. To determine the legal test, the court is required to determine the proper contractual interpretation of the relevant provisions of Article 10 of the Shareholders Agreement, which is governed by the laws of Chile. In applying the test to the facts to determine whether a breach has occurred, the court is required to apply the relevant provisions of Article 10 to the facts as established by the court. To the extent the court is required to examine particular features of the legal relationship between Datawave and Goldcorp, including in particular, the end result, this will be because the provisions of

Article 10, i.e., the test, mandate such an examination to determine whether a breach has occurred, not because such an approach is required according to some general principle of contractual interpretation under the laws of Ontario.

[266] I therefore propose to address Barrick's breach of contract claims in three stages. First, I will analyze the legal effect of the Goldcorp Agreement, i.e., the legal relationships created by the principal commitments made by Datawave to Goldcorp in that Agreement. Second, I will set out my conclusions regarding certain general principles that govern the operation of the Transfer restrictions in the Shareholders Agreement. Third, I will set out my conclusions regarding the operation of the Transfer restrictions when applied specifically to the legal relationships created by the Goldcorp Agreement. I will then address the specific breaches of the Shareholders Agreement that Barrick alleges Datawave committed as a result of execution of the Goldcorp Agreement.

The Legal Effect of the Goldcorp Agreement

[267] I turn first to an analysis of the legal effect of the Goldcorp Agreement i.e., the nature of the commitments made between Datawave and Goldcorp in the Goldcorp Agreement. As it is Barrick's position that the Goldcorp Transaction created, or gave rise to, a prohibited Transfer on January 6, 2010, I have limited my review to the Goldcorp Agreement as the alleged source of the prohibited Transfer except to the extent otherwise expressly stated.

Positions of the Parties

[268] Barrick asserts that the Goldcorp Agreement constituted an agreement pursuant to which on January 6, 2010: (1) Goldcorp acquired Datawave's right to purchase the Xstrata Interest, by which Barrick means that Goldcorp acquired collectively the Right of First Refusal and the Datawave Purchase Agreement upon its formation, (2) Datawave agreed to deliver the New Gold Notice purporting to exercise its right to purchase the Xstrata Interest; and (3) Goldcorp acquired the Xstrata Interest. It says the subsequent transfer of the DataSub shares to Goldcorp Tesoro, which it describes as a "clean up of formalities", is of no legal consequence.

[269] The defendants submit that the Goldcorp Agreement constituted a sale of the 70% Interest by Datawave/DataSub to Goldcorp, conditional upon DataSub's completion of the purchase of the 70% Interest from Xstrata Chile pursuant to the Datawave Purchase Agreement. This transaction is described by Barrick as a "pre-sale" of the 70% Interest by Datawave.

[270] The foregoing does not purport to be a complete summary of Barrick's submissions regarding the operation of the Shareholders Agreement. It is set out to identify a central issue in this action: did the Goldcorp Agreement constitute an unconditional sale by New Gold to Goldcorp of the Right of First Refusal, the Datawave Purchase Agreement or the 70% Interest? I conclude that it did not for the reasons set out in the following section.

Analysis of the Legal Effect of the Goldcorp Agreement

[271] The following sets out the court's findings regarding the legal effect of the commitments made by New Gold/Datawave and Goldcorp in the Goldcorp Agreement under the laws of Ontario. In this section, I have also addressed particular issues raised by Barrick. These conclusions, collectively, constitute the factual circumstances to which the Transfer restrictions are applied to determine whether a breach of the Shareholder Agreement occurred.

[272] The Goldcorp Agreement constitutes, in substance, an agreement of Datawave to sell the 70% Interest to Goldcorp, conditional upon Datawave's purchase of the 70% Interest from Xstrata Chile which was, in turn, conditional upon Goldcorp lending Datawave the funds required by Datawave to purchase the 70% Interest under the Datawave Purchase Agreement. The Goldcorp Agreement achieves this result by a sequence of covenants of one party in favour of the other, each conditional upon actions of the other party occurring in a sequence described in the Agreement.

[273] This Agreement bears close scrutiny. The only unconditional obligations in the Goldcorp Agreement are Datawave's covenant to exercise the Right of First Refusal, to settle and execute the form of the Datawave Purchase Agreement, to incorporate DataSub, and to assign the Datawave Purchase Agreement to DataSub.

[274] Goldcorp's obligation to make the $463 Million Loan is conditional upon Datawave performing the foregoing covenants, as well as: (1) Datawave delivering a promissory note of DataSub to evidence the Loan; (2) Datawave delivering a guarantee and specified security to be negotiated; (3) Datawave providing payment instructions to Goldcorp respecting payment of the purchase price for the Offered Interest; and (4) Datawave, DataSub and Finco delivering bring-down certificates respecting their respective representations and warranties and the performance of their respective covenants in the Agreement (which could also be precluded by subsequent actions of third parties).

[275] There is, in fact, no express covenant on the part of Datawave to deliver the documentation set out in (1) to (4) above. If Datawave satisfied these conditions, however, Goldcorp was obligated to make the $463 Million Loan and DataSub would be obligated to use the proceeds to purchase the Offered Interest. In turn, if the transaction for the purchase of the Offered Interest were completed and the shares in the Company transferred to DataSub were properly registered in its name under the laws of Chile, Datawave would also be obligated, as would be Goldcorp, to enter into the DataSub Share Purchase Agreement in the form scheduled to the Goldcorp Agreement. In addition, in such circumstances, Goldcorp also agreed that it would contemporaneously execute the construction guarantee, amend the Shareholders Agreement to provide the agreed upon enhancements to New Gold, and pay the amount of U.S. $50 million to New Gold on a basis to be agreed upon.

[276] Barrick does not argue that any of the covenants of the Goldcorp Agreement are unenforceable as a matter of the laws of Ontario. It also does not argue that the Goldcorp

Transaction is a "sham transaction" as that term is described by Lord Diplock in *Snook* v. *London & West Riding Investments, Ltd.*, [1967] 1 All E.R. 518 (C.A.), i.e., that the actual agreement between the parties differs from the transaction set out in the Goldcorp Agreement.

[277] Accordingly, I have proceeded on the basis that the covenants set out above are valid and binding obligations of Datawave and Goldcorp.

[278] Several features of these legal relationships established by the Goldcorp Agreement are relevant to the third step of the process of determining whether a breach of the Shareholders Agreement has occurred. Barrick argues that the covenants in the Goldcorp Agreement constitute, or give rise to, an unconditional sale on January 6, 2010 by Datawave to Goldcorp of the Right of First Refusal, of Datawave's rights under the Datawave Purchase Agreement or of the Offered Interest. Given the approach set out above, I consider these questions to relate to the operation of the Shareholders Agreement under the laws of Chile. However, for the reasons set out below, I also do not think that the Goldcorp Agreement gave rise to any of these circumstances under the laws of Ontario to the extent this is relevant to the issues in this action.

Alleged Sale of the Right of First Refusal

[279] On the plain meaning of the Goldcorp Agreement, Datawave did not grant Goldcorp the right to exercise the Right of First Refusal in either form or substance. Nor does it constitute a sale of the Right of First Refusal. The Agreement expressly provides that Datawave will exercise the Right of First Refusal, which it did. If Datawave had failed to exercise the Right of First Refusal properly, Goldcorp could have looked only to Datawave. Goldcorp did not, at any time, become entitled to assert the benefit of the Right of First Refusal against Xstrata Chile. Nor did Goldcorp purport to exercise the Right of First Refusal or to close the Datawave Purchase Agreement transaction directly with Xstrata Chile.

[280] There is also no basis in the language of the Goldcorp Agreement for concluding that, under the laws of Ontario, Datawave's exercise should be regarded as an action on behalf of Goldcorp, either as its agent or as trustee of a right held in trust for Goldcorp. If that had been intended, the language of the Agreement would have contained either express agency language in reference to the action of exercising the Right of First Refusal or a declaration that Datawave was holding the Right of First Refusal in trust for Goldcorp.

Alleged Sale of Datawave's Rights Under the Datawave Purchase Agreement

[281] Similarly, on the plain meaning of the Goldcorp Agreement, Datawave did not sell or assign the Datawave Purchase Agreement to Goldcorp. The Agreement deals specifically with the assignment of the Datawave Purchase Agreement to DataSub and completion of the purchase of the Offered Interest by DataSub pursuant to the Datawave Purchase Agreement. In the event that Goldcorp failed to fund the purchase of the Offered Interest for any reason, Datawave remained solely liable to Xstrata Chile to complete the transaction. Further, Goldcorp did not, at any time, become entitled to assert the benefit of the Datawave Purchase Agreement against

Xstrata Chile. It could look only to Datawave if the Goldcorp Transaction failed for whatever reason. Conversely, Xstrata Chile had no right to enforce performance of the Datawave Purchase Agreement against Goldcorp.

[282] In its oral submissions, Barrick proposed a legal theory for its position, based on the fact that Datawave had a non-transferable option to purchase the 70% Interest, that addressed the relationship of the two sale transactions contemplated by the Goldcorp Agreement. Barrick argues that an agreement for the future sale of an asset conditional upon the seller acquiring the asset pursuant to a non-transferable option constitutes an assignment or a grant by the seller to the purchaser of the benefit of the option. Put another way, Barrick says that such a transaction amounts to doing indirectly what cannot be done directly i.e. selling or assigning the non-transferable option.

[283] On the basis of this principle, Barrick argues that the legal effect of the Goldcorp Agreement under the laws of Ontario was to assign or grant to Goldcorp the benefit of the Right of First Refusal and the Datawave Purchase Agreement, which Barrick refers to collectively as Datawave's "right to purchase the Offered Interest". The Datawave commitment to sell the DataSub shares to Goldcorp, being conditional on DataSub completing the Datawave Purchase Agreement, constituted a grant or an assignment to Goldcorp of Datawave's Right of First Refusal or its rights under the Datawave Purchase Agreement.

[284] Barrick says this conclusion follows from general principles. It did not, however, cite any authorities under the laws of Ontario in support of the legal theory upon which this argument is based. I do not accept this submission insofar as it is a matter of the laws of Ontario for the following reasons. I think this argument conflates the two sale transactions under the Goldcorp Agreement – the Datawave Purchase Agreement between Xstrata Chile and Datawave/DataSub and the DataSub Share Purchase Agreement between Datawave and Goldcorp Tesoro, both of which provide for the sale of the 70% Interest. The two transactions are, in my opinion, separate and distinct for the reasons set out above, even if contemplated by the same agreement. This is reflected, in particular, in the different parties and differing legal rights and obligations pertaining to the Right of First Refusal and Datawave Purchase Agreement, on the one hand, and the Goldcorp Agreement and, in particular, the DataSub Share Purchase Agreement (even disregarding the existence of DataSub), on the other. Moreover, the Barrick argument assimilates the transfers of the 70% Interest under these agreements into an alleged transfer of the Right of First Refusal and the Datawave Purchase Agreement, which Barrick describes as the "right to purchase the Offered Interest". In the absence of any supporting legal authority for such an approach, I conclude that the legal theory is not supported by any legal principle under Ontario law.

The Legal Effect of the Goldcorp Agreement When Considered as a Whole

[285] It is also necessary to address two other allegations made by Barrick concerning the legal effect of the Goldcorp Transaction as of January 6, 2010 that rely on a consideration of the Goldcorp Agreement as a whole: (1) that, notwithstanding the plain meaning of the Goldcorp

Agreement addressed above, the Agreement, interpreted as a whole, constituted an unconditional sale of the Offered Interest to Goldcorp on January 6, 2010; and (2) that the arrangements pertaining to DataSub in the Goldcorp Agreement constituted DataSub a Goldcorp subsidiary at the time that it purchased the Offered Interest under the Datawave Purchase Agreement.

The Goldcorp Agreement Constitutes an Unconditional Sale of the Offered Interest

[286] Barrick says that the Goldcorp Agreement should be interpreted as a whole, by which it means having regard to the end result, without regard to the individual steps and transactions described therein. On this basis, it says, among other things, that the Agreement constituted an unconditional sale of the Offered Interest to Goldcorp, which is tantamount to a Transfer of Datawave's "right to purchase the Offered Interest". This issue is principally relevant to the manner in which the Transfer provisions operate.

[287] In this section, I address only the question of whether there is any basis to find, as a factual matter, for the first stage of the exercise of determining whether a breach of the Shareholders Agreement has occurred, that the Goldcorp Transaction involved an unconditional sale of the Offered Interest to Goldcorp. I am satisfied that it does not do so. I conclude instead that the conditional structure of the transaction is legally effective under the laws of Ontario for the reasons set out below. I will consider each issue in turn.

[288] The Goldcorp Agreement is structured around two separate sale transactions preceded by a loan ─ the $463 Million Loan to DataSub, the sale of the Offered Interest to DataSub, and the sale of the DataSub shares (or, viewed substantively, the 70% Interest) to Goldcorp. However, the Goldcorp Agreement does not provide for a series of steps that follow automatically one after the other and are triggered by Datawave's exercise of its Right of First Refusal. Therefore, the Goldcorp Agreement does not constitute an unconditional obligation on the part of Datawave to sell the 70% Interest to Goldcorp. The conditional nature of the New Gold commitment to sell the 70% Interest to Goldcorp is legally effective under the laws of Ontario. It is manifested in the following six aspects of the Agreement.

[289] First, and most important, the treatment of the two sale transactions in the Goldcorp Agreement created a risk of non-completion for Datawave from the date of exercise of the Right of First Refusal until at least completion of DataSub's purchase of the Offered Interest. On the exercise of the Right of First Refusal, Datawave assumed the risk that Goldcorp would not complete the Goldcorp Transaction. It created a binding agreement of purchase and sale between itself and Xstrata Chile at a stage in which it had only an unsecured commitment from Goldcorp to fund DataSub's purchase of the Offered Interest and to purchase the shares of DataSub after DataSub's purchase of the Offered Interest. If Goldcorp had defaulted on its obligations under the Agreement, Datawave would have remained liable to purchase the Xstrata Interest for U.S. $463 million by virtue of its exercise of the Right of First Refusal.

[290] This risk to Datawave, while perhaps not high, was nevertheless real. While the risk of an insolvency event pertaining to Goldcorp appears to have been negligible on the facts, it was

not eliminated. More significantly, Datawave also assumed the risk of a Goldcorp decision to breach the Agreement voluntarily. There are a number of reasons why this could have occurred. Market reaction to a sharp drop in metal prices and/or a very adverse change in economic conditions might, for example, have required Goldcorp to review the merits of the Goldcorp Transaction and accept the risks of litigation. Market activities including takeover bids or shareholder actions could also have had the same result.

[291] Second, under the Goldcorp Agreement, there is a clear separation in time between the $463 Million Loan from Goldcorp to DataSub and the consideration flowing from Goldcorp to Datawave for the DataSub shares (being the payment of U.S. $50 million and the amendments to the Shareholder Agreement and the CFLA in Datawave's favour). While the arrangements pertaining to the U.S. $50 million payment were subsequently revised, the revision was not legally significant because it retained the principle of subsequent delivery of the consideration. If the Goldcorp Transaction had not closed after the $50 Million Loan had been advanced, Datawave would have remained liable to Goldcorp in respect of this Loan.

[292] Third, while the Goldcorp Agreement scheduled the form of the DataSub Share Purchase Agreement, it provided that execution of that agreement would not occur until after completion of the DataSub purchase of the 70% Interest pursuant to the Datawave Purchase Agreement. This reflects the intention of the parties that an unconditional agreement of purchase and sale respecting the 70% Interest would not arise until the execution of this agreement.

[293] Fourth, conversely, Goldcorp's obligation to make the $463 Million Loan was conditional on Datawave delivering a promissory note, a guarantee, and security arrangements satisfactory to Goldcorp. These security arrangements remained to be negotiated. Moreover, if Datawave chose, for whatever reason, not to provide such documentation, Goldcorp had no obligation to make the Loan. Similarly, external developments could have prevented New Gold from delivering unqualified bring-down certificates.

[294] Fifth, consistent with this structure, I do not think that the Goldcorp Agreement gave rise to an equitable interest of Goldcorp Tesoro in the 70% Interest at the time of execution of that Agreement. An equitable interest in the DataSub shares in favour of Goldcorp did not arise until the point at which Goldcorp became entitled to an order for specific performance of the covenant to sell the DataSub shares. Given the structure of the Goldcorp Agreement, Goldcorp Tesoro did not acquire an equitable interest in the DataSub shares until the execution of the DataSub Share Purchase Agreement.

[295] Under the structure of the Goldcorp Agreement, if either party had breached a covenant under the Agreement, the non-defaulting party's right was to seek damages or other relief in respect of the particular covenant that had been breached. Accordingly, Goldcorp could not have asserted a claim for breach of a contract for the sale of the Offered Interest until after the DataSub Purchase Agreement had been entered into. Whether a claim for breach of a covenant in the Goldcorp Agreement would have entitled Goldcorp to the same damages as a claim for breach of the DataSub Share Purchase Agreement, or a claim for breach of a contract for the sale

of the 70% Interest, would have depended on the particular covenant that was breached and the circumstances giving rise to the breach.

[296] Sixth, there is no basis for a finding of the absence of any commercial purpose for the involvement of DataSub. This is addressed in greater detail below.

[297] In summary, there are, in substance, three separate transactions in the Goldcorp Agreement, each conditional upon the prior occurrence of stipulated events ─ the $463 Million Loan to DataSub, the purchase of the Offered Interest by Datawave/DataSub, and the purchase of the 70% Interest by Goldcorp Tesoro through its purchase of the DataSub shares. The Agreement does not constitute an unconditional sale of the 70% Interest, or the DataSub shares, from Xstrata Chile to Goldcorp on January 6, 2010.

DataSub Should be Considered a Goldcorp Subsidiary

[298] Barrick's alternative claim is that, by virtue of the contractual arrangements in the Goldcorp Agreement pertaining to DataSub, the Goldcorp Agreement contemplated that DataSub would be a Goldcorp subsidiary at the time it was assigned the Datawave Purchase Agreement and at the time it completed the purchase of the Offered Interest under that agreement. To be clear, in this section I am addressing this issue solely as a matter of the legal relationships contemplated by the Goldcorp Agreement. Related issues in respect of the operation of the Shareholders Agreement are addressed below.

[299] For this analysis, the relevant provisions of the Goldcorp Agreement are limited to the covenant of Datawave to incorporate DataSub and the positive and negative covenants of Datawave concerning DataSub in sections 4.1 and 4.2, respectively, of the Agreement. These covenants came into effect when the Goldcorp Agreement was executed. If these arrangements had contemplated that DataSub would be a Goldcorp subsidiary upon its incorporation, the Goldcorp Agreement would properly be characterized as an unconditional agreement to assign the benefit of the Datawave Purchase Agreement to Goldcorp prior to DataSub's purchase of the Offered Interest.

[300] However, I am satisfied that there is no basis under the laws of Ontario for such a finding.

[301] DataSub was a wholly-owned subsidiary of Datawave at all times prior to completion of the DataSub Share Purchase Agreement, as the term "subsidiary" is understood under the laws of Ontario. The positive covenants in section 4.1 of the Goldcorp Agreement, and the negative covenants in section 4.2, are intended to preserve DataSub as a single purpose corporation holding only the 70% Interest. This is not inconsistent with the purpose of DataSub, in the hands of both Datawave and Goldcorp, which was to act as a passive holding corporation whose assets were limited to the 70% Interest.

[302] Moreover, Goldcorp did not acquire rights directly in respect of DataSub. The covenants in sections 4.1 and 4.2 are covenants of Datawave, not DataSub. If the covenants had been

breached, it could only have looked to Datawave. Accordingly, I am satisfied that Datawave "controlled" DataSub at all times prior to completion of the sale of the DataSub shares pursuant to the DataSub Share Purchase Agreement as that term is understood under the laws of Ontario.

[303] Similarly, the fact that the Goldcorp Agreement contemplated that Goldcorp would loan the purchase price to DataSub against a guarantee of Datawave, and would pay the purchase funds directly to Xstrata Chile on the written direction of DataSub, is also insufficient to constitute DataSub as a Goldcorp subsidiary, even taking into consideration the other arrangements described herein. If Datawave had received institutional financing for its purchase, which Barrick acknowledges it was entitled to do under the Shareholders Agreement, Datawave might well have been required to provide similar security and payment arrangements.

[304] Further, to the extent the covenant respecting the voting arrangements pertaining to the DataSub shares would otherwise be relevant, such covenants are not referred to in the Goldcorp Agreement. There is no evidence that the terms of the Pledge Agreements were finalized and the agreements delivered at the time the Goldcorp Agreement was executed or at any time prior to January 31, 2010. Therefore, they cannot be relied upon for purposes of interpreting the legal effect of that Agreement. If it were necessary to address those provisions, I would also conclude, in any event, that they did not constitute DataSub a subsidiary of Goldcorp under the laws of Ontario for the same reasons as I conclude below, in respect of a related but separate issue, that these voting arrangements did not affect DataSub's status as an Affiliate of Datawave.

[305] I would note that, in addressing this question, I have also considered whether there is any evidence regarding the definition of "subsidiary" under applicable Chilean corporate law that is relevant for the conclusion I have reached. I have concluded that there is not. There is evidence in the form of differing views regarding the meaning of a "wholly-owned subsidiary" under Chilean law, which is relevant in respect of the allegation addressed later that the assignment of the Datawave Purchase Agreement to DataSub did not comply with section 10.3 of the Shareholders Agreement. There is, however, no evidence that is specific to the concept of a "subsidiary" under Chilean corporate legislation applicable to DataSub, or otherwise, that affects the determination of the present issue under the laws of Ontario.

Operation of the Transfer Restrictions in the Shareholders Agreement

[306] In this section, I will address the purpose and operation of the Transfer restrictions set out in Article 10 of the Shareholders Agreement. The issues in this section all pertain to the contractual interpretation of the relevant provisions of Article 10 of the Shareholders Agreement, which is governed by the laws of Chile.

[307] I propose to address this subject in the following order. I will first set out the definition of "Transfer" and the relevant provisions of Article 10. I will then set out four principal issues respecting the operation of the Transfer restrictions that are disputed by the parties, setting out my conclusions on each matter. The majority of this section then addresses the contractual interpretation of Article 10 in respect of these four issues. I conclude this section with a

summary of six significant conclusions regarding the operation of the Transfer restrictions that govern the determination of most of the issues raised by Barrick's breach of contract claims pertaining to the validity of Datawave's exercise of the Right of First Refusal.

The Transfer Restrictions

[308] The definition of "Transfer" in the Shareholders Agreement is as follows:

> "Transfer" means, when used as a verb, directly or indirectly, to sell, grant, assign, create an Encumbrance on, pledge or otherwise convey, or dispose of or commit or promise to do any of the foregoing, and when used as a noun, means a direct or indirect sale, grant, assignment, Encumbrance, pledge, conveyance, or other disposition.

[309] There is no dispute that this term is broader than the term "transfer" would be defined under Chilean law in at least three respects. It includes the creation of an "Encumbrance", which is defined in the Shareholders Agreement in broader terms than under Chilean law. When the term "transfer" is used as a verb, it also includes a commitment or promise to any of the actions that constitute a Transfer. Lastly, it includes indirect transactions that have the effect of a Transfer.

[310] Article 10 contains a self-contained code prohibiting all transactions that would constitute a Transfer by a shareholder of its Rights and Interests, except to the extent such transactions comply with the provisions therein. The following provisions of sections 10.1 and section 10.2 are relevant for the discussion below together with the provisions of sections 10.3 and 10.4:

> **10.1 General**
>
> Except as expressly provided in this Article, no Shareholder shall have the right to Transfer all or any portion of its Rights or Interests.
>
> **10.2 Limitations on Transferability**
>
> (1) Notwithstanding any other provision of this Article, any Transfer of Rights or Interests by a Shareholder permitted by this Article shall be subject to the following limitations:
>
> (a) No Shareholder shall Transfer any Rights or Interests except in conjunction with the Transfer of all, or a proportionate interest in all, of its Rights and Interests.
>
> (b) No Transfer of all or any part of a Shareholder's Rights or Interests shall be completed, and no transferee shall have the rights of a Shareholder unless and until the transferring Shareholder has provided to the other Shareholder notice of the Transfer and the transferee, as of the effective

> date of the Transfer, has entered into an agreement with and in form satisfactory to the Company and the other Shareholder to become a party to and be bound by this Agreement to the same extent as the transferring Shareholder. …
>
> (2) The Company shall not register or take any other action to give effect to or recognize any Transfer or purported Transfer of any Rights or Interests unless such transfer fully complies with the requirements of this Article or is otherwise specifically authorized pursuant to this Agreement.

[311] Accordingly, Article 10 provides that a shareholder may only Transfer some or all of its Rights or Interests (as defined in the Shareholders Agreement) to a third party after first extending a right of first refusal to the other shareholder in accordance with the terms set out in section 10.4, and provided that any Transfer involves a proportionate interest in all of the transferring shareholder's Rights and Interests. Section 10.3 provides one exception to the operation of the right of first refusal in respect of a Transfer. A shareholder may Transfer some or all of its Rights and Interests to an Affiliate without extending a right of first refusal to the other shareholder and without complying with the proportionate sale requirements of paragraph 10.2(1)(a). In such event, the transferring shareholder shall remain jointly and severally liable with the Affiliate in respect of all of the Affiliate's obligations and liabilities associated with the Rights and Interests transferred to it.

Four Principal Issues Regarding the Operation of the Transfer Restrictions

[312] In this action, Barrick alleges that the Goldcorp Agreement gave rise to a Transfer as of January 6, 2010 that was prohibited by Article 10 of the Shareholders Agreement. Barrick's argument relies on four aspects of the Transfer restrictions as interpreted by Barrick.

[313] Barrick argues that section 10.1 must be interpreted to apply to Transfers of Rights and Interests between shareholders. Barrick also relies on the fact that a "Transfer" includes not only a conveyance or other disposition but also a commitment or promise to effect a conveyance or distribution. Thirdly, Barrick relies on the inclusion of indirect conveyances or other dispositions in the definition of Transfer. Lastly, Barrick asserts that the use of the term "other Shareholder" in section 10.4 reflects an intention that the shareholder exercising a right of first refusal must complete the acquisition of the selling shareholder's interest for its own "benefit, account and risk" before agreeing to sell some or all of that interest to a third party.

[314] The defendants deny that the Goldcorp Agreement constituted a prohibited Transfer on January 6, 2010. The defendants say that the Goldcorp Agreement either did not constitute a Transfer at all by virtue of the language of section 10.1, or did not give rise to an agreement to convey or dispose of Rights or Interests that would constitute a Transfer that was subject to the provisions of Article 10 until after Xstrata Chile ceased to be entitled to the protections of the Shareholders Agreement. The defendants further deny that the language of section 10.4 limits

the rights of an exercising shareholder to sell any Rights or Interests to be acquired pursuant to a right of first refusal.

[315] I propose to address these four principal issues in two parts. First, I will briefly set out the principles of contractual interpretation under Chilean law that inform the analysis below. Then I propose to consider the following three questions regarding the operation of the Transfer restrictions in Article 10:

1. do the provisions of Article 10 apply to a Transfer of a shareholder's Rights and Interests to another shareholder?

2. what is the significance of including a commitment or a promise to convey or otherwise dispose of Rights or Interests in the definition of a "Transfer"? and

3. what is the meaning of an "indirect" transaction for purposes of the definition of a Transfer?

The interaction of these general principles is significant for the second part of the analysis pertaining to a shareholder's ability to enter into an agreement for the sale to a third party of Rights and Interests to be acquired from a selling shareholder before the transaction between the shareholders is completed. In the second part, I will deal specifically with the operation of Article 10 in respect of on-sales to third parties by addressing two questions:

1. do the principles governing the operation of Article 10 generally prohibit a shareholder from agreeing to sell Rights or Interests to a third party prior to completion of the transaction with the selling shareholder?

2. if not, do the right of first refusal provisions in section 10.4 impose such a restriction to the extent that the Rights and Interests are being acquired pursuant to the exercise of a right of first refusal?

Applicable Principles of Contractual Interpretation

[316] Each of these issues requires the contractual interpretation of specific provisions of Article 10 of the Shareholders Agreement under the laws of Chile. The parties agree that, in respect of each issue, Article 10 of the Shareholders Agreement is to be interpreted in accordance with its plain meaning. However, with respect to each of the four issues addressed in this section, the parties differ as to the correct interpretation to be placed on the plain meaning of the relevant language of that Article. In determining the contractual interpretation that I believe gives effect to the intention of the parties, I have had regard to three particular principles of contractual interpretation under the laws of Chile.

[317] First, the Transfer restrictions should be interpreted with a view to the interests that the parties to the Shareholders Agreement sought to protect in agreeing to those provisions. This

approach gives effect to the Rule of the Nature of the Contract referred to above. In this regard, I am satisfied that there are two broad interests protected by Article 10.

[318] Each shareholder is entitled to qualified protection against a Transfer of one shareholder's Rights or Interests to a party that the other shareholder is not prepared to accept as a joint venture partner. Protection against such an event is provided by an option to acquire the interest to be sold in the form of a right of first refusal. In this context, there is a companion right in favour of the selling shareholder to receive the same consideration as it would have received if it had completed its proposed sale to the third party.

[319] In addition, a shareholder is entitled to look to the other shareholder for satisfaction of all obligations and liabilities pertaining to the proportionate interest in the El Morro Project owned by the other shareholder. Accordingly, the Transfer restrictions prohibit a sale by such a shareholder of its Rights or Interests on a non-proportionate basis to a third party other than an Affiliate of that shareholder, in which case the transferring shareholder remains jointly and severally liable with the Affiliate.

[320] Second, the Transfer restrictions in Article 10 are a restriction on the freedom of the shareholders to transfer their interests in the El Morro Project. As such, under Chilean law they should be interpreted restrictively. The specific circumstances in which this principle is applied are dealt with below.

[321] Third, where applicable, I have also had regard to the conduct of Barrick and Xstrata Chile in accordance with the principle referred to above as the Authentic Rule. I also deal with the circumstances in which this principle is applicable below.

Analysis and Conclusions Regarding the Application of Article 10 to Transfers of Rights and Interests of One Shareholder to the Other Shareholder

[322] Section 10.1 provides that the general prohibition on Transfers operates only in respect of a sale by a shareholder of its Rights or Interests. While it is not express, I think it is clear that Article 10 does not purport to apply to the Transfer of Rights and Interests between shareholders. The following three considerations, which are based on the principles of contractual interpretation set out above, support this conclusion.

[323] First, this interpretation is consistent with the fact that, in the case of a transfer between shareholders, the parties themselves will voluntarily have entered into a separate agreement for the purchase and sale of the selling shareholder's Rights and Interests. There is, therefore, no need to provide any protection against the possibility that the proposed transaction will contravene the provisions of Article 10 ─ that will be dealt with directly in the agreement between the parties.

[324] In the case of a consensual transaction outside the provisions of section 10.4, the absence of any need for such protections is obvious. Indeed, the parties are free to agree to a Transfer that would otherwise give rise to a prohibited Transfer. In the case of a contract formed on the

exercise of a right of first refusal, there is an inherent protection against a proposed Transfer of a non-proportional interest, notwithstanding the fact that the terms of the contract formed on the exercise of the right of first refusal are not subject to negotiation. In such circumstances, as the Barrick Agreement demonstrates, any Third Party Offer must comply with the provisions of paragraph 10.2(1)(a) of the Shareholders Agreement. If it does not, the Third Party Offer would not constitute a permitted Transfer under Article 10, even if the right of first refusal was not exercised.

[325] Second, as mentioned above, this provision should be interpreted restrictively as it is a restriction on the freedom of parties to freely trade their interests in the El Morro Project. Consistent with this principle, I do not accept Barrick's alternative interpretation of section 10.2(1). Barrick argues that any transaction that is not expressly prohibited by section 10.1, including a sale of Rights and Interests between shareholders, is a Transfer that is "permitted by this Article" for the purposes of section 10.2(1) and, therefore, is subject to the provisions of that section. I do not think this is a reasonable interpretation of the phrase "permitted by this Article" in the context of a restraint on a shareholder's freedom of alienation. The broader reach of the Transfer restrictions in Article 10 that would result if this interpretation were adopted could only be justified if it furthered the purpose of the Transfer restrictions. For the reasons set out in the following section, I am satisfied that this proposed restriction cannot be justified on this basis. Accordingly, I think that properly interpreted the phrase "permitted by this Article" means, in accordance with its plain meaning, permitted in accordance with section 10.3 (transfers to Affiliates) or section 10.4 (transfers pursuant to the right of first refusal), subject to compliance with section 10.2.

[326] Third, as mentioned below, this interpretation of section 10.1 retains the protections of Article 10 in favour of the selling shareholder to the extent appropriate in respect of sales by the purchasing shareholder. As is discussed further below, a selling shareholder of less than all of its interest in the El Morro Project is entitled to the protections afforded by section 10.4, as well as the requirement of a proportional sale in paragraph 10.2(1)(a), if the purchasing shareholder proposes to sell some or all of the purchased interest to a third party who the selling shareholder is not prepared to accept as a new joint venture partner. Whether a selling shareholder would avail itself of the "mirror" right of first refusal in such circumstances is a practical consideration that would depend upon the particular circumstances and does not detract from the principle. The more important point is that section 10.1 cannot bear an interpretation that would deprive a selling shareholder who retains some of its Rights and Interests in the El Morro Project, and therefore is not exiting the Project, of the protections afforded in its favour in Article 10. The interpretation of section 10.1 set out above respects this requirement.

[327] Accordingly, a conveyance of a shareholder's Rights or Interests to the other shareholder, while a Transfer of Rights and Interests, is not subject to the provisions of Article 10 and, therefore, cannot give rise to a prohibited Transfer. For the same reason, a commitment or promise of one shareholder to convey or dispose of any of its Rights or Interests to the other shareholder, while a Transfer, also cannot give rise to a prohibited Transfer.

[328] I would note, however, that in order to preserve the selling shareholder's entitlement to the protections afforded by Article 10, insofar as it remains a shareholder and the purchasing shareholder intends to "on-sell" the interest it acquires, it is essential that any sale of Rights and Interests between shareholders be completed by the purchasing shareholder or by a subsidiary corporation that it controls before the transaction with the third party is completed. In other words, the transaction must first be completed as a transaction between the shareholders. This will be addressed further below.

[329] I would also note that, at points in their written submissions, Xstrata Chile and Goldcorp suggest that section 10.1 does not apply to both sales under the Goldcorp Agreement, i.e., to both the transaction between Xstrata Chile and Datawave and to the resale transaction between Datawave and Goldcorp. This view was supported by Barros. It should be clear that the principles set out above and elaborated in these Reasons do not go this far but would, instead, apply the Transfer restrictions to any resale of Rights and Interests purchased by a shareholder from the other shareholder.

[330] In my opinion, these principles reflect the parties' intention in respect of the Shareholders Agreement. Moreover, there is no difference in result as the Goldcorp Transaction was structured to provide that Datawave indirectly acquired the 70% Interest before selling it to Goldcorp in a transaction which complied with the Transfer restrictions because Xstrata Chile was no longer a shareholder at the point at which the second sale was completed. Nevertheless, I do not wish the court's adoption of a different approach to be taken as a decision regarding the merits of the alternative, broader interpretation of the reach of section 10.1. I would note, however, that for the reasons addressed below, such an interpretation could operate only where the selling shareholder sells all of its Rights and Interests. I would also note that it is not clear to what extent such a principle would support a transaction structured differently from the Goldcorp Transaction.

Analysis and Conclusions Regarding the Significance of Including a Commitment or Promise to Convey Rights or Interests in the Definition of a Transfer with Article 10

Position of the Parties

[331] While the Goldcorp Agreement does not constitute an outright conveyance or other disposition, in Barrick's view, it does constitute a commitment to convey to Goldcorp either the Right of First Refusal or Datawave's right to purchase the Offered Interest. Because a commitment or a promise to convey or otherwise dispose of Rights or Interests is included in the definition of Transfer, Barrick says that the issue of whether or not a proposed transaction complies with or contravenes the provisions of Article 10 should be determined at the time the commitment or promise is executed, as if the Transfer were being completed on that date. On this basis, Barrick says the Goldcorp Agreement gave rise to a prohibited Transfer of either the Right of First Refusal or Datawave's right to purchase the Offered Interest as of January 6, 2010.

[332] The defendants argue that, with respect to an agreement to convey or otherwise dispose of Rights or Interests, a Transfer can only arise when the agreement becomes unconditional. They submit that Datawave's commitment to sell the Offered Interest to Goldcorp only became unconditional at the time the DataSub Share Purchase Agreement was executed. The defendants also say that, in interpreting the operation of the Transfer restrictions, the court should have regard to the interests served by Article 10. They say that, given this consideration, whether or not a proposed Transfer complies with Article 10 should be determined by whether, in the circumstances of the particular transaction, a shareholder is entitled to the benefit of the protections in Article 10. The defendants say that, on this analysis, after Xstrata Chile agreed to sell its entire interest in the El Morro Project to Barrick, Xstrata Chile no longer had any interest that required, or entitled it to, continuing protection under Article 10.

[333] The foregoing summary of the positions of the parties reflects the fact that the inclusion of the concept of a commitment or promise to convey or otherwise dispose of Rights or Interests within the definition of a Transfer raises two separate issues: (1) the time at which a Transfer occurs; and (2) the time as of which compliance with the Transfer restrictions is addressed in respect of a Transfer. I will address each in turn. I conclude there are two consequences of significance for this action.

When Does a Transfer Occur?

[334] Based on the principles of contractual interpretation set out above, I conclude for the reasons set out below that a Transfer occurs in respect of an agreement to convey or otherwise dispose of some or all of a shareholder's Rights and Interests when the agreement becomes an unconditional agreement.

[335] This conclusion is based on the plain meaning of the definition of Transfer. The definition uses the words "commit or promise". This language is straightforward and unconditional. There is no language in the definition that would support the conclusion that a conditional agreement could give rise to a Transfer.

[336] This conclusion is also consistent with the Chilean principles of contractual interpretation described above. The governing principle in the interpretation of the definition of Transfer must be that the Transfer restrictions should operate in respect of any conveyance or other disposition by a shareholder of any portion of its Rights or Interests to the extent that the other shareholder is entitled to the protections in Article 10 in respect of that conveyance or other disposition. On the other hand, for the reasons stated above, the Transfer restrictions should be interpreted restrictively to apply only to those circumstances in which a shareholder is entitled to such protections. The Transfer restrictions should not be interpreted in a technical manner to prevent a conveyance or other disposition of a portion of a shareholder's Rights and Interests in circumstances where the other shareholder has no need for that protection.

[337] Consistent with these principles, an interpretation of the words "commit or promise to do any of the foregoing" must refer to an unconditional commitment or promise. An interpretation

that would result in a Transfer on the date a conditional agreement is executed would impose a restriction on the right of a shareholder to transfer its Rights and Interests in the El Morro Project that is unnecessary for the protection of the interests addressed by Article 10.

[338] Conversely, as the following three circumstances illustrate, the purposes of the Transfer restrictions are fully implemented if these words are interpreted to give rise to a Transfer at the point that an unconditional agreement comes into existence between the parties.

[339] The first circumstance to be considered is a Third Party Offer that gives rise to a Right of First Refusal, of which the Barrick Transaction itself is an example. The Barrick Agreement provided for the sale of the 70% Interest to Barrick conditional upon satisfaction of the Conditions Precedent. If such a conditional agreement constituted a Transfer for purposes of the Shareholders Agreement, the execution of that agreement on October 11, 2009 would have contravened the Transfer restrictions. In particular, the Transfer would have occurred without prior compliance with the right of first refusal provisions in section 10.4, which could not occur until expiration of the Exercise Period. However, it is clear that each of Barrick, Xstrata Chile and Datawave proceeded on the basis that Xstrata Chile complied with the Shareholders Agreement, notwithstanding execution of the Barrick Agreement.

[340] Underlying this understanding is an implied interpretation of the definition of Transfer relating to the concept of a commitment or promise. A proposed conveyance or other distribution that is the subject of a commitment or promise qualifies as a Transfer only when the commitment or promise becomes unconditional. If parties enter into a binding agreement containing a commitment or promise to convey Rights and Interests that is conditional upon the satisfaction of one or more events, the agreement will not give rise to a Transfer at the date of its execution. A Transfer will only arise upon satisfaction of the relevant conditions. In such circumstances, a proposed Transfer that might otherwise be a prohibited Transfer on the date of execution of the agreement may instead become a permitted Transfer as of the date the condition is satisfied and the Transfer arises.

[341] This principle, and its application to the Barrick Agreement, was confirmed by Morales in his cross-examination. In the Barrick Agreement, in order to deal with the right of first refusal provisions in section 10.4, the parties inserted a condition to the effect that such provisions had been complied with. This condition deferred the occurrence of a Transfer until after the Exercise Period of the Right of First Refusal expired without exercise.

[342] The second circumstance to be considered is the on-sale of a selling shareholder's Rights and Interests. This situation must be considered on the basis of the interpretation above that section 10.1 does not apply to a transaction involving one shareholder selling some or all of its Rights and Interests to another shareholder. In such circumstances, the issue is whether the execution of the agreement on-selling the selling shareholder's interest to a third party gives rise to a Transfer at the time the agreement between the purchasing shareholder and the third party is executed.

[343] Consistent with the interpretation above of the effect of a conditional agreement for purposes of the definition of Transfer, I conclude that a Transfer will arise on the date the agreement between the purchasing shareholder and the third party is executed only if it is unconditional. If, instead, the agreement with the third party is conditional upon the purchasing shareholder completing its acquisition of the selling shareholder's Rights and Interests, a Transfer can only arise at the time the acquisition is completed.

[344] This interpretation respects the purposes of the Transfer restrictions to the extent that the selling shareholder is otherwise entitled to the benefit of those restrictions. In the case where the selling shareholder sells all of its Rights and Interests, it will not be entitled to the benefit of the protections in Article 10 in respect of any future sale because, as discussed, it is exiting the project, regardless of whether the agreement between the purchasing shareholder and the third party is conditional or unconditional. However, for the same reason, to the extent that it remains a shareholder, it will continue to have the benefit of Article 10 in respect of a subsequent sale to the third party, including in particular the "mirror" right of first refusal and the provisions of sections 10.2(1)(a) and 10.3. In such circumstances, the agreement with the third party will necessarily have to address the application of these provisions, (including for example, a possible further condition respecting the right of first refusal), failing which it will give rise to a prohibited Transfer as of the date the Transfer arises.

[345] The third circumstance to be addressed is that of an on-sale by a third party offeror of the benefit of the Third Party Offer once it is executed with a selling shareholder. These circumstances would have arisen, for example, if Barrick had sold the benefit of the Barrick Agreement to a fourth party. In the circumstances of any such sale or assignment, the non-selling shareholder who does not exercise the initial right of first refusal (e.g. Datawave in respect of the Barrick Transaction) would become entitled to a further right of first refusal if the third party offeror were to propose to sell or assign the benefit of the Third Party Offer to a fourth party. Any such transaction can, of course, be policed by the selling shareholder through the assignment provisions in the Third Party Offer. However, in such circumstances, the Transfer restrictions also provide the non-selling shareholder with the legal ability to intervene directly at the point at which the agreement becomes unconditional if it does not provide for a further right of first refusal in its favour. I would also note that the non-selling shareholder would also have had the right to object to the notice of the Third Party Offer insofar as the identity of the ultimate purchaser would not be known if the Third Party Offer contained an open-ended assignment provision. For present purposes, however, the important point is that a non-selling shareholder is adequately protected without triggering the Transfer restrictions before the agreement between the third party offeror and the fourth party becomes unconditional.

Assessment of Compliance with the Transfer Restrictions

[346] The result of including a commitment or promise to convey in the definition of Transfer is that a Transfer may occur prior to the time of completion of the actual conveyance or other disposition that is the subject of the agreement. In the case of an agreement to convey Rights or Interests, a Transfer will arise in accordance with the principle set out above at the point in time

when the agreement becomes unconditional. This raises the question of whether, in such circumstances, compliance with the provisions of Article 10 in respect of the Transfer should be assessed as of the date the Transfer arises or as of the time of the proposed conveyance or other disposition.

[347] I understand Barrick's position to be that, in such circumstances, the Transfer is to be assessed for compliance with Article 10 on the date the agreement to convey becomes an unconditional agreement if it is not the date of the agreement itself. While I accept that the assessment must be made on that date, I do not agree that the assessment of compliance with Article 10 is to be made as if the Transfer occurred on such date, rather than as of the intended date of the conveyance and therefore having reference to the actual legal relationships contemplated at that time. Instead, I think that the assessment of whether the Transfer prohibitions are complied with must necessarily take into account the relationships that will exist at the time of completion of the proposed transaction for the following reasons.

[348] First, when viewed as a whole, Article 10 looks to the effect of the proposed transaction. By virtue of certain requirements, notably 10.2(1)(b) and 10.3, compliance with Article 10 requires compliance with certain documentation at the time of the conveyance. Similar requirements in paragraph 9.4(2)(ii) are incorporated by reference in paragraph 10.2(2)(e). In addition, as a result of events between the date of the unconditional agreement to convey giving rise to the Transfer and the date of conveyance, the provisions of paragraphs 10.2(2)(c) or (d), could be triggered or, conversely, could be satisfied. In summary, therefore, it is not possible to determine with certainty whether a Transfer complies with the provisions of Article 10 until the conveyance is completed.

[349] Second, as stated above, the Transfer restrictions are to be interpreted narrowly so as to apply only to the extent necessary to achieve the nature and purpose of these restrictions i.e., to apply in circumstances where a selling shareholder is entitled to the benefit of the protections of Article 10. This requires that whether a proposed transaction complies with the Transfer restrictions must be assessed by reference to the result of the transaction. For example, the definition of Transfer cannot operate to permit a party to allege that a proposed Transfer is prohibited if, after completion of the transaction, the party will have ceased to be a shareholder. In the present case, even if a Transfer arose on January 6, 2010, it would have been necessary to examine the relationship between the parties after the transaction was completed to determine whether the Transfer complied with the provisions of Article 10. In doing so, the nature of the specific transaction giving rise to the Transfer becomes critical.

Analysis and Conclusions Regarding the Significance of Including an Indirect Sale or Conveyance in the Definition of Transfer

[350] In the Shareholders Agreement, a Transfer also includes an indirect conveyance or other disposition of an interest in the El Morro Project or a commitment or promise to do so. There is little guidance in Chilean law for the meaning of "indirect" in this context.

[351] However, I am satisfied that the concept of an "indirect" conveyance or other disposition of a shareholder's Rights or Interests, and of an agreement for an indirect conveyance or other disposition, covers two categories of transaction.

[352] First, based on the language of the Parent Entities Addendum and the evidence of Morales and Barros, an "indirect" transaction to sell, grant, assign, create an Encumbrance on, pledge or otherwise convey, or dispose of Rights and Interests includes a sale or other assignment of shares of a corporation holding some or all of a shareholder's Rights or Interests in the El Morro Project. This is specifically addressed in the Parent Entities Addendum in respect of the shares of Finco, Datawave and any corporations upstream in the chain of control between New Gold and those corporations.

[353] Similarly, a sale to a third party of the shares of a corporation having a right to purchase a shareholder's Rights and Interests, whether by exercise of a right of first refusal or otherwise, would qualify as an indirect Transfer of the right to purchase such Rights and Interests. Accordingly, a sale of shares of DataSub could give rise to an "indirect" conveyance.

[354] In addition, and more generally, an "indirect" conveyance or other disposition also includes any transaction, or series of transactions, that, in substance, constitutes a conveyance of a shareholder's Rights and Interests to a third party but does constitute a sale, grant, assignment, Encumbrance, pledge, conveyance, or other disposition of such Rights and Interests, or a commitment or promise to such a transaction, in circumstances in which the other shareholder is entitled to the protections of Article 10. In other words, an "indirect" transaction also refers to a transaction that results in a state of affairs that would not comply with the Transfer restrictions if it were implemented by a sale, grant, assignment, Encumbrance, pledge, conveyance, or other disposition of the Rights and Interests involved. It should be noted, however, that insofar as this principle is applicable in respect of any proposed Transfer, it is a principle mandated by the language of the Shareholders Agreement rather than a general principle of Chilean law. It is therefore applicable in respect of any particular transaction only to the extent that the treatment of the transaction as a Transfer furthers the purposes of Article 10.

[355] I have previously referred to Barrick's argument that a future sale of an asset subject to a non-transferable option is, in substance, a sale or grant of the option. This is, in essence, an argument that, for the purposes of the Shareholders Agreement, the Goldcorp Agreement provides for an indirect Transfer of the Right of First Refusal or the Datawave Purchase Agreement. For the reasons set out below, I do not consider that application of the Transfer restrictions to such a transaction furthers the purposes of Article 10. Accordingly, I do not consider that the Shareholders Agreement mandates that the Goldcorp Transaction be treated as a Transfer in the form of an indirect conveyance of Datawave's "right to purchase the Offered Interest".

Does Article 10 Prohibit On-Sales to Third Parties of Rights and Interests Purchased from a Selling Shareholder?

[356] In this section, I will consider a central issue in this action ─ the extent to which an "on-sale" of a selling shareholder's Rights and Interests to a third party is permitted or gives rise to a prohibited Transfer under the Shareholders Agreement. I will approach this issue in two steps dealing first with the operation of the definition of a Transfer and the provisions of Article 10 generally and second with the issue as to whether the right of first refusal provisions in section 10.4 specifically impose a restriction or prohibition on such transactions.

Do the Definition of Transfer and the Provisions of Article 10 Generally Prohibit or Restrict On-Sales of a Purchased Interest?

[357] Section 10.1 does not apply to a Transfer between shareholders as discussed above. It does, however, apply to the sale of the purchased Rights and Interests to a third party. The issue in this section is whether the definition of Transfer and the provisions of Article 10 generally prohibit or restrict the purchasing shareholder from agreeing to sell the Rights and Interests to be acquired from a selling shareholder before that purchase is completed. This involves consideration of the interaction of the principles set out above.

[358] Where a selling shareholder completes the sale of all of its Rights and Interests to the purchasing shareholder before the purchasing shareholder agrees to sell the interest to a third party, the analysis is uncontroversial. Because the selling shareholder has ceased to be a party to the Shareholders Agreement, it is no longer entitled to the protections of the Shareholders Agreement. If, however, the selling shareholder has sold only a portion of its Rights and Interests, the selling shareholder will remain a party to the Shareholders Agreement. The selling shareholder therefore remains entitled to the benefit of the protections in Article 10 in respect of the on-sale agreement.

[359] A principal issue in this proceeding is whether the result is any different if the agreement for the sale of the selling shareholder's Rights and Interests is entered into before the sale between the shareholders is completed. In particular, do the definition of Transfer and the provisions of Article 10 generally prohibit or restrict the manner or extent to which a purchasing shareholder can deal with the Rights and Interests to be purchased from the other shareholder prior to completion of the purchase? In addition, do these provisions limit the purchasing shareholder to dealing with the selling shareholder's Rights and Interests only in conjunction with the sale of the purchasing shareholder's own Rights and Interests?

[360] In my view, for the following reasons, there is no basis for such an interpretation in either the language of section 10.1 or the nature and purpose of the Transfer restrictions as described above.

[361] Section 10.1 and the definition of Transfer should be interpreted in accordance with the plain meaning of these provisions. On this basis, however, nothing in the language of section

10.1 or the definition of Transfer, or in the interplay of these provisions, prevents a sale of Rights and Interests to be acquired from a selling shareholder whether before or after the purchase of those Rights and Interests is completed. Similarly, nothing in these provisions requires that such Rights and Interests can only be sold together with the purchasing shareholder's own Rights Interests.

[362] The conclusion in this section is also consistent with the nature and purpose of the Transfer restrictions. The Transfer restrictions protect against the imposition of an unwanted party on the other shareholder. As discussed above, a selling shareholder is entitled to the continuing benefit of the Transfer restrictions if it remains a shareholder after the sale of a portion of its Rights and Interests to the other shareholder is completed. If the purchasing shareholder agrees to sell some or all of the purchased Rights and Interests to a third party, the selling shareholder will be entitled to assert the benefit of Article 10 in respect of the transaction at the point at which the agreement between the purchasing shareholder and the third party becomes unconditional. As this would be expected to occur once the sale of the Rights and Interests of the selling shareholder to the purchasing shareholder is closed, a Transfer would arise at that time which must comply with Article 10. If the agreement between the purchasing shareholder and the third party becomes unconditional earlier, the Transfer that arises at such time would nevertheless be assessed for compliance with Article 10 taking into consideration the legal relationships that will exist at the time of completion of the proposed transaction.

[363] The effect of the Barrick submission to the contrary is to impose broader Transfer restrictions than are required to protect a continuing shareholder, given the nature and purpose of those restrictions. In particular, where the selling shareholder is exiting the Project, there is no rationale for allowing the shareholder to assert the benefit of Article 10 to prohibit an agreement for an on-sale of its Rights and Interests before the sale is closed nor to require that such an agreement also include the purchasing shareholder's own Rights and Interests. Such restrictions would not serve any purpose rationally connected to the purpose of the Transfer restrictions as set out above.

[364] There are two aspects of the conclusion in this section that are significant for the issues in this litigation.

[365] First, it should be noted that the critical assumption of the foregoing analysis is that, in any transaction between the selling shareholder and the purchasing shareholder, the purchasing shareholder, or a subsidiary of the purchasing shareholder that the purchasing shareholder controls, must take title to the selling shareholder's Rights and Interests before completion of the on-sale transaction with the third party. Provided that occurs and title passes to the purchasing shareholder directly or by virtue of its ownership of the subsidiary that takes title, the selling shareholder remains able to assert its rights under the Shareholders Agreement against the purchasing shareholder to the extent it remains a party to the Shareholders Agreement after its Rights and Interests have been sold.

[366] Second, it should also be noted that there is nothing in the language of section 10.1 or the nature and purpose of the Transfer restrictions that requires the purchasing shareholder, or its subsidiary, to hold the acquired Rights and Interests for any particular period of time. Accordingly, there is no basis for imposing a prohibition on contracting with a third party for an immediate re-sale of Rights and Interests to be acquired prior to completion of the purchase of such Rights and Interests. The selling shareholder is protected to the extent it is entitled to the protection of Article 10, and therefore the purposes of the Transfer restrictions are served, even if the hold period prior to the re-sale is nominal.

[367] I would observe that the conclusion in this section does not depend on whether an on-sale agreement is executed before or after the agreement is formed between the shareholders with respect to the Rights and Interests to be sold. The conclusion also does not depend upon whether the purchasing shareholder acquires the selling shareholder's Rights and Interests in a consensual transaction or pursuant to the exercise of a right of first refusal under section 10.4. It is also independent of whether or not the sale agreement between the purchasing shareholder and the third party is conditional or unconditional at the time of its execution.

[368] Based on the foregoing, there is nothing in either section 10.1 or the definition of Transfer that would prohibit the Rights and Interests of a selling shareholder to be sold by the purchasing shareholder, in isolation from the Rights and Interests of the purchasing shareholder, to a third party before the purchasing shareholder, or its subsidiary, has completed the purchase of those Rights and Interests. I would add for the sake of clarity that, based on the operation of that term as set out above, I see nothing in the "indirect" language in the definition of Transfer that bears on this issue. Therefore, if Article 10 does prohibit such "pre-sale" transactions, the source of that prohibition must be found in the right of first refusal provisions in section 10.4.

Do the Provisions of Section 10.4 Prohibit or Restrict On-Sales of A Purchased Interest?

[369] Barrick submits that the provisions of section 10.4 of the Shareholders Agreement must, however, be interpreted to require that a shareholder "consolidate", by which I understand it to mean "complete the acquisition of", the selling shareholder's Rights and Interests in the El Morro Project prior to entering into any agreement to sell any or all of such Rights and Interests to a third party.

[370] Before proceeding, I note the following three features of Barrick's position. First, as mentioned above, I have concluded that any sale of a shareholder's Rights and Interests to the other shareholder must be structured such that title to the selling shareholder's Rights and Interests vests in the purchasing shareholder, directly or indirectly through its subsidiary, for at least a moment in time before those Rights and Interests are delivered to any third party to avoid a prohibited Transfer under Article 10. The Barrick position is, however, more extreme insofar as it requires that no agreement for the sale of such Rights and Interests can be entered into until title vests in the purchasing shareholder which, under the Chilean law of sale, cannot occur until the time of conveyance of such Rights and Interests.

[371] Second, Barrick does not dispute the right of a purchasing shareholder to obtain financing from a financial institution for the purchase of Rights and Interests pursuant to the exercise of a right of first refusal, which would involve the granting of security over the Rights and Interests to be acquired. In particular, Regent acknowledged that he would expect that a bank would expect to receive security on the Rights and Interests if it were financing such a purchase. To the extent that the Barrick position requires, however, that such financing arrangements could only be entered into after the purchase of the Rights and Interests has been completed in order to comply with the Transfer provisions, I think the position is commercially unrealistic as discussed further below.

[372] Third, Barrick acknowledges, however, that Rights and Interests to be purchased from the other shareholder could be sold to a third party prior to completion of their acquisition by the purchasing shareholder if the provisions of section 10.2(1)(a) are complied with in the sale agreement with the third party. As I understand this argument, "consolidation" is, therefore, not required if the purchasing shareholder also agrees to sell its own Rights and Interests to the third party.

[373] In this section, I analyze the three principal submissions of Barrick in support of its interpretation of the right of first refusal provisions in section 10.4. The three arguments are: (1) the references in section 10.4 to the "other Shareholder" require an interpretation of that section that prohibits such a sale on the basis that the right of first refusal belongs to, and is intrinsic to, the "other Shareholder; (2) section 10.4 is an exception to the general prohibition against Transfers in section 10.1 and should therefore be interpreted restrictively; and (3) as a policy matter, the absence of such a prohibition would lead to a commercial absurdity. I will address each in turn and then add some additional comments.

> The Right of First Refusal Must be Exercised for the Benefit, Account and Risk of the Other Shareholder

[374] It is Morales' opinion that the right of first refusal under section 10.4 had to be exercised for the "benefit, account and risk" of the "other Shareholder", i.e., the exercising shareholder, and could not be for the "benefit, account and risk" of a third party. On this basis, it is his opinion that an exercising shareholder could not sell the Rights and Interests to be acquired by the exercise of the right of first refusal prior to their acquisition. He does not suggest, however, that the exercising shareholder was required to hold such Rights and Interests for any particular length of time provided the acquisition satisfied the "benefit, account and risk" test.

[375] I conclude that there is no basis for this contractual interpretation of section 10.4 in either the wording or the purpose of section 10.4 for the reasons set out below. In addition, Morales' opinion is dependent upon a factual determination regarding the operation of the Goldcorp Agreement under the laws of Ontario that is contrary to the findings of the court set out above. I will address each of these issues below.

[376] First, Morales' interpretation of section 10.4 is based on the many references in that provision to the "other Shareholder" as the party entitled to exercise the right of first refusal. From these references, Morales observes that the right of first refusal is intrinsic to, and belongs to, the "other Shareholder". From this observation, Morales draws the conclusion that the right must be exercised for the "benefit, account and risk" of the other Shareholder.

[377] The difficulty with Morales' conclusion is its imprecision which, in turn, masks some conceptual difficulties. Insofar as his conclusion means that an exercising shareholder cannot sell the Right of First Refusal to a third party without complying with section 10.2(1)(a) by also selling its other Rights and Interests, there is no dispute between the parties. Similarly, insofar as his conclusion means that the "other Shareholder" cannot exercise the Right of First Refusal as agent for a third party, there is also no dispute. In each case, at least in respect of circumstances in which the selling shareholder is only selling a portion of its Rights and Interests to the exercising shareholder, such arrangements are likely to give rise to a Transfer of Rights or Interests of the "other Shareholder" which do not comply with the provisions of Article 10. As set out elsewhere in these Reasons, however, there is no factual basis for a determination that either situation has occurred in this case.

[378] On the other hand, insofar as Morales suggests that there was an absolute prohibition against the sale of the Rights and Interests of a selling shareholder prior to completion of the purchase of such Rights and Interests, the conclusion is without support in the Shareholders Agreement and, in fact, is more restrictive than Barrick's own position. Morales' opinion that pre-sale arrangements are prohibited under the Shareholders Agreement proceeds from a conclusion that, in such circumstances, the Right of First Refusal is invalidly exercised because it was not exercised for the benefit, account or risk of the exercising shareholder. Morales does not proceed on the alternative theory, upon which Barrick bases its case, that a pre-sale gives rise to a prohibited Transfer because the provisions of section 10.2(1)(a) were not complied with.

[379] There is no basis to interpret the plain wording of section 10.4 as saying that the exercise of a right of first refusal in respect of Rights and Interests of the selling shareholder that are pre-sold to a third party is invalid because it is not for the benefit, account and risk of the exercising shareholder. Section 10.4 is totally devoid of any language that can be relied upon to support such a conclusion. Morales acknowledges this difficulty. He suggests, however, that a Chilean court would read these words into section 10.4 by way of elaborating the good faith obligations of the parties. The defendants' experts each considered this opinion to be without foundation.

[380] Morales considers that a court would read his proposed requirement into the language of section 10.4 because it is necessarily implied by the "other Shareholder's" good faith obligations. In other words, without such words, the selling shareholder would not receive the benefit of the protections under Article 10 to which it is entitled. I do not think this is correct.

[381] It is not clear why, in the context of a conditional transaction for the sale of a selling shareholder's interest, an exercising shareholder must be prevented under all circumstances from selling the interest prior to its acquisition pursuant to the exercise of the right of first refusal.

Morales does not explain why the shareholder's good faith obligations would require that the exercise of the right of first refusal must be for the benefit, account and risk of the other Shareholder. Nor does he explain how a pre-sale offends the purposes of the Transfer restrictions such that good faith obligations would be implied to prevent such a transaction.

[382] As mentioned above, a restriction on the operation of the right of first refusal in section 10.4 of the nature proposed by Morales is not the only, or even the most appropriate, means of protecting a selling shareholder where it is entitled to the benefit of Article 10. The operation of the general Transfer restriction in section 10.1 in accordance with the principles described above will also achieve the same result without the need to resort to Morales' interpretation of section 10.4. Provided the purchasing shareholder acquires title to the selling shareholder's Rights and Interests, the selling shareholder remains able to enforce the Transfer restrictions in respect of any sale to a third party purchaser without resort to the requirement addressed by Morales. Conversely, the proposed interpretation of Morales would prevent the exercise of the right of first refusal in circumstances in which the selling shareholder is not entitled to the benefit of the provisions of Article 10. For these reasons, I reject the conclusion that the requirement that a shareholder must exercise the right of first refusal for its "account, benefit and risk" is a necessary feature of the right of first refusal provisions in section 10.4 based on an elaboration of the good faith duties of the exercising shareholder.

[383] In summary, Morales' suggested interpretation of section 10.4 is not directed toward furthering the purpose of the Transfer restrictions, as described above. It is directed at prohibiting pre-sales of a selling Shareholder's Rights and Interests without any accompanying support for such an approach in the language of section 10.4 or any rational connection to the purpose of that provision. In the absence of such a rational connection, the language of section 10.4 is insufficient to support Morales' interpretation.

[384] In addition, as mentioned above, Morales proceeds on the basis that the legal effect of the Goldcorp Agreement is an irrevocable agreement of Datawave on January 6, 2010 to convey the Offered Interest to Goldcorp, or a designated subsidiary of Goldcorp. Morales did not analyze the Goldcorp Agreement as consisting of two transactions with the second being conditional upon completion of the first, in the manner set out above.

[385] As Morales' opinion does not address the legal effect of the Goldcorp Agreement under the laws of Ontario as the court has determined it to be, there is no obvious means of taking the principle underlying the Morales opinion into consideration in determining the operation of section 10.4 in respect of the Goldcorp Agreement.

[386] Accordingly, for the two reasons set out above, I have concluded that there is no basis in the evidence for finding that, under the laws of Chile, section 10.4 of the Shareholders Agreement should be interpreted to impose a requirement that a shareholder exercising the right of first refusal must do so for its own "benefit, account and risk" in the manner suggested by Morales.

[387] I also note that the defendants assert that Datawave did, in fact, satisfy this interpretation of section 10.4. Given the foregoing interpretation, this is a subsidiary issue which I have therefore addressed later in these Reasons.

Section 10.4 Should be Interpreted Restrictively or Narrowly

[388] Barrick's second submission is based on a principle of contractual interpretation that it says should apply in the interpretation of section 10.4. Barrick describes the right of first refusal provision as an exception to the general prohibition on Transfer set out in section 10.1. It says that, in accordance with Chilean principles of statutory construction, section 10.4 should be interpreted restrictively or narrowly to apply to the least number of possible cases. On this basis, it says that "other Shareholder" should be interpreted in the fashion proposed by Morales so that the right of first refusal would apply to the least number of circumstances.

[389] This interpretation of section 10.4 is not supported by the evidence of the Chilean legal experts regarding the operation of the Chilean principles of contractual interpretation. As mentioned, I accept the evidence of Peña and Barros that contractual restrictions on the transfer or alienability of rights are to be interpreted restrictively ─ that is, so as to apply to the smallest number of circumstances. However, there is no evidence of a general rule in Chilean law that exceptions to a general prohibition on Transfers are also to be interpreted restrictively in the manner proposed by Barrick. Logically, I think the opposite would be expected.

[390] Barrick relies, in particular, on testimony of Peña to the effect that the provisions of article 10.4 should be interpreted narrowly. My understanding of this testimony is that Peña was of the opinion that article 10.4 should be interpreted to apply only to the extent necessary to give effect to the nature and purpose of the Transfer restrictions in Article 10, as set out above. Accordingly, Peña's testimony contradicted Barrick's position that the "account, benefit and risk" requirement of Morales was a necessary element of section 10.4.

[391] Section 10.4 does not constitute a restriction on Transfer. Accordingly, while the restrictions on Transfer in section 10.1 should be construed on a restrictive basis, there is no basis for adopting a similar approach to the interpretation of the right of first refusal provisions in section 10.4. I conclude, therefore, that under the laws of Chile, section 10.4 should be interpreted according to its plain meaning.

Alleged Commercial Absurdity of the Defendants' Interpretation

[392] Lastly, Barrick argues that its interpretation of section 10.4 must be preferred to the defendants' interpretation because the latter would lead to a "commercial absurdity" and is therefore inconsistent with the principles of contractual interpretation in both Chile and Ontario. Ultimately, it is this argument that Barrick asserts to counter the question raised by the defendants as to why an exercising shareholder cannot pre-sell Rights and Interests of a selling shareholder if there is no required hold period for such assets once acquired. In this section, I will address two issues regarding the commercial reasonableness of the defendants'

interpretation of section 10.4 ─ the issue raised by Barrick and a further issue that arose in the trial.

[393] Relying on Regent's testimony, Barrick says that the defendants' view of the operation of rights of first refusal would result in a situation in which selling shareholders would not receive the best possible offer because potential purchasers would attempt to make lower offers or would remain out of the initial auction process of the selling joint venture partner altogether, in either case saving their best offers instead for the non-selling joint venture partner having the right to purchase the joint venture interest. Barrick says that, under this scenario, the party that would realize the profit on the selling joint venture partner's interest would be the non-selling joint venture partner rather than the selling joint venture partner. It says that this is precisely what Goldcorp did, implying that Goldcorp intended to pursue this strategy from the point in June 2009 when Goldcorp decided not to participate in the Xstrata Chile auction process.

[394] Before turning to the larger issue, I note that there is no evidence that Goldcorp intentionally pursued a strategy of "lying in the weeds" until the Xstrata Chile auction process was completed in order to acquire the Offered Interest in a transaction with New Gold. It is not necessary to set out the evidence for this conclusion in any detail.

[395] However, I would note that the evidence is clear that the conditions that presented the opportunity to Goldcorp were threefold: (1) rising metal prices that increased the value of the El Morro Project in the eyes of market participants; (2) a fixed cash price in the Barrick Transaction; and (3) Barrick's unwillingness to pay a sufficient price to New Gold, or inability to otherwise structure the Barrick Transaction, to obtain New Gold's waiver of the Right of First Refusal either directly or through Xstrata Chile. All of these circumstances arose well after June 2009 independently of any actions of Goldcorp. If any of these three conditions had not occurred, there would have been no opportunity for New Gold to conduct a successful value maximization process and there would have been no opportunity for Goldcorp to outbid Barrick in that process.

[396] I would add that I understand the testimony of Jeannes, Greville and Morales to the effect that none of these individuals had seen a transaction similar to the Goldcorp Transaction in their business lives, and that the Goldcorp Transaction was "unusual", in this context. It is the circumstances that made the Goldcorp Transaction economically feasible that appear to be what was truly "unusual" about the present situation. The fact that none of these individuals had seen a similar transaction says nothing probative about whether the defendants' interpretation of section 10.4 would lead to a commercial absurdity.

[397] Turning to the larger issue raised by Barrick, I agree that, if there were evidence that the defendants' view of the operation of rights of first refusal would necessarily lead to the commercially absurd result that Barrick describes, there would be a strong, if not conclusive, argument in favour of Barrick's interpretation of section 10.4. It would establish a purpose of the right of first refusal that must be respected in the interpretation and application of the Transfer restrictions in respect of any transaction.

[398] In the absence of any evidence of a theoretical nature pertaining to this issue, the court must consider this argument solely on the basis of the facts before it pertaining to this case. I conclude on the basis of such evidence that there is nothing inevitable about the occurrence of the matters that gave rise to the Goldcorp Transaction that would support such an argument.

[399] In fact, in more usual circumstances, where there is no reason for the market value of the selling joint venture party's interest to rise during the exercise period of a right of first refusal, there is a considerable risk that a prospective purchaser who remains out of the selling joint venture party's auction process will not have a second chance to acquire the asset through a transaction with the non-selling party. As an obvious example, the successful purchaser could require the departing joint venture party to obtain a waiver of the right of first refusal at its own cost, or the successful purchaser could purchase a waiver directly. Alternatively, the process could result in 100% of the project being offered to prospective purchasers to maximize value to the joint venture parties, as was contemplated for some time in the Xstrata Chile auction process. Further, the non-selling joint venture party could have, or could subsequently acquire through external transactions, the financial capacity to acquire the asset for its own account rather than with a view to reselling the asset. At the very least, the prospective purchaser would have to bid more than was agreed to by the third party offeror in order to make it worthwhile for the non-selling joint venture party to exercise the right of first refusal. Unless the value of the asset rises during the exercise period of a right of first refusal, Barrick's interpretation requires a willingness on the part of the prospective purchaser to bid a price above market value in the second process ─ itself a commercial absurdity.

[400] I would also observe that Barrick's evidence on the commercial absurdity of the defendants' view of the operation of rights of first refusal was limited to the personal views of Regent, Baker and Morales. In particular, Barrick did not provide any more general evidence from third party participants in the market who are familiar with the use and operation of rights of first refusal, expert or otherwise.

[401] In summary, I am not satisfied that Barrick's interpretation necessarily, or even regularly, results in a commercial absurdity that would require adopting Barrick's interpretation of the operation of section 10.4 over that of the defendants. Accordingly, I reject the proposition that this consideration should inform the interpretations of the Transfer restrictions and, in particular, the meaning of an indirect conveyance.

Additional Comment

[402] Barrick's interpretation of the right of first refusal provision in section 10.4 prompts an additional observation. Barrick acknowledges that a shareholder could obtain financing from a bank or other financial institution to finance the exercise of a right of first refusal. However, a shareholder would not exercise a right of first refusal in such circumstances without a firm financing commitment from the financing institution. Conversely, the financing institution would not advance funds to complete the transaction without executed loan and security documentation which would be effective conditional upon completion of the transaction. However, by virtue of

the definition of Encumbrance, the granting of security over Rights and Interests constitutes a Transfer under the Shareholders Agreement. I can see no distinction in principle in the language of Article 10 between the conditional financing arrangements that would be required to fund a shareholder exercise of the right of first refusal and the conditional sale of the 70% Interest to Goldcorp provided for in the Goldcorp Agreement. The Transfer restrictions apply in the same manner to both transactions because the conditional structure is essentially identical.

[403] In my opinion, the treatment of financing arrangements in the context of an exercise of a right of first refusal reinforces the conclusion that there is no basis in the language of Article 10 for the interpretation placed upon it by Barrick. If there is a distinction between these two scenarios that dictates a different result in the case of an on-sale to a third party, it must be grounded in a policy consideration outside the language of Article 10. However, the consideration proposed by Barrick – the commercial absurdity argument – is not supported on the evidence before the court.

Summary of Relevant Principles Pertaining to the Transfer Restrictions

[404] Based on the foregoing, the following six general principles regarding the operation of the Transfer restrictions are relevant to the issues in this litigation.

[405] First, a sale of Rights and Interests between shareholders is not subject to Article 10 provided the purchasing shareholder acquires such Rights or Interests directly or indirectly in a subsidiary that it controls. Further, there is nothing in the Shareholders Agreement that mandates that the shareholder, or its subsidiary, hold the Rights and Interests to be acquired for any particular period of time upon acquisition before completing a sale of such Rights and Interests to a third party.

[406] Second, an unconditional agreement by a shareholder to convey, or otherwise dispose of, Rights and Interests that it owns to a third party gives rise to a Transfer that is subject to the Transfer restrictions in Article 10. However, a Transfer does not arise in respect of an agreement to sell, assign or otherwise dispose of Rights or Interests until such agreement becomes unconditional. Whether or not such Transfer is a prohibited Transfer requires an assessment of the legal relationships among the parties at the time of completion of the proposed transaction.

[407] Third, a shareholder may sell Rights and Interests to be acquired from the other shareholder to a third party prior to acquisition of such Rights or Interests. Such a sale is permitted under Chilean law. There is also nothing in the Shareholders Agreement that prevents the shareholder from entering into an agreement with the third party for the sale of such Rights and Interests prior to entering into an agreement for their purchase or prior to exercising a right of first refusal in the shareholder's favour to acquire such Rights and Interests.

[408] Fourth, in particular, the right of first refusal provisions in section 10.4 do not impose any such limitation or restriction on the manner in which a shareholder can sell to a third party Rights and Interests to be acquired from the other shareholder. The absence of limitations or restrictions

on the exercise of a right of first refusal of the nature suggested by Barrick would not necessarily produce a commercially absurd result.

[409] Fifth, a sale by a purchasing shareholder to a third party of its right to purchase Rights or Interests from the other shareholder, including any agreement between the shareholders with respect thereto, as distinct from a sale of the Rights and Interests themselves, could give rise to a Transfer that would be subject to the Transfer restrictions in Article 10.

[410] Lastly, inclusion of indirect conveyances within the definition of Transfer has the effect of capturing two different circumstances within the term "Transfer". The first circumstance is a sale of shares in the corporate chain upstream from a party holding Rights or Interests in the El Morro Project. The second circumstance is a transaction resulting in a Transfer of Rights and Interests indirectly that, if done directly, would have given rise to the entitlement of the other shareholder to the protections set out in Article 10. The circumstances in which a transaction constitutes an indirect conveyance for the purposes of the definition of a Transfer are informed by the purposes of Article 10.

Conclusions Regarding Operation of the Transfer Restrictions in Respect of the Goldcorp Agreement

[411] In this section, I will address the application of the Transfer provisions to the Goldcorp Transaction in the third step of the analysis to determine whether the Goldcorp Transaction gives rise to a breach of the Shareholders Agreement. Based on the analysis above, I reach the following five conclusions.

[412] First, the Goldcorp Agreement contemplates two sale transactions as well as a prior loan transaction. The first sale transaction, pursuant to which Datawave acquired the 70% Interest through DataSub, was not subject to section 10.1 because it was limited to a transaction between shareholders. The second sale transaction, pursuant to which Goldcorp purchased the DataSub shares, was subject to section 10.1.

[413] Second, the second sale transaction was conditional upon completion of the Datawave Purchase Agreement. Accordingly, the agreement for the second sale transaction did not become unconditional until completion of the DataSub purchase of the Offered Interest and the execution of the DataSub Share Purchase Agreement immediately thereafter. At that time, Xstrata Chile was no longer a shareholder of the Company.

[414] Third, accordingly, the Transfer created by the unconditional agreement to sell the DataSub shares to Goldcorp did not constitute, or give rise to, a prohibited Transfer for the reason that Xstrata Chile was no longer entitled to the benefit of the protections of Article 10 in respect of the transaction contemplated by the DataSub Share Purchase Agreement. As a consequence, the provisions of Article 10 did not require that any sale of the DataSub shares be accompanied by a sale of the New Gold Interest or that Xstrata Chile have the benefit of a "mirror" right of first refusal in its favour. Even if it were held that the DataSub Share Purchase

Agreement became unconditional at an earlier date, compliance with the provisions of Article 10 in respect of that transaction would be assessed as of the time of completion of that transaction, at which point Xstrata Chile was no longer entitled to the benefit of such provisions.

[415] Fourth, the right of first refusal provisions in section 10.4 of the Shareholders Agreement did not impose any requirements on the manner of Datawave's purchase of the Offered Interest other than the formal requirements pertaining to the notice of exercise expressly set out in section 10.4. In particular, the provisions of section 10.4 did not prevent Datawave from making a conditional commitment to sell Goldcorp the 70% Interest prior to Datawave's exercise of the Right of First Refusal and acquisition of the Offered Interest from Xstrata Chile.

[416] Fifth, for the reasons set out above, under the laws of Ontario, DataSub was a wholly-owned subsidiary of Datawave controlled by Datawave at all times prior to completion of the Datawave Purchase Agreement. There are two consequences that flow from this determination. The more important consequence is that the structure of the Goldcorp Transaction satisfied the requirement that Datawave acquire the 70% Interest directly or indirectly for at least some period of time. I have proceeded on the basis that the Transfer provisions were satisfied if Datawave acquired the 70% Interest in a wholly-owned subsidiary over which it had legal control. However, as addressed below, DataSub also satisfied the requirements of an Affiliate for purposes of the Shareholders Agreement at all relevant times. The other consequence of the determination is that the transfer of the Datawave Purchase Agreement to DataSub did not constitute an indirect Transfer of Rights and Interests to Goldcorp by virtue of arrangements in the Goldcorp Agreement that constituted DataSub as a Goldcorp subsidiary upon its creation.

[417] Based on the foregoing conclusions, it necessarily follows that the Goldcorp Agreement did not constitute, or give rise to, a prohibited Transfer under Article 10 of the Shareholders Agreement.

Analysis of the Breaches of Datawave's Obligations Asserted by Barrick

[418] Barrick alleges that Datawave's execution of the Goldcorp Agreement had the following consequences under the Shareholders Agreement:

1. that under the Shareholders Agreement, the Goldcorp Agreement constituted, or gave rise to, a Transfer of the Right of First Refusal that did not comply with section 10.1 of the Shareholders Agreement;

2. that under the Shareholders Agreement, the Goldcorp Agreement constituted, or gave rise to, a Transfer of the Offered Interest that did not comply with section 10.1 of the Shareholders Agreement;

3. that under the Shareholders Agreement, the Goldcorp Agreement created, or gave rise to, an Encumbrance in respect of the Right of First Refusal that constituted a Transfer that did not comply with section 10.1 of the Shareholders Agreement;

4. that the purpose and intent of the Goldcorp Agreement was the circumvention of the Transfer restrictions in section 10.1 of the Shareholders Agreement;

5. that the Goldcorp Agreement required Datawave to breach its good faith obligations under the Shareholders Agreement by exercising the Right of First Refusal in a manner that is neither customary nor consistent with the nature of a right of first refusal;

6. that under the Shareholders Agreement, the Goldcorp Agreement constituted, or gave rise to, a breach of certain provisions of the CFLA; and

7. that under the Shareholders Agreement, the Goldcorp Agreement provided for a Datawave exercise of the Right of First Refusal that was a nullity under Chilean law.

[419] In reaching the conclusions set out above, I have considered and rejected each of these submissions. The following sections set out my analysis of each of the seven alleged breaches of the Shareholders Agreement that Barrick says resulted from Datawave's execution of the Goldcorp Agreement.

Overview

[420] Before examining these alleged breaches in detail, the following summarizes the principle which I believe informs the principal Barrick arguments and sets out my conclusions regarding this principle as it is applied in respect of the Shareholders Agreement.

[421] The principal arguments raised by Barrick involve, as a common element, an assertion that the Goldcorp Transaction constituted a sale by Datawave of its "right to purchase the Offered Interest". Each argument addresses a different aspect of the Goldcorp Transaction. By way of overview, the arguments can be divided into allegations that the Goldcorp Transaction gave rise to a direct Transfer of Datawave's "right to purchase the Offered Interest" and allegations that the Transaction gave rise to an indirect Transfer of such right.

[422] As mentioned above, Barrick does not dispute that, in the usual case, a party can agree to sell an asset which it has a right to acquire pursuant to an option granted by the owner of the asset. However, Barrick says that, in the present circumstances, such a transaction was prohibited because Datawave's "right to purchase the Offered Interest" was non-transferable. Barrick says that, pursuant to the Transfer restrictions, Datawave could not sell its "right to purchase the Offered Interest" without also selling the New Gold Interest, which would have given rise to a right of first refusal under section 10.4 of the Shareholders Agreement in favour of Xstrata Chile. Accordingly, Barrick argues that any transaction pursuant to which Datawave directly or indirectly sold the 70% Interest constituted a prohibited Transfer of Datawave's "right to purchase the Offered Interest".

[423] I have concluded above that, whether or not this is an accurate description of the economic effect of the Goldcorp Agreement, there is no basis to determine that, as a legal matter under the laws of Ontario, the Goldcorp Agreement constitutes an assignment of the benefit of Datawave's "right to purchase the Offered Interest". Instead, I consider that, if there is any basis for this conclusion, it is to be found in the laws of Chile or the contractual interpretation of the Shareholders Agreement.

[424] There is no evidence before the court that establishes that, under Chilean law, the legal effect of the Goldcorp Agreement in this regard is to be interpreted in a manner different from that described above under the laws of Ontario. In particular, there is no evidence from any of the Chilean law experts that Chilean law recognizes the legal proposition upon which Barrick relies. There is, instead, ample evidence that under Chilean law, as under Ontario law, more than one right to purchase the same asset can co-exist ─ i.e., Datawave's right to purchase the 70% Interest could co-exist with Goldcorp Tesoro's conditional right to purchase that interest from Datawave. Accordingly, I am satisfied that, under the laws of Chile, a party may enter into an agreement for a future sale of an asset with delivery to occur at the point at which the asset becomes part of the seller's patrimony i.e., at the point at which the seller acquires the asset. Based on the foregoing, I conclude Chilean law would treat the two sale transactions under the Goldcorp Agreement as separate and distinct, rather than as a sale or grant by Datawave to Goldcorp of its "right to purchase the Offered Interest".

[425] It is my understanding that Barrick does not disagree with this general proposition. Instead, it says that this general principle is displaced in respect of the Shareholders Agreement because Datawave's "right to purchase the Offered Interest" is a non-transferable right under the Shareholders Agreement in the absence of a concurrent sale of the New Gold Interest. Barrick says that this circumstance mandates an interpretation of the provisions of Article 10 that would prohibit transactions that would directly or indirectly result in a Transfer of the Datawave "right to purchase the Offered Interest". In the case of a future sale of Rights and Interests subject to an option in favour of a shareholder, it says that this requires that the future sale be assimilated into, and treated as, a sale of the option to acquire the Rights and Interests.

[426] A number of variants of this argument are addressed below focusing on different features of the Goldcorp Transaction that are described as direct or indirect Transfers. In particular, Barrick argues that the definition of Transfer should encompass multi-stage transactions that have the final result that a third party acquires the Offered Interest on the basis that such a transaction constitutes an indirect conveyance of Datawave's "right to purchase the Offered Interest". I conclude that the Goldcorp Agreement did not give rise to any of the breaches of the Shareholders Agreement or the CFLA alleged by Barrick to constitute direct Transfers of the Datawave "right to purchase the Offered Interest". I also conclude that Article 10 of the Shareholders Agreement is not to be interpreted in the manner proposed by Barrick in respect of any of the features of the Goldcorp Transaction identified by Barrick as giving rise to an indirect Transfer of Barrick's "right to purchase the Offered Interest" for the reason that such interpretation does not further any purpose of the Transfer restrictions.

Alleged Transfer of the Right of First Refusal

[427] I have previously set out my conclusion that, under the laws of Ontario, as between Datawave and Goldcorp, the Goldcorp Agreement did not constitute a sale by Datawave to Goldcorp of the Right of First Refusal, i.e., the option, on January 6, 2010. The issue in this section is whether, notwithstanding this result under the laws of Ontario, the provisions of the Shareholders Agreement, in particular Article 10, would treat the commitments of the parties to the Goldcorp Agreement as constituting a sale of the Right of First Refusal. This is a matter of the contractual interpretation of the Shareholders Agreement.

[428] Barrick submits that the provisions of the Shareholders Agreement have this result. I have rejected this argument for the following reasons.

[429] First, as mentioned above, there is no evidence that the Goldcorp Transaction would be treated as a sale of the Right of First Refusal under general principles of Chilean law.

[430] Second, there is also no basis for finding that the language of the Shareholders Agreement would treat the Goldcorp Transaction as constituting a sale of the Right of First Refusal.

[431] To succeed on this issue, Barrick must demonstrate that the Goldcorp Agreement constitutes, or gives rise to, a Transfer for the purposes of the Shareholders Agreement. While the definition of Transfer is broad as Barrick points out, its breadth is not relevant for present purposes. The fundamental problem is the fact that, pursuant to the Goldcorp Agreement, Datawave, not Goldcorp, exercised the Right of First Refusal. There is nothing in the definition of Transfer that would characterize or transform the transactions contemplated by the Goldcorp Agreement into an agreement to convey the Right of First Refusal. A covenant to exercise the Right of First Refusal is not a commitment to sell, grant, assign, pledge or otherwise dispose of the Right of First Refusal. Similarly, there is no basis for finding that a commitment to sell the 70% Interest once it is acquired constitutes a Transfer of the Right of First Refusal. This was the evidence of Barros and Peña.

[432] Morales' position on this issue is less clear. However, I do not think that it can be relied upon by Barrick for the following reason.

[433] Morales appears to conclude in his Report that the Goldcorp Transaction constituted a sale of the Offered Interest rather than a sale of the Right of First Refusal. However, his opinion is essentially that Datawave did not exercise the Right of First Refusal in its own right, for its own benefit and its own account but, instead, for Goldcorp. On this basis, Morales describes the Goldcorp Transaction as "tantamount" to an unlawful Transfer of the Right of First Refusal.

[434] It is clear from the Morales Report that this conclusion depends upon this court finding that, under the laws of Ontario, given the terms of the Goldcorp Agreement, Datawave did not exercise the Right of First Refusal in its capacity as the "other Shareholder" but instead acting

"on behalf of and for the benefit and the risk of another party ─ Goldcorp". However, the court has not made this requisite finding. Similarly, the court has not found that Datawave acted as the agent of Goldcorp in exercising the Right of First Refusal nor that it was the "conduit" through which Goldcorp exercised the Right of First Refusal. Instead, the court has concluded above that there is no basis for any such finding under the laws of Ontario. Accordingly, Morales' opinion that the Shareholders Agreement would treat the Goldcorp Agreement as giving rise to a sale of the Right of First Refusal cannot stand.

[435] Barrick argues that the testimony of certain of the defendants' witnesses supports the conclusion that Datawave sold the Right of First Refusal pursuant to the Goldcorp Agreement. I do not accept this submission for two reasons.

[436] First, it appears that Barrick seeks to rely on statements that acknowledged that Goldcorp acquired the Offered Interest, rather than the 70% Interest, in the hands of DataSub after completion of the purchase of the Offered Interest under the Datawave Purchase Agreement. I am satisfied that this argument rests on a semantic distinction that the witnesses did not have in mind during their respective cross-examinations at trial. In a similar manner, the suggestion that, after the Goldcorp Transaction, Goldcorp became vested by Datawave with the right to purchase the Offered Interest is based on a confusion of the terms "Offered Interest" and "70% Interest". Goldcorp never acquired Datawave's right to purchase the Offered Interest, i.e., the Right of First Refusal. It received a separate right to acquire the 70% Interest conditional upon Datawave completing the purchase of the Offered Interest by completing the Datawave Purchase Agreement.

[437] Second, I accept that it is possible to characterize the economic effect of the Goldcorp Transaction in several different ways. One of the characterizations would be a sale of the Right of First Refusal for U.S. $50 million and other El Morro Project-related benefits. However, the issue before the court in this action relates to a legal issue ─ the operation of the Transfer restrictions in the Shareholders Agreement, given the structure of the Goldcorp Agreement. The economic characterization of the Goldcorp Transaction is an entirely different exercise. It is not a relevant consideration for this issue except to the extent that it informs in some manner the issue of the nature and purpose of the Transfer restrictions in Article 10, which has been addressed above.

[438] As there was no Transfer of the Right of First Refusal resulting from the execution of the Goldcorp Agreement, I conclude that the Goldcorp Agreement did not give rise to a prohibited Transfer under the Shareholders Agreement on this basis.

Alleged Prohibited Transfer of the Offered Interest

[439] Barrick submits that, if Datawave's commitments under the Goldcorp Agreement do not constitute a sale of the Right of First Refusal for purposes of the Shareholders Agreement, such commitments constituted, or gave rise directly or indirectly to, a Transfer to Goldcorp on January 6, 2010 of Datawave's "right to purchase the Offered Interest" under section 10.4 of the

Shareholders Agreement. It says further that, by virtue of the inclusion of a commitment or promise to sell or assign Rights or Interests in the definition of "Transfer", the Goldcorp Agreement constituted a Transfer of Datawave's "right to purchase the Offered Interest" as of January 6, 2010. Accordingly, Barrick says that it follows that Datawave's purported exercise of the Right of First Refusal on January 7, 2010 was invalid for failure to comply with paragraph 10.2(1)(a) of the Shareholders Agreement.

Issues to be Addressed

[440] Before addressing this matter, I note one aspect of the Barrick position that requires clarification. As I understand the Barrick argument, Barrick alleges that New Gold granted to Goldcorp either the Right of First Refusal or the Datawave Purchase Agreement but not the Offered Interest itself, despite some language to this effect in its closing submissions and reply submissions. This is also consistent with the treatment of contracts for sale under Chilean law. Under Chilean law, a seller cannot convey ownership of an asset in a sale agreement. It can only agree to deliver or convey the asset that is the subject-matter of the agreement by delivery at the closing of the transaction. Accordingly, Barrick argues that, to the extent the Goldcorp Agreement constituted a sale of the 70% Interest, it was invalid because it was tantamount to a prohibited Transfer of Datawave's "right to purchase the Offered Interest", i.e., a prohibited Transfer of Datawave's Right of First Refusal or of the Datawave Purchase Agreement.

[441] This section addresses four different conceptual analyses proposed by Barrick to support its position that the Goldcorp Agreement directly or indirectly gave rise to a Transfer on January 6, 2010 to Goldcorp of Datawave's "right to purchase the Offered Interest" prior to completion of the purchase of the 70% Interest thereunder.

[442] First, Barrick argues that the Transfer of the Offered Interest occurred in the form of the transfer of the Datawave Purchase Agreement to DataSub because the effect of the covenants in the Goldcorp Agreement was to establish DataSub as an Affiliate of Goldcorp. Second, Barrick says that, even if DataSub was not a Goldcorp Affiliate, the Transfer was prohibited because the Goldcorp Agreement contemplated both a transfer of the Datawave Purchase Agreement to DataSub and a transfer of the DataSub shares to Goldcorp in the same agreement. Third, Barrick says that the Goldcorp Agreement had the effect of imposing a burden on Datawave's right to purchase the Offered Interest, that is, on the Right of First Refusal, which constituted an Encumbrance, thereby giving rise to a prohibited Transfer. Lastly, Barrick says that the Goldcorp Agreement was entered into with a view to circumventing the Transfer restrictions in the Shareholders Agreement.

[443] I propose to deal with each of these submissions in turn.

Alleged Transfer to a Goldcorp Affiliate

[444] Barrick submits that, pursuant to the Goldcorp Agreement, Datawave agreed to convey its right to purchase the Offered Interest, in the form of the Datawave Purchase Agreement, to an

entity that was to be an Affiliate of Goldcorp at all times after its incorporation and, in particular, at the time of completion of the Datawave Purchase Agreement. Barrick argues that because New Gold did not also agree to sell the New Gold Interest to Goldcorp, the Goldcorp Agreement therefore indirectly gave rise to a Transfer that was prohibited by virtue of non-compliance with section 10.2(1)(a) of the Shareholders Agreement.

[445] The definition of an "Affiliate" in the Shareholders Agreement is, with respect to a Shareholder, "any Person, which directly or indirectly Controls, or is Controlled by, or is under Common Control with, that Shareholder". For this purpose, "Control" means:

> [P]ossession, directly or indirectly, of the power to direct or cause direction of management and policies through ownership of voting shares, interests, or securities, or by contract, voting trust or otherwise. The definition of Control shall be incorporated into such terms as "Controlled" and "Controlling".

[446] Barrick argues that DataSub was not, at any time, an Affiliate of Datawave/New Gold because it was not "Controlled by" Datawave/New Gold. It says that DataSub was, instead, an Affiliate of Goldcorp by virtue of the covenants of Datawave in the Goldcorp Agreement pertaining to DataSub.

[447] This issue proceeds as a matter of contractual interpretation of the Shareholders Agreement under the laws of Chile. It is similar to, but not the same issue as, the question addressed earlier of whether the Goldcorp Agreement contemplated that DataSub would be established as a subsidiary of Goldcorp.

[448] DataSub was incorporated as a Chilean corporation, all of whose shares were registered in the name of, and were held by, Datawave. The affairs of DataSub were directed by an administrator rather than a board of directors. The authority to act as the administrator of DataSub in all matters, including the completion of the Datawave Purchase Agreement, was granted to a Chilean lawyer who acted for Datawave pursuant to a power of attorney executed by Datawave, which retained the power to change the administrator if it so chose. Notwithstanding these arrangements, Barrick argues that the result of Datawave's covenants in the Goldcorp Agreement pertaining to DataSub was that Datawave did not "Control" DataSub, as that concept is defined for the purpose of the Shareholders Agreement, and that, in fact, Goldcorp Controlled DataSub.

[449] I do not agree for the following reasons.

[450] The principles that govern Transfers to Affiliates in the Shareholders Agreement are clear. A shareholder is entitled to Transfer Rights or Interests on a non-proportional basis to an Affiliate provided (1) the Affiliate agrees to be directly liable under the Shareholders Agreement in respect of the obligations and liabilities associated with the Rights and Interests transferred to it; and (2) the shareholder remains jointly and severally liable in respect of such obligations and liabilities with the Affiliate. In summary, a shareholder has complete freedom to transfer Rights

and Interests within its corporate group provided it remains jointly and severally liable. From the perspective of the other shareholder, any Transfer of Rights and Interests of the other Shareholder is permissible, provided the transferring shareholder not only remains jointly and severally liable but also retains the ability to cause the transferee corporation to comply with the obligations and liabilities associated with the Rights and Interests transferred to it.

[451] The concept of "Control" should be interpreted for purposes of the definition of Affiliate in terms of whether any particular arrangement satisfies this test. As in the case of the interpretation of the Transfer restrictions generally, given that the interpretation of this term affects the breadth of the restriction on a shareholder's freedom to transfer its own assets, i.e., affects the breadth of the prohibitions on Transfer under the laws of Chile, this term should not be interpreted more broadly than is necessary to give effect to the purpose of the Transfer restrictions in respect of Affiliates.

[452] Based on this approach to the contractual interpretation of "Control", I am satisfied that the arrangements in the Goldcorp Agreement contemplated that Datawave would "Control" DataSub upon its incorporation and thereafter until the transfer to Goldcorp Tesoro of the DataSub shares pursuant to the DataSub Share Purchase Agreement.

[453] The covenants in sections 4.1 and 4.2 of the Goldcorp Agreement constituted contractual obligations of Datawave to Goldcorp in respect of the activities of DataSub. They are not covenants of, or on behalf of, DataSub in favour of Goldcorp. Accordingly, Goldcorp had no legal ability to directly cause DataSub to comply with its instructions if Datawave had failed to do so. If Datawave had breached the covenants, Goldcorp's rights were limited to an action against Datawave for breach of contract.

[454] Further, Datawave's commitment to these covenants did not extinguish or diminish Datawave's legal control of DataSub, both as the sole shareholder of DataSub and as the party having control over the Chilean lawyer who acted as the administrator of DataSub.

[455] More substantively, there is also nothing in these covenants that prevented DataSub from performing or discharging any obligations or liabilities associated with the Rights and Interests transferred to it, namely the Datawave Purchase Agreement, or the 70% Interest to be acquired by it upon the completion thereof. In fact, insofar as the Goldcorp Agreement contained any negative covenants pertaining to such obligations and liabilities, they are incorporated by reference from the Barrick Agreement in paragraph 4.2(g) of the Goldcorp Agreement, which refers to section 8.6 of the Barrick Agreement. As such, the Barrick Agreement itself addresses the intention of Barrick and Xstrata Chile regarding reasonable negative covenants that do not constrain the ability of a shareholder to perform its obligations and liabilities under the Shareholders Agreement. Nor would these covenants be unusual in an institutional financing with a third party.

[456] In reaching this conclusion, I have disregarded the voting arrangements that were subsequently agreed to between the parties in the Pledge Agreements. These arrangements

contemplated that Datawave would vote the DataSub shares in accordance with the instructions of Goldcorp at any meeting of the shareholders of DataSub. These voting arrangements were not, however, contemplated in the Goldcorp Agreement. I decline to infer that they were always in contemplation in the absence of any evidence to that effect.

[457] However, even if it were necessary to take these voting arrangements into consideration, I would reach the same conclusion. A contractual covenant to vote shares in accordance with directions of a third party is not the same as granting the third party the voting rights attached to the shares. That would require an actual registration of the shares in the name of the third party. That did not occur in this case. Moreover, as Ochagavia noted, Datawave retained the power to change the administrator of DataSub without calling a meeting of shareholders.

[458] In summary, Datawave retained the power to direct, or cause the direction of, the management and policies of DataSub through its ownership of the voting shares of DataSub, as well as through its relationship with the Chilean lawyer who, as the administrator of DataSub, had the power to act on its behalf. In particular, Datawave retained the power to cause DataSub to honour its obligations to Xstrata Chile in respect of the Datawave Purchase Agreement. On this basis, I conclude that the Goldcorp Agreement contemplated that DataSub would be established as, and would remain, an Affiliate of Datawave until completion of the DataSub Share Purchase Agreement. I therefore conclude that the Goldcorp Agreement did not create a prohibited Transfer on January 6, 2010 of the Datawave Purchase Agreement to Goldcorp by way of a Transfer to a party that was not an Affiliate of Datawave.

Allegation Based on the Existence of Obligations to Transfer the Datawave Purchase Agreement and the DataSub Shares

[459] Barrick submits that the Transfer was a prohibited Transfer because the following two commitments of New Gold existed in the same agreement: (1) a commitment to transfer the Datawave Purchase Agreement to DataSub; and (2) a commitment to transfer the shares of DataSub to Goldcorp. This argument proceeds on the assumption that the effect of these two commitments in the Goldcorp Agreement was an unconditional sale of Datawave's "right to purchase the Offered Interest" from Datawave to Goldcorp. Barrick asserts that, by agreeing to each of these transactions, New Gold indirectly Transferred the Datawave "right to purchase the Offered Interest". This argument can take one of two forms: (1) that the result was to transfer the Datawave Purchase Agreement to Goldcorp prior to DataSub's purchase of the Offered Interest under the Datawave Purchase Agreement; and (2) that the result of the two transactions was an indirect Transfer of the Datawave "right to purchase the Offered Interest" on the basis that there is no substantive structural difference between the theory described above and the structure addressed in respect of this argument. I will address each form of this argument in turn.

[460] Under the laws of Ontario, the Goldcorp Agreement could only constitute a transfer of the Datawave Purchase Agreement to Goldcorp before DataSub's purchase of the Offered Interest under the Datawave Purchase Agreement was completed if Datawave's obligation to complete both sale transactions was unconditional as of the date the Goldcorp Agreement was

executed or as of the date the Right of First Refusal was exercised. However, as set out above, that was not the case. Under the laws of Ontario, the Goldcorp Agreement contemplated two separate sale transactions ─ a sale of the Offered Interest to DataSub pursuant to the DataSub Share Purchase Agreement and a sale of the DataSub shares to Goldcorp Tesoro pursuant to the DataSub Share Purchase Agreement. The latter was conditional on the former transaction closing and became unconditional only after the former was concluded.

[461] There is no evidence from any of the Chilean legal experts that establishes that the Goldcorp Agreement would be interpreted in a different manner under the laws of Chile. Therefore, the Barrick submission can only be meaningful if the Transfer provisions of the Shareholders Agreement mandate a different result when applied to the transactions contemplated by the Goldcorp Agreement. This issue is therefore a matter of the application of the Shareholders Agreement. There is no basis for such a conclusion for the following reasons.

[462] Barrick's argument disregards both the timing and the conditionality of the two sales transactions under the Goldcorp Agreement. Insofar as the Datawave Purchase Agreement constituted Rights and Interests of Datawave, they were transferred to, and held by, an Affiliate of Datawave until the Datawave Purchase Agreement was completed. In addition, based on the interpretation of the Transfer provisions set out above, no Transfer of the DataSub shares arose until the Datawave commitment to sell the DataSub shares to Goldcorp Tesoro became unconditional. This did not occur until after the transaction contemplated by the Datawave Purchase Agreement closed.

[463] The second form of this argument reflects the fact that this argument is, in essence, a variant of Barrick's assertion described above that a sale of an asset subject to a non-transferable option constitutes the sale or grant of the option itself, in this case translated to reflect the involvement of DataSub. I have concluded above that there is no legal basis in Chilean law for the legal theory upon which this submission is based. I address the interpretation of the provisions of Article 10 to this argument of Barrick below in considering Barrick's argument that the Goldcorp Transaction should be considered as a whole. I conclude in that discussion that Article 10 of the Shareholders Agreement is not to be interpreted in the manner proposed by Barrick for the reason that it does not further any purpose of the Transfer restrictions. The reasoning in respect of the argument based on a multi-stage transaction is equally applicable to the present argument.

[464] Accordingly, I conclude that the existence of the Datawave covenants to assign the Datawave Purchase Agreement to DataSub and to sell the DataSub shares to Goldcorp Tesoro in the same agreement does not give rise to a prohibited Transfer on January 6, 2010 under the terms of the Shareholders Agreement.

Alleged Transfer By Way of Encumbrance

[465] Barrick alleges that, by virtue of the breadth of the definition of "Encumbrance" in the Shareholders Agreement, the imposition of a contractual "burden" on a party's Right or Interests

constitutes the creation of an Encumbrance on such Rights or Interests and thereby gives rise to a Transfer. It says that the Goldcorp Agreement imposed such a "burden" by limiting the manner and purpose for which Datawave could exercise the Right of First Refusal, and more generally by limiting its rights under the Datawave Purchase Agreement, and thereby limiting Datawave's ability to enjoy such contractual rights. Conceptually, I think that Barrick considers that the granting of this Encumbrance constitutes a direct or indirect Transfer of Datawave's "right to purchase the Offered Interest" to Goldcorp.

[466] I do not agree with this submission. While the definition of an "Encumbrance" in the Shareholders Agreement is framed in broad language, Barrick's position ultimately depends upon a finding that the contractual provisions in the Goldcorp Agreement respecting Datawave's exercise of the Right of First Refusal constituted a "burden". This is exclusively an issue of the contractual interpretation of the Shareholders Agreement. I do not think that such provisions can be so characterized for the following six reasons.

[467] First, insofar as there is any evidence as to the meaning of "burden" under Chilean law, it comes from Peña. He testified that there is no "encumbrance" if a party declares in a contract that the party is going to exercise a certain right that arises from a contract. Apart from this evidence, which contradicts the Barrick position, there is no evidence that the concept of a "burden" is recognized under Chilean law.

[468] Second, the source of this argument is the Morales Report in which Morales refers to Datawave's covenant in paragraph 4.1(f) of the Goldcorp Agreement and goes on to conclude:

> 122. Therefore, in every single act or contract executed by Datawave under or in connection with or in furtherance of the Acquisition and Funding Agreement Datawave was required to preserve, protect and maintain all the rights of Goldcorp under such agreement.
>
> 123. On January 6, 2010, Datawave's Right of First Refusal was thus effectively and fully Encumbered, or Transferred by way of Encumbrance in the language of the agreement, in favour of Goldcorp. Its exercise would no longer be Datawave's desire but Goldcorp's.

[469] Barrick suggests that Peña agreed with this conclusion. However, the questions put to Peña expressly assumed that: (1) the court would find that the Goldcorp Agreement limited Datawave's ability to exercise its rights under section 10.4; and (2) the court would find that the Agreement limited Datawave's ability to "retain the fruit" of the exercise of the Right of First Refusal. In my view, neither of these assumptions is supported by the facts in this case.

[470] In oral testimony, Morales described the term "Encumbrance" as extending to a contractual stipulation that completely prohibited the exercise of a right that a party was otherwise free to exercise, rather than merely limiting the circumstances of its exercise. He also

described an Encumbrance as addressing the scenario in which a right can only be exercised if a third party gives instructions to do so and/or its consent is required to do so.

[471] The New Gold covenants in the Goldcorp Agreement respecting the exercise of the Right of First Refusal are given in the context of a transaction by which New Gold realized the value of its Rights and Interests in the El Morro Project. Rather than limiting Datawave's exercise of its Right of First Refusal, the Agreement reflects Datawave's decision, freely entered into, to exercise such rights. Rather than limiting its ability to "retain the fruit" of such exercise, it reflects New Gold's realization of the value of the Right of First Refusal.

[472] More generally New Gold's decision to enter into the Goldcorp Agreement and to cause Datawave to exercise the Right of First Refusal does not partake of the characteristics identified by Morales set out above that constitute an Encumbrance. To suggest, as Barrick does, that after execution of the Goldcorp Agreement, Datawave no longer had the right to determine whether or not to exercise the Right of First Refusal, i.e., that it could only exercise its right to purchase the Offered Interest such that Goldcorp would become the owner of that interest, does not accurately describe the present circumstances. It ignores both the conditional nature of the two sales transactions in the Goldcorp Agreement, as well as, more importantly, the economic reality of the Goldcorp Transaction and Datawave's voluntary participation in the Transaction. I do not see any basis on which covenants directed toward a party's enjoyment of its Rights and Interests, including realization of their value, can be interpreted to fall within the definition of an "Encumbrance" as a "burden".

[473] This general approach is reflected in the opinions of Barros, Peña and Ochagavia, which I prefer to that of Morales for the reason that I consider that they more accurately address the nature of the covenants in the Goldcorp Agreement pertaining to Datawave's exercise of the Right of First Refusal than does Morales' opinion. It was Barros' opinion that, under the Shareholders Agreement, an encumbrance encompasses only acts of disposition or conveyance and does not include acts by which a shareholder uses or enjoys Rights and Interests. Similarly, Peña was of the opinion that the term Encumbrance, as used in the Shareholders Agreement, means the imposition of a "limitative right" over property. According to Peña, a contract imposing a duty to exercise a right of first refusal is not to be considered an encumbrance or burden because it does not devalue or diminish the right of first refusal and therefore does not constitute an Encumbrance. Ochagavia reached the same conclusion in a slightly different manner. He concluded that the Goldcorp Agreement facilitated the exercise of the right of first refusal by Datawave for its benefit by providing the financing necessary to do so and, as such, he was of the opinion that the Goldcorp Agreement did not constitute a burden or an encumbrance.

[474] Third, in the absence of evidence regarding the meaning of a "burden" under the laws of Chile, the court can have regard to the meaning under the laws of Ontario. This is reinforced by the fact that the concept of a "burden" appears in an agreement that has been created using North American precedents. The meaning of a "burden" in such jurisdictions, including Ontario, does not extend to covenants of the nature found in the Goldcorp Agreement.

[475] The term "burden" is defined in *Black's Law Dictionary*, 7th ed., *s.v.* "burden" as follows:

> n. 1. A duty or responsibility <seller's burden to insure the shipped goods>. 2. Something that is oppressive <a burden on the interstate commerce>. 3. A restriction on the use or value of land; an encumbrance <the easement created a burden on the estate>

[476] Of these uses, only the third is relevant. It suggests, however, that "burden" refers to a restriction on the use or value of land, not a chose in action. I think this correctly reflects the meaning of a "burden" in a legal context in common law jurisdictions.

[477] There is no restriction on the use or value of land in the present circumstances. The provisions in the Goldcorp Agreement upon which Barrick relies relate to the exercise of a contractual right, a chose in action, not the enjoyment of, or the use or value of, real property.

[478] Fourth, reading the definition of "Encumbrance" in the context of the Transfer provisions, I think the definition of "Encumbrance" is restricted to circumstances that have a comparable economic effect to a conveyance or other disposition, in whole or more likely in part, of a shareholder's Rights and Interests.

[479] The purpose of including an Encumbrance in the definition of Transfer is to prevent a shareholder from effecting the economic equivalent of a Transfer in favour of a third party by means of a transaction which is not otherwise subject to the provisions of Article 10 but, in respect of which, the other shareholder is entitled to the benefit of the Transfer restrictions. An obvious example is a financing pursuant to which a shareholder could find itself subject to a financial institution as its joint venture partner after realization proceedings. As a restriction in the right of a shareholder to alienate its assets, however, the term "Encumbrance" should not be defined more broadly than is necessary to address the purposes of the Transfer restrictions. The broader definition of "Encumbrance" proposed by Barrick would restrict the class of permissible Transfers in circumstances where there is no need to provide protections to the shareholder who is exiting the joint venture to further the purposes of the Transfer provisions.

[480] Fifth, to the extent Barrick is correct, paragraph 8.6(h) of the Barrick Agreement functions in a similar manner. The fact that Barrick agreed to this provision in the Barrick Agreement is therefore evidence according to the Authentic Rule that Barrick itself held the view that a covenant of this nature did not constitute an Encumbrance. I can see no reasonable distinction for present purposes between the provisions to which Xstrata Chile agreed in the Barrick Agreement relating to its enjoyment of a possible right of first refusal in its favour in the circumstances contemplated by paragraph 8.6(h) and the provisions of the Goldcorp Agreement respecting New Gold's exercise of the Right of First Refusal.

[481] An agreement to waive the exercise of a right of first refusal is surely a limitation of the right on Barrick's theory. In addition, the requirement to "use reasonable commercial efforts to

co-operate with Barrick" in respect of the exercise or waiver of rights of first refusal can have only one meaning if it is to have substantive content in circumstances where Xstrata Chile was exiting the joint venture. As Ochagavia suggests, Xstrata Chile was effectively bound to implement arrangements whereby Barrick could obtain the New Gold Interest if it so chose via Xstrata Chile's exercise of the right of first refusal. These circumstances are substantially similar to those contemplated by the Goldcorp Agreement. Accordingly, while the provisions of section 8(h) operated in different circumstances and provided less express protection to Barrick than the provisions of paragraph 4.1(f) of the Goldcorp Agreement, there is no difference in principle that I can discern in the nature and purpose of such provisions.

[482] Lastly, I do not think that Barrick's definition of "Encumbrance" accords with commercial reality. The definition proposed by Barrick is not necessary to further any of the purposes of a right of first refusal discussed below and would capture covenants given in other circumstances that Barrick acknowledges are not intended to constitute a Transfer. The Barrick position is also inconsistent with any reasonable financing arrangements that would have been required by lenders to New Gold if New Gold had chosen to finance the acquisition and purchase of the Offered Interest for its own account.

[483] Based on the foregoing, I conclude that the Goldcorp Agreement did not give rise to an Encumbrance that resulted in a prohibited Transfer.

Alleged Unsuccessful Attempt to Circumvent the Transfer Restrictions in the El Morro Shareholders Agreement

[484] Barrick says that the Goldcorp Transaction was structured as a transaction that was limited to the 70% Interest in order to circumvent the prohibitions on Transfer in the Shareholders Agreement. Specifically, Barrick submits that New Gold/Datawave's purpose and intent in entering into the Goldcorp Agreement was to circumvent the right of first refusal in favour of Xstrata Chile that would have been required under section 10.4 if the New Gold Interest had been conveyed together with Datawave's right to purchase the Offered Interest. Barrick says that the court should disregard the legal effect of the individual transactions contemplated by the Goldcorp Agreement and interpret the Goldcorp Agreement as a whole. It says that, when viewed on this basis, the Agreement constituted an indirect Transfer of the Datawave right to purchase the Offered Interest i.e., Datawave's Right of First Refusal and/or the Datawave Purchase Agreement and therefore required compliance with section 10.2(1)(a). In addition, Barrick also argues that, even if the steps in the Goldcorp Agreement are analyzed separately, the Goldcorp Transaction gives rise to two independent breaches of the Shareholders Agreement. I will address issue each in turn.

Analysis and Conclusions

[485] This submission has several aspects. I will address in turn the following issues raised by Barrick in respect of the structure of the Goldcorp Agreement: (1) that the Goldcorp Agreement should be interpreted under the laws of Ontario as a whole, having the objective of a Datawave

sale of its "right to purchase the Offered Interest" to Goldcorp; (2) that for the purposes of the Shareholders Agreement, the Goldcorp Agreement should be treated as constituting, or giving rise to, a Transfer of the Offered Interest that was a prohibited Transfer when the Goldcorp Transaction is regarded as a whole; and (3) that DataSub was inserted into the structure to avoid the Transfer restrictions.

The Interpretation of the Goldcorp Agreement Under the Laws of Ontario

[486] I have concluded above that, as between Datawave and Goldcorp, the individual covenants in the Goldcorp Agreement were legally enforceable as separate covenants and that the Goldcorp Agreement did not constitute an unconditional sale to Goldcorp of the Right of First Refusal, the Datawave Purchase Agreement or the Offered Interest.

[487] Barrick submits, however, that, under certain principles of contractual interpretation in Ontario, the Goldcorp Agreement should instead be viewed as a composite whole in assessing its legal effect, which it says is the sale of the Right of First Refusal or the Datawave Purchase Agreement, in either case in a manner that constituted a prohibited Transfer under the Shareholders Agreement.

[488] Before proceeding, I note three important features of this argument. First, the argument in this section proceeds as a matter of interpretation of the Goldcorp Transaction under the laws of Ontario. I have considered the issue under the laws of Chile in the next section. Second, Barrick does not argue that the Goldcorp Agreement constituted an unconditional sale of the 70% Interest from Datawave to Goldcorp except to the extent that the transaction was tantamount to a sale or assignment of Datawave's "right to purchase the Offered Interest". Third, for the purposes of this argument, Barrick appears to accept, in line with the analysis of the legal effect of the Goldcorp Agreement set out above, that if the Goldcorp Agreement is analyzed solely by reference to the individual covenants therein, it does not constitute a prohibited Transfer. However, Barrick argues that the legal effect is different when the Agreement is looked at as a whole.

[489] In particular, Barrick relies on a statement of the Court of Appeal in *3869130 Canada Inc. (c.o.b. I.C.B. Distribution 2001)* v. *I.C.B. Distribution Inc.*, 2008 ONCA 396, [2008] O.J. No. 1947, at para. 33, to the effect that, where parties enter into a series of contracts to give effect to a transaction, a court should have regard to the surrounding contracts in the interpretation of a particular contract. Barrick also relies more heavily on the statement in *GATX*, at para. 67, that the effect of the third party agreement in that case must be looked at in its entirety and judged as a whole. Similarly, it relies on *Apex Corp.* v. *Ceco Developments Ltd.*, 2008 ABCA 125, [2008] A.J. No. 325, at para. 35, in which the Alberta Court of Appeal stated that it was necessary to look at "the overall scheme and final result" rather than to adopt a "freeze-frame approach". I do not accept this argument for the following reasons.

[490] First, as a general proposition, I think this argument is incorrect insofar as it is cast as a matter of the interpretation of the Goldcorp Agreement.

[491] This is illustrated by the approach of the court in *GATX* referred to above. In that decision, the court was required to determine whether a shareholder of a joint venture corporation had breached a right of first refusal provision in a shareholders agreement by entering into an agreement with a third party in respect of a proposed corporate reorganization that would result in a takeover bid being made for the shareholder's shares in the joint venture corporation.

[492] To determine the facts to which this test was applied, the court established the legal obligations provided for in the agreement between the shareholder and the third party. There was no suggestion that any of the covenants were unenforceable as a legal matter or that the transaction was a "sham transaction". Therefore, the relevant facts to which the test, i.e., the right of first refusal provision, was applied were constituted by the legal obligations of the parties as set out in the third party agreement.

[493] The court then determined the scope of the right of first refusal by applying standard principles of contractual interpretation. The court concluded, at para. 68, that the words "sell or otherwise dispose of" in the shareholders agreement were "intended to encompass all means and methods by which either of them might choose to terminate their interest in the CGTX shares". In other words, it interpreted the definition of "disposition" very broadly.

[494] Deciding whether a breach had occurred therefore involved determining whether the facts, i.e., the legal obligations, triggered a breach of the right of first refusal. The court found that there had been a breach because the right of first refusal was to be interpreted broadly and therefore, when applied to the facts, mandated a consideration of whether the result of these legal obligations constituted a termination by one party of its interest in the CGTX shares. The court held that it did and therefore a breach had occurred.

[495] The important point is that the requirement to look at the result of performance of the relevant legal obligations was mandated by the scope of the right of first refusal, not the law that governed the third party agreement. In the first step of the exercise, which required finding the facts to which the test was applied, the court did no more than describe the legal relationships established by the third party agreement. The court did not apply any principle of looking at the agreement as a whole in this step. Consideration of the third party agreement as a whole took place in the third step of the exercise ─ the application of the test, i.e., the right of first refusal provisions, to the facts i.e., the legal obligations. Moreover, the court examined the third party agreement in this manner only because such an exercise was mandated by the test, i.e., the broad language of the right of first refusal, which resulted from the contractual interpretation of that provision. If, for example, the court had concluded that the term "disposition" was intended to be limited to an actual conveyance, no such analysis would have been required.

[496] Accordingly, the principle of looking at the result of a third party agreement would only be applied in the present context if the Shareholders Agreement warranted such an approach at the third stage of determining whether a breach had occurred, i.e., in applying the provisions of the Shareholders Agreement to the legal relationships established by the Goldcorp Agreement.

Any requirement to consider the effect of the Goldcorp Agreement as a whole to determine whether a breach has occurred must therefore be located in the language of the Shareholders Agreement or the principles of Chilean law. This is addressed below.

[497] Second, there are obvious differences in the present circumstances from those in the cases relied upon by Barrick. In respect of the *GATX* decision, this is addressed in the next section. In respect of *I.C.B. Distributions*, the present circumstances do not involve interpreting the Goldcorp Agreement by reference to any other agreements between Datawave and Goldcorp. While I accept that the Goldcorp Agreement was drafted with a view to avoiding a contravention of the Shareholders Agreement, I do not see how determining the operation of the covenants in the Goldcorp Agreement is affected by the contractual interpretation of the Shareholders Agreement.

[498] As a related matter, Barrick also suggests that the interpretation of the Goldcorp Agreement should be informed by certain factual evidence in the form of descriptions of the effect of the Agreement by the parties. In particular, Barrick relies on Jeannes' description of the Goldcorp Transaction as the acquisition of "Datawave's ROFR … and therefore the 70% from Xstrata" as evidence of this true purpose and intent. In the same vein, it relies on other descriptions of the Goldcorp Transaction by New Gold and Goldcorp representatives who referred to the Goldcorp Transaction as involving the acquisition of the Datawave Right of First Refusal.

[499] In addition to the conceptual issue raised above, which excludes the significance of such evidence on a different ground, I do not think this language is useful. There is no suggestion that the parties used the language upon which Barrick relies to describe an understanding of the legal relationships involved. In Jeannes' case, in particular, I am satisfied that his short-form description of the form of transaction being considered at the time as involving the acquisition of Datawave's Right of First Refusal and of Xstrata's 70% interest in the El Morro Project can be explained in terms of his original understanding of a transaction which contemplated Goldcorp's acquisition of 100% of the El Morro Project, which was to be accomplished by the acquisition of the New Gold Interest including the Right of First Refusal followed by an exercise of the Right of First Refusal. More importantly, this is not an evidentiary matter. It is a matter of the scope of the Transfer restrictions in the Shareholders Agreement. In the absence of demonstration of a "sham transaction", which has been addressed and rejected above, I do not think business short-hand for complicated business transactions is a reliable guide to such issue.

[500] In summary, the legal effects of the commitments of Datawave and Goldcorp in the Goldcorp Agreement are those determined above. These constitute the facts to which relevant provisions the Shareholders Agreement, as interpreted by the court, are applied to determine whether a breach has occurred. There is no room to interpret the legal effect of the Goldcorp Agreement as a whole under the laws of Ontario in the manner proposed by Barrick.

[501] There is a similar problem with a related argument raised by Barrick in respect of the loan arrangements contemplated by the Goldcorp Agreement.

[502] Barrick submits that the evidence does not support a finding that the Goldcorp Agreement constituted a *bona fide* financing arrangement. The thrust of Barrick's argument is that, from Goldcorp's perspective, the alleged loan was part of the overall transaction by which it acquired the Offered Interest and had none of the indicia of a commercial loan between third parties.

[503] I am of the opinion that whether or not the loan constituted a "financing arrangement" under the laws of Ontario is a semantical argument having no legal significance for the purposes of determining whether the Goldcorp Agreement gave rise to a prohibited Transfer. The loan arrangements under the Goldcorp Agreement are enforceable in accordance with their terms under the laws of Ontario. For purposes of determining the facts to which the provisions of the Shareholders Agreement are to be applied, the loan agreements are fully described by the Goldcorp Agreement ─ they are what they are. Whether they have any significance in this case depends upon whether the provisions of Article 10 of the Shareholders Agreement would treat such arrangements in a manner that gives rise to a breach thereunder.

The Interpretation of the Shareholders Agreement under the Laws of Chile

[504] Given the foregoing conclusion, this argument of Barrick turns on whether the provisions of Article 10 of the Shareholders Agreement require that, for purposes of determining whether a breach of the Shareholders Agreement has occurred, the Goldcorp Agreement should be viewed "as a whole" and, on that basis, constitutes a prohibited Transfer of Datawave's "right to purchase the Offered Interest" based on the theory proposed by Barrick that a future sale of Rights and Interests subject to a non-transferable option should be treated as a sale of the option itself.

[505] Barrick has not established that there is any general rule under Chilean law to the effect that a "multi-stage" agreement, as it characterizes the Goldcorp Agreement, should be interpreted under the laws of Chile as a whole, disregarding the individual steps or transactions and addressing only the final result. I have also concluded that Chilean law would not treat the Goldcorp Agreement as a sale or grant by Datawave to Goldcorp of Datawave's "right to purchase the Offered Interest". Accordingly, if the Goldcorp Agreement is to be treated in such a fashion for purposes of determining whether a prohibited Transfer has occurred, the basis for that approach must be found in the terms of the Shareholders Agreement itself.

[506] Barrick argues that the use of the term "indirect" in the definition of Transfer provides such a basis. This issue goes to the heart of Barrick's submissions because it brings together the two principal elements of Barrick's position. As mentioned, Barrick argues that the Goldcorp Agreement constituted an indirect sale of Datawave's "right to purchase the Offered Interest" in isolation from the New Gold Interest and therefore contravened section 10.2(1)(a). This is a matter of the contractual interpretation of the provisions of Article 10.

[507] In this context, the Canadian authorities relied upon by Barrick, particularly *GATX*, while not directly applicable, are illustrative. However, there is a fundamental difference between the

circumstances in *GATX* and in the present proceeding, that, in my opinion, compels a different conclusion.

[508] It is always possible to collapse a multi-stage transaction into a single-stage transaction described in terms of the before and after situations. It is not surprising that in simplifying the description of any transaction in this manner, it is possible to describe it in terms that will contravene particular provisions of a shareholders' agreement. A similar attempt to do so by characterizing the economic effect of the Goldcorp Transaction as a sale of the Right of First Refusal was rejected earlier in these Reasons.

[509] Such an approach is only justified, however, if the end result of the transaction offends the nature and purpose of the applicable provisions in the Shareholders Agreement. In the present case, reliance on the "indirect" language in the definition of "Transfer" would only be appropriate if the result of the Goldcorp Transaction were to deprive Xstrata Chile of the benefit of protections in its favour provided for in Article 10. Based on the analysis set out above, this was not the case. The structure of the Goldcorp Transaction addressed and provided for the protections to which a selling shareholder is entitled under Article 10. Characterizing a transaction structured in the form of the Goldcorp Transaction as an indirect conveyance of the Right of First Refusal or the Datawave Purchase Agreement would not further any purpose of the Transfer restrictions.

[510] Barrick argues for an interpretation of the Transfer restrictions that differs in several respects from the principles articulated above. This approach is, in turn, based on a fundamentally different view of the nature and extent of a selling shareholder's entitlement to the protections afforded by Article 10. It is based on the premise that it is necessary for the Transfer restrictions to operate in the manner proposed by Barrick to avoid a commercially absurd result.

[511] I have rejected this approach to the contractual interpretation of the Transfer restrictions for the following reasons. First, and most important, for the reasons set out above, I am not satisfied that the evidence supports the conclusion that, absent such an interpretation, the result would necessarily be a commercial absurdity. Second, setting aside the commercial absurdity argument, there is no reason for providing a right of first refusal in favour of an exiting shareholder. Put another way, what purpose of the Transfer restrictions, and in particular, of the right of first refusal, is furthered by requiring a sale of the New Gold Interest and a "mirror" right of first refusal? In this scenario, the only possible beneficiary would be the third party offeror who is not a party to the Shareholders Agreement. There is, however, no reason why the parties to the Shareholders Agreement would have intended to favour a third party to the Agreement over the remaining shareholder, unless it is accepted that the Goldcorp Transaction produces a result that would, if permitted, negate the utility of the right of first refusal as a mechanism by which a shareholder can exit the joint venture – the "commercial absurdity" argument rejected above.

[512] Accordingly, I conclude that the Shareholders Agreement does not mandate an approach to the Goldcorp Agreement, for purposes of assessing compliance with the Transfer restrictions,

that would collapse the two separate sale transactions therein such that the Goldcorp Agreement is considered to constitute a prohibited indirect Transfer of Datawave's right to purchase the Offered Interest.

The Involvement of DataSub

[513] I also do not think that there is any merit to the argument that DataSub was inserted into the structure of the Goldcorp Transaction to circumvent in some manner the Transfer restrictions in the Shareholders Agreement. I reject this argument for two reasons.

[514] First, Barrick has failed to demonstrate the precise means by which the use of DataSub had the result of circumventing the Transfer restrictions, apart from the indirect Transfer argument addressed above. Moreover, there are legitimate commercial reasons for the use of a Chilean subsidiary to hold the 70% Interest, including tax considerations that are set out later in these Reasons. Barrick itself intended to cause its own Chilean subsidiary to complete the purchase of the Barrick transaction. In addition, it provided a mechanism for extending the Xstrata Chile representations and warranties to Goldcorp after completion of the sale of the DataSub shares (but not before and therefore is not evidence for Barrick's position that the Goldcorp Transaction gave rise to a transaction directly between Xstrata Chile and Goldcorp as Barrick suggests). There is, therefore, no factual evidence to support Barrick's allegation that there was no legitimate commercial reason for inserting DataSub into the transaction.

[515] Second, and more fundamentally, the analysis of the Goldcorp Transaction and Datawave's compliance with the provisions of the Shareholders Agreement set out above does not depend upon the existence or involvement of DataSub in the Goldcorp Transaction. To be clear, I have concluded that the Goldcorp Agreement did not constitute, or give rise to, a prohibited Transfer under the Shareholders Agreement even if the involvement of DataSub is disregarded, that is, even if it is analyzed as a sale transaction to Datawave of the 70% Interest pursuant to the Datawave Purchase Agreement followed by a sale of the 70% Interest to Goldcorp/Goldcorp Tesoro conditional upon completion of the former transaction. The differentiation of the subject-matter under the Datawave Purchase Agreement and under the DataSub Share Purchase Agreement adds an additional dimension to the Goldcorp Transaction that reinforces the conclusion that Datawave did not engage in a prohibited Transfer to Goldcorp. It is not, however, necessary for the conclusions reached above.

Analysis of Particular Steps in the Goldcorp Agreement

[516] Barrick's alternative argument is that, independent of the alleged breach of the Transfer restrictions when the Goldcorp Agreement is addressed as a whole, two steps in the transaction described by the Goldcorp Agreement gave rise to independent breaches of the Shareholders Agreement with the result that completion of the Goldcorp Transaction contravened the Transfer restrictions of section 10.1 of the Shareholders Agreement. I think Barrick considers that these issues also involve allegations of attempted circumvention of the provisions of the Shareholders

Agreement, given their treatment in Barrick's written submissions. I find that neither allegation of breach of the Shareholders Agreement has merit.

[517] The first alleged breach pertains to Goldcorp's wire transfer directly to Xstrata Chile of the funds that Goldcorp Tesoro loaned to DataSub and DataSub used for the purpose of acquiring the Offered Interest. However, the fact that Goldcorp wired the loan proceeds directly to Xstrata Chile on behalf of DataSub is not sufficient to conclude that the actual purchaser of the Offered Interest was Goldcorp. Nor was it materially inconsistent with the mechanism provided in section 10.4(2) of the Shareholders Agreement. The wire transfer arrangements in the Goldcorp Agreement reflected common commercial practice to protect lenders. Indeed, as Ochagavia notes, section 4.1 of the CFLA contemplates similar arrangements in respect of advances made under that Agreement. This is therefore an argument of form over substance that I reject in the absence of any other evidence regarding the structure of the Goldcorp Transaction that supports the allegation. In my opinion, the payment arrangements neither constitute a breach of the provisions of section 10.4 of the Shareholders Agreement nor evidence of an intended circumvention of the Transfer restrictions in the manner described below.

[518] The second alleged breach pertains to the commitment in the Goldcorp Agreement to assign the Datawave Purchase Agreement from Datawave to DataSub.

[519] Barrick alleges that this gave rise to a breach of section 10.1 of the Shareholders Agreement. Barrick argues that, based on Morales' testimony, both section 16.1 of the Datawave Purchase Agreement and section 10.3 of the Shareholders Agreement applied to the assignment of the Datawave Purchase Agreement to DataSub. Barrick argues that the Goldcorp Agreement contemplated that DataSub, when incorporated, would not constitute a wholly-owned subsidiary of Datawave for purposes of section 16.1 and, as mentioned, would not satisfy the requirements of an Affiliate of Datawave for purposes of section 10.3 of the Shareholders Agreement.

[520] The defendants differ on their approach to this issue. Xstrata Chile maintains that DataSub was at all relevant times an Affiliate of Datawave and that the assignment of the Datawave Purchase Agreement to DataSub satisfied section 10.3 of the Shareholders Agreement. New Gold and Goldcorp, while initially taking this position, appear to place more reliance on the position that the governing assignment provision for the Datawave Purchase Agreement was section 16.1 of that Agreement. They say this provision was satisfied because, whether or not DataSub was also an Affiliate of Datawave, it was clearly a wholly-owned subsidiary of Datawave.

[521] I have concluded above that the Goldcorp Agreement did not contemplate that DataSub would be established as an Affiliate of Goldcorp before the Offered Interest was acquired and DataSub's shares were sold to Goldcorp Tesoro. For the reasons set out above, I am satisfied that DataSub was an Affiliate of Datawave at the time it acquired the Datawave Purchase Agreement and at the time it acquired the Offered Interest.

[522] In addition, insofar as it is also relevant, I conclude that DataSub was a "wholly-owned" subsidiary" of Datawave at such time for the purpose of section 16.1 of the Datawave Purchase Agreement. On this issue, I accept Barros' evidence that, under Chilean law, the concept of a wholly-owned subsidiary is a matter of ownership alone. This is consistent with the fact that the concept is a recent import from North American agreements where the concept is typically regarded as addressing *de jure* rather than *de facto* control. Further, a company that is otherwise a wholly-owned subsidiary may be subject to contractual constraints in favour of a third party, such as, for example, a financial institution, without losing that status. Barros was clear in his evidence to this effect. It also accords with commercial reality. While Morales testified that, in his opinion, a wholly-owned subsidiary connoted "ownership, benefit and control", he provided no authority for this proposition. For these reasons, I find that DataSub satisfied the definition of a "wholly-owned subsidiary" for the purposes of section 16.1 of the DataSub Purchase Agreement.

[523] Given these conclusions, it is not necessary to address the issue of which provision or provisions governed the assignment of the Datawave Purchase Agreement to DataSub. The assignment of the Datawave Purchase Agreement to DataSub satisfied both section 10.3 of the Shareholders Agreement and section 16.1 of the Datawave Purchase Agreement. Therefore, the assignment did not give rise to a breach of the Shareholders Agreement.

Alleged Breach of Good Faith Obligations Under the El Morro Shareholders Agreement

[524] As mentioned above, Datawave was required to exercise the Right of First Refusal in accordance with its good faith obligations under Chilean law. Barrick says this required Datawave to exercise the Right of First Refusal in accordance with the common business practice and understanding regarding rights of first refusal. Barrick argues that Datawave's exercise of the Right of First Refusal did not respect this requirement and therefore breached its good faith obligations to Xstrata Chile, even if the contractual provisions of the Shareholders Agreement did not prevent or prohibit pre-sales of the 70% Interest by Datawave prior to the exercise of the Right of First Refusal.

[525] There is a threshold difficulty with this argument. As mentioned above, the good faith obligations of Datawave under Chilean law do not create or impose obligations where the law or the Shareholders Agreement did not otherwise do so. To the extent that Barrick's submissions in this section rely on such good faith obligations for this purpose, given the determination above regarding the operation of the Transfer restrictions, including in particular article 10.4, there is no evidence to support such a finding.

[526] In addition, for completeness, it should be noted that Barrick did not seek or receive any assurance or representation from New Gold/Datawave or from Xstrata Chile regarding the manner in which the provisions of Article 10 were interpreted by the parties to the Shareholders Agreement, the manner in which Datawave was entitled to exercise the Right of First Refusal and resell the 70% Interest, or the nature of any restrictions or limitations on Datawave's

exercise of the Right of First Refusal. There is, therefore, no basis for the existence of good faith obligations based on misrepresentations made by any of the defendants.

[527] For these reasons, I find that, under the laws of Chile, there is no basis for a finding that Datawave breached its obligations of good faith by exercising the Right of First Refusal in a manner contrary to common business practice and/or understanding regarding rights of first refusal.

[528] I propose, however, to address the two principal submissions of Barrick in this regard because I am also of the opinion that, even if such good faith obligations could operate, Barrick has failed to establish the evidence that would support a finding that Datawave did, in fact, breach a common business practice or understanding. I will also address a related factual defence asserted by the defendants that, to the extent it is relevant, Datawave has established that it exercised the Right of First Refusal for its "benefit, account and risk".

Common Business Practice Pertaining to the Operation of Rights of First Refusal

[529] Barrick submits that Datawave exercised the Right of First Refusal for a purpose that is contrary to common business practice and, as such, breached its good faith obligations, even if it did not breach the strict wording of the Shareholders Agreement. It says that the common business practice and understanding in respect of rights of first refusal is that a non-selling joint venture partner must first acquire, or "consolidate", the selling joint venture partner's interest for its own account before it can enter into an agreement to sell some or all of that interest to a third party. To be clear, while similar to the issues raised regarding the contractual interpretation of section 10.4, this is a separate argument to the effect that Datawave breached its obligations of good faith in exercising the Right of First Refusal in a manner that was contrary to common business practice and understanding regarding rights of first refusal.

[530] There is no evidence specific to the common business practice and understanding of the operation of rights of first refusal under the laws of Chile, whether related to the performance of obligations of good faith or otherwise, apart from the personal views of the Chilean legal experts and disputed testimony concerning a recent Chilean corporate transaction involving a right of first offer. In this section, I therefore consider the evidence regarding (1) the purposes for which rights of first refusal are commonly exercised in the mining industry; and (2) the economic effects of the exercise of a right of first refusal.

[531] The issue of the purpose of a right of first refusal was addressed in the testimony of both the lay witnesses and the Chilean expert witnesses. I propose to summarize the testimony of certain of the witnesses to provide an indication of the divergence of both opinion and perspective among the witnesses and the parties.

The Testimony of Certain Witnesses

[532] Morales testified that, in his opinion, a right of first refusal was designed to allow a selling shareholder to exit a company or a joint venture and achieve the best possible price.

However, it should be pointed out that none of the other Barrick witnesses suggested this purpose for a right of first refusal. I think it is manifestly incorrect. In fact, it is contradicted by Regent's testimony discussed below.

[533] In Regent's view, the purpose of a right of first refusal was to allow a joint venture party, implicitly the majority party, to consolidate its interest in a mining project after the commencement of production, when presumably the minority partner would want to monetize its position to fund new exploration activities. As mentioned, Regent also testified that a right in favour of a non-selling shareholder to exercise a right of first refusal and to re-sell a departing shareholder's interest would result in a "chilling effect" on the selling shareholder's ability to maximize the value of its interest.

[534] Baker did not testify regarding the purpose of a right of first refusal. Instead, he testified as to his general understanding of the operation of rights of first refusal. Baker says that he understood that Datawave could exercise the Right of First Refusal if it found a partner to invest sufficient funds in Datawave, by a loan or an equity investment, to permit the exercise. He understood that Datawave could resell any portion of the project, but only after it had consolidated 100% of the interests in the project. In his view, the purchase of the Offered Interest and the sale of a portion of the consolidated interest, whether 70% or otherwise, had to be undertaken in two separate transactions, without any clarity as to the time required between the two transactions. Baker did not, however, base his understanding on any specific language of the Shareholders Agreement.

[535] Jeannes testified that the purpose of a right of first refusal was to give the non-selling party the opportunity to acquire the departing party's interest to prevent an undesirable stranger from entering the joint venture. As such, he considered that a junior joint venture partner was usually more interested in a right of first refusal inasmuch as the asset would be relatively more significant to a junior mining company and, accordingly, the identify of its joint venture partner and its development plans for the asset would be relatively more important to it than to senior mining companies.

[536] Jeannes also testified that, in his view, a right of first refusal prevents a departing joint venture party from maximizing the value of its interest. In the first instance, it prevents an auction from developing between the third party and the non-selling joint venture partner. More generally, he considered that parties wishing to maximize the value of an asset would not put any restrictions on the ability to sell that asset. He also testified that parties can draft provisions in a joint venture agreement to avoid the negative effect on price created by a right of first refusal. He referred specifically to a "right of first offer" as an alternative to a right of first refusal and to an exercise price for the right of first refusal in excess of the third party offer price to fund a "break fee" that could be paid to an unsuccessful third party.

Conclusions Regarding the Manner in Which Rights of First Refusal are Commonly Exercised

[537] From the foregoing, I draw the following conclusions regarding the nature and purpose, and the economic effects, of rights of first refusal in the mining industry.

[538] First, the purpose for exercising a right of first refusal, and the circumstances of exercise, may well differ as between senior and junior mining companies.

[539] Senior mining companies may consider the principal purpose to be to allow them to consolidate 100% of the interests in a producing asset after development has been completed, as Barrick asserts. As addressed elsewhere, there may also be circumstances in which a majority partner may have an interest in preventing the introduction of an undesirable minority joint venture party in substitution for an exiting party.

[540] That is not, however, exhaustive of the purposes for which a right of first refusal may be exercised, insofar as it ignores the reality that a junior mining company or an intermediate producer may have very different objectives. These parties typically regard the principal purpose of a right of first refusal to be to give them control over the identity of a new joint venture partner if the proposed purchaser is unacceptable to it as a majority partner. As the present circumstances illustrate, from the perspective of a junior or intermediate mining company, whose interests lie in seeing development occur as quickly as possible on the most attractive financial terms possible to it, some prospective majority purchasers are more attractive than others.

[541] There is nothing in the concept of a right of first refusal that prevents the exercise of a right of first refusal for any of the purposes described above. A central feature of a right of first refusal is the departing party's decision that it is prepared to sell its interest at a fixed price. Provided that the terms and conditions of the departing party's proposed sale, including but not limited to price, and the contractual provisions of the right of first refusal itself, are respected in the exercise of a right of first refusal, I do not see any basis in the concept of a right of first refusal for restricting the purposes for which a remaining shareholder may exercise a right of first refusal in its favour.

[542] Instead, I think it is more important that any interpretation of right of first refusal provisions, and of the scope of any good faith obligations pertaining to the exercise of such provisions, reflect the variety of purposes for which such rights may be used. Accordingly, in the absence of contractual provisions that contemplate restrictions on either the purposes for which a right of first refusal may be exercised, or the manner of exercise, such provisions and good faith obligations should be interpreted with a view to permitting the exercise of any such right of first refusal for any such purposes.

[543] Second, there are two economic effects of a right of first refusal. The first economic effect is to guarantee a price to the selling party, being the amount offered by the third party. Accordingly, in terms of the outcome, the selling party should be neutral as between an eventual

purchase by the third party and a purchase by the non-selling party, apart from the "commercial absurdity" argument that has been rejected. The other economic effect is to potentially inhibit the ability of the selling party to maximize the value of its interest. The extent to which this will actually occur in any given situation will, however, depend upon a number of factors. A few possibilities have been suggested by the witnesses in this case. One possibility is that a right of first refusal may prevent an auction between the third party offeror and a non-selling joint venture partner who is able to purchase the selling party's interest. Another possibility is that the risk of loss of the transaction to the non-selling joint venture partner may deter potential purchasers.

[544] Third, as a related matter, there is no scenario under which a right of first refusal is directed toward maximizing the value of a selling party's interest. As a constraint on the freedom of such party to sell its interest in the manner it chooses, a right of first refusal can only reduce the value of the departing party's interest. Being a creation of the contract between joint venture parties rather than a statutory creation, however, the parties can also address, although probably not eliminate entirely, the risk that the seller's interest will not be maximized, among other things, by introducing contractual arrangements or by agreeing to a joint sale of 100% of the interests in the asset.

[545] Fourth, to the extent that one of the purposes of a right of first refusal is to enable a remaining shareholder to have some ability to prevent imposition of an unwanted shareholder, there is nothing inconsistent with the evidence of the nature or use of rights of first refusal to allow a pre-arranged sale to a more desirable party, provided the selling shareholder is not prejudiced and receives the benefit of the protections under the shareholder agreement to which it is entitled. Put another way, there is no obvious principle that distinguishes between "consolidation" and "pre-sales" based on the nature and purpose, or the economic effects, of rights of first refusal.

[546] Fifth, while it is more likely that a majority joint venture partner will have the financial resources to exercise a right of first refusal than a minority partner, when the minority partner is a junior mining company, there are many situations in which that is not the case. Among other circumstances, rights of first refusal clauses are also present in joint venture agreements between two joint venture partners that each possess the financial capacity to exercise the right of first refusal. Further, the financial capacity of joint venture partners can change over the life of a joint venture. A partner that lacked the financial capacity to acquire its partner's interest at the time of formation of the joint venture may acquire the means to exercise a right of first refusal later when it arises. Accordingly, there is no implicit assumption regarding the financial circumstances of the joint venture parties than can inform a common business understanding regarding the exercise of rights of first refusal.

[547] Sixth, similarly, there is nothing in the foregoing discussion of rights of first refusal that suggests that there is any common practice or understanding to the effect that third parties have any control or other rights in respect of the determination of the identity of the new shareholder or joint venture partner. Provided the selling shareholder receives the purchase price bargained

for in the third party agreement on the terms and conditions provided for in that agreement, it has no right to determine the identity of the ultimate purchaser. There is no obvious principle that would grant such a right to the third party who derives whatever rights it has through its contract with the selling shareholder.

[548] Based on the foregoing, I conclude that there is no evidence upon which the court can find that Datawave exercised the Right of First Refusal in a manner that was contrary to common business practice. There is nothing in either the purposes for which a right of first refusal may be exercised or in the economic effects of the exercise of a right of first refusal that suggests or implies any restrictions of the nature proposed by Barrick in this action. Accordingly, there is no basis for a finding that Datawave breached its good faith obligations to Xstrata Chile in entering into, and implementing, the Goldcorp Agreement.

Canadian Case Law Relied on by Barrick

[549] Barrick also submits that, in the absence of Chilean authorities on this issue, Datawave's good faith obligations should be informed by the approach of Canadian courts to the customary operation of rights of first refusal. While such decisions are not determinative of such obligations, it is Barrick's position that they should be persuasive as being reflective of a common understanding regarding the purpose of rights of refusal.

[550] The principal decision relied upon by Barrick is *GATX*, in which rights of first refusal were described in the following manner at paras. 36 and 37:

> The general purpose of this Right of First Refusal, it seems to me, is evident. It is to protect the parties' respective interests by ensuring that if one party decides to dispose of all or a portion of its shares to a third party the other party has the pre-emptive right to acquire those shares first, on the same terms and conditions, including price, as that being offered by the third party. In this way, a party is protected against having an unwanted co-shareholder foisted upon it.
>
> This interpretation, which I believe to be clear from the face of the document itself, is consistent with the legal characteristics attributed to a right of first refusal by the Supreme Court of Canada. It is also consistent with the views of the parties here, as expressed in the evidence.

Barrick submits that this statement demonstrates that the nature and purpose of a right of first refusal is limited to allowing a non-selling joint venture partner to pre-empt a new partner by acquiring "full ownership" of the departing joint venture partner.

[551] I think it is clear, however, that *GATX*, and the other Canadian decisions to which Barrick points, do not purport to be a complete description of the nature and purposes of rights of first refusal. They are specific to the facts in the particular decisions. They therefore cannot be relied upon as judicial guidance as to the existence of a common business understanding or practice

regarding the only purposes for which, and the only manner in which, rights of first refusal may be exercised.

[552] *GATX*, for example, did not involve the acquisition of a departing joint venture party's interest, let alone a resale. While the passage relied on by Barrick confirms that a right of first refusal permits a non-selling shareholder to avoid imposition of an unwanted new partner by acquiring the departing partner's interest, it does not address in any manner the issue of whether a non-selling partner can sell the selling partner's interest before completion of its acquisition of that interest.

[553] Accordingly, I conclude that the Canadian law relied upon by Barrick does not support the conclusion that a joint venture party proposing to sell an interest in the joint venture to be acquired by the exercise of a right of first refusal cannot enter into an agreement for the sale of that interest prior to the exercise of the right of first refusal. In my opinion, there is nothing in the case law relied upon by Barrick that is inconsistent with the conclusions set out above regarding the purposes for which, and the manner in which, rights of first refusal may be exercised.

The Datawave Exercise of the Right of First Refusal Was Not For its Benefit, Account and Risk

[554] I have previously determined that the Shareholders Agreement did not require that a shareholder must exercise a right of first refusal for its own "benefit, account and risk". As mentioned, Morales was of the opinion that a Chilean court would read this restriction into section 10.4 of the Shareholders Agreement based on Datawave's good faith obligations. For the sake of completeness, this section addresses the defendants' alternative argument that, even if section 10.4 were interpreted in the manner proposed by Morales, or Datawave's good faith obligations imposed such a requirement on its exercise of the Right of First Refusal, New Gold/Datawave complied with its obligations in this respect.

[555] This is a factual issue which Morales formulates for the court in two different ways.

[556] First, in the Morales Report, Morales says that, for all intents and purposes, Datawave was actually carrying out Goldcorp's desire (will or volition) to exercise the Right of First Refusal to purchase the Offered Interest. In this sense, according to Morales, Datawave had effectively ceased to be the "other Shareholder" acting in its own right, account, benefit and risk for the purpose of exercising the Right of First Refusal. If this submission were established, it would be unnecessary to resort to a breach of Xstrata Chile's good faith obligations to ground a Barrick claim. Such a determination would probably support a finding of a prohibited Transfer on the basis of one of the other theories proposed by Barrick.

[557] However, there is no basis in the evidence for such a finding. In particular, as addressed elsewhere in these Reasons, there is no basis for a finding that Datawave sold Goldcorp the Right

of First Refusal, that it acted as an agent for Goldcorp in exercising the Right of First Refusal, or that it held the Right of First Refusal as the trustee for Goldcorp.

[558] Elsewhere in the Morales Report and in his oral testimony, Morales defined the question for the court to be the following: did Datawave notify Xstrata Chile of its (i.e., Datawave's) desire or willingness to purchase the Offered Interest and therefore complete the transaction of purchase and sale acting its own right, for its own benefit, account and risk? He also expresses the view that the payment arrangements in the Goldcorp Transaction demonstrate that the exercise of the Right of First Refusal was for the benefit, account and risk of Goldcorp.

[559] This raises a factual issue pertaining to the nature of the legal rights and obligations created by the Goldcorp Agreement under the laws of Ontario. If it were necessary to address this factual issue, I would find, contrary to Morales, that Datawave satisfied this requirement. When Datawave exercised the Right of First Refusal, it assumed the risk that Goldcorp would not complete the Goldcorp Transaction. Further, the exercise of the Right of First Refusal was clearly for the benefit of Datawave in the form of the consideration received for the 70% Interest upon its sale to Goldcorp. On this basis, I agree with the defendants that the structure of the Goldcorp Transaction, as set out in the Goldcorp Agreement, satisfied the "benefit, account and risk" test that Morales believes should be understood to govern the exercise of the right of first refusal in section 10.4.

[560] Based on the foregoing, I conclude that, even if one were to accept Morales' reading of section 10.4 to require that the "other Shareholder" must exercise the right of first refusal for its "benefit, account and risk", Barrick has failed to demonstrate that Datawave breached the provisions of section 10.4 or its good faith obligations to Xstrata Chile in the manner of its exercise of the Right of First Refusal.

[561] For the sake of completeness, Barrick also raised, but did not rely principally upon, an argument of agency under the laws of Chile. Barrick argued that the Goldcorp Agreement has all of the indicia of an agency relationship under Chilean law. Insofar as this argument ultimately depends upon a finding of an agency relationship by virtue of the provisions of the Goldcorp Agreement, this is a matter of Ontario law that has been addressed above. Insofar as Chilean law is somehow relevant, the evidence does not support a finding that, under Chilean law, the relationship between Goldcorp and Datawave would be characterized as that of principal and agent. Morales does not express his "account, benefit and risk" principle as creating an agency relationship. Barros and Ochagavia both testified that the requirements of agency were not established under Chilean law. I therefore accept their evidence on this issue.

Alleged Breach of the Carried Funding Loan Agreement

[562] Barrick also alleges that Datawave breached the CFLA by entering into the Goldcorp Agreement. In doing so, Barrick says that Xstrata Chile breached paragraphs 8.6(e) and 8.6(i) of the Barrick Agreement, which obligated Xstrata Chile not to waive or release any breaches of the CFLA or modify or amend the CFLA. Barrick makes two submissions.

[563] First, it says that, if the court finds that a breach occurred under the Shareholders Agreement that resulted in a Transfer of Rights and Interests in contravention of the provisions of Article 10, such Transfer would also constitute a "Default Event" under paragraph 12.6(c) of the CFLA. That provision establishes a Default Event if Datawave or Finco transferred all or a portion of their Rights and Interests to a non-Affiliate. In view of the determination that DataSub remained an Affiliate of Datawave until the sale of the DataSub shares to Goldcorp, the assignment of the Datawave Purchase Agreement to DataSub did not constitute a Transfer that contravened paragraph 12.6(c).

[564] Second, Barrick argues that the Goldcorp Agreement created a Lien (as defined in the CFLA) in favour of Goldcorp on Datawave's Collateral (as defined therein) which was not a Permitted Encumbrance (as defined therein). It says that the obligation in paragraph 2.1.3(e) of the Goldcorp Agreement to pledge the shares of DataSub to secure Datawave's obligations in respect of the $463 Million Loan required the creation of Liens that were not subordinate to the Liens granted in favour of Xstrata Chile pursuant to the Loan Documents (as defined therein) and therefore were not Permitted Encumbrances under the CFLA.

[565] Barrick says that the creation of these Liens resulted in a Default Event pursuant to paragraph 12.1(g) of the CFLA, which prohibited any Liens on any part of the Collateral, other than Liens in favour of Xstrata and Permitted Encumbrances. Barrick further alleges that Xstrata Chile became entitled to terminate the CFLA, to declare all amounts outstanding under the CFLA to be due and payable, and to demand repayment of all amounts owing thereunder by Finco. Xstrata Chile did none of these things in breach of its obligations to Barrick.

[566] For this purpose, "Collateral" includes the Rights and Interests of Datawave and Finco, the rights of Finco in respect of any Finco Loans made to the Company, and the shares and any other securities in Finco. Goldcorp argues that the shares of DataSub were not Rights or Interests under the Shareholders Agreement or the CFLA and, as such, did not constitute "Collateral" for the purposes of the CFLA. Therefore, Goldcorp submits that no Event Default occurred under paragraph 12.1(g) of the CFLA.

[567] For the following four reasons, I am of the opinion that the pledge of shares of DataSub did not give rise to a Default Event under the CFLA as a result of the creation of a Lien over the assets of DataSub.

[568] First, the Goldcorp Agreement did not, by itself, create any pledge or, for purposes of the CFLA, any Lien in either the shares or assets of DataSub. The Pledge Agreements were created by documents executed after the Barrick Agreement terminated. It should also be noted that, despite the reference to a pledge of the assets of DataSub in paragraph 2.1.3(e) of the Goldcorp Agreement, DataSub did not execute a pledge of this description. The only pledge agreements granted were the Pledge Agreements delivered by Datawave, which pertained to the DataSub shares.

[569] Second, and most important, I am not satisfied that the Datawave Purchase Agreement constituted "Rights and Interests" for the purposes of the definition of "Collateral" in the CFLA, despite language that is capable of such an interpretation. The "Loan Documents" in the CFLA are all directed toward providing Xstrata Chile with security over all securities of the Company and over all distributions from the Company, in whatever form they may be made. The purpose of the covenants in sections 8.3 and 9.1 of the CFLA, despite broader language, is clearly to maintain a first priority over such assets. Inclusion of Datawave's interest in the Datawave Purchase Agreement in the Collateral does not further protect Xstrata Chile's security over such assets and distributions.

[570] Third, as a related matter, it is certainly arguable that any security interest in the DataSub shares constituted by the Pledge Agreements in fact ranks subsequent to any interest that Xstrata Chile may have had in respect of the Datawave Purchase Agreement. As mentioned, DataSub did not grant Goldcorp Tesoro any security interest, by pledge or otherwise, over its assets. The Pledge Agreements granted Goldcorp Tesoro an interest in the assets of DataSub that was therefore subordinate to any claim that Xstrata Chile might have against DataSub for breach of the Datawave Purchase Agreement.

[571] Lastly, and in any event, any breach of the Shareholders Agreement is at best a highly technical one for several reasons. The Pledge Agreements were in existence for a very short period of time. But for the mechanics of transferring the funds in respect of the $50 Million Loan, the Pledge Agreements could have been executed substantially concurrently with the completion of the Datawave Purchase Agreement. In addition, despite the existence of the Pledge Agreements, DataSub had no equity value at any time prior to the closing of the Datawave Purchase Agreement. Further, there is no basis for finding a substantive default given the determination that the Goldcorp Agreement did not constitute, or give rise to, a prohibited Transfer that would result in a companion Default Event under the CFLA. Lastly, as Peña testified, the substantive commitments in the Goldcorp Agreement do not constitute, or give rise to, rights *in rem* over the Collateral and therefore do not constitute a Lien for purposes of the CFLA.

Alleged Illicit Clause

[572] Barrick also alleges that the Datawave notice of its desire to acquire the Offered Interest on January 7, 2010 was unlawful and therefore of no force and effect. Barrick submits that, accordingly, Datawave's exercise of the Right of First Refusal, or the completion of the Goldcorp Transaction, can be invalidated pursuant to Article 1683 of the Chilean Code as an "act affected with nullity".

[573] There are a number of grounds upon which an act or contract may be nullified under this Article of the Chilean Code. Barrick submits that the requirements for a declaration of nullity are satisfied in this case on the grounds of "illicit cause". Article 1467 of the Chilean Code addresses the concept of illicit cause in the following manner: "Cause is the motive that induces

to the act or contract and illicit cause is the one prohibited by law, or contrary to *bonos mores* or public order".

[574] *Bonos mores* is a concept that is not defined under Chilean law even if it is often used. Ochagavia referred to the definition proposed by a leading Chilean author, Alessandri, who describes it as "rules of external human behavior which, being in conformity with morality, are accepted by the general consciousness of a nation in a determinate time" or "traditional and common behavior of the members of a society pursuant to the prevailing morality". Ochagavia also refers to the definition proposed by another leading author, Claro, who states that *bonos mores* are "the rules of social morality considered being fundamental for the ordering of society".

[575] Ochagavia testified that it would be open to a Chilean court to grant a declaration of nullity if it found that the purpose of the Datawave Purchase Agreement, and associated agreements, was to cause loss or harm to Barrick, and that such purpose is contrary to *bonos mores* or public order under Chilean law. Barrick says that Datawave delivered the notice with the intended purpose and effect of causing loss or harm to Barrick in the form of depriving Barrick of the Xstrata Interest and of interfering with and undermining the rights and interests of Barrick under the Barrick Agreement. On this basis, it says that delivery of the notice was "essentially contrary to the concepts of *bonos mores* or public order".

[576] I am satisfied that Datawave's exercise of the Right of First Refusal is not subject to invalidation under Article 1683 of the Chilean Code as an "act affected with nullity" for two interrelated reasons.

[577] First, to succeed on this ground, Barrick must demonstrate that a Chilean court would invalidate the impugned actions based on a finding of an action or a contract contrary to *bonos mores* or public order and therefore constituting an illicit cause. There is no evidence before the court to support a conclusion that the mere exercise of a right of first refusal, which by definition must deprive a third party of the benefits of its contract with a selling joint venture party, is an action that is contrary to *bonos mores* under the laws of Chile.

[578] There is, in fact, some disagreement among the experts as to the existence of this principle of Chilean law, as evidenced by the statements in the Peña Report at paragraph 357 and the Barros Report at paragraph 223(c). In any event, however, none of Ochagavia, Peña or Barros suggested that the principle was operative in the present circumstances and Peña expressly stated that the requirements for a declaration of nullity were not present. Ochagavia further testified that, while in his opinion, a Chilean court could apply the doctrine in the present circumstances as a matter of law, he had not found any instance in which a Chilean court had done so.

[579] Second, the only evidence in support of Barrick's position was provided by Morales who acknowledged that his view was debatable and, more significantly, expressed his conclusion to be based on an understanding that the Goldcorp Agreement was "meant only to derail the Xstrata

Barrick sale process". However, the record does not support Barrick's position that the purpose of the Goldcorp Agreement, or of Datawave's exercise of the Right of First Refusal, was solely to cause loss or harm to Barrick.

[580] There is no evidence that either New Gold's or Goldcorp's "intended purpose" in entering into the Goldcorp Agreement was to cause harm to Barrick. The Goldcorp Transaction was a negotiated agreement between two commercial entitles that had benefits to both New Gold/Datawave and Goldcorp. It was inevitable in the context of a right of first refusal that Datawave's exercise would result in Barrick losing the benefit of the Barrick Agreement. However, while that was a consequence of Datawave's actions, it was not a purpose, let alone the sole purpose. The intended purpose was to realize the benefits of the Goldcorp Transaction to each of them respectively. Furthermore, I think the determination above that the Goldcorp Agreement did not give rise to any breach of the Shareholders Agreement necessarily excludes the possibility of a finding that the sole purpose of that Agreement, or of Datawave's exercise of the Right of First Refusal, was to cause loss or harm to Barrick.

[581] Based on the foregoing, I do not accept Barrick's submission that a Chilean court would invalidate the Goldcorp Agreement under Article 1683 of the Chilean Code on the basis that the Agreement constituted, or gave rise to, an "act affected with nullity" by virtue of being contrary to *bonos mores* under the laws of Chile.

[582] Further, I would observe that a declaration of nullity would appear to require a determination that the Goldcorp Agreement, or Datawave's exercise of the Right of First Refusal, breached the Shareholders Agreement. Accordingly, the significance of this allegation, outside the context of remedies, is unclear. I am not certain that this claim constitutes an independent actionable claim by Barrick.

Conclusion Regarding Barrick's Claims Based on a Failure to Complete the Barrick Transaction

[583] Based on the foregoing, the Barrick claims against Xstrata Chile for breach of contract relating to its failure to complete the Barrick Transaction are dismissed. Barrick has failed to demonstrate that the Datawave exercise of the Right of First Refusal was invalid by virtue of a breach of the Shareholders Agreement. Accordingly, it cannot demonstrate that the Conditions Precedent were satisfied on January 7, 2010 and, therefore, it cannot demonstrate that Xstrata Chile was obligated to complete the Barrick Transaction. As Xstrata Chile terminated the Barrick Agreement effective January 31, 2010, its obligation to complete the Barrick Transaction terminated, at the latest, on that date.

PART IIB – BARRICK'S REMAINING CLAIMS

[584] In this Part of the Reasons, I propose to deal with the remainder of Barrick's claims against the defendants. These comprise in order: (1) additional claims against Xstrata Chile for breach of contract; (2) tortious claims against all of the defendants for inducing breach of

contract, interference with contractual relations, and conspiracy; (3) common law claims against New Gold and Goldcorp for breach of confidence involving the misuse of confidential information; and (4) an unjust enrichment claim against Goldcorp.

The Barrick Claim Against Xstrata Chile Based on Breaches of Certain Obligations Under the Barrick Agreement

[585] Barrick submits that Xstrata Chile breached certain other obligations under the Barrick Agreement both before and after Datawave's exercise of the Right of First Refusal. I will first set out the obligations relied upon by Barrick and will then address the alleged breaches by Xstrata Chile. For clarity, these claims are in addition to the claims for breach of contract based on Xstrata Chile's failure to complete the Barrick Transaction.

Principles of Chilean Law Governing the Performance of Contractual Obligations

[586] There are two principles of Chilean law that govern the operation of contractual obligations that are relevant to the nature and extent of the liability of Xstrata Chile under the Barrick Agreement.

The "Reasonable Standard"

[587] Under Chilean law, Xstrata Chile was obligated to perform its obligations under the Barrick Agreement according to the standard of the "Good Family Father". This standard required Xstrata Chile to act with the ordinary or common diligence that a person would use in managing his or her own business affairs. Both Xstrata Chile and Barrick agree that this standard equates to the "reasonable person" standard under Ontario law. In these Reasons, I will refer to it as the "reasonable" standard.

[588] I am also satisfied that, under Chilean law, contractual obligations are obligations of "means" rather than obligations of "result". As Ochagavia states in his report, under an obligation of "means", the obligated party is required to perform in a diligent manner to satisfy the relevant covenant but "there is no actual and legally enforceable commitment to obtain the result". In other words, in respect of obligations of means, there can be no strict liability unless the parties expressly agree otherwise. The obligated party commits only to do what could reasonably be expected of it, subject to the applicable standard of care, in order to obtain that result. It is not the failure to obtain the result but negligence, i.e., the failure to do what could reasonably be expected given the applicable covenant, that constitutes non-performance. This principle of Chilean law has two main consequences for this action.

[589] First, the covenants of Xstrata Chile, upon which Barrick bases its claims for breach of contract, are obligations of means. Therefore, to obtain a damage award, Barrick must demonstrate not only a breach of the relevant covenants but also negligent performance of such covenants by Xstrata Chile.

[590] Second, because contractual obligations are obligations of means, damages may only be awarded if a court finds that a party has breached an obligation in a negligent manner. However, a court may award specific performance where it is satisfied that a covenant has not been performed by one of the parties, even if negligence has not been established.

Good Faith Obligations

[591] Under Chilean law, as mentioned above, Xstrata Chile was obligated to perform its obligations under the Agreement in good faith. Chilean law presumes that parties to a contract are acting in good faith and, unless the law expressly provides for the opposite presumption, requires that bad faith be proven. There are, however, four important qualifications regarding the operation of good faith under Chilean law.

[592] First, as mentioned, good faith is not the source of material obligations that have not been negotiated and accepted by the parties. Rather, as Ochagavia stated in his report, to the extent good faith gives rise to unexpressed duties, it imposes only those duties that can be reasonably expected in order to fulfill the objectives of the contract. Second, good faith obligations are reciprocal. Third, good faith does not alter the applicable standard of diligence required under Chilean law in the performance of any particular contract ─ in this case, the reasonable standard. Lastly, good faith does not prevent a party from acting in its own legitimate self-interest. It does not subject one party completely to the interests of the other such that it must disregard its own self-interest.

The Breaches Alleged by Barrick

[593] Barrick alleges breaches of Xstrata Chile's obligations to it based on two general grounds.

[594] First, pursuant to the Shareholders Agreement, Xstrata Chile was obligated not waive or acquiesce in any breaches of the Shareholders Agreement, including in particular the Transfer restrictions in section 10.1 or the CFLA, to the extent that any such breach might cause a failure of the Conditions Precedent in the Barrick Agreement. For this purpose, Barrick relies in particular on section 4.2 of the Barrick Agreement ─ the obligation to use reasonable endeavors to obtain the satisfaction of the Conditions Precedent ─ in combination with the obligations in paragraphs 8.6(e), (f), (g) and (i), of which the most important are the obligations not to waive, release or assign any Claims (paragraph 8.6(e)) and not to modify, amend or terminate any Loan Document (which, as defined therein, includes the Shareholders Agreement) (paragraph 8.6(g)).

[595] Barrick says that, given this obligation, the standard of the Good Family Father ─ the reasonable standard ─ required Xstrata Chile to investigate whether the Datawave exercise of the Right of First Refusal was valid. Barrick says that Xstrata Chile either knew, or reasonably ought to have known, that the exercise of the Right of First Refusal was invalid. On this basis, it says Xstrata Chile breached its obligations to Barrick either because it acted negligently in acquiescing in the Datawave exercise of the Right of First Refusal when it knew the exercise to

be invalid, or in failing to conduct a reasonable investigation that would have resulted in such knowledge. Barrick attributes Xstrata Chile's actions, which it characterizes as careless and self-interested, to the value of its interest in the BHP Royalty that it retained as a result of completing the Goldcorp Transaction

[596] Second, Barrick says that Xstrata Chile's good faith obligations informed several other duties directed toward satisfying the Conditions Precedent and, thereby, completing the Barrick Transaction. Xstrata Chile was required to keep Barrick informed at all times of any circumstance that might create the risk that one or more of the Conditions Precedent might fail. It should be noted that these obligations also flow from the specific wording in sections 4.2 and 8.6 (paragraphs (e) and (g) in particular) of the Barrick Agreement. In addition, Xstrata Chile was obligated to forego taking actions that would frustrate completion of the Barrick Transaction and/or assist the Datawave exercise of the Right of First Refusal.

[597] I would note that Barrick also relies on the further assurances clause in section 17.11 of the Barrick Agreement to support each of the foregoing claims. Under both Chilean law and Ontario law, this provision does not create material obligations that are relevant to the foregoing issues. Accordingly, it has been disregarded in reaching the conclusions below.

Analysis of Barrick's Allegations of Breaches of the Barrick Agreement

[598] Barrick's specific claims are addressed in this section under two categories: (1) breaches that occurred in respect of Xstrata Chile's acquiescence in the Datawave exercise of the Right of First Refusal, which are based on Xstrata Chile's obligations not to waive or acquiesce in breaches of the Shareholders Agreement; and (2) breaches that occurred prior to the Datawave exercise of the Right of First Refusal, which are based on Xstrata Chile's good faith obligations and the other contractual obligations referred to above.

Alleged Breaches in Respect of the Datawave Exercise of the Right of First Refusal

[599] As described above, these claims are based on Xstrata Chile's alleged failure to properly investigate and assess the validity of Datawave's exercise of its Right of First Refusal. Given the determination that Datawave validly exercised the Right of First Refusal, these claims cannot succeed, as discussed below. However, they raise an important question of the extent of Xstrata Chile's duty to investigate and assess the validity of the exercise of the Right of First Refusal. As this was argued in considerable detail, I have set out my views on this issue before addressing the treatment of Barrick's associated claims in these Reasons.

Conclusions Regarding the Scope of Xstrata Chile's Duty to Investigate

Definition of the Issue

[600] Barrick does not dispute that the New Gold Notice satisfied the formal requirement of section 10.4(2) of the Shareholders Agreement regarding the notice of exercise of the Right of First Refusal. However, Barrick argues that the Datawave exercise of the Right of First Refusal

would be invalid if it contravened the Transfer restrictions in section 10.1 of the Shareholders Agreement even if the New Gold Notice was valid on its face.

[601] Barrick alleges that Xstrata Chile had a duty to conduct a reasonable investigation before "accepting" the New Gold Notice. It argues that this duty required it to persist in seeking details of the Goldcorp Transaction and a copy of the Goldcorp Agreement. Barrick argues that Xstrata Chile failed to discharge this obligation. Xstrata Chile submits that its only obligation was to review any publicly available information and any information made available to it by Barrick.

[602] I would note that Xstrata Chile has also argued that there is, in fact, no room under the Shareholders Agreement for an invalid exercise of the Right of First Refusal if the New Gold Notice was delivered in the manner required by the provisions of section 10.4, in particular section 10.4(2). This conclusion proceeds from the fact that there is no concept of an action or step of "acceptance" by Xstrata Chile. Either the exercise of the Right of First Refusal was valid and an agreement was formed or it was not. This is a matter of interpretation of the scope of Xstrata Chile's obligations under the Barrick Agreement and, as such, is a matter of Chilean law.

[603] I am satisfied that Chilean law did impose an obligation on Xstrata Chile in the circumstances of this case to consider the validity of Datawave's exercise of the Right of First Refusal. Ochagavia states in his report that Xstrata Chile had an obligation not to accept an invalid exercise of the Right of First Refusal. He grounds this obligation in section 4.2 of the Barrick Agreement and Xstrata Chile's good faith obligations. Moreover, Ochagavia defined the scope of this duty to extend beyond mere examination of the New Gold Notice to include taking into account all of the information that Xstrata Chile had received at the time of its assessment. Accordingly, the issue in this section is not the existence of a duty to investigate but the extent of the investigation that such duty required of Xstrata Chile in order to honour its obligations to Barrick.

Analysis and Conclusions Regarding the Scope of Xstrata Chile's Duty

[604] I conclude that Xstrata Chile's obligation to consider the validity of Datawave's exercise of the Right of First Refusal was limited to a review and assessment of information pertaining to the Goldcorp Transaction that was publicly available or was otherwise provided to it by third parties, including Barrick. I also conclude that Xstrata Chile was obligated to sell the Offered Interest to Datawave unless such evidence clearly demonstrated a breach of the Shareholders Agreement. I reach this conclusion on the following basis.

[605] The starting point for an analysis of Xstrata Chile's duty to conduct an investigation and assessment are the contractual obligations in sections 4.2 and 8.6 of the Barrick Agreement as supplemented by Xstrata Chile's good faith obligations. In particular, under the obligation in paragraph 8.6(g), Xstrata Chile agreed not to amend the Shareholders Agreement and not to waive any breaches of that Agreement. As a result, Xstrata Chile had an obligation to consider whether Datawave breached any of the Transfer restrictions by entering into the Goldcorp Transaction or by exercising the Right of First Refusal. The standard of performance required of

Xstrata Chile in regard to this obligation is the reasonable standard. Similarly, although this did not occur, Xstrata Chile would have been required to consider whether any other actions of Datawave prior to January 31, 2010 in furtherance of the Goldcorp Agreement breached any terms of the Shareholders Agreement or the CFLA. I would note, however, that any such breach must have occurred prior to January 31, 2010, by virtue of the terms of the Barrick Agreement.

[606] However, in drafting these provisions of the Barrick Agreement, Xstrata Chile and Barrick were aware of the provisions of the Shareholders Agreement. Absent express language to the contrary, I think it is reasonable to proceed on the basis that the parties intended the Barrick Agreement to function harmoniously with the Shareholders Agreement. It was not intended that Xstrata Chile would obligate itself to perform covenants requiring Datawave's assistance in the absence of a right under the Shareholders Agreement allowing Xstrata Chile to require such assistance. I am also satisfied, on the evidence of Chilean law, that Xstrata Chile's good faith obligations would not impose any such covenants in the absence of an express intention in the Barrick Agreement.

[607] Accordingly, the scope of Xstrata Chile's duty to investigate must be defined having regard to Xstrata Chile's rights under the Shareholders Agreement. In the present circumstances, Xstrata Chile's ability to conduct the investigation contemplated by Barrick was limited by the terms of the Shareholders Agreement. Section 10.4(2) required simply that Datawave deliver a notice of its desire to exercise the Right of First Refusal. Datawave had no obligation in that Agreement to provide any documentation or other information respecting the Goldcorp Transaction in order to exercise the Right of First Refusal. Nor did it have any obligation to respond to Xstrata Chile's requests for information and documentation subsequent to the exercise. Moreover, there is no evidence that Datawave's good faith obligations required it to provide such information if requested either pursuant to section 10.4 of the Shareholders Agreement or otherwise.

[608] This conclusion is reinforced by another principle of Chilean law. As Morales acknowledged in his cross-examination, Xstrata Chile was entitled to assume that Datawave was acting in good faith in its exercise of the Right of First Refusal absent proof to the contrary.

[609] Lastly, as a practical matter, I think that a duty to investigate beyond considering information that is publically available or otherwise provided to Xstrata Chile does not make commercial sense. It inevitably raises the question of how much review is sufficient to discharge the alleged obligation without providing a principled answer to the question. Even receipt of the Goldcorp Agreement would not necessarily answer the question of the validity of the Datawave exercise of the Right of First Refusal. In many circumstances, such an agreement might be so general in its terms ─ leaving the structure to be worked out before closing ─ that it would provide no guidance as to whether the provisions of a right of first refusal had been complied with. In other circumstances, the structure might be significantly altered or supplemented between the date of exercise and the date of closing. In this case, for example, the contractual voting arrangements pertaining to the DataSub shares were not agreed to between the parties

until the Pledge Agreements were executed in the last few days leading up to the closing of the Goldcorp Transaction.

Alleged Breach of Xstrata Chile's Duty at Time of Receipt of the New Gold Notice

[610] It is agreed that, at the time Xstrata Chile received the New Gold Notice, Xstrata Chile had an obligation to review the Notice in accordance with the reasonable standard and determine whether it complied with the Shareholders Agreement. In that review, Xstrata Chile was required to consider not only the language of the New Gold Notice but also any other information that it had received from New Gold or Barrick concerning the proposed transaction.

[611] Barrick says that Xstrata Chile had sufficient information on January 6, 2010, when it received the New Gold Notice, to conclude that Datawave's exercise of the Right of First Refusal was invalid. Essentially, Barrick says Xstrata Chile should reasonably have known that Datawave's actions would result in a breach of the Transfer restrictions in the Shareholders Agreement from the fact that Datawave's exercise of the Right of First Refusal pursuant to an agreement between New Gold and Goldcorp would result in Goldcorp acquiring the Offered Interest.

[612] Given the conclusion above that the Goldcorp Agreement did not give rise to a breach of the Shareholders Agreement, this claim cannot succeed. In these circumstances, by definition, Xstrata Chile could never have been in possession of information establishing that Datawave invalidly exercised the Right of First Refusal at the time it received the New Gold Notice. Accordingly, Barrick cannot assert a claim for damages even if a breach of duty were established.

Alleged Failure to Take Steps to Determine the Validity of the Datawave Exercise of the Right of First Refusal Subsequent to Receipt of the New Gold Notice

[613] The evidence indicates that neither Xstrata Chile nor Barrick had any knowledge of the structure of the Goldcorp Transaction until Baker watched the Jeannes television interview on January 7, 2010 after the Goldcorp Transaction was publicly announced. Even then, knowledge of the actual structure was not available to Barrick until it obtained a copy of the Goldcorp Agreement on or about January 19, 2010, when it became publicly available, and, in the case of Xstrata Chile, until January 26, 2010, when it received a copy of the Agreement from Barrick.

[614] Barrick alleges that, if Xstrata Chile did not have sufficient information to conclude that the Datawave exercise was invalid at the time it received the New Gold Notice, it was obligated to make inquiries in order to determine the substantive validity of the purported exercise. Specifically, it says that Xstrata Chile was under an obligation to inquire into the details of the Goldcorp Transaction and to request from Datawave any information that could reasonably be relevant to determining whether the New Gold Notice was delivered in respect of a valid exercise of the Right of First Refusal. It says this duty extended to insisting on a substantive response to its request for more information regarding the Goldcorp Transaction, including

insisting on receipt of a copy of the Goldcorp Agreement and contacting New Gold to discuss the concerns raised by Barrick.

[615] The record indicates that, in an e-mail dated January 7, 2010, McConnachy did request details and an explanation of the specifics of the Goldcorp Transaction to assist in Xstrata's analysis of Xstrata Chile's "ability to accept the exercise of the Right of First Refusal". However, McConnachy never received any response to his e-mail and did not make any further inquiries or request a copy of the Goldcorp Agreement. Barrick alleges that this inactivity constituted a breach of Xstrata Chile's obligations to conduct a reasonable review of the validity of Datawave's exercise of the Right of First Refusal and, as such, constituted a breach of the Barrick Agreement.

[616] As with the previous claim, given the determination above, this claim cannot be actionable. Even if it is assumed for this purpose that Xstrata Chile breached its obligations to Barrick by failing to conduct a reasonable review of the validity of the Right of First Refusal, the breach does not give rise to a claim for damages.

[617] However, given the finding above regarding the scope of Xstrata Chile's duty to investigate, I also conclude that, on the evidence before the court, Xstrata Chile satisfied the standard required of it in respect of this duty.

[618] There is no evidence that Xstrata Chile failed to consider the Goldcorp press release; the Jeannes interview; Garver's letter to Xstrata Chile dated January 11, 2010 advising of Barrick's position; the Original Barrick Claim, a copy of which Barrick received from Garver on January 13, 2010; or the Goldcorp Agreement, when it received a copy on January 26, 2010. Given the absence of any right to documentation under the Shareholders Agreement and the absence of evidence of any other right to documentation under any other provision of Chilean law, Xstrata Chile did not breach this obligation by failing to insist upon receiving further details of the Goldcorp Transaction or a copy of the Goldcorp Agreement from New Gold after having made the request of Datawave. In addition, while Xstrata Chile benefitted from the failure to close the Barrick Transaction by retaining its 70% interest in the BHP Royalty, that fact alone does not support the assertion that Xstrata Chile breached its good faith obligations to Barrick in the present circumstances.

Breaches Alleged to have Occurred Prior to the Datawave Exercise of the Right of First Refusal

[619] Barrick also alleges that Xstrata Chile failed to honour its contractual and good faith obligations to take positive actions in two respects that would have resulted in satisfaction of the Conditions Precedent. It submits that, but for these breaches of Xstrata Chile's obligations, Barrick would have obtained the Xstrata Interest pursuant to the Barrick Agreement. These claims are independent of Barrick's claims based on its assertion that Datawave breached the Shareholders Agreement in entering into the Goldcorp Agreement or in exercising its Right of First Refusal.

Failure to Inform Barrick of the New Gold Inquiries into the Mechanics of Exercise of the Right of First Refusal

[620] The record indicates that Xstrata Chile did not inform Barrick of either the December 2, 2009 conference call with New Gold representatives, in which questions about the mechanics of the Right of First Refusal were first raised by New Gold, or the New Gold e-mail of the same day that dealt with the same issue. Xstrata Chile also did not inform Barrick of its e-mail response on December 4, 2009, or the further question raised by New Gold's external counsel in a telephone call on December 8, 2009 that also dealt with the exercise of the Right of First Refusal.

[621] Barrick alleges that, in failing to do so, Xstrata Chile breached its obligations under section 4.2 of the Barrick Agreement to keep Barrick informed "of any circumstances which may result in any Condition Precedent not being satisfied in accordance with its terms".

[622] This claim is dismissed for the following reasons.

[623] First, the obligation in section 4.2 was to keep Barrick informed of facts, not speculation. The questions regarding the mechanics of the exercise of the Right of First Refusal did not constitute evidence of an established intention, or even a serious likelihood of an intention, to exercise the Right of First Refusal. Indeed, Barrick, as well as Xstrata Chile, regarded the limited information received regarding the New Gold value maximization process as more likely to be planted "disinformation" directed at Barrick. Given that this exchange occurred in early December 2009, before there was a serious possibility of completing a transaction with Goldcorp, it may well be that New Gold's actions were at least partly motivated by this purpose.

[624] Further, the materiality of information of this nature was demonstrated by Barrick's own actions. Barrick learned independently of New Gold's possible exercise of the Right of First Refusal in a conversation between Baker and a Mitsui & Co. representative in early December. Barrick did not consider this conversation worthy of disclosure to Xstrata Chile. Nor did Barrick advise Xstrata Chile of Garver's communication with the Vancouver law firm on December 18, 2009 regarding its retainer to advise New Gold about a possible exercise of the Right of First Refusal.

[625] Second, as a related matter, section 4.2 of the Barrick Agreement required disclosure of any circumstance that may result in any Condition Precedent not being satisfied. This covenant required disclosure of information pertaining to a potential exercise of the Right of First Refusal only if the information revealed a serious possibility of the exercise occurring. As mentioned above, the questions regarding the manner of exercise did not reveal a serious possibility of an exercise.

[626] Third, as mentioned above, Barrick must demonstrate that Xstrata Chile acted negligently in performing its obligations in order to find that Xstrata Chile breached its obligations to Barrick. Given the speculative rather than factual nature of this information and the materiality

of this information, as reflected in Barrick's reaction upon receipt of similar information from Matsui & Co., the evidence does not support a finding that Xstrata Chile acted negligently in failing to disclose this information, even if it were determined that it had an obligation to make such disclosure.

[627] In summary, Xstrata Chile's failure to inform Barrick of the communications described above did not constitute the failure to inform Barrick "of circumstances which may result in any Conditions Precedent not being satisfied in accordance with its terms".

[628] In addition to the foregoing findings, I would also conclude, if it were necessary, that breach of this covenant was not causally related to the damages asserted by Barrick in this action. There is no direct connection between the alleged failure to disclose this information and the execution of the Goldcorp Agreement. Put another way, there is no evidence that Barrick's knowledge in early December 2009 that New Gold was inquiring into the mechanics of the exercise of the Right of First Refusal would have altered the course of events in a manner that necessarily would have resulted in the Barrick Transaction being completed rather than the Goldcorp Transaction.

Execution of the Feasibility Study

[629] Barrick also alleges that Xstrata Chile's execution of the Feasibility Study Agreement without Barrick's knowledge or consent breached an obligation of Xstrata Chile not to facilitate a competing transaction, being the Goldcorp Transaction.

[630] In asserting this claim, Barrick relies upon the facts, among others, that Xstrata Chile told Barrick that it was the owner of the Feasibility Study Agreement and advised Barrick that New Gold's claims were "spurious" and would go away when it heard of them. Barrick says that Xstrata Chile then surreptitiously entered into the Feasibility Study Agreement out of self-interest, knowing that it would facilitate the exercise of the Right of First Refusal by New Gold.

[631] Barrick does not specify which provision of the Barrick Agreement it alleges Xstrata Chile breached in entering into the Feasibility Study Agreement. It says only that there was no reason for Xstrata Chile not to have disclosed the situation to Barrick and consulted with Barrick on its decision to enter into the Feasibility Study Agreement. In the absence of a specific covenant in the Shareholders Agreement that addresses these circumstances, I assume for this purpose that Xstrata Chile's good faith obligations created an obligation not to facilitate the Goldcorp Transaction.

[632] There are two preliminary issues to be addressed before considering this submission.

[633] First, Barrick attributes Xstrata Chile's conduct to self-interest ─ in this case, being its interest in booking the Barrick Transaction by December 31, 2009. I do not see this as relevant to the issue of whether a breach occurred for the reason that I do not think a court can infer that Xstrata Chile breached any obligation to Barrick in entering into the Feasibility Study Agreement from this fact, either alone or together with the other facts upon which Barrick relies.

Good faith obligations under Chilean law do not prevent a party from acting in its own self-interest, provided such actions do not breach the relevant agreement.

[634] Second, Barrick emphasizes the fact that Xstrata Chile did not inform Barrick of the negotiation of the Fluor Feasibility Study ownership issue and did not obtain its consent before entering to the Feasibility Study Agreement. I also do not see this as relevant to the issue of whether a breach of an obligation not to facilitate the Goldcorp Transaction occurred. In asserting this claim, Barrick does not invoke the obligation to disclose in section 4.2 of the Barrick Agreement. I consider that it does not apply to the present circumstances given the factual findings below. I see nothing in the Barrick Agreement that imposes an obligation on Xstrata Chile to consult with Barrick before entering into the Feasibility Study Agreement even if it were held that Xstrata Chile was obligated not to enter into that Agreement because it facilitated Datawave's exercise of the Right of First Refusal. Similarly, Barrick has not demonstrated any provision of the Barrick Agreement that obligated Xstrata Chile to obtain Barrick's consent prior to entering into the Feasibility Study Agreement.

[635] Turning to the substantive issue, there are two factual issues raised by Barrick's claim:

(1) Did the Feasibility Study Agreement "facilitate" the Goldcorp Transaction?

(2) If so, did Xstrata Chile know, or ought Xstrata Chile reasonably to have known, that the Feasibility Study Agreement would have this effect?

I conclude that the answer to each is in the negative for the following reasons.

[636] The evidence does not establish that the Feasibility Study Agreement facilitated the Goldcorp Transaction. To do so, Barrick would have to establish that Goldcorp would not have entered into the Goldcorp Transaction unless the Company obtained ownership of the Fluor Feasibility Study. The evidence before the court does not support this conclusion. Even if Goldcorp indicated to New Gold that it desired this result, there is no evidence that this was an absolute requirement for the Goldcorp Transaction to proceed. Moreover, it is unclear why Goldcorp would have made it a requirement given that the information in the Fluor Feasibility Study had become historical. New Gold was entitled to provide Goldcorp with a copy of the Fluor Feasibility Study to use in conducting its financial due diligence prior to making the Goldcorp Offer. Goldcorp then engaged its own mining engineering firm to review the Fluor Feasibility Study in connection with its acquisition of the 70% Interest and has subsequently commissioned an entirely new feasibility study.

[637] The evidence also does not establish that Xstrata Chile knew, or reasonably should have known, that entering into the Feasibility Study Agreement would have facilitated the Goldcorp Transaction.

[638] I am satisfied on the evidence that Xstrata entered into the Feasibility Study Agreement for two principal purposes: (1) by doing so, Xstrata received New Gold's agreement to Xstrata's form of the Assignment Agreements and was thereby able to book the sale of the Xstrata Interest

in 2009 as soon as it received the comfort requested from Barrick as well as obtain New Gold's agreement to the release of Xstrata Chile from the Shareholders Agreement and the CFLA; and (2) Xstrata wished to avoid any possibility of arbitration of the ownership issue, which could have re-set the Exercise Period as mentioned above and/or delayed or upset the Barrick Transaction, depending upon Barrick's view of the significance of the Fluor Feasibility Study. Accordingly, Xstrata thought it was furthering fulfillment of the Conditions Precedent, and therefore completion of the Barrick Transaction, in entering into the Feasibility Study Agreement. Further, I am satisfied that Xstrata did not disclose the Feasibility Study Agreement to Barrick because, at the time, having no knowledge of the discussions between Goldcorp and New Gold, there was no reason to suspect that the execution of such agreement might create a circumstance that would result in the failure of the Condition Precedent in section 4.1(c) of the Barrick Agreement.

[639] Further, the evidence is that, as of December 31, 2009, neither Barrick nor Xstrata believed that there was a serious possibility that New Gold would be in a position to complete a transaction with any third party before the Right of First Refusal expired. Both parties believed that the limited information that they had received pointed to an effort by New Gold to obtain a higher price from Barrick. In addition, for the reasons stated above, even if Xstrata Chile had been aware of a potential transaction, there was no information from which it ought reasonably to have known that a failure to agree to the Feasibility Study Agreement would have prevented the Goldcorp Transaction.

[640] I would add that it is also unclear on the evidence whether Barrick would have closed the Barrick Transaction in accordance with the Barrick Agreement if the Feasibility Study Agreement had not been entered into. Whether Xstrata Chile would have been prepared to warrant title to the Fluor Feasibility Study to Barrick is unclear given New Gold's position on the ownership issue, which arose after the Barrick Agreement was executed. Whether Barrick would have accepted such a warranty, or been prepared to waive the requirement altogether if none was forthcoming, is also unclear.

[641] Given these findings, Barrick cannot assert a viable claim for breach of Xstrata Chile's good faith obligations, or breach of contractual obligations in the Barrick Agreement, based on Xstrata Chile's execution of the Feasibility Study Agreement. The finding that execution of the Feasibility Study Agreement did not facilitate the Goldcorp Transaction removes the necessary element of causation. The finding that Xstrata Chile did not know, and could not reasonably have known, that the Feasibility Study Agreement would have this effect excludes any finding that Xstrata Chile breached any duty it might otherwise have had based on its good faith obligations. Further, the absence of constructive knowledge precludes a finding of negligence even if Xstrata Chile were found to have breached a duty to Barrick, contractual or otherwise, by executing the Feasibility Study Agreement.

[642] Based on the foregoing, this claim is dismissed.

Conclusion Regarding Barrick's Claims Based on Allegations of Breaches of the Barrick Agreement

[643] Based on the foregoing, Barrick's claims against Xstrata Chile for breach of contract based on alleged breaches of Xstrata Chile's obligations under the Barrick Agreement are also dismissed.

Liability of the Defendants in Tort

[644] Barrick also asserts the following tort claims against New Gold, Goldcorp and the Xstrata Parent Entities: (1) inducing Xstrata Chile to breach its contractual obligations to Barrick under the Barrick Agreement; (2) intentionally interfering with Barrick's economic relations with Xstrata Chile; and (3) conspiring with the effect of depriving Barrick of the Xstrata Interest and Xstrata's 70% interest in the BHP Royalty. I will address each of these claims after addressing the applicable law governing these tort claims.

Governing Law

Applicable Legal Standard

[645] The Supreme Court ruled in *Tolofson* v. *Jensen; Lucas (Litigation Guardian of)* v. *Gagnon*, [1994] 3 S.C.R. 1022, [1994] S.C.J. No. 110, that tort liability is governed by the law of the place where the tort occurred ─ the *lex loci delicti*. The principle is set out at pp. 1049-51 where it is expressed in terms of the place where the activity occurred and, where the consequences constitute the wrong, the place where the consequences are directly felt:

> From the general principle that a state has exclusive jurisdiction within its own territories and that other states must under principles of comity respect the exercise of its jurisdiction within its own territory, it seems axiomatic to me that, at least as a general rule, the law to be applied in torts is the law of the place where the activity occurred, i.e., the *lex loci delicti*. There are situations, of course, notably where an act occurs in one place but the consequences are directly felt elsewhere, when the issue of where the tort takes place itself raises thorny issues. In such a case, it may well be that the consequences would be held to constitute the wrong.
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> …
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> [T]he approach responds to a number of sound practical considerations. The rule has the advantage of certainty, ease of application and predictability. Moreover, it would seem to meet normal expectations. Ordinarily people expect their activities to be governed by the law of the place where they happen to be and expect that concomitant legal benefits and responsibilities will be defined accordingly. The government of that place is the only one with power to deal with these activities. The same expectation is ordinarily shared by other states and by people outside

> the place where an activity occurs. If other states routinely applied their laws to activities taking place elsewhere, confusion would be the result. In our modern world of easy travel and with the emergence of a global economic order, chaotic situations would often result if the principle of territorial jurisdiction were not, at least generally, respected. Stability of transactions and well grounded legal expectations must be respected. Many activities within one state necessarily have impact in another, but a multiplicity of competing exercises of state power in respect of such activities must be avoided.

[646] In the absence of a physical event causing injury, the determination of the *lex loci delicti* in respect of the torts of inducing breach of contract, interference with contractual relations and conspiracy is not straightforward.

Conclusion Regarding the Applicable Law of the Tort Claims Against New Gold and Goldcorp

[647] In respect of the tort claims against New Gold and Goldcorp, Barrick submits that, using either the "defining activity" test or the "consequences felt" test, the *lex loci delicti* in respect of the torts alleged against these defendants should be Ontario or British Columbia.

[648] I agree with Barrick's submission that the defining activities of the parties giving rise to the tort claims consist of the negotiation and execution of the Goldcorp Agreement. This activity occurred entirely in Ontario and British Columbia where the principal offices of New Gold and Goldcorp are located. The actions of the principal officers, and the external advisors, of these defendants in respect of such negotiations and the actions of their respective boards of directors approving the Goldcorp Transaction occurred almost exclusively in these provinces. Insofar as it is also relevant, the Goldcorp Agreement is governed by the laws of Ontario.

[649] I find that the foregoing considerations outweigh the following matters raised by New Gold and Goldcorp in support of their position that the laws of Chile should apply to these claims.

[650] First, I do not think the governing law of the Shareholders Agreement, the CFLA and the Barrick Agreement is determinative. Insofar as the law of the applicable contracts is relevant, I consider that the Goldcorp Agreement is more significant in this context as that is the agreement that committed Datawave and Goldcorp to the course of action alleged to be tortious.

[651] Similarly, the actions that occurred in Chile in furtherance of the alleged torts are also not determinative. The defendants rely on the fact that the delivery of the New Gold Notice to Xstrata Chile, the closing of the sale of the Offered Interest to DataSub, and the closing of the sale of the DataSub shares to Goldcorp Tesoro, took place in Chile. However, extensive activity in respect of each of these actions also occurred in Ontario and British Columbia.

[652] Third, I do not think it is correct to say that Barrick's loss should be treated as having occurred only in Chile because Barrick intended to cause a Chilean subsidiary to acquire the

Offered Interest and would have retained all profits in Chile. This is an argument that, applying the "consequences felt" test, the loss was suffered by the Barrick subsidiary in Chile. At the time the actions occurred, Barrick, not its proposed Chilean subsidiary, was the party to the Barrick Agreement. Accordingly, it is Barrick that has suffered the alleged loss and has asserted the claims in this action. Barrick is not located in Chile but is located in Ontario. Moreover, the intention that distributions from the El Morro Project would be retained in Chile is not determinative. Any loss was also suffered by Barrick at a corporate level as a reduction in the aggregate value of its assets which, in turn, affected its aggregate market value.

[653] Lastly, I do not think that either the registration of the Company's shares in Chile or the location of the El Morro Project is of any real significance for purposes of either the "defining activity" test or the "consequences felt" test in respect of the alleged torts.

[654] Accordingly, I conclude that either Ontario or British Columbia law is applicable to Barrick's tort claims. The parties have agreed that there is no evidence that the laws of British Columbia differ in any respect from the laws of Ontario in respect of these torts and, that, accordingly, to the extent that the laws of either province would govern the tort claims, the laws of Ontario shall govern these claims.

[655] Therefore, I conclude that the Barrick tort claims are governed by the laws of Ontario as the *lex loci delicti*. Given this determination, I have not addressed Barrick's alternative claims against New Gold and Goldcorp for extra-contractual liability under the laws of Chile.

Conclusion Regarding the Tort Claims Asserted Against the Xstrata Parent Entities

[656] Barrick submits that, in respect of the tort claims against the Xstrata Parent Entities, the evidence indicates that the tortious conduct occurred only in Australia and Canada because all of the relevant Xstrata representatives were based in, and communicated from, Australia, apart from Greville who was in British Columbia during the first week of 2010 on a ski vacation. Xstrata has not led any evidence to suggest that the applicable laws of Australia regarding the alleged tortious conduct of the Xstrata Parent Entities would differ in any respect from the laws of Ontario. Further, neither of the Xstrata Parent Entities has pleaded that Chilean law applies to any of Barrick's tort claims.

[657] Accordingly, I conclude that the Barrick tort claims against the Xstrata Parent Entities are also governed by the laws of Ontario. It is therefore also unnecessary to address Barrick's alternative claims against the Xstrata Parent Entities based on extra-contractual liability under the laws of Chile.

Inducing Breach of Contract

[658] Barrick asserts that each of New Gold, Goldcorp and the Xstrata Parent Entities are liable for inducing Xstrata Chile to breach the Barrick Agreement. The specific breach giving rise to this claim is the sale of the Offered Interest to DataSub on February 16, 2010 but it proceeds from Barrick's position that Datawave did not validly exercise the Right of First Refusal.

[659] The elements of the tort of inducing breach of contract have been set out in *Correia* v. *Canac Kitchens*, 2008 ONCA 506, [2008] O.J. No. 2497, at para. 99, referring to the decision of the House of Lords in *OBG* v. *Allan*, [2007] UKHL 21, [2008] A.C. 1 (H.L.):

> The Lords defined the elements of the tort of inducing breach of contract as follows: (1) the defendant had knowledge of the contract between the plaintiff and the third party; (2) the defendant's conduct was intended to cause the third party to breach the contract; (3) the defendant's conduct caused the third party to breach the contract; (4) the plaintiff suffered damage as a result of the breach (see *OBG* at paras. 39-44 (Hoffman L.)). The Lords confined the tort to cases where the defendant actually knew that its conduct would cause the third party to breach (it is not enough that the defendant ought reasonably to have known that its conduct would cause the third party to breach); the defendant must have intended the breach (it is not enough that a breach was merely a foreseeable consequence of the defendant's conduct); and there must be an actual breach (it is not enough for the conduct to merely hinder full performance of the contract).

[660] I will consider the elements of the tort to the extent possible in respect of New Gold and Goldcorp first and then in respect of the Xstrata Parent Entities.

Claims Against New Gold and Goldcorp

[661] Barrick has established that New Gold and Goldcorp were aware of the terms of the Barrick Agreement. Xstrata Chile provided New Gold with a copy of the form of the Agreement on October 11, 2009, when it delivered the Xstrata Chile Notice. In turn, as contemplated by the December 18 New Gold Letter, New Gold provided Goldcorp with a copy of the form of the Agreement on or about December 23, 2009.

[662] The main difficulty with Barrick's claim lies in the third requirement ─ that the defendants' conduct caused Xstrata Chile to breach the Barrick Agreement. This turns on whether the Goldcorp Transaction, in particular Datawave's exercise of its Right of First Refusal, caused a breach under the Shareholders Agreement or the CFLA. I have concluded above that it did not.

[663] Tort liability for inducing breach of contract is accessory liability. It requires a finding of primary liability by Xstrata Chile for breach of the Barrick Agreement. As set out above, without a breach of the Shareholders Agreement, there is no basis for finding that New Gold's or Goldcorp's conduct caused Xstrata Chile to breach the Barrick Agreement. The Barrick Agreement terminated on either January 8, 2010 or January 31, 2010. Barrick is, therefore, unable to establish a valid and enforceable agreement between Xstrata Chile and Barrick as of the date on which the sale of the Offered Interest to DataSub was completed, being February 16, 2010.

[664] For this reason, the Barrick claim against New Gold and Goldcorp for inducing a breach of the Barrick Agreement is dismissed.

[665] The second requirement of the tort of inducing a breach of contract requires Barrick to demonstrate that New Gold's and Goldcorp's conduct was intended to cause Xstrata Chile to breach the Barrick Agreement. Because considerable time was spent in the parties' submissions on whether this requirement of this tort claim has been demonstrated, I will also set out my observations with respect to this issue.

[666] In *Correia* at para. 98, the Court of Appeal addressed the intention requirement for the tort of inducing breach of contract and the tort of interference with economic relations as follows:

> In defining the two torts, the Lords emphasized that both are intentional torts that aim to give redress in the context of deliberate commercial wrongdoing: see *OBG* at paras. 141-143, 145, 191 (Nicholls L.). Where the impugned conduct is merely negligent, then it must be actionable using negligence principles, and if it is not, it cannot be made actionable by recharacterizing it as wrongful commercial interference.

[667] To the same effect is the following statement of Lord Hoffmann in *OBG,* at para. 39, which makes it clear that actual knowledge is required and that neither constructive knowledge nor an unreasonable mistaken belief is sufficient:

> To be liable for inducing breach of contract, you must know that you are inducing a breach of contract. It is not enough that you know that you are procuring an act which, as a matter of law or construction of the contract, is a breach. You must actually realize that it will have this effect. Nor does it matter that you ought reasonably to have done so. This proposition is most strikingly illustrated by the decision of this House in *British Industrial Plastics Ltd.* v. *Ferguson*, [1940] 1 All ER 479, in which the plaintiff's former employee offered the defendant information about one of the plaintiff's secret processes which he, as an employee, had invented. The defendant knew that the employee had a contractual obligation not to reveal trade secrets but held the eccentric opinion that if the process was patentable, it would be the exclusive property of the employee. He took the information in the honest belief that the employee would not be in breach of contract. In the Court of Appeal McKinnon LJ observed tartly ([1938] 4 All ER 504, 513) that in accepting this evidence the judge had "vindicated [his] honesty … at the expense of his intelligence" but he and the House of Lords agreed that he could not be held liable for inducing a breach of contract.

[668] To establish this element of the claim, Barrick must therefore demonstrate two separate factual matters. It must establish that New Gold and Goldcorp knew that implementing the Goldcorp Transaction would result in, or did result in, a breach of the Shareholders Agreement

or the CFLA, thereby rendering the Datawave exercise of the Right of First Refusal invalid. Barrick must also prove that, in taking the position that implementation of the Goldcorp Transaction complied with the Shareholders Agreement and the CFLA, New Gold and Goldcorp intended to "procure" Xstrata Chile's breach of the Barrick Agreement, which requires more than demonstration that the breach was a foreseeable consequence of the defendants' conduct.

[669] There is no evidence before the court that either New Gold or Goldcorp believed that implementing the Goldcorp Agreement would result in any such breach. The only evidence before the court on this issue was adduced by New Gold and Goldcorp. Each of these parties say that they believed that the Goldcorp Transaction did not breach the Shareholders Agreement or the CFLA. Each also says that it relied on a contractual representation from the other party that the Goldcorp Transaction did not breach any applicable agreement ─ in the case of Goldcorp, from New Gold pursuant to paragraph 5.1(e) of the Goldcorp Agreement and, in the case of New Gold, from Xstrata Chile pursuant to the Datawave Purchase Agreement, although the latter is less probative as it was delivered after the exercise of the Right of First Refusal.

[670] Barrick suggests that the court should infer the requisite intent from a number of different circumstances: (1) New Gold's failure to advise Barrick that it was marketing 100% of the El Morro Project, or 70% of the Project, in addition to the New Gold Interest; (2) an alleged deliberate misdescription of the transaction under consideration with Goldcorp in the December 18 New Gold Letter; (3) the multi-staged transaction structure of the Goldcorp Transaction, which Barrick alleges is evidence of a deliberate attempt to effect a prohibited Transfer indirectly; (4) the provisions in the second paragraph of section 2.4 of the Goldcorp Agreement, which Barrick says would have been unnecessary if the parties truly believed the Datawave exercise of the Right of First Refusal did not violate the Shareholders Agreement; (5) New Gold's decision not to provide Xstrata Chile with a copy of the Goldcorp Agreement when McConnachy requested a copy on January 7, 2010; and (6) the absence of contemporary evidence of the state of mind of New Gold and Goldcorp in entering into the Goldcorp Agreement, and, in particular regarding Goldcorp's state of mind after having put the issue in play in its affirmation of its honest belief in its Statement of Defence.

[671] I have considered whether it is possible for the court to address the issue of intention in case I have erred in concluding that Datawave did not breach the Shareholders Agreement by entering into the Goldcorp Agreement and implementing the Goldcorp Transaction. However, to do so requires considering the intention of Datawave and Goldcorp in the scenario in which the formal requirements of section 10.4 regarding the New Gold Notice would have been satisfied but the substantive requirements of the Shareholders Agreement pertaining to the proposed Transfer would have been breached. In such event, the parties' knowledge of the existence and nature of Datawave's breach(es) as well as their respective intentions would be issues to be assessed in respect of this claim.

[672] In order to address this issue, it would be necessary to make assumptions regarding the nature of the breach of the Shareholders Agreement, the nature and extent of Datawave's and Goldcorp's knowledge of such breach, and their intentions in asserting that no such breach had

occurred. It would also be necessary to make similar assumptions in respect of Xstrata Chile's actions in accepting the Datawave exercise of the Right of First Refusal notwithstanding that it was invalidly exercised by virtue of a breach of the Shareholders Agreement. Any such assumptions would necessarily be hypothetical in the circumstances and therefore arbitrary. Even then, the relevance of the matters from which Barrick urges the court to draw an inference of the requisite intention will depend upon the particular assumptions made by the court. I consider that it would be inappropriate for the court to address this issue on this basis and therefore decline to do so.

[673] I would also note that I have not addressed the fourth requirement of the tort of inducing breach of contract, being the demonstration of damage to Barrick flowing from the breach of contract. Given the conclusion above with respect to the Barrick claim against New Gold and Goldcorp for inducing breach of contract, it is unnecessary to address this issue. For the same reason, I have declined to address this issue below in respect of the claims for inducing breach of contract against the Xstrata Parent Entities and in respect of the claims for interference with economic relations and conspiracy asserted against each of the defendants.

Claim Against the Xstrata Parent Entities

[674] The claims against each of the Xstrata Parent Entities will be addressed in turn.

Claim Against Xstrata Queensland

[675] In the case of Xstrata Queensland, the claim appears to be one of vicarious liability based principally on the relationship among Xstrata Chile, Xstrata Queensland, Greville and McConnachy. It is agreed that Greville and McConnachy were senior officers and employees of Xstrata Queensland who also acted on behalf of Xstrata Chile. Greville acted pursuant to a power of attorney given by Xstrata Chile to him, and McConnachy acted pursuant to a delegation to him by Greville of the authority that Greville received pursuant to that power of attorney. To the extent that the claim is also based on the actions of Charles Sartain, ("Sartain"), Louis Irvine ("Irvine") and Neal O'Connor ("O'Connor"), the analysis below is also applicable, as each acted on behalf of Xstrata Chile pursuant to a power of attorney given to him by Xstrata Chile.

[676] Barrick alleges that, through these officers, Xstrata Queensland induced Xstrata Chile's breach of the Barrick Agreement by causing Xstrata Chile to acquiesce in New Gold's breach of the Shareholders Agreement in the manner described above. This caused Xstrata Chile to close the Goldcorp Transaction without undertaking an appropriate investigation and assessment of Datawave's exercise of the Right of First Refusal.

Claim Against Xstrata Canada

[677] In the case of Xstrata Canada, there is no evidence of any action by or on behalf of the corporation in respect of Xstrata Chile's breach of the Barrick Agreement that would ground a claim of vicarious liability for an alleged breach of the contract.

[678] The Barrick claim therefore relies on the Parent Entities Addendum to which Xstrata Canada was a party. Barrick says that Xstrata Canada was obliged to ensure that Datawave complied with the Shareholders Agreement, that it failed to enforce the Addendum against New Gold in this respect, and that this failure resulted in Datawave's exercise of the Right of First Refusal and ultimately Xstrata Chile's breach of the Barrick Agreement. Barrick also alleges that Xstrata Canada failed to cause Xstrata Chile to enforce the Shareholders Agreement in respect of Datawave's Right of First Refusal, which resulted in Xstrata Chile's alleged breach of the Barrick Agreement.

Analysis and Conclusions Regarding the Claims Against the Xstrata Parent Entities

[679] Barrick has demonstrated two of the requirements of the tort of inducing breach of contract in respect of these claims: that a valid and enforceable agreement existed between Xstrata Chile and Barrick and that the Xstrata Parent Entities knew that the Agreement existed. There can be no issue that the Xstrata Parent Entities either had the Agreement or had the "means of knowledge" required to satisfy this requirement.

[680] However, for the reasons set out above, I have concluded that the Conditions Precedent were not satisfied on or before January 7, 2010, and accordingly, that the Barrick Agreement was validly terminated no later than January 31, 2010. I have also concluded that Xstrata Chile did not breach its other obligations to Barrick under the Sale Agreement. Given these findings, neither of the Xstrata Parent Entities can be liable on any theory proposed by Barrick for inducing Xstrata Chile to breach the Barrick Agreement.

[681] Given this determination, it is also unnecessary to address the particular requirements of Barrick's claim against the Xstrata Parent Entities for inducing breach of contract. I have, however, set out certain conclusions on the issues raised by Barrick in respect of the Xstrata Parent Entities in case I have erred in concluding that Xstrata Chile did not breach obligations to Barrick under the Barrick Agreement in failing to close the Barrick Transaction.

[682] In this regard, I conclude that Barrick's claim against the Xstrata Parent Entities would also fail for the following two additional reasons specific to each of the Entities.

Claim Against Xstrata Queensland

[683] Barrick's claim against Xstrata Queensland requires some clarification. Barrick submits that Xstrata Chile ceded control over its operations and affairs to Xstrata Queensland, which directed the actions of Xstrata Chile, primarily through the actions of Greville and McConnachy but also through the actions of Sartain, Irvine and O'Connor (collectively, the "Xstrata Personnel"). This suggests that Barrick's claim is that Xstrata Queensland procured Xstrata Chile's alleged breach of the Barrick Agreement by causing it to breach the Agreement. However, there is no evidence that Xstrata Queensland directed the Xstrata Personnel to cause Xstrata Chile to breach the Barrick Agreement.

[684] The Xstrata Personnel were authorized by Xstrata Chile to act on its behalf. At all times, the Xstrata Personnel purported to act on behalf of Xstrata Chile in respect of the matters giving rise to Barrick's claim even if, at the same time, they were also employees of Xstrata Queensland. There is no evidence that the powers of attorney had the result under the laws of Chile that the actions of these individuals constituted the actions of Xstrata Queensland.

[685] Therefore, I have approached Barrick's claim against Xstrata Queensland as a claim that the Xstrata Personnel caused Xstrata Chile to breach the Barrick Agreement and that Xstrata Queensland is vicariously liable for such actions.

[686] There are two difficulties with this claim in addition to the determination that the Xstrata Personnel did not cause Xstrata Chile to breach the Barrick Agreement.

[687] First, the actions of the Xstrata Personnel in the present circumstances are subject to the rule in *Said* v. *Butt*, [1920] 3 K.B. 497 (K.B.D.) under which a managing director or officer of a corporation is not liable for inducing a breach of contract by the corporation if he or she acted *bona fide* within the scope of his or her authority. This rule has been extended to the case of an employee of a parent company acting on behalf of a subsidiary: see *1175777 Ontario Ltd.* v. *Magna International Inc.* (2001), 200 D.L.R. (4th) 521, [2001] O.J. No.1621 (C.A.), at para. 23. To avoid the operation of the rule in *Said* v. *Butt*, Barrick must demonstrate that Greville, McConnachy, Sartain, Irvine and O'Connor did not act *bona fide* and in the best interests of Xstrata Chile, even if it were found that Xstrata Chile breached the Barrick Agreement. There is, however, no evidence of any fraud or personal interest on the part of any of these individuals that would satisfy this requirement.

[688] Second, to succeed in such a claim, Barrick must establish that, in taking the tortious actions, the Xstrata Personnel were acting on behalf of Xstrata Queensland rather than Xstrata Chile. This has not been established in this case. Courts have recognized that the same individuals can function in responsible positions for two different entities at different times without attracting liability to both entities for their actions: see, e.g., *Charlebois* v. *Commission*, [1994] N.B.J. No. 38 (Q.B.), at paras. 1 and 47, aff'd by [1995] N.B.J. No. 239 (C.A.). Accordingly, the evidence could not support a finding of vicarious liability against Xstrata Queensland even if tortious actions had been established.

Claim Against Xstrata Canada

[689] The claim against Xstrata Canada also fails for several different reasons. Barrick argues that Xstrata Canada failed to enforce its rights under the Parent Entities Addendum to require that New Gold compel Datawave to comply with the Shareholders Agreement. In addition, Barrick argues that Xstrata Canada failed to assert its rights as a shareholder of Xstrata Chile to prevent Xstrata Chile from breaching the Barrick Agreement. The claim against Xstrata Canada is therefore based on its failure to act as a party to the Parent Entities Addendum in respect of New Gold and as a shareholder in respect of Xstrata Chile.

[690] While the Addendum included a covenant of New Gold in favour of Xstrata Canada to ensure that Datawave complied with its obligations under the Shareholders Agreement, there was no contractual relationship between Xstrata Canada and Barrick that required Xstrata Canada to enforce such covenant. There is no evidence of any of the Chilean legal experts to the effect that Barrick was entitled to assert a claim against Xstrata Canada for failure to enforce the Parent Entities Addendum. Nor have I been provided with any principle of law under the laws of Chile or Ontario that would impose such a duty on Xstrata Canada in favour of Barrick on a non-contractual basis.

[691] Similarly, Xstrata Canada cannot attract liability, in its capacity as a shareholder of Xstrata Chile, solely by failing to assert its limited rights as a shareholder to prevent Xstrata Chile from breaching the Barrick Agreement. Barrick asserts that Xstrata Canada owed a duty to Barrick to prevent Xstrata Chile from breaching the Barrick Agreement. However, there is no evidence that such an obligation exists under the laws of Chile in the present circumstances. Nor is there any such obligation imposed on a shareholder of a corporation under the laws of Ontario, absent special circumstances that are not present in this action.

Intentional Interference with Barrick's Economic Relations

[692] Barrick also asserts that each of New Gold, Goldcorp and the Xstrata Parent Entities intentionally interfered with Barrick's economic relations with Xstrata Chile, causing an actionable loss to Barrick.

[693] The elements of the tort of intentional interference with economic relations are set out in *Reach M.D. Inc.* v. *Pharmaceutical Manufacturers' Association of Canada* (2003), 65 O.R. (3d) 30, [2003] O.J. No. 2062 (C.A.), at para. 44, as follows: (1) an intention to injure Barrick; (2) an interference made by unlawful means; and (3) economic loss resulting from the interference.

[694] To substantially the same effect is the definition proposed by Lord Hoffman at para. 51 of *OBG*:

> Unlawful means therefore consists of acts intended to cause loss to the claimant by interfering with the freedom of a third party in a way which is unlawful as against that third party and which is intended to cause loss to the claimant. It does not in my opinion include acts which may be unlawful against a third party but which do not affect his freedom to deal with the claimant.

The same definition of unlawful means was also approved by the Court of Appeal in *Correia,* at para. 102.

[695] This definition has the merit of identifying the volitional or intentional element of this tort ─ there must be a demonstrated interference with the third party's freedom.

[696] This is consistent with the origin of the tort of interference with economic relations as described by Lord Hoffmann, at para. 6, which in England at least is now assimilated into the more general tort of causing loss by unlawful means:

> It starts with cases like *Garret* v. *Taylor* (1620) Cro Jac 567 , in which the defendant was held liable because he drove away customers of Headington Quarry by threatening them with mayhem and vexatious suits. Likewise, in *Tarleton* v *M'Gawley* (1794) Peake 270 Lord Kenyon held the master of the *Othello*, anchored off the coast of West Africa, liable in tort for depriving a rival British ship of trade by the expedient of using his cannon to drive away a canoe which was approaching from the shore. In such cases, there is no other wrong for which the defendant is liable as accessory. Although the immediate cause of the loss is the decision of the potential customer or trader to submit to the threat and not buy stones or sell palm oil, he thereby commits no wrong. The defendant's liability is primary, for intentionally causing the plaintiff loss by unlawfully interfering with the liberty of others.

[697] Before proceeding to consider each of these three requirements in turn, I note the following distinction between the tort of inducing breach of contract and the tort of intentional interference in economic relations set out in *Alleslev-Krofchak* v. *Valcom Ltd.*, 2010 ONCA 557, [2010] O.J. No. 3548 (C.A.), at paras. 97, leave to appeal to S.C.C. refused [2010] S.C.C.A. No. 403:

> If the defendant induces a third party to breach its contract with the plaintiff, the defendant ought to be liable to the plaintiff as an accessory to the unlawful conduct, namely the breach of contract, suffered by the plaintiff. That is the role of the inducement tort. If the third party does not breach a contract with the plaintiff, but instead interferes with the plaintiff's economic relations as a result of unlawful means used by the defendant against that third party, the defendant ought to be liable to the plaintiff because unlawful means were employed by the defendant to intentionally harm the plaintiff. That is the role of the intentional interference tort.

I propose to consider these claims first against New Gold and Goldcorp and then against the Xstrata Parent Entities.

Claims Against New Gold and Goldcorp

[698] Barrick argues that New Gold's and Goldcorp's conduct in entering into the Goldcorp Agreement breached the Shareholders Agreement and the CFLA and that this conduct was directed at causing Xstrata Chile to terminate the Barrick Agreement and to transfer the 70% Interest to Goldcorp under the Goldcorp Agreement. It says these actions were therefore directed towards restricting Xstrata Chile's "freedom" or ability to deal with Barrick, which caused harm to Barrick. As a result, Xstrata Chile became the vehicle through which harm was

caused to Barrick in a manner contemplated by *Valcom*, at para. 60. Therefore, Barrick says that, if the court does not find the defendants liable for the tort of inducing breach of contract, it should find that their actions attract liability for the tort of intentional interference.

[699] A significant requirement of the tort is demonstration of "unlawful means". In *Valcom* at para. 54, Goudge J.A. adopted the following statements of Lord Hoffman in *OBG* regarding the requirements of the tort, which make it clear that the conduct of the defendants must be actionable by the third party:

> In my opinion, and subject to one qualification, acts against a third party count as unlawful means only if they are actionable by that third party. The qualification is that they will also be unlawful means if the only reason why they are not actionable is because the third party has suffered no loss. In the case of intimidation, for example, the threat will usually give rise to no cause of action by the third party because he will have suffered no loss. If he submits to the threat, then, as the defendant intended, the claimant will have suffered loss instead. It is nevertheless unlawful means. But the threat must be to do something which *would* have been actionable if the third party had suffered loss.

[700] Barrick argues that New Gold's and Goldcorp's conduct in entering into the Goldcorp Agreement constituted "unlawful means" by causing, or giving rise to, breaches of the Shareholders Agreement and the CFLA by Datawave. Barrick submits that this conduct was directed at restricting Xstrata Chile's "freedom" to deal with Barrick and thereby caused it harm.

[701] I conclude that Barrick has failed to establish "unlawful means" for two reasons.

[702] First, and most obviously, given the determinations above that Datawave did not breach the Shareholders Agreement or the CFLA by entering into the Goldcorp Agreement and that Datawave's exercise of the Right of First Refusal was valid, Barrick cannot demonstrate any breach of contract that constituted "unlawful means". In the absence of any other actions alleged to constitute "unlawful means", Barrick cannot establish this requirement of the tort. Put in the language of this tort, because the Conditions Precedent were satisfied, Xstrata Chile was obligated to close the transaction contemplated by the Datawave Purchase Agreement. It had no freedom that could have been interfered with by New Gold or Goldcorp. The only circumstances in which this tort could be alleged would be the case in which Datawave and/or Goldcorp sought to compel Xstrata Chile to accept an invalidly exercised Right of First Refusal by unlawful means (the nature of which in such a scenario has not been addressed by the court).

[703] Second, even in such circumstances, I do not think that Barrick can establish interference with economic relations on its own theory of this case.

[704] This question must be considered in the context of the alleged invalidity of Datawave's exercise of its Right of First Refusal. For this purpose, it is assumed that the underlying exercise of the Right of First Refusal was invalid even if the New Gold Notice complied with the formal

requirements of section 10.4. As mentioned above, Barrick says that Xstrata Chile breached its obligations to Barrick by failing to conduct a reasonable investigation. It says that, if Xstrata Chile had performed such obligations to the reasonable standard, it would have discovered the invalidity of the exercise of the Right of First Refusal.

[705] I do not think that Barrick could logically establish that New Gold and Goldcorp interfered with Xstrata Chile's freedom to deal with Barrick in this situation. In the circumstances assumed in Barrick's submission, Xstrata Chile was not only free but also obligated to reach its own conclusion regarding the validity of the exercise of the Right of First Refusal. Barrick says any investigation by Xstrata Chile would have revealed the invalidity of the exercise of the Right of First Refusal. In such circumstances, Xstrata Chile's conclusion as to the validity of the exercise of the Right of First Refusal, and its decision to terminate the Barrick Agreement, would be an independent act on the part of Xstrata Chile that would exclude any finding of interference on the party of New Gold or Goldcorp.

[706] For the sake of completeness, the second requirement of the tort of interference with economic relations is demonstration of an intention to injure Barrick. I have concluded that, given the determination above, the court cannot address the issue of intention of any of the defendants in respect of this tort for the same reason that I declined to address the similar requirement for the tort of inducing breach of contract.

Claims Against the Xstrata Parent Entities

[707] I propose to deal separately with the claims for interference with economic relations against Xstrata Queensland and Xstrata Chile.

The Claim Against Xstrata Queensland

[708] Barrick submits that Xstrata Queensland interfered with Xstrata Chile's economic relations by causing it to: (1) acquiesce in the alleged breaches of the Shareholders Agreement and the CFLA rather than permitting Xstrata Chile to assert those breaches and complete the Barrick Transaction; (2) fail to carry out an appropriate investigation and review of Datawave's exercise of the Right of First Refusal, thereby causing Xstrata Chile to breach its obligations to Barrick under the Barrick Agreement; (3) participate in the closing of the Goldcorp Transaction in which it conveyed the Xstrata Interest to DataSub rather than to Barrick as required under the Barrick Agreement; and (4) enter into, and complete, the Feasibility Study Agreement.

[709] This claim fails for the following reasons.

[710] First, given the determinations above that Xstrata Chile did not breach the Barrick Agreement, the Barrick claim against Xstrata Queensland must fail on the ground that there was no interference with Xstrata Chile's economic relations. As mentioned, Xstrata Chile had no freedom to forego completion of the sale of the 70% Interest to DataSub.

[711] Second, there is no evidence that Xstrata Queensland caused the Xstrata Personnel to take, or forego, the actions alleged to give rise to this claim. Therefore, Barrick must establish tortious actions on the part of the Xstrata Personnel for which Xstrata Queensland is vicariously liable. Barrick alleges that the Xstrata Personnel had a duty to Xstrata Chile to act in its best interests and to refrain from causing it to breach material agreements. However, there is no basis for such a claim for the same reasons as there is no basis for the similar claim in respect of the tort of inducing breach of contract.

[712] Third, I do not think that Barrick has established any "unlawful means". Barrick alleges that the unlawful means in respect of this claim are breaches of the duty of the Xstrata Personnel to act in Xstrata Chile's best interests and not to cause it to breach material agreements. This issue is rolled up into the reasons for dismissing the vicarious liability claim against Xstrata Queensland. As mentioned above, there is no basis for excluding the operation of the rule in *Said* v. *Butt* in respect of the Xstrata Personnel in the present case. This determination also excludes the finding of unlawful means in the form of the alleged breaches of duty to Xstrata Chile on the part of these parties. I would add that I have a serious doubt regarding whether the alleged breach of duty could constitute unlawful means in any event.

The Claim Against Xstrata Canada

[713] Barrick submits that Xstrata Canada interfered with Xstrata Chile's economic relations by: (1) failing to ensure that Datawave complied with the Shareholders Agreement by enforcing the Parent Entities Addendum against New Gold; and (2) failing to cause Xstrata Chile to enforce the Shareholders Agreement against Datawave in respect of its exercise of the Right of First Refusal. Barrick says Xstrata Canada had voting control over the shares of Xstrata Chile and had a duty, which it breached, to simply refrain from standing by and acquiescing in the conduct of Xstrata Queensland and its officers.

[714] This claim fails for the following reasons.

[715] First, given the determination that Datawave did not breach the Shareholders Agreement, Barrick's claim cannot succeed for the reason that Xstrata Canada cannot have breached either of its alleged obligations.

[716] Second, there is no legal principle under the laws of Chile or Ontario which imposes an obligation on a shareholder to refrain from standing by and acquiescing in conduct of the nature described above in respect of the claim against Xstrata Chile. Therefore, Barrick's allegation that breach of such duty constituted the "illegal means" for this tort claim cannot succeed.

[717] Lastly, the Xstrata Personnel had no relationship to Xstrata Canada. There is, therefore, no basis for asserting this claim by way of vicarious liability against this defendant.

Conspiracy to Injure

[718] Barrick also asserts that each of the defendants is liable in tort for unlawful conduct conspiracy as described by Estey J. in *Canada Cement LaFarge Ltd.* v. *British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452 at pp. 471-72: "where the conduct of the defendants is unlawful, the conduct is directed towards the plaintiff (alone or together with others), and the defendants should know in the circumstances that injury to the plaintiff is likely to and does result".

[719] Before proceeding, it is necessary to describe the involvement of each of the defendants in the conspiracy alleged by Barrick.

[720] Barrick says that New Gold and Goldcorp acted in combination commencing December 4, 2009, with a common intention and objective that Goldcorp would acquire either 70% or 100% of the El Morro Project, never 30%. Barrick says this common objective can be inferred from the "surreptitious nature of their plan to keep their conduct secret from both Xstrata Chile and Barrick". It points to: (1) actively misleading Barrick into thinking the New Gold value maximization process was limited to the New Gold Interest and failing to disclose that New Gold was actively marketing the 70% Interest and a 100% interest in the El Morro Project; (2) actively misleading Xstrata Chile into believing that New Gold was marketing only its 30% interest by means of the disclosure notices, knowing Barrick would receive those notices; (3) using misleading language in the December 18 New Gold Notice to obfuscate the nature of the proposed transaction; and (4) executing and implementing the Goldcorp Agreement.

[721] Barrick says Xstrata Chile joined this conspiracy no later than early January "as it became aware of the common plan of New Gold and Goldcorp". Barrick says Xstrata Chile's interest was to retain its 70% interest in the BHP Royalty. It says Xstrata Chile actively participated in and facilitated the Goldcorp scheme, under the direction of Xstrata Queensland and with the "apparent acquiescence" of Xstrata Canada. Xstrata Chile's active participation was demonstrated by, among other actions: (1) determining to "accept" the New Gold Notice and not inquiring adequately into the details of the Goldcorp Transaction; (2) failing to object to Datawave's purported exercise of the Right of First Refusal, notwithstanding knowledge that it was invalid; (3) actively participating in the closing of the transactions contemplated by the Goldcorp Agreement; and (4) knowingly transferring the 70% Interest to an entity within Goldcorp's control.

[722] Barrick alleges that the Xstrata Parent Entities also participated in the conspiracy. In the case of Xstrata Queensland, such participation took the form of directing Xstrata Chile to take the actions it did. In the case of Xstrata Canada, such participation took the form of acquiescing to Xstrata Queensland's alleged control of Xstrata Chile.

Legal Requirements of the Conspiracy Claim

[723] The elements of this tort have been set out by the Court of Appeal in *Agribrands Purina Canada Inc.* v. *Kasamekas*, 2011 ONCA 460, [2011] O.J. No. 2786 (C.A.), at para. 26, as follows:

> For the appellants to be liable for the tort of unlawful conduct conspiracy, the following elements must therefore be present:
>
> (a) they act in combination, that is, in concert, by agreement or with a common design;
>
> (b) their conduct is unlawful;
>
> (c) their conduct is directed towards the respondents;
>
> (d) the appellants should know that, in the circumstances, injury to the respondents is likely to result; and
>
> (e) their conduct causes injury to the respondents.

Analysis of the Claims Asserted Against New Gold, Goldcorp and Xstrata Chile

[724] There are three principal difficulties with this claim ─ demonstration of unlawful conduct, demonstration of actions in combination, and demonstration that the defendants' conduct was directed towards Barrick. I will address each in turn.

Unlawful Means

[725] To succeed in this claim, Barrick must establish among other things, that each of the alleged conspirators engaged in unlawful conduct. The case law indicates that unlawful conduct can include both breach of contract and tortious conduct.

[726] In this proceeding, Barrick alleges that the unlawful conduct of New Gold and Goldcorp consists of: (1) breach of contract, including breaches of the Transfer restrictions and the confidentiality provisions of the Shareholders Agreement, and a breach of the CFLA; and (2) the tortious conduct addressed above (inducing breach of contract and interference with economic relations).

[727] I have concluded above that the implementation of the Goldcorp Agreement did not cause a breach of the Transfer restrictions of the Shareholders Agreement. I have also concluded that the actions of New Gold and Goldcorp do not support either of the tortious claims asserted against New Gold and Goldcorp for inducing breach of contract or interference with economic relations. I conclude below that neither New Gold nor Goldcorp breached the confidentiality provisions of the Shareholders Agreement and, in any event, that Barrick has no common law

claim in its own right for breach of confidence involving misuse of confidential information. Accordingly, Barrick cannot establish the use of any unlawful means directed against Barrick by New Gold or Goldcorp.

[728] In the case of Xstrata Chile, the alleged unlawful conduct consists of: (1) a breach of its obligations to Barrick under the Barrick Agreement, as supplemented by its good faith obligations, to undertake a reasonable investigation and assessment of the validity of Datawave's exercise of the Right of First Refusal; (2) actively participating in the closing of the Goldcorp Transaction, including execution of the Datawave Purchase Agreement; and (3) breaching the Barrick Agreement and closing the sale of the Offered Interest to an entity fully within Goldcorp's control. All of this alleged unlawful conduct is premised on a finding that Datawave breached the Shareholders Agreement by entering into the Goldcorp Agreement and exercising the Right of First Refusal

[729] I have concluded above, however, that Xstrata Chile did not breach the Barrick Agreement by completing the sale of the 70% Interest to DataSub pursuant to the Datawave Purchase Agreement because Datawave validly exercised the Right of First Refusal. Accordingly, Barrick cannot demonstrate the use of any unlawful means directed against Barrick by Xstrata Chile.

[730] Given these determinations, the unlawful purpose conspiracy claims asserted against each of New Gold, Goldcorp and Xstrata Chile must fail.

Alleged Action in Combination

[731] Barrick's claims against New Gold and Goldcorp are, in substance, claims that these parties agreed on a common design on or about December 4, 2009, and used a number of unlawful means to achieve that purpose.

[732] Given the determination above, it is not necessary to address this issue and, subject to the comments below, I decline to do so. I would, however, make the following observations with respect to this requirement of the conspiracy claim.

[733] First, insofar as the claim against New Gold and Goldcorp is based on the existence of alleged action in combination prior to the execution of the Goldcorp Agreement, the evidence for such a combination is lacking.

[734] In effect, Barrick seeks to convert the relationship of negotiations between the parties regarding a possible transaction into a conspiratorial combination. For Barrick to succeed in this claim, it must establish that New Gold and Goldcorp formed a common intention that Goldcorp would acquire 70% or 100% of the El Morro Project, but never 30%, as Barrick suggests on or about December 4, 2009. The facts do not support this conclusion.

[735] There was no certainty that New Gold would accept a transaction with Goldcorp until the New Gold board of directors accepted the Goldcorp Offer on January 6, 2010. Despite the

intensive negotiations in early January 2010, New Gold not only retained the option of accepting a better offer from Barrick but it solicited one. Further, the structure of the Goldcorp Transaction was not established until late December 2009. Until shortly before Christmas, there was also a possibility that the third party who conducted due diligence at the El Morro Project on or about December 21, 2009 might also be interested. Moreover, the evidence indicates that the possibility that Goldcorp might acquire the New Gold Interest in exchange for a producing asset, as part of the transaction under consideration, was not definitively ruled out by the parties until late December 2009. These matters are addressed further below in respect of the Barrick claim that Datawave breached the confidentiality provisions of the Shareholders Agreement in providing disclosure to Goldcorp in December 2009.

[736] Accordingly, the only agreement upon which Barrick can rely in asserting this claim is the Goldcorp Agreement. The court must therefore analyze the alleged conspiracy as having occurred on and after January 6, 2011. However, the only unlawful means identified by Barrick during the period from that date to February 16, 2011 is the exercise of the Right of First Refusal, which the court has concluded did not constitute, or give rise to, breaches of the Shareholders Agreement or the CFLA.

[737] There is a similar problem of proof with regard to the claim against Xstrata Chile. Barrick claims that Xstrata Chile joined the conspiracy in early January in order to further its own interest of retaining its 70% Interest in the BHP Royalty and assisted the conspiracy by facilitating, rather than opposing, completion of the Goldcorp Transaction, although it knew that the Transaction involved a prohibited Transfer under the Shareholders Agreement.

[738] However, the only agreement to which Barrick can point is the Datawave Purchase Agreement. This agreement, and the other actions of Xstrata Chile in facilitating the completion of the Goldcorp Transaction, do not demonstrate a conspiratorial combination with New Gold and/or Goldcorp. Nor does the fact that Xstrata Chile benefitted from completion of the Goldcorp Transaction by retaining its interest in the BHP Royalty. Instead, these facts reflect the operation of the provisions of section 10.4 of the Shareholders Agreement, by which Xstrata Chile became bound to complete the sale of the Offered Interest to Datawave without the exercise of any will on its part. In the case of Xstrata Chile, the requirement of an action in combination is excluded by the determination that Datawave's exercise of the Right of First Refusal was valid.

Conduct Directed Towards Barrick and Knowledge that Injury will Result

[739] With regard to the requirement that the conduct be directed towards the plaintiff, Barrick says that, on the facts of this case, there could have been no doubt that Barrick alone would suffer loss as a result of the defendants' conduct. Because this case involves the exercise of a right of first refusal, the defendants could not achieve their respective objectives of having Goldcorp acquire the Offered Interest and Xstrata Chile retain the BHP Royalty without causing Barrick to suffer damage in the form of the loss of those assets. Barrick says that New Gold, Goldcorp and Xstrata Chile therefore knew that injury to Barrick would likely result from their

actions, in particular from Datawave's exercise of the Right of First Refusal. Barrick says that it does not matter that the defendants' conduct may have been motivated by self-interest or some other cause.

[740] This issue is only significant in the circumstances where a court finds that Datawave breached its obligations under the Shareholders Agreement in exercising the Right of First Refusal and completing the Goldcorp Transaction. Given the determination that Datawave validly exercised the Right of First Refusal, it is not meaningful to characterize the actions of any of New Gold, Goldcorp or Xstrata Chile as having been either directed towards Barrick or taken with the knowledge that injury to Barrick was likely to result, in each case in the sense required to assert a claim in conspiracy.

[741] While there is no doubt that New Gold and Goldcorp intended the natural consequences of their actions, their conduct was directed towards realization of their own interests in compliance with the Shareholders Agreement and the Barrick Agreement. While Barrick's deprivation of the benefit of the Barrick Agreement was an inevitable result of the exercise of the Right of First Refusal, the conduct of New Gold and Goldcorp was not specifically directed toward that end. In the case of Xstrata Chile, it was obligated to complete the Datawave Purchase Agreement pursuant to the Shareholders Agreement on the valid exercise of the Right of First Refusal. Its actions were directed towards complying with its obligations under the Shareholders Agreement. These facts are a consequence of the more fundamental finding that the defendants' actions were taken legitimately in the furtherance of their respective self-interests in compliance with the Shareholders Agreement, the CFLA and the Barrick Agreement, as the case may be.

Claims Asserted Against the Xstrata Parent Entities

[742] The claims against the Xstrata Parent Entities cannot succeed given the determination above that the claim of conspiracy against Xstrata Chile has not been established. In this sense, the claims against Xstrata Queensland and Xstrata Canada are dependent upon, and derivative of, a viable claim against Xstrata Chile. The comments above in respect of the claim of conspiracy against Xstrata Chile are also applicable to the claims against each of the Xstrata Parent Entities.

Alleged Misuse of Confidential Information

[743] In addition to the foregoing claims, Barrick asserts a common law claim against New Gold and Goldcorp for breach of confidence in the form of the misuse of confidential information, which it says entitles it to a restitutionary remedy in the form of a constructive trust. Barrick alleges that New Gold and Goldcorp misused confidential information pertaining to the El Morro Project in two respects that led directly to Goldcorp's gain and Barrick's loss of the Xstrata Interest. I will address these claims separately in turn.

Barrick's Common Law Claim Against New Gold and Goldcorp Respecting Disclosure Contemplated by the December 8 New Gold Letter and the December 18 New Gold Letter

[744] The principal claims of breach of confidence and misuse of confidential information against New Gold and Goldcorp relate to the New Gold disclosure of confidential information to Goldcorp made as contemplated by the December 8 New Gold Letter and the December 18 New Gold Letter. After describing these claims in greater detail, I will address the claims first by dealing with the scope of the confidentiality provisions in the Shareholders Agreement, then with the applicable law of Barrick's common law claims, and finally with Barrick's entitlement to a common law claim under the laws of Ontario.

[745] Section 12.11(2) of the Shareholders Agreement governed disclosure of confidential information pertaining to the El Morro Project. Barrick's principal claim for misuse of confidential information pertains to Datawave's disclosure to Goldcorp in December 2009 of confidential information in furtherance of a transaction for the Xstrata Interest. Barrick says Datawave breached section 12.11(2) in making such disclosure to Goldcorp. New Gold and Goldcorp submit that Datawave was permitted to disclose confidential information to Goldcorp pursuant to paragraphs 12.11(2)(d) and 12.11(2)(e) of the Shareholders Agreement.

[746] There is no question that Datawave provided Goldcorp with access to confidential information pertaining to the El Morro Project in December 2009, after Goldcorp signed a confidentiality agreement with New Gold. There is also no issue that Goldcorp used this information in making its decision to enter into the Goldcorp Transaction. The information disclosed comprised information in a data room established by New Gold and information received on a site visit to the El Morro Project on December 21 and 22, 2009. After the December 18 New Gold Letter, Goldcorp also received a copy of the form of the Barrick Agreement that New Gold had received in October 2009 together with the Xstrata Chile Notice.

[747] Barrick submits that the December 8 New Gold Letter misrepresented the purpose of the disclosure to Goldcorp in describing the purpose to be a possible sale of the New Gold Interest and a possible financing described by paragraph 12.11(2)(d) of the Shareholders Agreement. Barrick says that, by December 8, 2009, New Gold and Goldcorp were focused entirely on a transaction involving the Xstrata Interest and not the New Gold Interest. Barrick says the disclosure was therefore for the purpose of a sale involving either 100% or 70% of the El Morro Project. Accordingly, Barrick submits that the disclosure of confidential information pertaining to the El Morro Project and the Company pursuant to the December 8 New Gold Letter, including disclosure in the course of the site visit of the El Morro Project on December 21 and 22, 2009, violated New Gold's duty of confidentiality, as well as its duty of good faith. In addition, Barrick says that the further disclosure of confidential information made pursuant to the December 18 New Gold Letter, principally the form of the Barrick Agreement, also violated New Gold's duty of confidentiality as well as its duty of good faith.

Did the Disclosure Breach the Provisions of Section 12.11(2) of the Shareholders Agreement?

[748] Barrick does not suggest that it is entitled to enforce the confidentiality provisions of the Shareholders Agreement that it says Datawave breached by providing confidential information to Goldcorp. Instead, it asserts a common law claim that is addressed later. However, the scope of that common law claim is defined by the extent to which Datawave was entitled, as a contractual matter, to make such disclosure under the Shareholders Agreement. This is a matter of the contractual interpretation of section 12.11(2) of the Shareholders Agreement. In view of the conclusion reached below, it is only necessary to consider the operation of paragraph 12.11(2)(e). In addition, Barrick's argument turns on a finding that Datawave made its disclosure to Goldcorp in respect of a sale of the 70% Interest rather than the New Gold Interest by virtue of a commitment to such a transaction by Datawave and Goldcorp prior to the December 8 New Gold Letter.

[749] I propose to address these issues in the following order. First, I will address the contractual interpretation of paragraph 12.11(2)(e). I will then address Barrick's common law claim dealing in order with the proper law of the claim, the issue of standing, the factual pre-condition of Barrick's claim and the specific claim in respect of disclosure of the Barrick Agreement.

Preliminary Matters

[750] Before proceeding to address the issue in this section, there are two preliminary matters raised by Barrick pertaining to the December 8 New Gold Letter and the December 18 New Gold Letter.

[751] First, Barrick seeks to limit the extent of Datawave's right to disclose confidential information to the statements of intended purpose in the December 8 New Gold Letter and the December 18 New Gold Letter, the text of which has been set out above. This position amounts to an argument that the parties to the Shareholders Agreement amended the Agreement to narrow the permissible disclosure to whatever was communicated by Datawave to Xstrata Chile in these Letters.

[752] There is no basis for such a conclusion in the evidence before the court. There is no language in the Shareholders Agreement that would limit a shareholder's use of confidential information given to the use disclosed to the other shareholder under paragraph (iii) to the proviso in section 12.11(2) even if such a discrepancy could be established. There is also no evidence that Chilean law would require such an approach to the contractual interpretation of paragraph 12.11(2)(e).

[753] Second, Barrick asserts that the December 8 New Gold Letter and the December 18 New Gold Letter were misleading in their description of the use for which the confidential information was to be disclosed to the prospective purchasers. Because the text of these Letters does not

affect the interpretation of the confidentiality provisions in the Shareholders Agreement, this is an entirely separate issue. In this section, I address only the issue of whether the disclosure of the confidential information to Goldcorp was permitted under section 12.11(2) of the Shareholders Agreement.

Analysis and Conclusions Respecting Contractual Interpretation of Paragraph 12.11(2)(e)

[754] Paragraph 12.11(2)(e) of the Shareholders Agreement provides that, notwithstanding section 12.11(1), a shareholder may disclose such confidential information as may be reasonably required by a third party in connection with the negotiation and due diligence relating to a Transfer of any Rights and Interests to the extent permitted by the Shareholders Agreement. The issue in this section is therefore whether paragraph 12.11(2)(e) permitted disclosure in furtherance of the Goldcorp Transaction.

[755] The Shareholders Agreement, including the provisions of paragraph 12.11(2)(e), is governed by the laws of Chile. None of the Chilean legal experts has suggested that any specific principles of contractual interpretation are particularly applicable for this exercise. However, the Chilean experts did provide their opinions regarding the manner in which they believe paragraph 12.11(2)(e) should be interpreted.

[756] Morales' opinion is that Datawave was not permitted under paragraph 12.11(2)(e) to disclose confidential information in furtherance of its value maximization process insofar as that process contemplated the sale of 70% or 100% of the El Morro Project. I will address the basis for this opinion below.

[757] Ochagavia was of the opinion that the disclosure was authorized pursuant to paragraph 12.11(2)(e) on the basis that such provision was not limited to disclosure in connection with a sale by a shareholder of its own Rights and Interests. In his view, therefore, disclosure of confidential information regarding a possible transaction involving the sale of the 70% Interest after it was acquired by DataSub was not prohibited by paragraph 12.11(2)(e).

[758] Peña was also of the opinion that paragraph 12.11(2)(e) permitted disclosure in connection with the sale of the 70% Interest, not merely the New Gold Interest. In Peña's opinion, a Transfer of the 70% Interest was permitted under Chilean law and was not subject to the provisions of section 10.1 of the Shareholders Agreement (because section 10.1 only addressed sales of a shareholder's own Rights and Interests). Accordingly, while not expressly stated, Peña's opinion is that a sale of the 70% Interest without a concurrent sale of the New Gold Interest was permitted by the Shareholders Agreement and, therefore, disclosure was permitted in furtherance of such a transaction.

[759] Barros also disagreed with the position taken by Morales. The basis of his position is, however, somewhat unclear. Insofar as he based his position on Xstrata Chile's failure to oppose such disclosure, I have not relied upon his opinion. However, Barros also makes it clear that his

opinion is based on, or is a consequence of, his conclusion that there were no grounds in the Shareholders Agreement for prohibiting Datawave's exercise of the Right of First Refusal and the sale of the 70% Interest to a third party.

[760] I think that the wording of paragraph 12.11(2)(e) of the Shareholders Agreement, as well as common sense, mandates an interpretation of that provision in the present circumstances that permitted Datawave to disclose confidential information to Goldcorp in furtherance of a sale of the 70% Interest to Goldcorp conditional on DataSub's purchase of the Offered Interest. I reach this conclusion for the following three reasons.

[761] First, the language of paragraph 12.11(2)(e) is clear. It permits disclosure in connection with negotiations and due diligence relating to a Transfer of any Rights and Interests to the extent permitted by this Agreement. It was not limited in Datawave's case to a sale of the New Gold Interest. Accordingly, paragraph 12.11(2)(e) permitted disclosure in respect of both (1) the Transfer of the Offered Interest to Datawave pursuant to the exercise of the Right of Refusal and (2) the Transfer of the 70% Interest from Datawave to Goldcorp pursuant to the sale of the DataSub shares pursuant to the DataSub Share Purchase Agreement, in each case provided the Transfer was "permitted by the Shareholders Agreement".

[762] Unlike the phrase "permitted by this Article" used in Section 10.2, which is descriptive of the circumstances addressed in sections 10.3 and 10.4, the phrase "permitted by this Agreement" is very general in nature. I am satisfied on the evidence of Ochagavia, Peña and Barros that the reference in paragraph 12.11(2)(e) to Transfers of any Rights and Interests "permitted by this Agreement" is a reference to any Transfers of Rights and Interests that comply with the Agreement in any manner. Accordingly, it includes all transactions in which the other shareholder will receive the benefit of the provisions in Article 10 to which it is entitled in accordance with the principles set out above. In this manner, paragraph 12.11(2)(e) complements and reinforces the Transfer restrictions to the extent, but only to the extent, that such restrictions would apply to a proposed Transfer.

[763] Accordingly, I conclude that the disclosure made by New Gold to Goldcorp did not breach paragraph 12.11(2)(e) because it was made in respect of a Transfer of Rights and Interests that was permitted by the Shareholders Agreement.

[764] Second, whether or not Datawave complied with paragraph 12.11(2)(e) should, as a matter of common sense and logic, parallel the issue of whether the underlying transaction gave rise to a Transfer that was permitted or prohibited under the Shareholders Agreement.

[765] Barrick urges the court to interpret the Shareholders Agreement in a manner that would prevent disclosure of information to a prospective purchaser that it would require to conduct due diligence in furtherance of a transaction that was permitted by the Agreement. I think this submission should be rejected as contrary to commercial sense.

[766] The parties to the Shareholders Agreement cannot have intended to restrict a shareholder's options in exercising a right of first refusal under section 10.4 by means of the confidentiality provisions. Such an interpretation goes well beyond the purposes for which parties require confidentiality provisions in shareholders agreements and would require more explicit support elsewhere in the provisions of the Shareholders Agreement. Such evidence is absent in the present circumstances.

[767] Third, the Morales opinion is expressly based upon his conclusion that:

> … Datawave was not permitted under the El Morro Shareholders Agreement to Transfer anything other than its own Rights or Interests and seek offers that it would have to submit to the Right of First Refusal process established in Section 10.4. In no event Datawave was permitted under the El Morro Shareholders Agreement to offer its Right of First Refusal against Xstrata Chile for its 70% Participating Interest. That right could only be exercised by no one other than New Gold as the "other Shareholder" in the language of Section 10.4. Recipients of this proposal were not an "other Shareholder" in the language of Section 10.4 and could not be validly offered the right to exercise Datawave's Right of First Refusal against Xstrata for its 70% Participating Interest because it was a "Right or Interest" that could not be disposed of by any of the parties to the El Morro Shareholders Agreement …

[768] I think it is clear that, as a corollary of Morales' opinion regarding Datawave's exercise of the Right of First Refusal, his conclusion regarding the operation of paragraph 12.11(2)(e) is only applicable if the underlying conclusion is validated. In other words, Morales' opinion is dependent upon a prior finding that Datawave's exercise of the Right of First Refusal was invalid. However, I have rejected the conclusion that the Goldcorp Agreement gave rise to a prohibited Transfer. In these circumstances, the basis for Morales' opinion regarding the operation of paragraph 12.11(2)(e) does not exist. I would note, however, that Morales' approach, while reaching a contrary conclusion, also reflects a congruence between the operation of the Transfer restrictions and the operation of the disclosure provisions of the Shareholders Agreement .

[769] This conclusion is determinative of Barrick's common law claim for misuse of confidential information, apart from its claim with respect to disclosure of the form of the Barrick Agreement, which is dismissed below on other grounds. I have, however, addressed the remaining issues regarding Barrick's common law claim in case I have erred in reaching the foregoing conclusion.

Proper Law of the Obligation in Respect of Barrick's Common Law Claim of Misuse of Confidential Information

[770] The parties agree that the choice of law rule for a common law claim for breach of confidence is the proper law of the obligation. In Dicey and Morris, *The Conflict of Laws*, 12th

ed. (London: Sweet & Maxwell, 1993) at p. 1471, the authors state that the proper law of the obligation is to be determined according to the following rules:

> (a) If the obligation arises in connection with a contract, its proper law is the law applicable to the contract;
>
> (b) If it arises in connection with a transaction concerning an immovable (land) its proper law is the law of the country where the immovable is situated (*lex situs*); and
>
> (c) If it arises in any other circumstances, its proper law is the law of the country where the enrichment occurs.

[771] Goldcorp argues that the restitutionary obligation is based on a breach of the Shareholders Agreement, as the contract that governs the scope of the obligation of confidentiality, and therefore the proper law of the obligation should be Chile.

[772] Barrick says that the confidentiality agreement between New Gold and Goldcorp, or the Goldcorp Agreement, are equally relevant or that a "web of duties" is owed by the parties to one another. It says that the court should apply the principled approach illustrated in *Minera Aquiline Argentina SA* v. *IMA Exploration Inc.*, 2006 BCSC 1102, [2006] B.C.J. No. 1626 (S.C.) at para. 200, aff'd 2007 BCCA 319, [2007] B.C.J. No. 1232 (C.A) to find that the proper law of the obligation is Ontario law based on a number of factors including: (1) the New Gold employees who were involved in delivering the New Gold Letters were in Ontario and British Columbia; (2) the Goldcorp employees who received and reviewed the confidential information were in Ontario and British Columbia; (3) Goldcorp received and reviewed the confidential information without any knowledge of the applicable laws of any particular jurisdiction and without any knowledge of any applicable contractual obligations, including the Shareholders Agreement; and (4) Goldcorp was enriched in British Columbia.

[773] Applying the principled approach described in *Minerva Aquiline*, I am of the opinion that the laws of Chile govern this claim for the following reasons.

[774] First, and most importantly, the scope of the claim is defined by the Shareholders Agreement, which is governed by the laws of Chile.

[775] Second, insofar as New Gold or Goldcorp turned their minds to the question of whether New Gold's disclosure of confidential information to Goldcorp would attract liability to either or both of these defendants, I think it is reasonable to conclude that they would therefore have expected that, at a minimum, their obligations would be governed by the laws of Chile.

[776] Third, Barrick did not own any of the confidential information, apart from the Barrick Agreement which was owned jointly with Xstrata Chile. Nor did Barrick furnish any of the confidential information. The confidential information was owned by Xstrata Chile and Datawave, neither of which is a Canadian corporation and neither of which operates in Canada.

[777] Fourth, as Goldcorp points out, if Xstrata Chile had enforced the confidentiality provisions of the Shareholders Agreement, it would have been expected that the laws of Chile would govern its claims against both Datawave, as the confider of the information, and Goldcorp, as the recipient. I see no basis for distinguishing the circumstances of Xstrata Chile from those of Barrick in this action, particularly as any claim for breach of confidence would, in all probability, have been asserted by both Xstrata Chile and Barrick.

[778] However, none of the parties have pleaded the laws of Chile in respect of Barrick's breach of confidence claims. In addition, none of the Chilean legal experts provided evidence in their written reports or in oral testimony regarding the Chilean law of breach of confidence, other than in respect of the interpretation of the relevant provisions of the Shareholders Agreement as discussed above.

[779] In such circumstances, the court is required to assume that the laws of Chile in respect of Barrick's common law claims for breach of confidence involving the misuse of information are the same as the laws of Ontario.

Is Barrick Entitled to Assert this Breach of Confidence Claim Under Ontario Law?

The Issue

[780] As mentioned above, Barrick asserts that Datawave's disclosure to Goldcorp of confidential information pertaining to the El Morro Project in December 2009 breached a common law duty of confidence owed by each of Datawave and Goldcorp to Barrick directly.

Positions of the Parties

[781] The defendants argue that Barrick has no standing to assert this common law claim in the present circumstances because it was neither the owner of the confidential information disclosed by New Gold to Goldcorp, the confider of the confidential information, nor a party to the Shareholders Agreement.

[782] Barrick says that it was entitled to a duty of confidence in its favour. As a participant in the Xstrata Chile auction process and successful bidder, it says it had a reasonable expectation that the confidential information respecting the El Morro Project would remain confidential. It also says that it obtained from Xstrata Chile a contractual right to confidentiality respecting the El Morro Project pursuant to sections 8.6(e) (by virtue of Xstrata Chile's obligation to enforce the confidentiality provisions of the Shareholders Agreement) and 12.1 (the confidentiality agreement) of the Barrick Agreement. Barrick says that, in the present circumstances, neither Xstrata Chile nor the Company, the other two parties to the Shareholders Agreement, could be expected to enforce the confidentiality of such information, particularly as Xstrata Chile benefitted from the Goldcorp Transaction. It argues that, therefore, it should be entitled to assert a common law claim on the basis that it was only as a result of New Gold's and Goldcorp's breaches of confidence that it was deprived of the benefit of the Barrick Agreement. Otherwise,

it says, New Gold and Goldcorp will be able to rely on a lack of standing to shield themselves from liability for their breaches of confidence.

Applicable Law

[783] The elements of a common law claim in tort for breach of confidence have been confirmed by the Supreme Court of Canada as follows in *Lac Minerals Ltd.* v. *International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, at pp. 635-36:

1. the information conveyed was confidential;

2. the information was communicated in confidence; and

3. the information was misused by the party to whom it was communicated to the detriment of the party communicating it.

[784] This position was affirmed by the Court of Appeal in *Free Trade Medical Network Inc.* v. *RBC Travel Insurance Co.*, [2006] O.J. No. 3636 (C.A.), at para. 8. In that decision, the court went on to state, at para. 11, that:

> We accept that it may not be accurate in all cases of breach of confidence to say that the person seeking to rely upon a confidence must be the owner of the confidential information. As Lord Denning said in *Fraser v. Evans*, however,
>
> > ... the party complaining must be the person who is entitled to the confidence and to have it respected. He must be a person to whom the duty of good faith is owed.

[785] The Supreme Court also confirmed that a third party who receives information with the knowledge that it was communicated in breach of confidence may be subject to equitable remedies: see *Cadbury Schweppes Inc.* v. *FBI Foods Ltd*., [1999] 1 S.C.R. 142, at para. 19.

[786] Barrick submits that the flexibility demonstrated by courts in upholding confidentiality supports the conclusion that defendants need not owe a duty of confidence directly to a plaintiff in order to be liable for breach of confidence. For this proposition, it relies specifically on the decision in *Minera Aquiline.*

Analysis and Conclusions

[787] I agree with the defendants that Barrick cannot assert its common law claim for breach of confidence for the following reasons.

[788] First, while I accept that equity is to be applied flexibly to render justice, there is no authority for imposing a duty of confidence in favour of a third party to a contract who is neither the owner of the confidential information nor a confider of the confidential information.

[789] In particular, I am not persuaded that either *Minera Aquiline* or *Cadbury Schweppes* support Barrick's position on this issue. In *Cadbury Schweppes*, the plaintiff was the legal successor-in-interest to the original confider of the confidential information. *Minera Aquiline* was decided on the basis of a contractual claim. The plaintiff was a contracting party to the confidentiality agreement by its terms so the issue in the present circumstances did not present itself. Neither the trial decision nor the appellate decision addressed the issue in the present action directly and the comments of the trial judge in *Minera Aquiline* respecting the common law claim are entirely *obiter dicta*. I am therefore of the opinion that there is nothing in that decision that can be relied on to find that a duty of confidence could be owed to an unrelated third party, i.e., a party who neither owns the confidential information nor provides it to a party in circumstances establishing a duty of confidence.

[790] Second, I do not see a compelling reason in equity to impose such a duty. This claim is only significant in the circumstances in which the transaction, in furtherance of which disclosure was made, otherwise complied with the Shareholders Agreement. If it did not, Barrick would have more direct means of asserting a claim against the defendants. I do not think it is reasonable to provide a right in equity to prevent an otherwise permitted transaction by restricting the disclosure of confidential information.

[791] Third, Barrick cannot assert a reasonable expectation based on its participation in the Xstrata Chile auction process. Goldcorp did not participate in that process and, therefore, never signed a confidentiality agreement. Further, Barrick never took an assignment of the benefit of the executed confidentiality agreements, or otherwise received the benefit of such agreements, from Xstrata Chile.

[792] Based on the foregoing, I conclude that Barrick has no standing to assert its common law claims for breach of confidence based on misuse of information because neither New Gold nor Goldcorp owed a duty of confidence to it. It follows that any claim that Barrick might have arising out of a breach of the disclosure provisions of the Shareholders Agreement would be limited to a claim against Xstrata Chile based on disclosure of the Barrick Agreement, which is discussed below.

Factual Pre-Condition to Barrick's Claim

[793] There is also a factual difficulty with Barrick's common law claims even if it were assumed that paragraph 12.11(2)(e) limited permissible disclosure in furtherance of a sale of the New Gold Interest.

[794] I do not think that it is disputed that the information required by a prospective purchaser of the New Gold Interest would not differ from the information required by a prospective purchaser of the Xstrata Interest. Therefore, because New Gold was marketing the options of a 30% interest, a 70% interest and a 100% interest in the El Morro Project, the Barrick argument can only succeed if Barrick can establish that New Gold disclosed information to Goldcorp after the parties had resolved to pursue a transaction limited to the 70% Interest. Otherwise, to the

extent confidential information was provided to Goldcorp in connection with a *bona fide* negotiation of a possible purchase of the New Gold Interest alone or in contemplation of a purchase of 100% of the Project, the provisions of paragraph 12.11(2)(e) were satisfied, even if the parties ultimately agreed on a transaction that involved only the 70% Interest.

[795] However, the evidence does not support this assertion. Barrick alleges that New Gold and Goldcorp were focused entirely on a transaction involving the Xstrata Interest and not the New Gold Interest by December 8, 2009. The last of the confidential information was delivered no later than the Goldcorp site visit of El Morro on December 22, 2009, with the exception of the copy of the Barrick Agreement which is addressed below. The evidence establishes that New Gold and Goldcorp did not resolve to pursue a transaction limited to Goldcorp's purchase of the Offered Interest until December 24, 2009 at the earliest. This occurred after delivery of both the December 8 New Gold Letter and the December 18 New Gold Letter and the disclosure contemplated by these Letters. This conclusion is based on two principal considerations that, collectively, indicate that New Gold and Goldcorp kept open for as long as possible the option of an exchange of an operating asset of Goldcorp for the New Gold Interest.

[796] First, an asset swap was New Gold's preferred option. Goldcorp was prepared to consider such a transaction with New Gold as it understood that Barrick was unwilling to do so. An asset swap, if feasible, would therefore have made any Goldcorp offer more attractive to New Gold than any Barrick offer for the New Gold Interest. Accordingly, New Gold pursued that possibility, and Goldcorp was responsive to such a transaction, until December 24, 2009, when New Gold advised, after completing a site visit and other due diligence on or about December 22, 2009, that the San Dimas mine was not acceptable to New Gold.

[797] Further, while Bianchini mentioned to Jeannes that it might not be possible for Goldcorp to acquire the New Gold Interest without triggering a right of first refusal in favour of Xstrata, this was not firmly established until shortly before Christmas 2009. Bianchini was not a lawyer. He relayed the information with the qualification that the lawyers were still looking at the issue, which implied that a different result might still be possible. For legal advice on this issue, Jeannes relied on his internal general counsel, who was not available at the time of the conversation with Bianchini and who only looked at the issue later. More importantly, until there was a real possibility of an asset exchange transaction with New Gold, there was no reason to research this issue. It could only bring a halt to negotiations for New Gold's preferred option to Goldcorp's disadvantage. For this reason, it is not surprising that there is no evidence of an opinion of legal counsel for either Goldcorp or New Gold on this matter.

Claim for Breach of Confidence in Respect of the Barrick Agreement

[798] I agree with Barrick that it had an ownership interest in the Barrick Agreement and, as such, was entitled to a duty of confidence in its favour respecting disclosure of this Agreement. However, I think Barrick waived any right it might otherwise have had to prevent disclosure of the Barrick Agreement by its acquiescence to such disclosure.

[799] Barrick received a copy of the December 18 New Gold Letter on December 21, 2009. Barrick had notice from that letter that New Gold was proposing to disclose the Barrick Agreement to at least one of the parties named in the earlier New Gold disclosure letters. Moreover, it is understood that the parties named in the earlier disclosure letters comprised only mining companies and trading companies. As Goldcorp was named in the December 8 New Gold Letter, it therefore knew, or should have known, that Goldcorp was a potential recipient of the Agreement.

[800] Barrick did not raise any issue concerning the disclosure to Goldcorp of the Barrick Agreement until after Datawave exercised the Right of First Refusal. Its only reaction, upon receiving this correspondence on December 21, 2009, was to inquire about an entirely separate issue pertaining to a possible exercise of the Right of First Refusal by Datawave.

[801] I accept Ochagavia's uncontradicted evidence on the consequences of such inaction under Chilean law. It was Ochagavia's opinion that Xstrata Chile could rely on Barrick's failure to object to such disclosure based on the Authentic Rule of contractual interpretation, as well as the principle of estoppel, which he says is part of the duty of good faith under Chilean law.

[802] For the same reasons, I think Barrick's acquiescence should be interpreted under the law of Ontario as an acknowledgment that such disclosure was permissible in the context of a prospective purchase of the 70% Interest or, alternatively, as a waiver of any claim it might otherwise have had. Whether or not Barrick considered that such a transaction could only occur after New Gold had "consolidated" 100% of the El Morro Project is irrelevant for this issue.

Conclusion Regarding Barrick's Common Law Claim for Breach of Confidence

[803] Based on the foregoing, I conclude, for three reasons, that Datawave did not breach the provisions of section 12.11 of the Shareholders Agreement in providing confidential disclosure to Goldcorp in furtherance of the Goldcorp Transaction. Barrick had no standing to assert such a claim for the reasons stated above. Disclosure of the confidential information to Goldcorp was permitted under paragraph 12.11(2)(e) of the Shareholders Agreement. Insofar as disclosure of the form of the Barrick Agreement was subject to a duty of confidentiality of Datawave in favour of Barrick, Barrick's acquiescence precludes the assertion of any right in respect of such disclosure.

Claims Against Goldcorp in Respect of Alleged Breach of Confidentiality by Director

[804] Barrick also asserts two common law claims for breach of confidence pertaining to Telfer. I will first describe the factual background to each of these claims. I will then address, in turn, the issues of the proper law of these claims, Barrick's entitlement to assert these claims under the laws of Ontario, and the merits of these claims.

Disclosure of Information Regarding the Xstrata Auction Process

[805] In June 2009, in his capacity as a director of New Gold, Telfer received certain confidential information provided by Xstrata Chile to New Gold in connection with the Xstrata Chile auction process. This information included the Xstrata Confidential Information Memorandum, the identities of the bidders in the Xstrata Chile auction process, and a letter of Xstrata Chile to the bidders describing that auction process. It also included a confidential New Gold memorandum discussing New Gold's strategic options regarding the El Morro Project. Both New Gold and Xstrata Chile considered this information to be confidential information that was not to be disclosed to third parties.

[806] Telfer received the information by email on June 17, 2009 in anticipation of a conference call with Oliphant, Gallagher, Portmann and another director to discuss New Gold's options in respect of the Xstrata Chile auction process. That call took place on June 19, 2009.

[807] On the following day, June 20, 2009, Telfer forwarded the documentation by email as an attachment to Jeannes who, in turn, forwarded it to Timo Jauristo, the head of the Goldcorp corporate development department ("Jauristo"). Jeannes did not open the attachment to the email to read the documentation. However, Jauristo and several other Goldcorp corporate development employees read the documentation at or about that time.

Disclosure of Information Respecting the New Gold Value Maximization Process

[808] On or about November 3, 2009, in his capacity as a director of New Gold, Telfer received a corporate development update prepared by Portmann that was forwarded to all New Gold directors in connection with a meeting of the New Gold board of directors held on that date. At that meeting, among other things, the proposed New Gold value maximization process was discussed. Telfer attended and participated in that meeting, including the discussion of the proposed New Gold process.

[809] On December 1, 2009, Telfer received a further corporate development update from Portmann in his capacity as a New Gold director. That update included a discussion of New Gold's primary objectives for its value maximization process, including the criteria of its preferred partner and a summary of the negotiations with three interested parties, including Barrick. It is acknowledged that this information was also confidential to New Gold.

The Proper Law of These Claims

[810] Barrick's claim regarding the confidential information disclosed in June 2009 is based on the confidentiality provisions of the Shareholders Agreement. Accordingly, I consider that the conclusions regarding the proper law of this claim should be the same as the conclusions regarding Barrick's common law claims in respect of the disclosure made by New Gold to Goldcorp in December 2009.

[811] With respect to Barrick's common law claim for breach of confidence in regard to the confidential information delivered to Telfer in November and early December 2009, I conclude that the proper law is the law of Ontario. That information was prepared by New Gold in its offices in Ontario and/or British Columbia. It was forwarded to Telfer, who received it in one of these jurisdictions or in California which has no connection with this action. The information was related to the status of New Gold's value maximization process and New Gold's objectives in that process rather than to the El Morro Project directly.

[812] Accordingly, the proper law of this claim should be the law of British Columbia, which it is agreed is the same as the law of Ontario for this purpose, or the law of Ontario, which it is agreed shall apply in such circumstances.

Barrick's Entitlement to Assert its Breach of Confidence Claims Under Ontario Law

[813] Barrick's ability to assert these common law claims under Ontario law is, however, subject to the same disability as was addressed above.

[814] The issue regarding the alleged use of confidential information in June 2009 is identical, being based on an alleged breach of the Shareholders Agreement.

[815] While the facts are different in respect of the claim based on the alleged use of the information received by Telfer in November and early December 2009, I see no difference in principle that would give Barrick a right to assert this claim. In particular, Barrick was not a participant in the New Gold value maximization process by its own choice. It therefore could have had no expectation of confidentiality between New Gold and any of the participants in that process. New Gold would have been free to reveal its corporate objectives, and/or its assessment of the other prospective bidders, to one or more of the participants in that process if it chose to do so. Its decision not to enforce the alleged breach of confidentiality is tantamount to a decision to make such disclosure.

[816] Accordingly, if it were necessary to reach a conclusion on the issue, I would conclude that Barrick was not entitled to assert either of these common law claims under the law of Ontario. There are also, however, fundamental factual problems with these claims that go to their merit. These issues are addressed in the following section.

Analysis and Conclusions Respecting the Claims Based on the Alleged Use of Confidential Information Received by Director

[817] New Gold and Goldcorp do not deny that Goldcorp received the confidential information regarding the Xstrata Chile auction process in June 2009 in breach of New Gold's confidentiality obligations to Xstrata Chile under the Shareholders Agreement. Similarly, they do not deny that, later in 2009, Telfer received confidential information regarding New Gold's value maximization process in his capacity as a New Gold director when he was, concurrently, the chairman of the board of Goldcorp. They deny, however, that Goldcorp misused the information to Barrick's detriment.

Alleged Use of Information Respecting the Xstrata Chile Auction Process

[818] Barrick alleges that Goldcorp made the decision not to participate in the Xstrata Chile auction process as a result of its review of the documentation received via Telfer in June 2009. In doing so, it says Goldcorp misused confidential information.

[819] Insofar as this decision resulted in one less competitor for the Xstrata Interest, it would appear to have benefitted rather than harmed Barrick. However, Barrick alleges that a significant consequence of this decision was that Goldcorp did not sign a confidentiality agreement with Xstrata Chile as a result of its decision. Barrick argues that, had it done so, Goldcorp would never have been able to participate in the New Gold value maximization process; New Gold and Goldcorp would never have agreed upon the Goldcorp Transaction; Datawave would never have exercised the Right of First Refusal; and Barrick would have acquired the Xstrata Interest.

[820] This claim requires that Barrick demonstrate that Goldcorp made the decision not to participate in the Xstrata Chile auction process on the basis of the confidential information. The record does not support such a conclusion.

[821] Jeannes says that the decision had already been made before he received the information. There is no evidence that contradicts this statement and several considerations that support it.

[822] There is no evidence that Goldcorp was considering making an indicative bid prior to receipt of the confidential information. In particular, there is no evidence that Goldcorp had conducted any assessment or due diligence regarding the El Morro Project prior to receiving the confidential information, notwithstanding that, under the Xstrata Chile auction process, indicative bids were to be made by June 28, 2009. There is also no evidence of internal Goldcorp activity after Jeanne's receipt of the information that casts doubt on Jeannes' testimony. In particular, there are no emails or other communications after the information was received that evidence any decision-making by Goldcorp regarding the Xstrata Chile auction process.

[823] Further, I have no reason to doubt Jeannes' evidence that Goldcorp knew that Barrick was interested in the El Morro Project as this was public knowledge in the mining industry at the time. I accept his evidence that Goldcorp did not consider that it could be competitive on price with Barrick, given the potential for the synergies to Barrick, as such evidence is consistent with the absence of any Goldcorp involvement in Chile at the time. More significantly, there is ample evidence that Goldcorp was fully occupied pursuing other projects that it believed it had a greater chance of acquiring.

[824] In summary, these factors strongly support Jeannes' evidence that Goldcorp had decided not to participate in the auction process prior to receiving the confidential materials from Telfer on or about June 20, 2009. In any event, the facts do not support a conclusion that Goldcorp used the information regarding the Xstrata Chile auction process to decide not to participate in it, much less a decision to stay out of Xstrata Chile's sale process and pursue a purchase of the 70% Interest via New Gold after that process had ended.

Alleged Use of Information in December 2009

[825] Barrick also alleges that Goldcorp used all of the information described above in early December 2009 in deciding to participate in the New Gold value maximization process.

[826] For this purpose, the following factual background is relevant. BMO contacted Goldcorp on November 12, 2009 regarding the New Gold process and sent it a "teaser" letter and confidentiality agreement the next day. Goldcorp expressed no interest at the time. Subsequently, Telfer raised the opportunity at a Goldcorp board meeting on December 2, 2009. As a result of a discussion prompted by Telfer's comments, the Goldcorp board resolved to participate in the New Gold process and Jeannes initiated that participation by writing an email to Oliphant on December 4, 2009.

[827] Barrick says that the court should infer that the December 1, 2009 confidential New Gold update that Telfer received in his capacity as a New Gold director "acted as the catalyst" for raising the El Morro Project at the Goldcorp board meeting. Barrick says the court should also infer that Telfer was aware of New Gold's strategy regarding the El Morro Project when he raised the opportunity with the Goldcorp board and that he shared this information with other individuals at Goldcorp in connection with Goldcorp's decision to "get back into the El Morro process". Barrick says that the court should infer that Goldcorp therefore misused the information that it received in June 2009 regarding the Xstrata Chile auction process and the information regarding the New Gold value maximization process that it received between November 13, 2009 and December 2009. It says such misuse directly resulted in Goldcorp and New Gold entering into discussions and ultimately executing the Goldcorp Agreement.

[828] I am not satisfied that Barrick has demonstrated that Goldcorp used any of the confidential information that Telfer received in reaching its decision to participate in the New Gold value maximization process.

[829] There is no evidence that any of the information received in June 2009 respecting the El Morro Project was used in the Goldcorp board discussions in early December 2009. Nor is there any evidence that any of the information was used in any material way by its corporate development team in its analysis of a prospective transaction in December 2009. To the contrary, Goldcorp appears to have relied upon the information furnished to it directly by New Gold that was contemplated by the December 8 New Gold Letter and the December 18 New Gold Letter.

[830] In particular, there is also no evidence that any of the confidential information respecting New Gold's objectives in its value maximization process was relevant to Goldcorp's decision to approach New Gold. Instead, what was relevant was the existence of an opportunity that resulted from increasing metal prices and the fixed cash price in the Barrick Transaction, all of which was public information. Moreover, New Gold had been quite open about its preferred options through Bianchini and in its direct conversations with Barrick.

[831] Barrick's argument comes down to its suggestion that Telfer's receipt of the New Gold corporate development update on December 1, 2009 acted as a "catalyst" for raising the New Gold value maximization process with the Goldcorp board. That is, Telfer would never have been reminded of, and therefore would never have raised, the opportunity to invest in the El Morro Project with the Goldcorp board if he had not received this New Gold document.

[832] There is, however, no evidence to this effect. It is at least as likely to have been the case that Telfer, as an experienced participant in the mining business, was aware of the opportunity independently, given that the status and principal details of the Barrick Transaction were public information. Barrick asks the court to draw an adverse inference from his failure to testify. I decline to do so for the reason that, given the other difficulties with this argument, it was unnecessary for Goldcorp to produce evidence on the factual issues pertaining to this claim.

[833] In any event, even if it were the case that receipt of the New Gold memorandum reminded Telfer of the El Morro Project and prompted his suggestion to the Goldcorp board that Goldcorp should consider this opportunity, such limited actions do not constitute misuse of confidential information. Being reminded of an investment opportunity that is public knowledge upon receipt of a memorandum containing confidential information pertaining to that opportunity is not the same as using the confidential information contained in it. Barrick has not demonstrated use by Goldcorp of the confidential information in the memorandum in any part of its decision to participate in the New Gold value maximization process. Given the lack of any supporting evidence and the absence of any detailed discussion of the El Morro "opportunity" at the Goldcorp board meetings, I decline to draw the inference that such use occurred.

Conclusion Regarding Barrick's Claim for Breach of Confidence Based on Information Received by Telfer

[834] Based on the foregoing, I conclude that Barrick has failed to assert a viable common law claim for breach of confidence in respect of the confidential information received by Telfer.

Unjust Enrichment Claim

[835] Lastly, Barrick submits that Goldcorp was unjustly enriched by its unlawful and tortious conduct in executing the Goldcorp Agreement and completing the Goldcorp Transaction. It says that the principles of unjust enrichment permit a claim in restitution for which the appropriate remedy is a proprietary remedy in the form of a constructive trust directed against Goldcorp.

[836] This claim addresses several different circumstances. The principal purpose of this claim is to provide a remedy if the court finds that the New Gold Notice complied with the formal requirements of section 10.4 of the Shareholder Agreement but the Goldcorp Agreement constituted, or gave rise to, a prohibited Transfer under the Shareholders Agreement. In addition, Barrick asserts this claim as an alternative proprietary remedy to specific performance in the circumstances in which the court finds that Xstrata Chile breached the Barrick Agreement but is not liable for damages under the laws of Chile by reason of a failure to establish

negligence in respect of the breach. In addition, Barrick asserts a constructive trust claim based on breach of confidence to the extent that the substantive elements of Barrick's common law claim for breach of confidence are established but Barrick is otherwise prevented from asserting such a claim, for example, on the grounds of standing.

[837] To the extent that Barrick's claim for unjust enrichment addresses only the foregoing circumstances, it cannot succeed given the court's determination above that none of these circumstances occurred. I have set out my views on this claim in greater detail, however, on the understanding that Barrick also asserts this claim as an alternative cause of action generally.

[838] I will deal first with the applicable law pertaining to this claim and then with the disposition of the substantive issues regarding this claim.

Applicable Law

[839] The three requirements of an unjust enrichment claim are set out in *Garland* v. *Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629, at para. 30, as follows:

> As a general matter, the test for unjust enrichment is well established in Canada. The cause of action has three elements: (1) an enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) an absence of juristic reason for the enrichment (*Pettkus v. Becker*, [1980] 2 S.C.R. 834, at p. 848; *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762, at p. 784).

[840] There is no dispute that the choice of law rule for unjust enrichment claims is the proper law of the obligation. However, the parties disagree as to what the proper law is in the circumstances of this case.

[841] The traditional rules governing the proper law of the obligation, as articulated by Dicey and Morris, have been set out above. As mentioned above, in recent years, courts have determined which of these rules applies to any particular circumstances by taking a principled approach to the choice of law issue. The issue is decided by asking which legal system has the closest and most real connection to the obligation. This approach is supported in Castel and Walker, *Canadian Conflict of Laws*, 6th ed., looseleaf (Markham: LexisNexis Canada, 2005), which was cited with approval by Koenigsberg J. in the trial decision in *Minerva Aquiline* at para. 195:

> In my view, any difficulty arising from the apparent clash of the first two subrules can be resolved by taking a principled rather than a categorical approach to the choice of law issue. The essential question to be answered in choosing the appropriate law to govern a claim is, "what legal system has the closest and most real connection to the obligation?" This principle is supported by the comments of Castel & Walker at s. 32.1:

> Since choice of law rules tend to be based on the elements of a cause of action and not on the appropriate consequences of seeking relief, the law governing a claim for unjust enrichment will depend on the nature of the wrong giving rise to the claim. For instance, where the obligation arises in connection with a pre-existing contractual relationship either actual or intended, the obligation is most closely connected with the law applicable to the contractual relationship. Similarly, the obligation to restore the benefit of an unjust enrichment in connection with a person's ownership of an immovable may have its closest and most real connection with the law of the legal unit where the immovable is situated. Thus, it has been proposed that the law governing restitutionary claims in general should be the "law of the unjust factor." Should an analysis based on this approach fail to yield a compelling result, the obligation to restore the unjust enrichment could be regarded as more closely connected with the law of the place where the immediate or ultimate enrichment occurred since the enrichment is at the heart of the action and "the law of the place of the defendant's enrichment is more closely connected with the defendant than the law of the place of the plaintiff's impoverishment."

[842] In *Minera Aquiline*, the court had to consider a situation in which the relevant contract was governed by the laws of British Columbia but the issue concerned confidential information pertaining to mining properties located in Argentina. The trial judge approached the issue in the following manner, at para. 200:

> In my view, a more principled approach to a case such as this one, where the obligation arises in connection with both a pre-existing contractual relationship and a transaction involving foreign land, would be to examine all the factors that could be relevant to the strength of the connection between the obligation and the competing legal systems. Such factors should be given weight according to a reasonable view of the evidence and their relative importance to the issues at stake. Thus, each of the factors listed by Dicey and Morris would be considered and weighed along with the following non-exhaustive list of factors to determine which set of laws has the closest and most substantial connection to the obligation.
>
> > * Where the transaction underlying the obligation occurred or was intended to occur;
> >
> > * Where the transaction underlying the obligation was or was intended to be carried out;
> >
> > * where the parties are resident;

> * where the parties carry on business;
>
> * what the expectations of the parties were with respect to governing law at the time the obligation arose; and
>
> * whether the application of a particular law would cause an injustice to either of the parties.

[843] The trial judge concluded in *Minera Aquiline*, at para. 206, that, although the enrichment occurred in Argentina, "the legal system that informed and guarded the perceptions and actions of the key players at the time the breach of confidence occurred was Canadian and American law". On this basis, the court concluded that British Columbia law had the closest and most real connection to the obligation between these parties and therefore applied to determine liability of the common law claim asserted for breach of confidence.

[844] Goldcorp argues that the court should have regard to the following factors in determining that the law governing the obligation to make restitution for an unjust enrichment should be Chile: (1) the subject matter of the dispute is either shares or real property, in either case situated in Chile; (2) the entity that acquired the Offered Interest, DataSub, is a Chilean company, so the enrichment occurred in Chile; (3) the entity that would have acquired the Offered Interest would have been a Barrick subsidiary incorporated in Chile, so the deprivation would have occurred in Chile; and (4) the juristic reason for the enrichment is the Datawave Purchase Agreement, which was governed by the laws of Chile.

[845] I conclude that, in the present circumstances, the laws of Ontario should govern Barrick's unjust enrichment claim. I reach this conclusion on the basis of the following factors.

[846] I agree with New Gold and Goldcorp that the alleged juristic reason for the enrichment is the Goldcorp Transaction. The Goldcorp Agreement and the actions taken under it by New Gold and Goldcorp are central to this claim. The occurrence of the alleged enrichment and deprivation flowed naturally from Datawave's exercise of the Right of First Refusal. That action occurred pursuant to the mutual covenants of New Gold and Goldcorp in the Goldcorp Agreement that collectively constitute the Goldcorp Transaction.

[847] The Goldcorp Agreement is governed by the laws of Ontario. It was negotiated and executed in Ontario and British Columbia (which, for this purpose, is understood to have the same law as Ontario). For the reasons discussed above in respect of the proper law of the tort claims, I also think that the enrichment and corresponding deprivation should be regarded as having occurred both in British Columbia and Ontario at the corporate level of Goldcorp and Barrick, as well as in Chile for the reasons asserted by Goldcorp. As in *Minerva Aquiline*, there is no evidence that any of the principal actors were aware of the Chilean law pertaining to unjust enrichment. As in that case, the laws of British Columbia and Ontario informed and guided the perceptions and actions of the key players in respect of the actions giving rise to the unjust enrichment claim.

[848] Accordingly, I find that the law of Ontario has the closest and most real connection between the parties to the unjust enrichment claim and therefore applies to the determination of this claim.

Analysis and Conclusions Respecting the Unjust Enrichment Claim

[849] The nature of Barrick's unjust enrichment claim has been described above.

[850] With respect to the first and second requirements of the unjust enrichment claim, Barrick says that Goldcorp was enriched by acquiring the Offered Interest and Barrick suffered a corresponding deprivation by losing the Offered Interest. It submits that a plaintiff can obtain recovery against a defendant who acquires a benefit unjustly from a third party where the plaintiff can demonstrate that it would have obtained the benefit from the third party but for the conduct of the defendant.

[851] It relies for this proposition on the statement of LaForest J. (for the majority) in *Lac Minerals Ltd.* at pp. 669-70:

> In my view the facts present in this case make out a restitutionary claim, or what is the same thing, a claim for unjust enrichment… [T]here are concurrent findings below that but for its interception by Lac, Corona would have acquired the property. In *Air Canada* v. *British Columbia*, [1989] 1 S.C.R. 1161, at pp. 1202-03, I said that the function of the law of restitution "is to ensure that where a plaintiff has been deprived of wealth that is either in his possession or would have accrued for his benefit, it is restored to him. The measure of restitutionary recovery is the gain the [defendant] made at the [plaintiff's] expense." [Emphasis added.] In my view the fact that Corona never owned the property should not preclude it from the pursuing a restitutionary claim: see Birks, *An Introduction to the Law of Restitution*, at pp. 133-39. Lac has therefore been enriched at the expense of Corona.

Barrick says that, in the present case, but for Goldcorp's conduct, Xstrata Chile would have completed the Barrick Agreement and obtained the Offered Interest so that Goldcorp obtained the Offered Interest at Barrick's expense. Goldcorp does not take issue with this analysis, which is assumed for the purposes of these Reasons.

[852] Barrick submits that, as a matter of equity, it would be unjust for Goldcorp to rely on the Goldcorp Agreement as a juristic reason for its acquisition/enrichment and thereby retain the 70% Interest at Barrick's expense if the court found that New Gold breached the Shareholders Agreement. It says that, in such circumstances, Barrick has the superior claim because it participated in the Xstrata Chile auction process in good faith, complied with the rules of that process and complied with its duties of confidentiality. In addition, Barrick says it became the Third Party Offeror in reliance on "a good faith and customary interpretation" of section 10.4 of the Shareholders Agreement. In contrast, it says Goldcorp stayed out of the Xstrata Chile

auction process after concluding it could not win it and then tried to make an end-run around that process in a manner prohibited by the Shareholders Agreement, as well as by misusing confidential information.

[853] The principal difficulty with this claim pertains to the third requirement ─ the absence of a juristic reason for the enrichment. As mentioned, Barrick submits that there would be no juristic reason for Goldcorp's enrichment if the court were to find any of the following circumstances: (1) the Goldcorp Agreement resulted in a breach of the Shareholders Agreement, whether or not the tort claims or the breach of confidence claims are established; (2) Goldcorp committed any one of the three torts alleged against it; or (3) Goldcorp committed a breach of confidence by way of misuse of confidential information.

[854] In view of the findings above that (1) the Goldcorp Agreement did not constitute a prohibited Transfer under the Shareholders Agreement; (2) the actions of New Gold and Goldcorp did not constitute the tortious acts of inducing breach of contract, interference with economic relations or conspiracy; and (3) Barrick has not established the substantive elements of a claim for breach of confidence based on misuse of confidential information, Barrick's unjust enrichment claim cannot succeed.

[855] In addition, as mentioned above, there is no basis in the evidence for a finding that Goldcorp entered into the Goldcorp Agreement with the sole, or principal, purpose of harming Barrick. Nor is there any evidence that Goldcorp stayed out of the Xstrata Chile auction process with a view to circumventing that process by dealing directly with New Gold. Therefore, given the other circumstances in this litigation, I would not conclude that the equities of the situation favoured Barrick as it suggests. In the present circumstances, each party acted principally, if not solely, with a view to furthering their respective self-interests in a competitive environment, and in compliance with their respective legal and contractual obligations.

PART III – EVIDENCE PERTAINING TO REMEDIES SOUGHT BY BARRICK

[856] The parties also tendered evidence with respect to a number of matters bearing on the appropriate remedy if Barrick were successful in its claims against the defendants. This evidence falls into two categories described and dealt with in these Reasons as described below.

[857] First, the parties tendered considerable factual evidence pertaining to the quantification of Barrick's loss and to the companion issues of the appropriate remedy in the circumstances of this action. Barrick calculated its loss to be Cdn. $747 million, as set out in a report referred to as the "Duff & Phelps Report", which is described below. The Duff & Phelps Report is based on a number of sources that fall into two categories: (1) reports on the El Morro Project prepared for Xstrata Chile, New Gold (and its predecessor companies) and Goldcorp between 2008 and February 2011; and (2) reports prepared by Barrick in connection with this litigation. In response to the latter reports, Xstrata Chile also caused two expert reports to be prepared for this trial.

[858] The reports prepared by or for Xstrata Chile, New Gold and Goldcorp between 2008 and 2011 are described below. The expert evidence presented at the trial by Barrick and Xstrata Chile is summarized in some detail, together with certain conclusions regarding issues raised pertaining to this evidence, in case it becomes relevant. In addition, the nature of this evidence, the principal matters in dispute between the parties, and the difficulties involved in making findings regarding the issues raised in respect of this evidence, inform the conclusions below as to the appropriate remedy for Barrick's claims.

[859] Second, the parties also addressed a number of legal issues regarding Barrick's entitlement to damages under Chilean law. Among other matters, the evidence at trial addressed the operation of the limitation of liability provisions in sections 9.10 and 9.11 of the Barrick Agreement. If applicable, the manner in which these provisions operate would depend upon findings of the presence or absence of willful misconduct (or *dolo*) or gross negligence on the part of Xstrata Chile. It would also require a finding as to whether Barrick's claim for the replacement value of the Xstrata Interest and its 70% interest in the BHP Royalty would constitute damages characterized as *daño emergente* or as *lucro cessante* under Chilean law. A determination on these issues would therefore require a finding, or a hypothetical assumption, regarding the nature of Xstrata Chile's breach of the Barrick Agreement. Given the conclusions above regarding the absence of any such breach, I have not addressed the legal issues pertaining to the extent to which Barrick would be entitled to damages under the laws of Chile and the Barrick Agreement.

Sources of Information Prepared Between 2008 and 2011

[860] Between 2008 and 2011, a number of parties reviewed the technical and financial estimates for El Morro. The principal reports of this nature are the following:

1. the Fluor Feasibility Report;

2. an audit dated 2008 by AMEC Americas Limited (the "AMEC Report") of an Xstrata Chile estimate of the mineral resources contained in the La Fortuna deposit, that was used in the Fluor Feasibility Study;

3. an independent review of the Fluor Feasibility Study dated May 9, 2008, prepared for Metallica Resources, Inc., a predecessor corporation of New Gold, by Pincock & Allen & Holt (the "PAH Report") in the form of a technical report in compliance with National Instrument 43-101;

4. a report prepared on behalf of Goldcorp, which was completed in March 2010 but is dated February 16, 2010 (the "Goldcorp Report"), addressing the Fluor Feasibility Study, including recommendations for additional work, in the form of a technical report in compliance with National Instrument 43-101; and

5. a press release of Goldcorp dated February 9, 2011, announcing updated reserve and resource estimates for its mineral property interests, including the El Morro Project (the "Goldcorp 2011 Press Release").

Draft Hatch Feasibility Study

[861] In addition, since the Goldcorp 2011 Press Release, Goldcorp has engaged Hatch Chile ("Hatch"), an affiliate of Hatch & Associates, a major international engineering firm, to prepare an updated feasibility study of El Morro. The Hatch feasibility study had not been completed by the trial date and was therefore not in evidence. However, certain technical and cost estimates, and certain draft chapters, prepared for the draft feasibility study, were available prior to trial and are discussed below.

Overview of the Proposed El Morro Project

[862] By way of overview, the Fluor Feasibility Study, and these other reports, contemplated a stand-alone open pit mine to extract ore to a depth of 700 metres over a 15 year period from an ore-body referred to as the "La Fortuna" ore-body, with the potential to transition to underground mining to extend the life of the mine. The Fluor Feasibility Study envisaged a processing plant at the El Morro site producing a copper-gold concentrate having a throughput of 90,000 tonnes of ore per day.

[863] The process design envisaged the following components: (1) a primary crushing of run-of-mine ore in a gyratory crusher; (2) a 1,000 metre long belt conveyor that would deliver the crushed ore to a stockpile; (3) a grinding circuit consisting of a single semi-autogenous grinding mill and two ball mills, operating in parallel, to further reduce the ore in size; (4) a rougher floatation circuit; (5) a regrinding circuit, in which the concentrate from the rougher floatation circuit is further reduced in size; (6) a cleaner and scavenger floatation circuit, from which the product is the final, saleable concentrate in the form of a slurry; (7) two thickeners to increase the density of the slurry; (8) a concentrate slurry pipeline to transport the concentrate to a filtration plant; and (9) the concentrate filtration plant, in which the moisture content of the concentrate is reduced, rendering it transportable by truck to a port near Huasco, Chile where it is to be loaded on board a ship for transport to a smelter. The processing plant also includes a dammed tailings storage facility that would ultimately cover an area of 450 hectares.

[864] This plan envisaged the construction of substantial new infrastructure including: (1) a 125 km access road from the Pan-American highway to the Project; (2) a new power substation on the Chilean national power grid at an external site and overhead transmission lines to the Project; (3) a desalination plant located at an external site to convert sea water to fresh water, electric transmission lines to this plant and a 200 km pipeline to pump the water from the plant to the Project; (4) the pipeline to take the concentrate slurry to the filter plant off-site; (5) a new port facility on the Chilean coast; and (6) the on-site infrastructure.

[865] There has been no significant change in the components or configuration of the mine facilities on-site and off-site since these reports, apart from an adjustment to the location of some of this infrastructure.

The Barrick 2011 Mine Plan

[866] As mentioned above, on May 28, 2009, after signing a confidentiality agreement, Barrick received the Xstrata Confidential Information memorandum as well as a financial model of the El Morro Project created by Xstrata. In the second stage of the Xstrata Chile auction process, Barrick also received copies of the Fluor Feasibility Study and the PAH Report, together with a copy of an earlier report concerning geotechnical studies conducted by Piteau Associates.

Creation of the Barrick 2009 Mine Plan

[867] In connection with its assessment of the El Morro Project during the Xstrata Chile auction process, Barrick developed a "2009 Mine Plan" as a high level estimate of the value of the El Morro Project based on, but incorporating less detail from, the Fluor Feasibility Study. The 2009 Mine Plan was used by Barrick to assess the attractiveness of the El Morro Project as an investment opportunity relative to Barrick's existing assets and other potential investments. It was also used as a basis for assessing the value, or range of values, of the El Morro Project as described below.

[868] Given the short time available to conduct due diligence and prepare an offer, Barrick relied on the Xstrata financial model including, in particular, the Fluor Feasibility Study resource block model based on drilling to-date that was used for such financial model. For this purpose, Barrick also used the metallurgical process contemplated by the Fluor Feasibility Study, including the average gold and copper recovery rates determined in the Feasibility Study. Barrick also assumed construction of all of the infrastructure contemplated by the Fluor Feasibility Study.

[869] In developing the Barrick 2009 Mine Plan, Barrick verified the mineral resource estimate for the Project, based on the resource block model, the pit design and the production schedule in the Fluor Feasibility Study. In estimating the mineral resources at the El Morro Project, important variables are estimated copper and gold prices, estimated metal recovery rates from the mined ore and the estimated costs of production. It is important to note that higher metal prices not only increase revenue but also lower the cut-off grade of mined ore, thereby increasing reserves. From this data, Barrick developed detailed estimates of a production schedule and equipment fleet from which, using a commercial software program, it derived estimates of (1) capital expenditures; (2) process costs; (3) operations costs; and (4) equipment costs.

[870] In its 2009 Mine Plan, Barrick estimated in-pit reserves to be 459 metric tonnes of ore containing 0.57% copper and 0.44 grams per tonne of gold amounting to 5,744 million pounds of contained copper and 6.5 million ounces of contained gold. Barrick did not materially increase these reserves in the 2011 Mine Plan described below. However, in the Goldcorp 2011 Press

Release, Goldcorp reported materially higher reserves that are currently being used by Hatch in its preparation of the Hatch feasibility study. The 2009 Mine Plan envisaged a through-put capacity of the processing plant of 92,500 tonnes of ore per day.

[871] Barrick developed its capital cost estimate using the Fluor Feasibility Study estimate as a baseline, adjusted to reflect Barrick's own estimates based on three principal factors: (1) first principles for the pre-stripping and mining operation; (2) escalation factors for costs related to the processing plant and infrastructure; and (3) particular cost increases for costs that were considered to be underestimated in the Fluor Feasibility Study. Barrick also added a 10% contingency factor to the total capital cost estimate to accommodate unforeseen developments.

[872] Barrick developed its operating cost estimate by updating the Fluor Feasibility Study costs by applying then-current Chilean rates for wages, salaries and other costs. Because it did not develop its estimate of processing costs from first principles, Barrick considered its estimate of these costs to have a greater than normal possibility of error and chose to include a 5% contingency for estimated processing costs.

[873] In addition, Barrick made certain assumptions regarding the treatment and refining costs to be charged by smelters for producing and refining the metal content in the concentrate to be produced by the El Morro Project. Barrick also assumed that Chilean income tax would be payable at a rate of 17%.

[874] By way of overview, both the capital cost and the operating cost estimates developed by Barrick were materially higher than the estimates in the Fluor Feasibility Study. On the other hand, Barrick also used higher metal prices than the Fluor Feasibility Study in its estimate of future revenues. For this purpose, it used long-term copper and gold prices of U.S. $2.25/lb and U.S. $900/oz, respectively.

[875] Barrick then derived an estimated net cash flow from the project for each year of the projected 14-year life, assuming that production commenced in mid-2014. Using this estimate, Barrick calculated a net present value for the Xstrata Interest. This amount was equal to 70% of the present value calculation of the estimated net after-tax cash flows from the El Morro Project less 70% of the present value of the estimated initial and sustaining capital costs. The use of a 70% factor reflected the Xstrata Interest. In this calculation, Barrick used both a 5% and an 8% discount rate to produce a range of values. The discount rates of 5% and 8% reflect Barrick's understanding of the discount rates typically used by other mining companies and equity research analysts as measures of the cost of capital for gold and base metal mining companies, respectively. The issue of the appropriate discount rate for a net present value calculation of the Xstrata Interest is addressed further below. A similar discounted after-tax cash flow estimate was derived for 70% of the BHP Royalty, which was also discounted using a 5% and an 8% discount factor.

Creation of the Barrick 2011 Mine Plan

[876] In December 2010, Barrick updated the 2009 Mine Plan for use in this litigation. The updated mine plan was completed on January 11, 2011, and will be referred to as the "2011 Mine Plan". The 2011 Mine Plan assumes that the Barrick Transaction had closed in February 2010 in accordance with the Barrick Agreement and that mine production would commence in mid-2014.

[877] The 2011 Mine Plan used the 2009 Mine Plan as the base case and was updated to reflect Barrick's then-current information on estimates regarding metal prices, costs, the rate of inflation and the Chilean-U.S. dollar exchange rate. In particular, Barrick says that it incorporated its experience with cost escalation at its Pascua-Lama and Cerro Casala projects. The 2011 Mine Plan otherwise used the same methodologies and key assumptions as were used in the 2009 Mine Plan.

[878] In its 2011 Mine Plan, Barrick estimated in-pit reserves to be 464 million tonnes of ore containing 0.57% copper and 0.44 grams per tonne of gold, amounting to 5,830 million pounds of contained copper and 6.56 million ounces of contained gold. This is not materially different from the reserves in the 2009 Mine Plan.

[879] Overall, the higher gold price used in the 2011 Mine Plan was largely offset by higher capital and operating costs. In particular, costs increased as a result of a stronger Chilean peso, inflation, and increased costs for labour, consumables, commodities, and mining equipment. Operating costs were increased by 18%, mainly as a result of higher costs for labour and consumables. Similarly, capital costs increased by 15%, primarily due to increases in the costs of labour, materials and equipment. These costs were addressed in the BDO Report discussed below.

[880] It should be noted that, in developing the 2009 Mine Plan and the 2011 Mine Plan, Barrick did not revise the project details set out in the Fluor Feasibility Study with a view to optimizing the mine plan or other aspects of the Project, as either action would have required further testing and studies. It also did not evaluate potential synergies with its two other mining projects in the area or attempt to quantify any upside potential for additional resources at depth or within the El Morro Project area beyond the La Fortuna ore-body. The value of the potential benefits associated with these features of the El Morro Project was therefore not addressed in the Duff & Phelps Report, which calculated Barrick's damages, or in the BDO Report described below.

The Micon Report

[881] In 2011, Micon International Limited ("Micon"), an internationally recognized mining industry consultant, was retained by Barrick to review the technical and cost estimates used in the Barrick 2011 Mine Plan. Micon's conclusions are set out in a report dated August 25, 2011, which was supplemented by a supplemental report dated October 7, 2011 (collectively, the

"Micon Report"). A principal of Micon, Christopher Lattanzi ("Lattanzi"), testified at trial regarding the conclusions in the Micon Report.

[882] Micon compared the significant technical and cost estimates in the Fluor Feasibility Study and the Barrick 2011 Mine Plan. It noted that there was substantial agreement between the two with respect to technical estimates but that the Barrick cost estimates were materially higher as would be expected due to the lapse of time between the estimates.

Conclusions in the Micon Report Concerning the Barrick 2011 Mine Plan

[883] Micon concluded that the technical and cost estimates in the Barrick 2011 Mine Plan were based on appropriate engineering estimating methodologies and that the estimates were reasonable and appropriate, other than with respect to the following five matters which Lattanzi characterized as "relatively minor".

[884] First, based on its own metallurgical testing of representative samples of mineralization from the La Fortuna deposit, Micon developed its own computerized simulation of the metallurgical process proposed for El Morro, from which it predicted likely recoveries of copper and gold from the mined ore. In Micon's estimation, the average copper recovery projection of 89.5% used by Barrick should be reduced to 88.1%. Conversely, in Micon's estimation, the average gold recovery projection of 66.1% used by Barrick should be increased to 67.1%.

[885] Second, Micon concluded that Barrick had inadvertently omitted the cost of road haulage of the concentrate from the filtration plant to port. It estimated this cost at between U.S. $15 and U.S. $20 per wet tonne of concentrate.

[886] Third, Micon considered that Barrick marginally overstated the smelter "payability factor" representing the percentage of contained copper in the concentrate for which smelters are typically prepared to pay. Micon concluded that the factor should be 96.2% rather than 96.5%.

[887] Fourth, Micon considered that Barrick had underestimated the rate of consumption of steel balls used in the grinding circuit in the processing plant. Micon estimated the additional process operating cost to reflect its estimate of usage would be approximately U.S. $0.50 per tonne of ore processed.

[888] Fifth, Micon recommended removing the 5% contingency allowance that Barrick had included in the operating cost estimates but which Micon considered unusual.

Micon Comments on the Draft Hatch Feasibility Study

[889] In its supplemental report dated October 7, 2011, Micon provided its conclusions regarding the technical and cost estimates developed by Hatch for use in the draft Hatch feasibility study. Micon noted that the Hatch feasibility study, when completed, will represent the most up-to-date and comprehensive analysis of the technical and cost parameters associated with production of the La Fortuna ore-body.

[890] Micon noted that the principal difference between the Barrick 2011 Mine Plan and the Hatch estimates relates to the mining plan. In the Goldcorp 2011 Press Release, Goldcorp announced a new reserve estimate for El Morro, based on updated metal prices, of 531 million tonnes grading 0.52% copper and 0.48 grams per tonne of gold. Consistent with this higher reserve, the draft Hatch feasibility study provides for a mine plan producing 537 million tonnes at an average copper grade of 0.52% and average gold grade of 0.49 grams per tonne. The Hatch mine plan also has a lower stripping ratio of 2.87:1 than the Barrick 2011 Mine Plan ratio of 3.26:1, which results in a lower cost per tonne of ore processed. Micon assumes this lower ratio reflects the conversion of some material formerly considered to be waste to ore as a result of the higher metal prices used in the draft Hatch feasibility study.

[891] Micon further observed that the draft Hatch feasibility study provides for a lower estimate of copper recovery, a higher estimate of gold recovery, and a 30% higher quantity of gold recovered, all of which are consistent with the difference in grades between the Hatch and Barrick estimates. Micon also observed that the Hatch estimates would negate two of Micon's conclusions: (1) that Barrick had marginally overestimated the payability factor for copper; and (2) that Barrick had underestimated the transportation cost by U.S. $15 to U.S. $20 per tonne. If a loss calculation were mandated, the Duff & Phelps Report would therefore be adjusted accordingly.

[892] More generally, Micon concluded that there is a significant level of agreement between the Hatch and Barrick estimates. In particular, there is essential agreement between the Barrick and Hatch estimates of initial capital expenditures and average operating costs. Overall, Micon considered the Hatch projections to be economically somewhat more favourable than the Barrick projections. The other estimates, particularly regarding the quantity of gold to be produced and the lower smelting and refining charges, were more favourable in the Hatch projections than in the Barrick estimates. However, in the absence of the completed Hatch feasibility study, it is not possible to quantify the additional value of El Morro that results from the Goldcorp reserves and revised mine plan.

[893] Micon did note a significant difference between the Hatch and Barrick estimates pertaining to the life-of-mine sustaining capital expenditures for the processing plant offsite infrastructure, the tailings facility and replacement of the equipment fleet. Micon noted that the Hatch estimate is materially higher than the Barrick estimate. It is, however, not possible to explain the difference based on the record before the court.

The Duff & Phelps Report

[894] As mentioned, the Barrick claim for damages is based upon a quantification of its loss calculated by Duff & Phelps in a report dated August 26, 2011, which was supplemented by a reply report dated October 10, 2011 (collectively, the "Duff & Phelps Report"). The partner at Duff & Phelps responsible for the preparation of the Duff & Phelps Report, Scott Davidson ("Davidson"), testified at the trial.

Conclusion

[895] The Duff & Phelps Report calculates Barrick's loss in this action to be between U.S. $853 million and U.S. $711 million, with a mid-point of U.S. $782 million, which equates to Cdn. $747 million at the exchange rate in effect on the calculation date, being July 31, 2011. The following summarizes the approach and principal conclusions of the Duff & Phelps Report.

Definition of Loss and Approach Adopted for Calculation of the Loss

[896] The Duff & Phelps Report defines loss as that amount which, if paid to Barrick, would put Barrick in the same financial position that it would have been in had Barrick been able to complete its purchase of the Xstrata Interest and Xstrata's 70% interest in the BHP Royalty for U.S. $465 million in February 2010 and to develop the El Morro mine thereafter.

[897] Barrick's loss was calculated as the amount by which the foregone net cash flows that Barrick would have earned from the Xstrata Interest and Xstrata's 70% interest in the BHP Royalty, discounted to a capital sum or present value at a discount rate that Duff & Phelps considers to be appropriate, exceeds the purchase price in the Barrick Transaction, less the estimated return earned by Barrick on the purchase price funds not expended.

Adjustments to the Barrick 2011 Mine Plan Cash Flows

[898] The anticipated future net cash flows from El Morro used for this calculation were the net cash flows set out in the Barrick 2011 Mine Plan adjusted to reflect the issues raised in the Micon Report and to reflect the net impact of the carried loans under the CFLA.

[899] Duff & Phelps adjusted the long-term copper and gold prices used in the calculation of revenues from the number mandated by Barrick's treasury group for long-term planning purposes to U.S. $3.00/lb and $1,270/oz, respectively. In reaching its conclusion to use these prices, Duff & Phelps relied primarily on the Gulley Report described below, although it did consider current market-based indicia of price forecasts, including forward prices and consensus estimates of analysts as well as the price forecasts used by the parties to this litigation.

[900] Duff & Phelps acknowledged that it is not expert in mining engineering and therefore it relied on Micon's opinion regarding the Barrick mineral reserve estimate, grades, recoveries, mine schedule, capital costs and operating costs. Duff & Phelps made the following adjustments to the technical and cost assumptions used by Barrick in its 2011 Mine Plan after discussions with representatives of Barrick and Micon: (1) expected copper recovery was reduced to the average of the Barrick and Micon estimates, being 88.8%; (2) expected gold recovery was increased to the average of the Barrick and Micon estimates, being 66.6%; (3) the expected payability factor for contained copper was reduced to the Micon estimate; (4) projected transportation costs were increased to the midpoint of Micon's estimated range, being $17.50 per wet tonne of concentrate; (5) projected processing costs were increased by Micon's estimate in respect of grinding costs; and (6) the 5% contingency factor included in the projected processing costs was removed based on Micon's opinion. Duff & Phelps calculated that, in aggregate, these

adjustments represented a reduction in the net present value of the aggregate interest of Xstrata Chile in the El Morro Project of approximately U.S. $100 million. In addition, the estimated cost of diesel fuel was increased from $0.70 per litre to $0.80 per litre to reflect updated cost estimates used in planning for Cerro Casala that became available after completion of the Barrick 2011 Mine Plan.

[901] It is important to note that Duff & Phelps did not, however, take into account the additional reserves announced by Goldcorp in February 2011 or the revised mine plan on the basis of which the draft Hatch feasibility study is being developed.

Weighted Average Cost of Capital/Discount Rates

[902] To arrive at a discount rate that Duff & Phelps considered appropriate, Duff & Phelps developed a weighted average cost of capital based on the capital asset pricing model. Conceptually, the discount rate developed using this model consists of a risk-free rate of return and an additional rate of return for the business risks of the particular project reflecting the rates of return on alternative investments.

[903] For this purpose, Duff & Phelps undertook three weighted average cost of capital calculations for, respectively, a junior copper mining company (9% - 10%), a senior gold producer (5% - 6%) and a senior base metal producer (8% - 9%).

[904] Because the debt to total capital ratio was low in each case, ranging from 10% for a junior copper company to 20% for a senior base metal producer, the debt contribution to the weighted average cost of capital was modest in each case. The principal difference between the calculations was the unlevered beta applied to the equity risk premium, which ranged from 1.5 for a junior copper company to 0.6 for a senior gold producer.

[905] The beta is a measure of the volatility of an asset or class of assets relative to the market as a whole. It is a function of the excess expected return on an individual security (i.e. the return over and above the return available on a risk-free investment) relative to the excess expected return on the market index. As such, it is a measure of systematic risk and, accordingly, application of the beta derived for each category of company to the risk-free rate of return provides an equity risk premium that is proportionate to the systematic risk of each such category of company relative to the market as a whole. The higher the volatility, the higher the systematic risk and therefore the higher the cost of equity capital. Securities that have betas greater than 1.0 are expected to have a positive excess return that exceeds that of the market index when the market return exceeds the risk-free rate. Conversely, securities that have betas greater than 1.0 are also expected to have a negative excess return that exceeds that of the market when the market return is less than the risk-free rate. Accordingly, systematic risk relates to the uncertainty of future returns due to uncontrollable movements in the market as a whole and generally comprises external factors that affect all economic assets within the market as a whole. Unsystematic risk relates to risks that are investment specific. The capital asset pricing model

assumes that unsystematic risk does not exist because rational actors in the market eliminate it by holding well diversified portfolios of assets that are not perfectly correlated.

[906] In determining the appropriate discount rate within the range presented by the three weighted average cost of capital calculations that it developed, Duff & Phelps says it assessed a number of factors including the resource risk inherent in the anticipated future cash flows, the metals price risk, geopolitical risk and project-specific risks, including in particular permitting and production delays and higher than anticipated capital or operating costs.

[907] As discussed further below, Davidson did not disagree with the principle emphasized in the BDO Report that the appropriate weighed average cost of capital, and therefore the appropriate discount rate, is a function of the particular investment and not the investor. However, he considered that the market for the El Morro Project included senior gold companies and senior diversified base metal companies but did not include junior copper or gold companies, based on the parties who participated in the Xstrata Chile auction process and the New Gold value maximization process. Davidson attributed this largely to the size of the asset, including the size of the reserves, and the associated capital expenditures required to develop the asset relative to the size of junior mining companies.

[908] On this basis, Duff & Phelps considered that the appropriate discount rate should fall within the range of rates established by the weighted average cost of capital for senior gold producers and for senior diversified base metal producers. It selected a range between 6% and 7% with a midpoint of 6.5%, giving greater weight to the weighted average cost of capital for senior gold producers and less weight to the cost of capital for diversified senior base metal producers and taking into consideration the other market-based indicia of value described below. Duff & Phelps also considers that the premium of 1.6% over its weighted average cost of capital calculation for senior gold producers represents an appropriate adjustment for the stage of development of El Morro as well as the copper/gold mix of the proposed mine.

[909] Applying a narrower range of discount rates of 6 ¼% to 6 ¾% to 70% of the anticipated net cash flows from El Morro results in a range of U.S. $1,183 million to U.S. $1,329 million for the aggregate Xstrata interest in the El Morro Project. Deducting the Barrick purchase price of U.S. $465 million and adding back the expected return earned by Barrick on the purchase funds, which is not material, results in a calculated loss to Barrick ranging between U.S. $711 million and U.S. $853 million, with a midpoint of U.S. $782 million, or Cdn. $747 million at the exchange rate on July 31, 2011.

[910] Duff & Phelps considers that its conclusion regarding the appropriate range for a weighted average cost of capital is also supported by market-based indicia of value. Among other market-based data to which Duff & Phelps points in support of its position are: (1) the internal rates of return of 6.4% and 7.1% derived from the price in the Barrick Transaction and the Goldcorp Transaction, respectively, upon which it places considerable reliance; (2) discount rates used by mining analysts; and (3) discount rates used by the financial advisors to New Gold and Goldcorp. All of these rates fall within a range between 5% and 8%.

[911] In regard to the internal rates of return derived in respect of the Barrick Transaction and the Goldcorp Transaction, I would note that these calculations are based on the 2009 Mine Plan, in the case of Barrick, and on a Goldcorp financial model in 2009, in the case of Goldcorp, which was made available to Duff & Phelps but was not in evidence at trial. The court was not provided with any detail regarding either of those calculations. From a reference in the Duff & Phelps Report, it appears the Goldcorp financial model differed from the Barrick 2009 Mine Plan in that it assumed larger quantities of payable copper and gold, a lower gold price, and payment of the U.S. $50 million payment to New Gold. However, in Duff & Phelps' view, it is significant that its choice of discount factor results in value to each of Barrick and Goldcorp reflected in the difference between the internal rate of return and the likely cost of capital of each of these parties.

[912] The Duff & Phelps Report states that the Barrick loss was expressed as a range to reflect the difficulty in deriving, with certainty, a specific point estimate conclusion for each of the variables impacting the calculations, including but not limited to, future metal prices and the production profile. More generally, Davidson acknowledged that arriving at the discount rate, or the range of discount rates, involved a significant element of subjective judgment after calculation of the cost of capital for the three classes of market participants.

[913] Duff & Phelps also points out that there are other factors that could result in a higher loss that are not easily quantified and, therefore, are not included in the loss calculation. These include the possibility of higher than estimated metal prices. Duff & Phelps also did not attempt to quantify any possible returns from mineral resources at depth in the planned mine pit, any synergies available to Barrick from its other mines in the area, or the exploration potential of the remainder of the El Morro Project beyond the La Fortuna deposit.

Issues Regarding the Copper Price Assumption

[914] There is, however, an unresolved difficulty with the metal price assumptions used in the Duff & Phelps Report that was addressed on Davidson's cross-examination. The Duff & Phelps Report calculated Barrick's loss by reference to the fair market value of the aggregate Xstrata interest in the El Morro Project which can be viewed, alternatively, as the replacement cost of a theoretically identical asset in the market at the loss quantification date. Duff & Phelps accepted that, consistent with the definition of fair market value, the present value of the aggregate Xstrata interest in the El Morro Project was the highest price available in an open competition, i.e., the price at which the next most competitive bidder would fall away.

[915] In arriving at the present value of the Xstrata Interest in the El Morro Project, it is therefore necessary to use the forecast copper prices that the successful bidder in such an auction would use in making its final bid. Duff & Phelps relied on the Gulley Report for this purpose. The Gulley Report appears to propose the Market Sentiment Price (as described below) as the appropriate price for a fair market value determination of this nature. However, in choosing a copper price of U.S. $3.00/lb, Duff & Phelps used Gulley's Single Reference Price (as described below) for copper, rather than his Market Sentiment Price. Using a copper price of U.S. $2.50,

being Gulley's Market Sentiment Price, would result in a present value calculation of the aggregate interest of Xstrata in the El Morro Project that is approximately equal to the purchase price in the Barrick Transaction.

The BDO Report

[916] At the request of Xstrata Chile, BDO LLP ("BDO") provided comments on the Duff & Phelps report in an affidavit sworn October 5, 2011 by Spencer Cotton ("Cotton"), the BDO partner responsible for the preparation of the report (the "BDO Report").

Approach and Conclusions of the BDO Report

[917] The BDO Report defined Barrick's loss in the same manner as the Duff & Phelps Report and approached the calculation of the loss on the same basis. However, the BDO Report calculated Barrick's loss in this action based on the Barrick 2011 Mine Plan to be between U.S. $102 million and (U.S. $104 million) with a midpoint of effectively nil. The following summarizes the BDO Report comments on the Duff & Phelps Report.

Weighted Average Cost of Capital/Discount Rate

[918] BDO noted that virtually the entire difference in the loss calculations of Duff & Phelps and BDO arises from the selection of different discount rates used in the present value calculation of the foregone future cash flows. Subject to three matters dealt with below in respect of which BDO ran sensitivity analyses, BDO considered the forecast cash flows relied on in the Duff & Phelps Report to be reasonable as a basis for use in the quantification of Barrick's loss.

[919] However, BDO considered that Duff & Phelps misapplied generally accepted valuation principles resulting in the use of an inappropriately low cost of capital in the calculation of Barrick's loss. BDO makes two criticisms of the Duff & Phelps approach.

[920] First, as mentioned, BDO emphasizes that the appropriate cost of capital to be used in present value calculations of future cash flows is a function of the investment, not the investor. This is consistent with the fact that the weighted average of capital addresses the risks associated with the projected cash flows from the property itself. In this case, BDO considered that Duff & Phelps failed to take into account the fact that the investment, El Morro, is at a pre-production stage of development and that the cash flows should be assessed accordingly. BDO considered that it was not appropriate to have regard to the cost of capital of senior gold mining companies, whose assets are predominantly producing assets and therefore do not have development risk, in determining the weighted average cost of capital for discounting purposes.

[921] Second, BDO considered that the market prices the risk of companies with gold reserves differently from the risk of companies with copper reserves. Accordingly, BDO says the appropriate discount rate should take into account the fact that El Morro's forecast cash flows are mostly to be derived from expected copper production. It says that weighting in favour of senior

gold companies results in a failure to take into account the risk profile of El Morro, given the composition of its reserves, and therefore the risk differentials inherent in the asset.

[922] BDO says that, effectively, Duff & Phelps applied a cost of capital more reflective of the way a senior gold producer could finance El Morro than the way a discount rate should be determined for a development stage copper-gold project. It says that the calculation of loss in accordance with generally accepted valuation theory should not involve the application of the cost of capital of Barrick, or of similar companies, to the subject investment. Instead, the cost of capital must take into consideration the inherent risks of achieving the projected cash flows over and above those risks faced by a senior gold company.

[923] In arriving at a range of discount rates that BDO considered appropriate, BDO therefore focused on the junior copper and junior gold segments of the mining industry. Given the anticipated split of forecast revenues from El Morro between copper and gold production, BDO prorated its estimate of an overall beta for use in calculating the weighted average cost of capital by 74% for copper and 26% for gold. On the basis of this approach, BDO concluded that the appropriate weighted average unlevered beta for use in this calculation was 1.42. In reaching this conclusion, BDO started with the unlevered betas of junior copper and gold mining companies owning pre-production stage development properties, as it considered that the market assessment of the risks associated with these companies reflected the market assessment of the risks of El Morro. BDO converted this unlevered beta into a levered beta assuming a debt/equity ratio of 1:9, representing the leverage that would be available in respect of El Morro over the life of the mine, which resulted in a beta of 1.55. Duff & Phelps did not make this latter adjustment in its calculation. However, BDO also used a slightly higher assumed inflation rate of 2.6% compared to the 2% rate used by Duff & Phelps.

[924] Based on the foregoing, BDO estimated the appropriate weighted average cost of capital for El Morro to be in the range of 9% to 10%, with a midpoint of 9.5%. In its view, this range of rates results in a cost of capital that a market participant would require to compensate it for the risks of the El Morro cash flows. BDO says it considers this range of discount rates to be appropriate given a number of factors including: (1) the forecast cash flows reflect the unadjusted Barrick 2011 Mine Plan, including the risk associated with the price assumptions therein; (2) capital and operating expenses may not materialize as forecast; (3) operating effectiveness in the processing operations may not realize the forecast levels; (4) tax rates may not remain as forecast; (5) metal prices may not be as forecast; and (6) the planned commencement of production may be delayed.

[925] When applied to the Duff & Phelps cash flows, this resulted in a net present value of Xstrata's aggregate interest in the El Morro Project that was approximately equal to the purchase price of U.S. $465 million in the Barrick Transaction and, accordingly, a negligible loss to Barrick as set out above.

Additional Conclusions of BDO

Sensitivity Analyses Requested by Xstrata Chile

[926] BDO conducted requested sensitivity analyses on three items. Xstrata Chile raised each of these items in its submissions on damages as reasons for a reduction in the quantum of Barrick's damages.

[927] First, BDO adjusted the Duff & Phelps cash flow projection to incorporate the schedule of long term copper prices set out in the Hunt Report described below. This adjustment reduced the net present value of the Xstrata Interest, on its own, to between (U.S. $950 million) and (U.S. $1,030 million). Cotton acknowledged, however, that BDO did not attempt to quantify the downward effect on operating costs that BDO would also expect to occur, likely on a lagged basis, in the economic environment that would see the price declines anticipated in the Hunt Report. Therefore, it would not be possible to simply adjust for the price schedule in the Hunt Report by a simple reduction of the amount calculated by BDO.

[928] Second, BDO adjusted the commencement of initial production from the mid-2014 date assumed in the 2011 Barrick Mine Plan to the milestone date set out in the July 2011 monthly report of the Company. BDO calculated that the effect of such a deferral of the initial production date was a reduction in the net present value calculated by Duff & Phelps of U.S. $90 million.

[929] Lastly, at Xstrata's request, BDO adjusted the Duff & Phelps cash flow projections to assume tax rates of (1) 35%, which assumes that none of the cash flows from El Morro would have been reinvested in Chile; and (2) 26%, which assumes that effectively 50% of such cash flows would have been reinvested in Chile. On these alternate assumptions, BDO calculated that the net present value calculated by Duff & Phelps would be reduced by U.S. $450 million if the 35% tax rate were applicable and by U.S. $230 million if the 26% effective tax rate were applicable. The issue of the appropriate tax rate for purposes of the net present value calculation is addressed below.

BDO Comments on the Duff & Phelps Cash Flows

[930] BDO was also requested by Xstrata to review and comment on the reasonableness of the Duff & Phelps cash flows. The following summarizes issues raised by BDO and the court's assessment of their relevance for the issues in this proceeding.

[931] First, BDO observed that the Duff & Phelps estimate of pre-production capital expenditures was approximately 41% higher than the estimate in the Fluor Feasibility Study. It also observed that the estimated pre-production costs of Barrick's Pascua-Lama and Cerro Casala projects had risen by approximately 68% and 43%, respectively, over a shorter time frame, from 2009 to the second quarter of 2011. BDO expressed the opinion that, as an advanced stage development project with initial production scheduled for 2013, the Pascua-Lama cash flow projections, in particular the cost estimates included therein, would be relevant to a determination of the reasonableness of the Duff & Phelps cash flow projections. It calculated

that a 68% increase in the initial capital expenditures contemplated by the Fluor Feasibility Study would reduce the net present value calculated by Duff & Phelps by U.S. $380 million.

[932] BDO raised the same concern regarding the level of sustaining capital expenditures estimated in the Duff & Phelps Report to be U.S. $361 million over the life of the mine, representing a 33% increase over the estimate in the Fluor Feasibility Study. BDO calculated the impact of a 68% increase in the estimate set out in the Fluor Feasibility Study on the net present value calculation in the Duff & Phelps Report to be U.S. $25 million.

[933] However, I am satisfied on the evidence before the court that Pascua-Lama is not a comparable project in terms of both pre-production capital costs and sustaining capital expenditures for at least three principal reasons. First, Pascua-Lama is located at a substantially higher altitude than the El Morro Project. The elevation of Pascua-Lama involves significantly thinner air, resulting in substantially higher construction and operating costs for the mine. Second, the Pascua-Lama project involves facilities on both sides of the Argentine-Chilean border. This has also resulted in considerably higher development costs of the project than would be expected for El Morro. Third, the nature of the product and therefore the scale of operations is materially different from that proposed for El Morro. Moreover, there is no necessary reason why the proportionate cost increases in initial capital costs would approximate the proportionate cost increases in sustaining capital costs. Accordingly, in any loss calculation in this action, I consider that it would not be appropriate to increase the cost estimates by the factor, and for the reasons, proposed by BDO. As mentioned below, the draft Hatch feasibility study cost estimates, which BDO did not rely on, provide the most current and reliable estimate of costs for El Morro.

[934] Second, BDO raised two issues pertaining to the mining costs estimated in the Duff & Phelps Report that would result in a life of mine increase of U.S. $118 million – an appreciation in the Chilean peso against the U.S. dollar by approximately 5.5% in the six months between the completion of the Barrick 2011 Mine Plan and the loss calculation date, and increased diesel fuel prices in Chile for July 2011 compared to the prices used in the Duff & Phelps Report. The combined effect of these items on the net present value calculated by Duff & Phelps is only U.S. $35 million. In any event, it is not clear that the forecast long-term exchange rate and diesel fuel price used in the Duff & Phelps Report, which are more relevant than short-term rates and prices, are materially incorrect.

[935] Lastly, BDO questions why the Barrick 2011 Mine Plan indicated increases in both quantities/usage as well as unit increases in respect of mining costs, as compared to the Barrick 2009 Mine Plan, but only unit cost increases in respect of processing costs. This was satisfactorily explained by Darren Dell, the Barrick director of technical evaluations, who was responsible for the creation of the Barrick 2009 Mine Plan and the preparation of the Barrick 2011 Mine Plan.

Comparison of the Approach of Duff & Phelps and BDO to Determination of the Appropriate Discount Factor

[936] As set out above, there is a significant difference between the Duff & Phelps and the BDO approaches to the calculation of the appropriate discount factor to use in determining the net present value of the anticipated cash flows from El Morro, for the purposes of quantifying Barrick's loss.

[937] The difference between Duff & Phelps and BDO is perhaps best expressed in the following manner. Both parties agree that the cost of capital must be determined as the rate of return that the market would require in respect of the risk of receipt of the projected cash flows from the particular asset. Duff & Phelps believes that, for this purpose, the market is the universe of companies interested in acquiring the particular asset, in this case senior gold companies and senior diversified base metal companies. It does not include junior companies because such companies could not afford either the acquisition cost or the capital expenditures required to develop El Morro. Accordingly, it says the cost of capital should be the cost of capital required by senior gold and diversified base metal companies. Whether or not using discount rates of 5% for gold and 8% for copper properly values the risks of a development project in such circumstances, Duff & Phelps considers that these rates should be applied because these companies would price mining development projects on this basis in the present market.

[938] BDO takes the position that the fact that junior companies were not, or could not be, potential purchasers of the El Morro Project is irrelevant because the exercise of determining a cost of capital requires a pricing of the underlying asset by reference to comparable projects. Implicit, but never made explicit, is a broader concept of the market for this purpose, which includes other potential investors beyond the senior companies assumed by Duff & Phelps. In valuing senior gold and diversified base metal companies, the market should only attribute value to an investment in a pre-development property such as the El Morro Project using a weighted average cost of capital that is appropriate for the risk associated with the particular property.

[939] There is no empirical evidence before the court that directly addresses the correct approach. Nor is there any evidence regarding the market impact on Barrick or Goldcorp following the announcement of the Goldcorp Transaction, which might also assist in quantifying the market's perception of Barrick's loss. It is therefore necessary to address the difference between Duff & Phelps and BDO on a more theoretical basis. I think it is fair to distinguish the two approaches in the following manner.

[940] Broadly, BDO believes that the weighted average cost of capital that is appropriate, and that it has identified, addresses the risks of El Morro as a pre-development property in isolation, without regard to ownership of the Project by Goldcorp or Barrick. As BDO notes, this approach quantifies the cost of capital that a direct investor in the El Morro Project on a stand-alone basis would require. BDO considers that it has identified a cost of capital that more closely reflects

the risks of El Morro in isolation. However, it does so at the cost of any compatibility with market-based indicia of value.

[941] As evidence supporting its approach, BDO refers to the value of the Casino Project owned by Western Gold and Copper Corporation, a junior mining company. This mining project, located in the Yukon, is at the pre-feasibility stage. BDO calculated the internal rate of return implied by the current market capitalization of this company of approximately $200 million to be 13.6%. However, without considerably more detailed expert analysis of this project compared to El Morro, the court cannot rely on this evidence to support the BDO conclusion concerning the appropriate weighted average cost of capital for El Morro.

[942] Conversely, the weighted average cost of capital derived by Duff & Phelps more likely reflects the cost of capital of a senior gold producer proposing to develop El Morro. That is, it reflects the risks of development in the hands of a senior gold producer. This approach is closer to a quantification of the cost of capital that an investor in Barrick would expect Barrick to require in respect of its investment in the El Morro Project given the market valuation of Barrick. It is more consistent with market-based indicia of value.

[943] More generally, the more market-based approach of Duff & Phelps assumes that the market prices risk correctly using these cost of capital calculations. That is by no means certain in all instances, as recent market developments have demonstrated. The Duff & Phelps cost of capital calculation and the market-based indicia referred to by Duff & Phelps may be, but are not necessarily, evidence that the Duff & Phelps approach is correct. On the other hand, BDO's approach to identifying the appropriate risk profile for El Morro by reference to junior gold and copper mining companies not only has little compatibility with current market indicia but also results in somewhat surprising conclusions.

[944] As mentioned, using the 2011 Mine Plan, the mid-point of the range of the net present values of El Morro calculated by BDO using the Duff & Phelps cash flow results in a negligible loss to Barrick. Essentially, BDO calculates the value of the Xstrata Interest at the time of the trial to be approximately equal to the purchase price that Barrick would have paid for the Xstrata Interest under the Barrick Agreement had the Barrick Transaction closed.

[945] Perhaps more surprisingly, using the Barrick 2009 Mine Plan, including forecast metal prices and costs at the time of the Barrick Agreement, and the weighted average cost of capital BDO considers appropriate, the BDO conclusion is that Barrick significantly overbid for the Xstrata Interest and was spared a loss when Goldcorp agreed to the Goldcorp Transaction. BDO agrees with Duff & Phelps that the value of the El Morro Project rose between 2009 and 2011 due, in part, to rising metal prices. Similarly, while BDO did not analyze the Goldcorp Transaction from this perspective, the Duff & Phelps calculation of the internal rate of return for that transaction implies that BDO would also consider that Goldcorp overpaid for the Xstrata Interest, even at the higher metal prices prevailing at the time of that transaction. Similarly, the BDO Report implicitly concludes that, insofar as market analysts and financial advisors to the

parties used a lower weighted average cost of capital in valuing El Morro, they also failed, and continue to fail, to assess the risks of El Morro correctly.

[946] The difference of approach between Duff & Phelps and BDO is also reflected in a difference of opinion as to what constitutes fair market value in the present circumstances. Duff & Phelps suggests that, for valuation purposes, the price contracted for by Barrick and the price paid by Goldcorp, which it considers to be U.S. $513 million, are indicative of fair market value for the Xstrata Interest, being the highest price in the market based on actual transactions. BDO, on the other hand, does not consider that the prices bid by Barrick and Goldcorp represent fair market value as defined for the purposes of the applicable valuation standards. BDO considers that these prices exceeded fair market value, yielding an implicit rate of return that is less than the cost of capital to each of Barrick and Goldcorp for the development of El Morro. In particular, BDO considers that Barrick offered a price in the Barrick Transaction that exceeded the fair market value. BDO considers that Barrick did so because, in common with other large mining companies at the time, it was under a compulsion to transact based on a market-driven need to maximize cash flow per share and its receipt of unprecedented cash flows due to high metal prices during the past few years.

[947] In other words, in BDO's opinion, the outcome of the Xstrata Chile auction process was not a price that represented the fair market value of the Xstrata Interest but a price that exceeded the fair market value. This conclusion is surprising given the traditional definition of fair market value.

[948] Given the conclusion reached below regarding the appropriate remedy in this action, it may not be necessary to reach a determination regarding the preferable approach to the weighted average cost of capital. However, to the extent it is necessary to do so, I conclude that the appropriate discount rate is more closely reflected in the Duff & Phelps approach than in the BDO approach. The disconnect between the market value and the results generated by the BDO approach suggests (1) that the particular risks associated with El Morro in the hands of a senior gold producer are not the same as the risks associated with a junior mining company holding a single pre-production development property; and (2) as the evidence in this proceeding indicates, the risks of a property at the stage of development of El Morro are materially less than the risks associated with the properties of the junior mining companies upon which BDO relied, which it acknowledges are at an earlier stage of pre-development.

[949] I would note that a considerable amount of time was also spent at trial on the issue of whether the Duff & Phelps use of unlevered betas, rather than relevered betas, in its weighted average cost of capital calculations for the three categories of market participants understated the results. This is more of a technical issue than a substantive issue in the present action, given the level of materiality, which is approximately equal to the difference in the offsetting inflation assumptions used by the parties in their respective calculations.

The Gulley Report

[950] At the request of Barrick, David Gulley ("Gulley"), a senior managing director of Mescrow Financial Consulting, LLC, a diversified financial services firm, provided a report regarding the appropriate range of copper and gold prices for use in computing damages in this case (the "Gulley Report"). The following summarizes the approach and conclusions of Gulley.

Methodological Approach

[951] Gulley provided three different price levels for copper and gold for the period 2011 to 2027, being to the end of the projected life of the La Fortuna pit, which he termed the "Reference Period" for the purposes of his report. For each of copper and gold, he provided a Reference Range of prices, being the range of prices historically observed during periods with market conditions similar to those expected during the Reference Period. He also provided a "Market Sentiment Price", which Gulley recommends for use in a traditional net present value approach to fair market value. Finally, Gulley provided a "Single Reference Price", which he believes to be the single best price for use in damage calculations.

[952] The Reference Prices established by Gulley for both copper and gold assume the following global economic trends: (1) a continuation of trade liberalization and industrial development in Asia, South America and elsewhere with growth rates varying from year to year and geographically but remaining within or near the range of historical experience; (2) a continuation in the decline in purchasing power of the U.S. dollar, also in or near the range of historical experience; (3) a continuation of the historical long-term nature of base metal prices, which has been characterized by a very long-term secular trend, mid-term price cycles and short-term market volatility, with principles driven by an income-elastic, price-elastic nature of copper markets; and (4) the absence of any fundamental change in technology, outright failure of industrialization in Asia, radical change in the international financial system or prolonged global calamities, natural or manmade. Gulley did, however, consider in his conclusion that it was more likely than not that a temporary period of gold and copper price consolidation would occur at some point in the near future. I note that this economic scenario differs significantly from the scenario upon which the Hunt Report, described below, is based.

[953] An important aspect of Gulley's approach is the distinction between the Market Sentiment Price and the Single Reference Price. Gulley's conception of the Market Sentiment Price is the risk-averse price at which the most competitive alternative buyer in a competitive auction would drop out of the auction. Gulley considered the Market Sentiment Price to be a conservative price. In his approach, the Market Sentiment Price is the fair market value price but not the price that would make Barrick whole as the successful bidder, as it does not yield a calculation of the expected full value of the asset to Barrick.

[954] The expected full value of an asset is calculated by application of the Single Reference Price, which is the price that balances equally the upside and downside uncertainty regarding price. According to Gulley, the expected full value, or intrinsic value, of an asset can exceed the

price necessary to acquire the asset in an auction for a number of reasons. The principal reasons expressed by Gulley include additional resource potential, strategic considerations, such as the need to replace depleting assets or superior knowledge of the local geology, economic considerations, such as lower tax rates or a lower effective cost of capital, and "optionality" of the property associated with higher than expected prices. Gulley suggests that evidence for this concept of a higher expected full value of an asset is to be found in the net asset value multiples applied to mining assets by the market.

[955] In this case, Gulley recommended a Single Reference Price for gold of U.S. $1,270 per troy ounce and for copper of U.S. $3.00/lb. In the Gulley Report, all prices are adjusted to real prices as of January 1, 2011. Gulley did not, however, provide an express forecast of prices over the Reference Period. The following describes Gulley's approach in respect of each of copper and gold in greater detail.

Copper Prices

[956] Gulley recommended that the Reference Range of Prices for copper should be between U.S. $2.50/lb and U.S. $3.75/lb. He arrived at this range by examining copper prices during the period 2002 to 2011. He considers that this period, which experienced strong economic growth in the developing world and periods of global financial crisis, exhibits a market experience that will continue to occur during the Reference Period. The copper market in the 1990s had been characterized as being in a long bear market. Dr. Gulley considers the main drivers for the resurgence in copper prices since 2002 to be the demand from China, in particular, and Asia in general, on the demand side and stagnant supply as result of depletion of mines and underinvestment during the bear market on the supply side.

[957] Gulley selected the prices during this period to be the Reference Range of Prices after excluding the bottom 10th percentile of spot prices during this period, as Gulley does not expect these prices, which were experienced in 2002 and 2003, to be indicative of future average market conditions. Gulley believes the growth rate in demand for copper during the period 2001 to 2009 averaged 2.4%. He expects this growth rate to continue during the Reference Period with the mining industry having a hard time meeting this demand.

[958] Gulley considers that the floor price within this Reference Range of Prices reflected the industry's long-run marginal cost of production. In his estimation, at 80% capacity utilization, the long-run marginal cost of production is approximately U.S. $2.50/lb. Below this price, Gulley considers mining production to be unsustainable over an extended period of time. Because Gulley does not anticipate market conditions will be characterized by chronic over-capacity during the Reference Period, he considers a price of U.S. $2.50/lb to be too low to be the Single Reference Price for copper during the Reference Period. He considered it highly unlikely, as well as unprecedented, that market conditions would push the copper price down to the mining industry's breakeven point throughout the entire Reference Period. In this connection, he considered that a forecast published by Brook Hunt, a recognized copper consultancy, supported his conclusion. That forecast, which he regarded as deliberately

conservative, envisaged a long-term average price of U.S. $2.79/lb through 2021 with a "floor price" of U.S. $2.50/lb.

[959] Gulley recommended a Market Sentiment Price of U.S. $2.50/lb for copper. He arrived at this price by studying the five copper price forecasts published by market analysts between December 2010 and February 2011. Considering only the 25% to 75% price range (which involved dropping the highest and lowest forecast), the remaining forecasts fall between U.S. $2.00/lb and U.S. $2.49/lb. He considered it reasonable to adopt a price close to the top of this range as indicative of fair market value given the inherently conservative nature of such published price forecasts.

[960] However, in Gulley's opinion, the Market Sentiment Price is not a reliable forecast of future prices and is too conservative for several reasons. He noted that this price falls below the midpoint of the Reference Range of Prices, which was U.S. $2.73/lb. In addition, it falls at or below various estimates of the industry's long-run marginal cost of production, which, as discussed above, he considers to be U.S. $2.50/lb.

[961] Gulley therefore recommended a Single Reference Price of U.S. $3.00/lb for copper as the single best price to use in the calculation of Barrick's actual financial loss. Gulley says he arrived at this price by considering market fundamentals, which he concluded would be supportive of strong copper prices for most of the Reference Period. He considers it significant that copper prices equalled or exceeded U.S. $3.00/lb for over 70% of the past five years, despite the occurrence within that period of a global financial crisis and ensuing recession as well as the incomplete recovery in the United States and the other developed economies. As a result, he considered it possible that copper prices could rise as high as U.S. $5.00/lb in the current market cycle. This established a reasonable range, in Gulley's view, of U.S. $2.50/lb to U.S. $5.00/lb, within which a Single Reference Price of U.S. $3.00/lb should be considered very reasonable.

Gold Prices

[962] With respect to gold prices, Gulley concluded that the Reference Range of Prices should be between U.S. $378 and U.S. $2,155 per troy ounce. This represents the price of gold in 2011 dollars during the periods January 1974 to December 1983 and January 2002 to June 2011, adjusted such that the peak is 10% below the highest spot price during these periods and the bottom is 10% above the lowest spot price. Gulley considered these prices to have occurred under economic conditions that he expects to continue in force during the Reference Period.

[963] Gulley recommended a Market Sentiment Price for gold of U.S. $1,225 per troy ounce and a Single Reference Price for gold of U.S. $1,270 per troy ounce. The Single Reference Price represents the approximate average of the Reference Range of Prices.

[964] The defendants did not challenge Gulley's recommendations regarding gold prices. It is therefore unnecessary to set out his rationale for his Single Reference Price for gold in greater detail.

The Hunt Report

[965] At the request of Xstrata Chile, Simon Hunt Strategic Services Ltd. provided an opinion on the future of the copper industry and a schedule of projected copper prices in nominal dollars for each year through to 2034, based on a view as to the future of the copper industry during that period. The report is contained in an affidavit of Simon Hunt ("Hunt"), the author of the report, dated September 30, 2011 (the "Hunt Report").

[966] Hunt suggested that average copper prices in 2010 dollars would range between U.S. $2.31/lb and U.S. $1.85/lb in the period 2014 to 2027. In a revised table to the Hunt Report, using a constant 2% deflator for the years after 2010, Hunt's schedule of prices averaged $2.37/lb for the years 2011 to 2034 and $2.14/lb for the years 2011 to 2027.

[967] The Hunt Report sets out three principal reasons for this conclusion, which, collectively, contemplate both a very different general economic environment and very different market fundamentals for the copper market from those envisaged in the Gulley Report.

[968] First, the Hunt Report proceeds on the basis that the period from 2011 to 2034 will differ substantially from the past twenty years for two main reasons. Hunt assumes that the events of 2008-2009 were the "first rumblings" of a global balance depression, by which Hunt intends a period of rolling recessions, not a business cycle recession. The Hunt Report anticipates that the next six to seven years will be characterized by a substantial deleveraging of debt resulting in an increased savings rate, decreased consumption and a lower growth rate. More generally, the Hunt Report anticipates a lower long-term growth rate as the combination of accumulated debt during the last generation, increasing public debt associated with an aging population, and political issues in the U.S., European and Chinese economies that will depress growth and potentially result in asset deflation. This will translate into lower global industrial production levels, which Hunt estimates will average 0.4% annually between 2011 and 2020. This reduced level of industrial production will directly impact the demand for, and consumption of, copper, which is an industrial input in a number of industries, principally electricity transmission and construction.

[969] Second, the Hunt Report predicts that the amount of copper used per unit of industrial production (the copper intensity) will fall significantly during this period for two principal reasons. Hunt suggests that the recent high prices for copper, driven to a significant extent by financial sector purchasers as discussed below, are forcing substitution of aluminum, steel, plastics and other materials for copper-based alloys and of lower copper alloys for higher copper alloys. In addition, Hunt predicts that technological innovation in several areas will significantly reduce the demand for copper.

[970] Third, the Hunt Report argues that, since 2004 and in particular commencing in 2008, world refined copper consumption has been overstated because demand is being mistakenly equated with consumption. The Report suggests that during this period, the financial sector, both in the developed countries and in China, has purchased and warehoused, largely outside the

reporting system of the world's metal exchanges, large stocks of copper that represent the difference between the total demand for copper and fabricator consumption of copper in these years. Hunt believes that these misunderstood purchases have masked the reality of the copper market, which is that, as a result of a number of factors including the effects of substitution, the supply of copper has exceeded fabricator demand for some time and, accordingly, the market price of copper since 2002 is not sustainable.

[971] Based on these considerations, the Hunt Report sets out the following conclusions.

[972] First, Hunt suggests that real consumption of copper by fabricators is much lower that is generally assumed and, therefore, at some point the financial sector will be unable to absorb more copper stocks and will begin to liquidate the copper stocks held outside the reporting system.

[973] Second, Hunt suggests that the copper prices experienced since 2004 are not a reliable guide to future price levels by virtue of the financial sector involvement in the copper market and that the anticipated decline in copper prices will be exacerbated by the liquidation of financial stocks for a period of time resulting in a sharp decline in prices. He suggests that this will commence with a new credit crisis in 2012-2013 and continue with copper prices not reaching their lows until 2016-2018, which will be associated with a period of general asset deflation. More generally, Hunt expects a world depression from 2013 to 2018-2020 with asset deflation, further depressed in the case of copper by the enforced sales of copper inventory by financial holders of copper outside the reporting system.

[974] Third, the Hunt Report envisages a decline in the growth rate of global copper consumption from 2.2% over the period 1990 to 2010 (adjusted for Hunt's estimate of financial purchases of copper stocks during this period) to 1.5% over the period 2014 to 2020, which Hunt foresees as a period characterized by more surplus production than surplus demand. As a consequence, Hunt foresees falling prices during this period to the point where high-cost production is eventually closed. Finally, Hunt foresees a long period of sustainable growth after 2020 but at a reduced growth rate for world refined copper consumption, in particular as the impact of new technologies begins to operate.

Chilean Tax Issues

[975] In response to the position of the defendants that the use of a 17% tax rate under the Chilean tax regime is unrealistic, Barrick tendered an affidavit and a supplementary affidavit of John Giakoumakis, a vice-president, tax, of Barrick ("Giakoumakis"), and an expert report dated October 20, 2011 (the "Baraona Report") of Juan Manuel Baraona ("Baraona"), a Chilean tax lawyer, which reviewed and commented on these affidavits.

[976] Baraona testified that Chile has established a two-stage, integrated taxation system under the Chilean Income Tax Law. Under this regime, enterprises pay a general corporate income tax (referred to as the "Tier 1 tax") at the rate of 17%, which has been increased to 20% for 2011 and

18.5% for 2012. Dividends and other forms of profit distributions made by an enterprise to a shareholder or a partner are not subject to tax if paid to other local Chilean entities, to avoid double taxation, but are subject to an additional tax at the rate of 35% (the "Tier 2 tax") if paid to entities not domiciled in Chile. By virtue of a credit mechanism pertaining to Tier 1 tax, the total tax rate applicable to income earned by the Chilean entity is 18% in such circumstances.

[977] Giakoumakis testified at trial that he advised Barrick that a 17% rate should be used in the preparation of the Barrick 2009 Mine Plan for two main reasons. He considered that the funds generated by El Morro would be redeployed within that country, given Barrick's level of existing exploration and development activities as well as its corporate development focus on Chile. He also considered that, even if such funds were not utilized in Chile, there were sufficient means of investing them outside Chile that would not attract the Tier 2 tax. Giakoumakis did not provide specific details of the anticipated use of the funds that would have been generated by the El Morro Project together with anticipated funds from Barrick's other current projects in Chile. On the other hand, Barrick's policy since entering Chile has been to retain any funds generated by mining projects in that country.

[978] In paragraph 13 of the Giakoumakis affidavit sworn September 1, 2011 (the "First Giakoumakis Affidavit"), Giakoumakis stated that the Tier 2 tax can be deferred as long as the dividends are reinvested by the recipient corporation in another Chilean corporation or otherwise remain in Chile. He also stated that Barrick structures its business in Chile to allow it to take advantage of tax provisions that provide Barrick with the ability to defer the Tier 2 tax on profits. In paragraph 7 of the Giakoumakis supplementary affidavit sworn October 13, 2011 (the "Second Giakoumakis Affidavit"), Giakoumakis set out a number of options, on a non-exhaustive basis, that he considered to be available to Barrick to defer the Tier 2 tax. These options included investing in mining projects in Chile or outside of Chile using a Chilean company as the investing vehicle, as well as lending money to non-Chilean entities.

[979] The Baraona Report states that the options set out in paragraph 7 of the Second Giakoumakis Affidavit could be used by an operating entity or by the recipient entity of distributions from the operating entity to defer Tier 2 tax, in the latter case, by utilizing a further provision of the Chilean Income Tax Law that allows for postponement of the Tier 2 tax if dividends are reinvested in a Chilean company. Such a company may then use the funds in a variety of ways including those described by Giakoumakis. While Baraona indentified certain requirements that must be satisfied to qualify for this exemption, there is no suggestion that these requirements are onerous in any respect. The Baraona Report states that this provision of the Chilean Income Tax Law is widely used when investors desire to undertake new investment projects using other legal vehicles and that there are no legal limitations on the type or location of investments that the recipient vehicle can undertake.

[980] Based on Baraona's testimony, which was not contradicted, I am satisfied that a 17% tax rate should be used in any loss calculation in this action for the following reasons. First, and most important, the evidence indicates that, provided certain requirements are met, the Chilean Income Tax Law currently allows Barrick to structure its affairs in a manner that avoids the

payment of Tier 2 tax on profits from its Chilean mining operations even if those profits are ultimately redeployed outside of Chile. Second, Barrick has a continuing focus on mining projects in Chile in addition to the El Morro Project. Based on the exploration history of Chile, and the favorable economic environment, there is reason to believe that additional investment opportunities will be identified over the life of El Morro within Chile. Third, in the present circumstances, the risk that the Chilean tax regime will change in a manner that significantly affects the net present value of El Morro, or that additional investment opportunities will not become available to Barrick, while not negligible, does not require separate treatment in the loss calculation. Instead, these risks are of the order of magnitude that are typically considered to be included in the risks addressed by the discount factor in a net present value calculation of damages.

PART IV – CONCLUSIONS REGARDING REMEDIES SOUGHT BY BARRICK

[981] The primary relief sought by Barrick in this action is an order for specific performance directed against Goldcorp, requiring it to deliver up the El Morro Project, and against Xstrata Chile, requiring it to deliver up Xstrata's 70% interest in the BHP Royalty, subject to payment by Barrick of U.S. $465 million (less $100 as it does not seek delivery of the Fluor Feasibility Study). A variant of this requested relief would impose a constructive trust of the El Morro Project in favour of Barrick. In either event, Barrick suggests that the relief should include an order that New Gold enter into agreements in the form of the Assignment Agreements and any other relevant documentation entered into among Xstrata Chile, New Gold and Goldcorp at the closing of the Goldcorp Transaction. While not expressly acknowledged, I think it is also understood that any such relief would require Barrick to compensate Goldcorp for the development activities conducted in respect of the El Morro Project since February 16, 2010. As an alternative remedy, Barrick seeks damages against Xstrata Chile for breach of the Barrick Agreement, which it calculates at $747 million as described above.

[982] In view of the determinations above regarding the absence of any breach of the Barrick Agreement by Xstrata Chile, and the absence of any tortious conduct by New Gold or Goldcorp, I propose to limit the discussion in this Part of the Reasons to certain issues raised relative to the requested relief of specific performance. For the purposes of this discussion, it is assumed, contrary to the conclusions set out above, that Datawave's exercise of the Right of First Refusal as contemplated by the Goldcorp Agreement breached the Shareholders Agreement to the knowledge of each of the defendants.

Availability of the Remedy of Specific Performance

[983] The availability of the remedy of specific performance in the present action depends firstly upon whether the remedy is available to Barrick under the laws of Chile; secondly, if not, whether the laws of Chile or the laws of Ontario govern the availability of specific performance; and thirdly, whether the circumstances assumed for this Part of the Reasons justify such an order of specific performance against Goldcorp. I will address each issue in turn.

Availability of Specific Performance under Chilean Law

[984] It is agreed that specific performance is available under the laws of Chile in favour of a non-defaulting party to a contract directed against the defaulting party. However, the parties dispute the availability of an order for specific performance directed against a third party who has acquired an asset that was the subject of the contract that was breached.

[985] New Gold and Goldcorp submit that the evidence before the court demonstrates that Barrick would not be entitled to specific performance against such a third party. They rely on Barros' testimony that specific performance would not be available to Barrick as a result of the transfer of the Xstrata Interest to a third party and that, in these circumstances, Barrick's only remedy would be a claim for the damages it suffered as a result of the breach of the Barrick Agreement. I note that Barros does not suggest that the result would be different if Goldcorp had knowledge of the breach of the Barrick Agreement at the time it received the Xstrata Interest. This evidence was not contradicted by other testimony. I accept it as determinative of the operation of Chilean law in the circumstances addressed in this Part.

[986] Barrick argues, however, that the transactions effected pursuant to the Goldcorp Agreement could be annulled pursuant to Article 1683 of the Chilean Code. The principles upon which a contract can be nullified under Article 1683 have been set out above in addressing the issue of whether a Chilean court would invalidate the Goldcorp Agreement.

[987] Even in the hypothetical circumstances assumed in this Part of the Reasons, Barrick has not demonstrated that an order of nullity would be available under Article 1683. Each of Barros, Peña and Ochagavia considered that such an order would require demonstration of immoral behaviour beyond mere knowledge of a breach of contract to justify such relief. To obtain a declaration that the Goldcorp Agreement was a nullity, Barrick would have to demonstrate that the purpose of the Datawave Purchase Agreement, and the agreements associated with it, was to cause loss or harm to Barrick and that such purpose is contrary to *bonos mores* or public order under Chilean law. I am not persuaded that the evidence before the court would satisfy this requirement for nullification of the Datawave Purchase Agreement even in the circumstances assumed for this Part of the Reasons.

[988] Accordingly, I conclude that, if a court were to find the hypothetical circumstances assumed for the purposes of this Part, an order of specific performance directed against Xstrata Chile would be available under the laws of Chile but an order of specific performance directed against Goldcorp would not be available.

Applicable Jurisdiction in Respect of Remedies for Xstrata Chile's Alleged Breach of Contract

[989] Accordingly, the court must determine whether the *lex fori* or the *lex causae* governs the entitlement of Barrick to an order for specific performance.

[990] The majority of the Supreme Court in *Tolofson*, at paras. 76-77 stated that, under the laws of Canada, the substantive right of a party may be governed by a foreign law but all matters pertaining to procedure are governed by the law of the forum. As a general rule, the nature of a plaintiff's remedy, including whether a plaintiff is entitled to an order for specific performance or imposition of a constructive trust, is treated as a procedural rather than a substantive issue and is therefore governed by the law of the forum: see e.g. *National Gypsum Co.* v. *Northern Sales Ltd.*, [1964] S.C.R. 144, 1963 CarswellNat 401, at para. 8, in which Fauteux J. stated "…how a right might be enforced is a matter of procedure"; and *Somers* v. *Fournier*, [2002] O.J. No. 2543 (C.A.), at para. 14, quoting *Sutt* v. *Sutt*, [1969] 1 O.R. 169 (C.A.), at p. 175 per Schroeder J.A.

[991] Accordingly, I conclude that, in the present proceedings, the availability of specific performance is governed by the law of Ontario. In reaching this conclusion, I would note that I have rejected the following two submissions made by New Gold and Goldcorp.

[992] First, New Gold and Goldcorp rely on the principle that where right and remedy are indissolubly connected, both should be considered to be substantive and governed by the appropriate law irrespective of the *lex fori* characterization for domestic purposes: see *Castel & Walker,* Vol. 1, at 6-6 where it is stated that this principle is applicable where the remedy is predicated on, and serves to vindicate, a substantive right and the granting or denial of the remedy affects the recognition of the right. New Gold and Goldcorp argue that this principle is applicable in the present circumstances because, in their view, the remedies available to Barrick are provided in the Barrick Agreement as matters of Chilean law. I do not accept this submission for three reasons.

[993] First, insofar as it is relevant to this issue, the provisions of the Barrick Agreement do not evidence an intention that Chilean law will apply to the remedies available to Barrick in the event of a breach of the Agreement. To the contrary, section 17.6 of the Barrick Agreement, which provides that the rights and remedies provided in the Agreement are in addition to other rights and remedies given by law independent of the Agreement, evidences an intention not to restrict Barrick's remedies to the remedies provided in the Barrick Agreement or under Chilean law. For this purpose, it is relevant that "Law" is defined to include "any law … otherwise applicable to Seller, Buyer or entities that Control the Seller or the Buyer, as the case may be".

[994] Second, in circumstances where the parties have stipulated that a non-defaulting party would be entitled to equitable relief without specifying the applicable law in the event such relief were sought, Canadian courts will apply the *lexi fori* in determining entitlement to such relief: see *Telesis Technologies, Inc.* v. *Sure Controls Systems Inc.*, 2010 ONSC 5288, [2010] O.J. No 4875 (S.C.), at paras. 8 and 9, where L.B. Roberts J. held as follows:

> The Agreement does not expressly stipulate that the law of Ohio applies to any interlocutory remedy sought by the plaintiff. Further, pursuant to subsection 17(f) of the Agreement, the plaintiff may seek any provisional remedy, such as an injunction, from a court of its choosing.

> In the present motion, the plaintiff seeks an equitable remedy in the form of an interlocutory injunction. Absent any express agreement by the parties that Ohio law will apply to procedural matters, which is absent in the present case, this is a procedural matter that is governed by the *lex fori* or Ontario law, notwithstanding that the merits of this proceeding are governed by Ohio law. In my view, the fact that the Agreement allows the plaintiff to seek an injunction in a court of its choosing implies that the parties at least tacitly agreed that the procedural laws of the chosen court would apply to applications for any provisional remedies.

[995] More generally, in this case, it cannot be said that the remedy of specific performance is either predicated on, or serves to vindicate, Barrick's claims against the defendants. Proof of these claims is entirely distinct from the issue of the determination of the appropriate remedy in respect thereof.

[996] Goldcorp also led evidence at trial from Barros to support an argument that the court should apply the doctrine of *renvoi* and give effect to the provisions of Chilean private international law, which by virtue of Article 169 of the Private International Law Code considers remedies to be substantive. However, absent certain exceptions that are not applicable in the present circumstances, Canadian courts treat a choice of law provision in a contract as a reference to the internal law of the chosen foreign jurisdiction but not to the private international law of that jurisdiction: see e.g. *Rosencrantz* v. *Union Contractors Ltd. and Thornton*, [1960] B.C.J. No. 91 (S.C.), at paras. 19-21. Accordingly, the characterization of remedies as substantive rules in Chilean private international law is irrelevant in this court for purposes of determining the applicable law respecting Barrick's remedies for breach of the Barrick Agreement.

Specific Performance Against Goldcorp

[997] Barrick, supported by Xstrata Chile, submits that specific performance can be ordered against Goldcorp as the subsequent purchaser of the Xstrata Interest given Goldcorp's active participation in the events that resulted in Barrick's loss of the Xstrata Interest as well as notice of Barrick's claim at the time it acquired the Xstrata Interest. New Gold and Goldcorp argue that specific performance is not available in the particular circumstances.

[998] Barrick, supported by Xstrata Chile, also submits that damages are inadequate to compensate it for its loss of the Xstrata Interest for two reasons: (1) the subject matter of the Barrick Agreement is something unique or highly distinctive, such that it cannot be readily replaced; and (2) it will be extremely difficult to calculate Barrick's damages accurately for the breach of contract. New Gold and Goldcorp argue that damages are an adequate remedy. They also argue, among other things, that Barrick has failed to establish any actual loss. I will address each issue in turn.

Specific Performance Against a Subsequent Purchaser

[999] Barrick submits that specific performance can be awarded against a subsequent purchaser of an asset where the subsequent purchaser had notice of the plaintiff's claim when it acquired the asset. It relies on the decisions of the Supreme Court in *Irving Industries (Irving Wire Products Division) Ltd.* v. *Canadian Long Island Petroleums Ltd.*, [1975] 2 S.C.R. 715 and of Spence J. in *I.M.P. Group Ltd.* v. *Dobbin*, [2008] O.J. No. 3572 (S.C.). In addition, Barrick submits that courts have also found specific performance to be the appropriate remedy for the tort of inducing breach of contract where the property at issue is unique and damages would be inadequate. For this principle, it relies on *Oceanaire Investments Ltd.* v. *Redman*, [1988] B.C.J. No. 2071 (S.C.).

[1000] In each of these cases, the principle applied by the courts is that a party who takes the subject matter of a contract as a subsequent purchaser with notice of an existing agreement governing the subject property becomes a party to the action because, in the circumstances, equity considers the party's conscience as having been affected by the notice. This is clear from the following passage of Spence J. in the *I.M.P.* decision, at paras. 144 and 145:

> Generally, specific performance is a claim by and against the parties to a contract. However, when a claim for specific performance relates to the conveyance of property, and the property in question has subsequently been conveyed to a third party, that third party can properly be made a party to an action for specific performance. As Martland J. observed in the Supreme Court of Canada, adopting a passage from *Fry on Specific Performance*, 6th ed., p. 90, in *Canadian Long Island v. Irving Wire Products*, [1975] 2 S.C.R. 715 at 737:
>
> > If a stranger to the contract gets possession of the subject-matter of the contract with notice of it, he is or may be liable to be made a party to an action for specific performance of the contract upon the equitable grounds of his conscience being affected by the notice.
>
> Thus, a third party who is alleged to have taken the subject matter of the contract with notice becomes a party to the action because equity considers his conscience as having been affected by the notice.

[1001] Further, it is clear from *I.M.P.* that there need be no actionable wrong in the usual sense for specific performance to be ordered. In that decision, the court specifically stated at para. 147 that no actionable wrong, contractual, tortious or restitutionary, was alleged against the third party. Nor is it necessary to establish actual knowledge, or willful blindness, of the contract in a way that gives rise to a constructive trust: see *I.M.P.*, at para. 149.

[1002] In the present circumstances, there can be no doubt that Goldcorp was aware of the Barrick Agreement. The Barrick Transaction had been publically announced on October 12, 2009. Goldcorp received a copy of the form of the Barrick Agreement from New Gold on or

about December 23, 2009. This is sufficient notice of Barrick's adverse claim to justify an order of specific performance provided Barrick is able to establish circumstances justifying such an award. In any event, Goldcorp was served with the Original Barrick Claim on or about January 13, 2010.

[1003] Goldcorp argues that the principle in *IMP* is dependent upon the plaintiff demonstrating that it had an equitable interest in the property that is the subject of the agreement of which the third party had notice. It says that Barrick cannot satisfy this requirement in the present circumstances because equitable interests do not exist under the laws of Chile. As described above, under Chilean law, a contract for the sale of a property grants the purchaser no more than a right to take delivery at closing against payment of the purchase price.

[1004] I accept that in *IMP* the purchaser had an equitable interest in the shares that were the subject of the dispute: see para. 150. However, I am not persuaded that such a requirement exists in respect of property situated in a jurisdiction that does not recognize equitable interests in property. I see no reason, apart from a technical application of the principle, why a party should not be entitled to obtain a remedy for specific performance under the laws of Ontario if it can establish that it would stand in the position of an equitable owner if the applicable agreement were governed by the laws of Ontario.

[1005] More significantly, I do not think that it is correct, as a matter of law, that a plaintiff must demonstrate an equitable interest in an asset to obtain relief by way of specific performance against a third party purchaser of the asset. In *Canadian Long Island Petroleums*, the Supreme Court awarded specific performance in respect of a breach of a right of first refusal. In doing so, the Supreme Court addressed, for other purposes, whether a right of first refusal created an interest in land and concluded that it did not. In fact, Maitland J. indicated at p. 736 that it had been contended that, if the respondents did not have a property interest in the property acquired by the third party, they had no rights enforceable as against the third party. Maitland J. proceeded on the basis that, in that decision, the respondents had the benefit of a restrictive covenant in their favour but did not have an equitable interest in the relevant land. The Supreme Court nevertheless upheld the lower court decisions awarding specific performance.

[1006] This conclusion is reinforced by the principle that underlies the result in *Canadian Long Island Petroleums*. Maitland J. based the decision on the plaintiff's entitlement to an injunctive remedy if it had brought an action to prevent a breach of the right of first refusal prior to the transfer of the property. An equitable interest in land would not have been a prerequisite for obtaining such relief.

[1007] In the present circumstances, I see no principled reason for departing from the reasoning in *Canadian Long Island Petroleums* merely because, under the laws of Chile, Barrick did not have an equitable interest in the land. It did have an interest akin to a restrictive covenant in the Barrick Agreement. Such an interest would, in my opinion, be sufficient to bind the conscience of a third party in the circumstances assumed for the purposes of this Part.

[1008] Goldcorp relies on a number of cases in which courts have granted relief based on the fact that a holder of a right of first refusal has an option in the land after the right of first refusal is triggered. However, I do not think that they support Goldcorp's position that an equitable interest in land is required to obtain an order of specific performance against a third party purchaser with knowledge.

[1009] In particular, in *McFarland* v. *Hauser*, [1979] 1 S.C.R. 337, it is clear from the discussion at pp. 357-58 that the availability of a remedy of specific performance against the third party was not at issue as the relevant land had not been transferred to the third party. The issue in that decision was, instead, the priority as between competing equitable interests in the property. The circumstances in *Faris* v. *Eftimorski*, [2004] O.J. No. 3407 (S.C.), were similar to those in *McFarland*. In *Harris* v. *McNeely*, [2000] O.J. No. 472 (C.A.), the court denied a request for specific performance on the grounds of laches, as ten years had elapsed since the original transfer of land that contravened the right of first refusal. While the Court of Appeal referred to the existence of an option in favour of the holder of the right of first refusal, there is nothing in the decision that suggests this finding was a necessary pre-condition to the relief sought.

[1010] Based on the foregoing, I conclude that, in the circumstances assumed for the purposes of this Part, the remedy of specific performance directed against Goldcorp would be available to Barrick if it could demonstrate that such relief was appropriate in the circumstances.

Damages an Inadequate Remedy

[1011] As mentioned, Barrick submits that damages would be an inadequate remedy for Xstrata Chile's breach of the Barrick Agreement and of the tortious conduct of New Gold and Goldcorp that deprived it of the Xstrata Interest. I agree that specific performance would be the appropriate remedy in the circumstances assumed for the purposes of this Part of the Reasons, both because of the uniqueness of the Xstrata Interest and because of the difficulty in accurately calculating Barrick's damages. I will address each consideration in turn.

Uniqueness of the Xstrata Interest

[1012] In *Semelhago* v. *Paramadevan*, [1996] 2 S.C.R. 415, at para. 22, the Supreme Court held that specific performance should not be granted absent evidence that the property in dispute is "unique to the extent its substitute would not be readily available". In the present circumstances, however, the Xstrata Interest is intrinsically unique and, although unnecessary for this conclusion, also arguably unique in the hands of Barrick.

[1013] In *Inmet Mining Corp*. v. *Homestake Canada Inc.*, 2002 BCSC 61, 99 B.C.L.R. (3d) 93, at para. 402, aff'd 2003 BCCA 610, 24 B.C.L.R. (4th) 1, Satanove J. found the Troilus gold mine to be a unique property for three reasons:

> I find Troilus mine to be a unique property. Firstly, cases dealing with gold mines seem to treat them as having a peculiar and special value (see *Lac Minerals Ltd. v. International Corona Resources Ltd.* (1989), 61 D.L.R. (4th) 14 (S.C.C.)).

> Secondly, it is apparent that Troilus is unique amongst gold mines because it is the lowest grade, gold producing mine in North America. Thirdly, the nature of the ore body and its peculiar nugget effect creates a greater than usual challenge in estimating the ore reserve and extracting it from the earth. In fact, it is fair to say that it is the unique nature of this mine that created the reconciliation problem between mine and mill which lead in turn to many of the unfounded allegations against the plaintiff.

There is ample evidence for a similar conclusion in the present circumstances.

[1014] The El Morro Project demonstrates similarly unique characteristics. It includes a high quality copper-gold mineral deposit in the La Fortuna ore-body that contains large reserves and significant mineral resources. It also exhibits significant exploration potential both at pit depth and elsewhere on the El Morro Project site. There is no evidence of available comparable assets that Barrick could have purchased at the date of the alleged breach or at the date of the trial. It is also significant that the Xstrata Interest represented the majority interest in the El Morro Project and, therefore, carried the right to control the development of El Morro.

[1015] While BDO proposed that the Casino project referred to above was a potentially comparable property, the evidence regarding this property is not sufficient for the court to reach this conclusion. Among other things, the Casino project is at an earlier stage of development, is a smaller project, and is located in the Yukon, rather than Chile. Nor is there evidence that the project, or 70% of the shares of the company, were for sale even if the shares were traded publicly.

[1016] Further, as set out above, the potential existed for Barrick to realize considerable synergies from its acquisition of the Xstrata Interest that would not exist in respect of purchases of other mining assets outside the Atacama region of Chile.

[1017] New Gold argues that Barrick's purchase of an additional 25% interest in the Cerro Casala project, which was announced on February 18, 2010 and completed on March 21, 2010, constituted the purchase of a similar property to the Xstrata Interest. Among other things, it argues that the availability of this investment demonstrates that the El Morro Project was not unique and that the court should find that Barrick avoided any loss by its purchase of this interest. I do not agree for three reasons.

[1018] First, apart from the similarity in the purchase price, which was apparently U.S. $475 million, there is no other evidence to establish the similarity of Cerro Casala and El Morro in terms of the fundamental characteristics of the mining project, including but not limited to the ore grades, the quantity of the reserves, the metallurgical processes involved, or the exploration potential.

[1019] Second, even if the contemplated Cerro Casala and El Morro mines were similar, there is no evidence that Cerro Casala had additional potential comparable to that of the El Morro Project, which is acknowledged.

[1020] Third, and in any event, the evidence establishes that Barrick would have acquired the additional interest in Cerro Casala even if it had completed its purchase of the Xstrata Interest. It had sufficient cash resources to do so and had identified Chile as a country in which it wished to expand its portfolio of producing assets. Barrick advised Xstrata Chile on both February 5, 2010 and February 12, 2010 that it was ready, willing and able to complete the Barrick Transaction. There is no evidence that Barrick was unable financially to complete both the Barrick Transaction and the Cerro Casala transaction at the same time.

Difficulty in Quantifying Damages

[1021] Courts have also found specific performance to be an appropriate remedy where an accurate calculation of damages would otherwise be extremely difficult on the rationale that, in such circumstances, there is a real risk of under-compensating the innocent party: see e.g. *Neighbourhoods of Cornell Inc.* v. *1440106 Ontario Inc.*, [2003] O.J. No. 2919 (S.C.) at paras. 112-14, aff'd [2004] O.J. No. 2350 (C.A.), leave to appeal to S.C.C. refused, [2004] S.C.C.A. No. 390.

[1022] The evidence adduced at trial relative to Barrick's damage claim amply supports the conclusion that a monetary award in this case cannot adequately compensate Barrick for the loss of the Xstrata Interest with any reasonable degree of certainty. There are six broad categories of difficulty presented in this case regarding the determination of Barrick's damages: (1) the determination of the appropriate metal prices for forecast purposes; (2) the determination of the appropriate reserves for development of the mine plan underlying the net present value calculation of the project; (3) certain issues regarding the technical and cost estimates; (4) the determination of the appropriate discount factor for purposes of the present value calculation of the projected cash flows from El Morro; (5) the inability to value the potential additional value in the El Morro Project; and (6) the changing nature of certain significant elements of the mine. The significance of each of these considerations for the conclusion that a damage award would not be an appropriate remedy in the present circumstances is summarized below.

[1023] First, a very significant variable in the value of the El Morro Project, and therefore of the quantum of Barrick's damages, is the price of copper that is assumed for forecasting purposes, as copper revenues are estimated to approximate three-quarters of total revenues from El Morro. Similarly, the forecast price for gold that is assumed, even if it was not disputed in this trial, is a significant variable for the value of the Project. At the U.S. $3.00/lb price for copper recommended by Gulley and used by Duff & Phelps, El Morro is very profitable. At the U.S. $2.50/lb price level used by BDO, the value of Xstrata Chile's aggregate interest in the El Morro Project approximates the purchase price in the Barrick Transaction.

[1024] However, copper prices cannot be forecast in a vacuum. Historically, prices have been tied to levels of industrial production. It is necessary to base any finding regarding long-term prices on a conclusion regarding the anticipated level of economic activity in both the developed as well as the developing world over the life of the mine, which is expected to commence in or after 2014 and run for approximately 14 years.

[1025] The evidence on copper prices consists of the Gulley Report and the Hunt Report. As the discussion of these reports indicates, Gulley and Hunt have radically different views regarding the likely global economic environment over this period and regarding the market fundamentals for the copper market. This results in significantly different views as to the appropriate copper price or prices to use for forecasting purposes. Moreover, on the evidence before the court, it is difficult to assess the particular issue raised by Hunt of the impact of financial purchases of copper on the reliability of current copper prices as a reference for future prices.

[1026] Another significant variable is the quantity of ore produced by El Morro over the life of the mine. There are at least three principal variables that can impact this amount. First, despite extensive drilling and the sophistication of the models used, there is always a risk that the ore-body will exhibit different characteristics from those modelled, in particular, in terms of grades. Second, and very significantly, copper and gold prices affect the size of the reserves, i.e., the amount of ore that can be profitably mined, and therefore the pit dimensions and design. Third, there is always a risk that metallurgical recoveries will not equal the recoveries modelled for the mine. The draft Hatch feasibility study materials appear to reflect the influence of all three of these factors.

[1027] Third, as described above, there are a number of issues pertaining to the technical and cost estimates of El Morro that arise out of the Micon Report and the Hatch feasibility study. For the most part, these issues can be resolved on a balance of probabilities standard. In addition, based on the draft Hatch feasibility study, it would appear that the date of commencement of commercial production assumed in the Duff & Phelps Report has been adjusted by Goldcorp. Although Barrick suggests that its experience with permitting in the Atacama region of Chile, and its relationship with local authorities, would have allowed it to keep to the schedule contemplated by the 2011 Mine Plan, this is certainly less probable given the generally more difficult permitting environment since 2009 in respect of mining projects in Chile. There is also a significant discrepancy in the evidence between the Barrick 2011 Mine Plan (including its antecedents) and the draft Hatch feasibility study regarding the appropriate level of sustaining capital expenditures. Micon has stated that it is unable to resolve this discrepancy based on the information it has received. The difference is sufficiently great to have a material impact on the net present value of the El Morro Project.

[1028] Fourth, the use of a discounted cash flow analysis to quantify Barrick's damages raises the issue of the appropriate capitalization rate for discounting purposes. The difference in approach between the Duff & Phelps Report and the BDO Report has been set out above. The choice of capitalization rate has a very significant influence on whether the value of El Morro is determined to be material or negligible. There is, however, no theoretically correct weighted

average cost of capital for the El Morro that has been identified for the court. While I would be inclined to accept a discount rate that is broadly consistent with other market-based indicia if it were necessary to make a determination on this issue, a court should have reservations about doing so if there is an alternative. Markets do not always price risk appropriately, and, accordingly, the BDO conclusion that Barrick and Goldcorp may have overpriced the Xstrata Interest cannot be entirely disregarded. The capital asset pricing model is a useful but not always reliable means of assessing the value of assets that do not trade on their own in a public market. Moreover, the choice of discount factor and the choice of metal prices for forecast purposes are inevitably related and their determination involves a significant subjective element.

[1029] Fifth, there is a significant opportunity for additional value to be derived from the El Morro Project that has not been valued by Duff & Phelps and is not susceptible of quantification. There is a reasonable possibility that mining could continue underground after the life of the open pit mine. In addition, there is the possibility that further exploratory drilling on the Project site may discover other economic ore bodies, whether in respect of anomalies already identified or otherwise. Further, Goldcorp and New Gold acknowledged the fact that, as the owner of the Xstrata Interest, there would be a real potential for Barrick to obtain synergies in respect of the construction and the operation of El Morro that would add value to its interest in the El Morro Project beyond the value addressed in the calculations of the net present value of the projected cash flows set out in the 2011 Mine Plan. In the absence of any means of reliably quantifying such additional value, any valuation of the Project that is based solely on these net cash flows from the Project necessarily undervalues Barrick's loss.

[1030] Lastly, for a number of reasons set out above, the net present value of the El Morro Project is a moving target. As mentioned, in the Goldcorp 2011 Press Release, Goldcorp has announced materially higher reserves for El Morro based on updated prices and further drilling activity. On the basis of these reserves, Hatch was engaged at the time of the trial in developing an updated feasibility study based on a revised mine plan, with certain other revisions to the proposed infrastructure. The projected net cash flows to be developed in connection with this feasibility study would provide a substantially clearer picture of the value of El Morro, and of Barrick's corresponding loss, as of the date of trial. As Micon noted in its supplemental report, the Hatch feasibility study, when completed, will represent the most up-to-date and comprehensive analysis of the technical and cost parameters associated with the actual project to be developed to exploit the La Fortuna ore-body.

[1031] However, the estimates provided to Micon by Hatch did not include a projection of the net present value of the after-tax cash flows from El Morro comparable to those upon which Duff & Phelps and BDO calculated the value of the Xstrata Interest and corresponding loss to Barrick. Accordingly, even if it were possible to address with some confidence the other considerations set out above, the evidence before the court for purposes of calculating Barrick's damages is, by definition, out-of-date and therefore, at best, an imperfect basis for making such a determination.

[1032] In summary, while it is possible to make findings regarding each of the foregoing issues on a probability standard, I do not think that such an exercise would be meaningful in the present

circumstances. It is certain that the scenario resulting from such findings would not occur. The real imponderable is whether the deviation from such scenario would be material or immaterial. There can be no certainty on this issue.

[1033] Investors are prepared to accept considerable uncertainty regarding the foregoing factors in order to evaluate investment opportunities because there is no other reasonable alternative. However, that level of uncertainty is not compatible with a damage calculation, where the purpose is to put the injured party in the position it would have been in if the breach had not occurred. If there is an alternative remedy that avoids the high degree of uncertainty that is inherent in the discounted present value approach to the quantification of damages in the present circumstances, I think the court should adopt it, absent considerations that disentitle the injured party to such relief. The alternative of specific performance addresses this concern and provides substantial certainty of the outcome to Barrick. Accordingly, the remedy of specific performance in respect of the 70% Interest is highly preferable in the circumstances assumed for this Part of the reasons in the absence of factors militating against such relief. As discussed in the following section, Goldcorp has not identified any such considerations.

Other Considerations Relevant to an Order of Specific Performance

[1034] Goldcorp has raised several considerations which it submits militate against an order of specific performance. I have rejected these arguments for the reasons set out below.

[1035] First, Goldcorp argues that, in order to obtain an order of specific performance against a subsequent purchaser, the party seeking the relief must have an equitable interest or proprietary claim in the subject property or asset, which it says Barrick is unable to establish in the present circumstances because Chilean law does not recognize equitable interests. This issue has been addressed above.

[1036] Second, Goldcorp argues that Barrick does not come before the court with 'clean hands'. It points to Blasutti's offer of an increased purchase price to Xstrata Chile on the evening of January 6, 2010, which it describes as a flagrant attempt to induce Xstrata Chile to breach its obligations under the Shareholders Agreement. As set out above, given the complete lack of understanding of the nature and structure of the Goldcorp Transaction on the part of Barrick and Xstrata Chile at the time, and the commercial reality that Blasutti's offer addressed, I do not find that this offer is properly characterized as an attempt to induce a breach of contract by Xstrata Chile.

[1037] Third, Goldcorp argues that Barrick could have sought injunctive relief in the Original Barrick Claim to prevent completion of the Goldcorp Transaction. It says this factor should weigh against its entitlement to an order of specific performance after completion of the Goldcorp Transaction. While this may be a relevant consideration as Goldcorp suggests, I am not persuaded that, on its own, it is determinative in the present circumstances in the face of the other factors described above that weigh in favour of an order of specific performance.

[1038] Fourth, Goldcorp argues that the subject matter of the Barrick Transaction is not unique. It says that the fact that there may be challenges in calculating damages does not mean that damages cannot be quantified, nor that an award of damages would be inadequate. In support of this argument, it relies on the "voluminous expert evidence" in respect of quantification of damages filed by Barrick, including the specific quantification of loss calculation of Duff & Phelps.

[1039] In many circumstances, damages can be calculated with reasonable certainty even if there is a difficulty in arriving at such a calculation. However, for the reasons set out above, I think that the present circumstances are much more extreme – to the point where reasonable certainty is not a possibility. In addition, as Barrick points out, a court is less likely to award specific performance where the transactional objective was a purely monetary one. In the present circumstances, the transactional objective of the Barrick Agreement was Xstrata Chile's interest in the El Morro Project, rather than a strictly monetary one.

[1040] Fifth, I would note that both New Gold and Goldcorp also argue that Barrick has failed to establish the existence of damages with reasonable certainty. I acknowledge that under at least two scenarios – the higher discount rate proposed by BDO or the lower copper prices based on Gulley's Market Sentiment Price – the evidence would suggest that Barrick did not suffer any damages. I have addressed each of these issues above. In my opinion, however, Barrick has adduced sufficient evidence of the real possibility of loss to warrant an order of specific performance in the present circumstances.

[1041] Lastly, in connection with the requested relief of specific performance, Barrick also seeks an order requiring New Gold to enter into the Shareholders Agreement and the CFLA with Barrick on the terms of the Assignment Agreements, as finalized in or about December 31, 2009. New Gold argues that there is no authority for such an order. However, New Gold/Datawave agreed to the Assignment Agreements in contemplation of the closing of the Barrick Transaction and received consideration for such agreement in the form of Xstrata Chile's consent to the Feasibility Study Agreement. Given these arrangements, I conclude that such an order would be appropriate if an order of specific performance were made in the circumstances assumed for the purpose of this Part of these Reasons.

Specific Performance in Respect of Xstrata Chile's 70% Interest in the BHP Royalty

[1042] The foregoing discussion has focused on the appropriateness of the remedy of specific performance in respect of the 70% Interest held by Goldcorp in Goldcorp Tesoro.

[1043] However, the same considerations would apply in respect of Barrick's claim for an order directed against Xstrata Chile in respect of its 70% interest in the BHP Royalty. I note that, in its submissions, Xstrata Chile did not oppose such an order.

[1044] Accordingly, in the circumstances assumed for the purposes of this Part of the Reasons, I would also conclude that an order for specific performance directed against Xstrata Chile in

respect of its 70% interest in the BHP Royalty would be more appropriate than an award of damages.

PART V – CONCLUSION

[1045] Based on the foregoing, the Barrick claims against the defendants in this action are dismissed in their entirety.

[1046] The parties should contact my office to arrange a meeting of counsel to address cost submissions regarding this matter.

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Wilton-Siegel J.

Released: June 26, 2012

SCHEDULE A

The El Morro Shareholders Agreement

The following definitions in section 1.1 are relevant:

> **"Affiliate"** means, with respect to a Shareholder, any Person which directly or indirectly Controls, or is Controlled by, or is under common Control with, that Shareholder.
>
> **"Control"** means possession, directly or indirectly, of the power to direct or cause direction of management and policies through ownership of voting shares, interests, or securities, or by contract, voting trust or otherwise. The definition of Control shall be incorporated into such terms as **"Controlled"** and **"Controlling"**.
>
> **"Encumbrances"** means mortgages, charges, deeds of trust, security interests, pledges, liens, royalties, overriding royalty interests, preferential purchase rights, or other encumbrances or burdens of any nature whether imposed by contract or operation of law (other than a Permitted Encumbrance).
>
> **"Rights or Interests"** means, with respect to any Shareholder, that Shareholder's Participating Interest together with all of its other rights, interests, entitlements, obligations and liabilities under this Agreement, including all Shares and Shareholder Loans held by such Shareholder, any entitlement to Distributions or to the Withdrawal NSR Royalty and any Carried Funding Loans.
>
> **"Transfer"** means, when used as a verb, directly or indirectly, to sell, grant, assign, create an Encumbrance on, pledge or otherwise convey, or dispose of or commit or promise to do any of the foregoing, and when used as a noun, means a direct or indirect sale, grant, assignment, Encumbrance, pledge, conveyance, or other disposition.

1.2 Interpretation

(1) This Agreement is the result of negotiations between the parties and the terms and provisions hereof (except where otherwise defined or the context otherwise requires) shall be construed in accordance with their usual and customary meaning.

9.1 Carried Funding

(1) Datawave shall have a one time right to elect to have Xstrata fund seventy percent (70%) of all Program Funding Commitments of Datawave from the effective date of such election until the commencement of Commercial Production ("Carried Funding"). By way of example only, if the Participating Interests of Xstrata and Datawave are 70% and 30% respectively at the time of such election and there is no Project Financing, then after giving effect to such election and using the example of a Program and Budget requiring a total Program Funding Commitment of $1,000, Xstrata will contribute $910 (comprised of $700 in respect of its own Program Funding Commitment plus $210 as Carried Funding (representing 70% of Datawave's $300 Program Funding Commitments)) and Datawave will contribute the remaining $90. Applying the same example, but assuming in addition that 60% of Program Funding Commitments are funded by Project Financing, then $600 will be funded by Project Financing and of the remaining required $400 of Program Funding Commitments Xstrata will contribute $364 (comprised of $280 in respect of its own Program Funding Commitment plus $84 as Carried Funding) and Datawave will contribute the remaining $36.

9.4 Non-Assignment

(1) The obligations of Xstrata pursuant to this Article 9 provide Carried Funding or a Completion Guarantee are personal to Datawave and cannot be assigned by Datawave to any unaffiliated third party and shall cease upon Datawave or Finco ceasing to be an Affiliate of Datawave Public Parent.

(2) If at any time after Datawave has made a Carried Funding Election or Xstrata has provided the Completion Guarantee, either of the Datawave Participants Transfers to a third party (other than a Transfer to another Affiliate of Datawave Public Parent) all or any portion of its Rights and Interests (to the extent permitted under Article 10) or ceases to be an Affiliate of Datawave Public Parent, Xstrata shall not have any obligations to provide further Carried Funding and any such Transfer, or transaction by which either Datawave Participant ceases to be an Affiliate of Datawave Public Parent, shall be conditional on:

(i) the then outstanding balance (including all principal and interest) of the Carried Funding Loans being repaid in full, and

(ii) Xstrata being released from, in the case of such Transfer, that portion of the Completion Guarantee relating to the Rights and Interests being Transferred or, in the case of either Datawave Participant ceasing to be an Affiliate of Datawave Public Parent, the entire portion of the Completion Guarantee relating to the Datawave Participants' Participating Interest.

10.1 General

Except as expressly provided in this Article, no Shareholder shall have the right to Transfer all or any portion of its Rights or Interests.

10.2 Limitations on Transferability

(1) Notwithstanding any other provision of this Article, any Transfer of Rights or Interests by a Shareholder permitted by this Article shall be subject to the following limitations:

(a) No Shareholder shall Transfer any Rights or Interests except in conjunction with the Transfer of all, or a proportionate interest in all, of its Rights and Interests.

(b) No Transfer of all or any part of a Shareholder's Rights or Interests shall be completed, and no transferee shall have the rights of a Shareholder unless and until the transferring Shareholder has provided to the other Shareholder notice of the Transfer and the transferee, as of the effective date of the Transfer, has entered into an agreement with and in form satisfactory to the Company and the other Shareholder to become a party to and be bound by this Agreement to the same extent as the transferring Shareholder.

(c) No Shareholder shall make a Transfer that would (i) violate or is prohibited by any Applicable Laws or by the terms of any agreement or other instrument affecting the Company, the Shareholders or the Property, (ii) result in the cancellation of any Governmental Authorization, (iii) result in the other Shareholder or the Company becoming subject to any governmental controls or regulations or any taxation or additional taxation to which they were not subject prior to the proposed Transfer, by reason of the nationality or residence of the proposed transferee.

(d) No Shareholder shall make a Transfer that would, after giving effect thereto, result in (i) such Shareholder and its Affiliates holding in the aggregate 10% or less of the Participating Interests unless such Transfer results in such Shareholder and its Affiliates holding no Participating Interest or (ii) the Transferee and its Affiliates holding in the aggregate 10% or less of the Participating Interests.

(e) The requirements of Section 9.4 in the case of a Transfer by either of the Datawave Entities to a non-Affiliate.

(2) The Company shall not register or take any other action to give effect to or recognize any Transfer or purported Transfer of any Rights or Interests unless such transfer fully complies with the requirements of this Article or is otherwise specifically authorized pursuant to this Agreement.

10.3 Transfer to an Affiliate

(1) A Shareholder may Transfer all or any portion of its Rights and Interest to an Affiliate. Any such Transfer shall be subject to the requirements of Section 10.2 (other than paragraphs (a) and (e) thereof) but shall not be subject to the right of first refusal imposed by Section 10.4. …

10.4 Right of First Refusal

(1) If either Shareholder (or former Shareholder in the case of the Withdrawal NSR Royalty) (in either case a "Selling Shareholder") receives a *bona fide* written offer (a "Third Party Offer") from any person dealing at arm's length with the Selling Shareholder to purchase all, or any part of its Rights and Interests (the "Offered Interest"), which the Selling Shareholder wishes to accept, the Selling Shareholder must promptly give notice of the Third Party Offer (the "Notice of Offer") to the Company and to the other Shareholder and comply with this Section 10.4. The Notice of Offer must contain a copy of the Third Party Offer, disclose the identity of the person making the Third Party Offer (the "Third Party Offeror") and provide evidence sufficient to establish that the Third Party Offeror has the power and capacity, including the financial capacity, to complete the purchase of the Offered Interest and that the conditions set out in Section 10.2 will be satisfied. If the Third Party Offer provides for any non-cash consideration to be paid to the Selling Shareholder in respect of the Offered Interest, the Notice of Offer must specify the Selling Shareholder's good faith estimate of the cash equivalent value of such non-cash consideration. If the Offered Interest is being offered for sale to the Third Party Offeror together with or in conjunction with other unrelated assets of the Selling Shareholder, the other Shareholder will in accordance with Section 10.4(2) be entitled to purchase only the Offered Interest and, the Notice of Offer must specify the Selling Shareholder's good faith estimate of the cash equivalent value being offered by the Third Party Offeror for the Offered Interest. If the other Shareholder does not agree with any one or more of the foregoing estimates, as applicable, such disagreement, if not resolved, will constitute a dispute which may be submitted directly to arbitration by either Shareholder for final determination pursuant to Section 12.2, in which case all time periods referred to in this Section 10.4 shall be extended by the time taken to obtain such final determination. Upon the Notice of Offer being given, the other Shareholder will have the right to purchase all, but not less than all, of the Offered Interest at the same price and upon the same terms and conditions as are contained in the Third Party Offer, subject to paying the aforesaid cash equivalent in lieu of any non-cash consideration.

(2) If the other Shareholder desires to purchase all the Offered Interest it will give notice of such desire to the Selling Shareholder and to the Company within 60 Business Days of having been given the Notice of Offer, in which case the transaction of purchase and sale will be completed in accordance with the terms set out in the Third Party Offer (subject to paying the aforesaid cash equivalent in lieu of any non-cash consideration) by delivery of the Offered Interest by the Selling Shareholder with good

title, free and clear of all Encumbrances against payment by certified cheque or bank draft by the other Shareholder. If, at the time of completion, any portion of the Offered Interest is subject to any Encumbrance, the other Shareholder will be entitled to deduct from the purchase money to be paid to the Selling Shareholder the amount required to discharge such Encumbrance and will apply such amount to discharge such Encumbrance, on behalf of the Selling Shareholder. Concurrently with such completion, the other Shareholder shall assume, and shall indemnify and obtain the release of the Selling Shareholder from, all of the Offeror's obligations under any Financial Assurance.

…

(4) If the other Shareholder does not give notice in accordance with the provisions of Section 10.4(2) that it is willing to purchase all the Offered Interest, the right of the other Shareholder, except as hereinafter provided, to purchase the Offered Interest will terminate and the Selling Shareholder may sell all, but not less than all, of the Offered Interest to the Third Party Offeror in accordance with the terms of the Third Party Offer at any time within 120 Business Days after the expiry of the 60 Business Day period specified in Section 10.4(2). If the Offered Interest is not so sold within such 120 Business Day period on such terms, the rights of the Parties pursuant to this Section 10.4 will again take effect with respect thereto. [emphasis added]

10.5 Exceptions to First Right of Refusal

Section 10.4 shall not apply to the following:

(a) any Transfer by Xstrata or its Affiliates (other than a Transfer of the Withdrawal NSR Royalty) at any time after a decision to proceed with Development, unless immediately before giving effect to such Transfer the Participating Interests held by Xstrata and its Affiliates, in aggregate, are less than 50% of all Participating Interests;

12.5 Further Assurances

The Shareholders agree to do all such further things, take all such further actions and execute and deliver all such further documents and instruments as may be reasonably necessary or convenient to carry out the intent, purposes and provisions referenced in this Agreement.

12.11 Confidentiality

(2) Notwithstanding Section 12.11(1), any Party may disclose confidential information:

…

(d) as may reasonably be required by a *financial institution or other similar entity* in connection with any financing required by a Party for purposes of [the El Morro Shareholders Agreement] or otherwise;

(e) as may be reasonably required by a third party or parties in connection with the negotiation and due diligence relating to a Transfer of any Rights and Interests to the extent permitted by [the El Morro Shareholders Agreement].

(f) information which is or becomes part of the public domain other than through a breach of this Agreement; and

provided that:

(i) in the event of disclosure as contemplated in item (b) above, the Party making such required disclosure shall first deliver a copy thereof to the other Parties on a timely basis to permit the other Parties to comment thereon prior to such disclosure,

(ii) in the event of disclosure as contemplated in items (d) and (e) above, the person receiving the disclosure agrees to be bound by and observe the provisions of this Section, and

(iii) in the event of disclosure as contemplated in items (c), (d) and (e) above the disclosing Party notifies the other Parties in advance of such disclosure, indicating in such notice the nature of the information being disclosed and the name(s) of the proposed recipient(s) of that information.

The Parent Entities' Addendum

(1) Each of the undersigned acknowledges that the intended result of the restrictions contained in Article 10 of the Agreement concerning Transfer of Rights and Interests (including Transfer of Shares of the Company) and the related right of first refusal could be avoided by the Transfer, directly or indirectly, of the shares of the Shareholders and accordingly (i) each of the undersigned agrees that the provisions of Article 10 of the Agreement shall apply, *mutatis mutandis*, to any Transfer of any shares of the Shareholders or any shares of any entity (other than Datawave Parent, Xstrata Parent or any entity that controls Xstrata Parent) holding, directly or indirectly, shares of the Shareholders and (ii) each of the undersigned undertakes to ensure compliance with the foregoing by any of its respective Affiliates that may from time to time own, directly or indirectly, any shares of the Shareholders. For greater certainty, in

applying the provisions of the right of first refusal in Article 10 in the foregoing context, such right of first refusal shall be implemented by applying it to the Rights and Interests held by the Shareholder of the shares of which are, directly or indirectly, proposed to be Transferred, rather than to such shares themselves.

...

(3) Xstrata Parent shall take all steps necessary to ensure that Xstrata duly, timely and fully performs all of its obligations under the Agreement, including compliance with any arbitration award pursuant to Section 12.2 thereof.

(4) Datawave Parent shall take all steps necessary to ensure that Datawave duly, timely and fully performs all of its obligations under the Agreement, including compliance with any arbitration award pursuant to Section 12.2 thereof.

The Carried Funding Loan Agreement

Under the CFLA, "Rights and Interests" and "Permitted Transfers" are defined as follows:

> "**Rights and Interests**" means, with respect to any Shareholder, all of its rights, interests, entitlements, obligations and liabilities under the Company's bylaws as Shareholder, or under this Agreement, the [El Morro] Shareholders Agreement, or any other agreement between the Shareholders, including all shares and shareholder loans held by such Shareholder, any entitlement to Distributions or to the Withdrawal NSR Royalty and any Carried Funding Loans.
>
> "**Permitted Transfer**" means any transfer by any Datawave Participant of all or any portion of their Rights and Interests to an Affiliate, as long as (i) the Datawave Participant remains jointly and severally liable with its Affiliate for all of the obligations and liabilities associated with the Rights and Interests transferred to its Affiliate, …; (ii) the Datawave Participant and its Affiliate effecting such transfer execute any documents, guarantees and agreements reasonably required by Xstrata to record such joint and several liability; and (iii) such transfer satisfies the requirements of clauses (b), (c) and (d) of Section 10.2(1) of the [El Morro] Shareholders Agreement.

4. Total Carried Funding Facility

4.1 By means of this instrument and always subject to the fulfillment of each and all of the condition precedent provided for in Section 5 below, Xstrata will make, in one or more advances, a non revolving carried funding loan to Finco up to the total principal amount of 600.000.000

Dollars or such greater amount as may be required to fund 70% of the combined Program Funding Commitments of the Datawave Participants until commencement of Commercial Production ("Total Carried Funding Facility").

A Loan Advance shall be disbursed by Xstrata directly to the Company who shall receive such Loan on behalf of Finco, in an amount equivalent to 70% of the combined Program Funding Commitments of the Datawave Participants related to each Cash Call made by the Company pursuant to an Approved Expenditure (the "Disbursement Request Amount") provided however that each and every one of the conditions precedent indicated in section 5 below have been fulfilled.

For the above program, Finco shall grant an irrevocable power of attorney in the form contained in the Exhibit 11 named "Power of Attorney from Finco" or "Poder Irrevocable de Finco", in favour of the Company, so the Company can validly request and receive, on behalf of Finco, the pertinent Loan Advance directly from Xstrata, who within the next 10 Business Days after making the Loan Advance, shall notify the Company and the Datawave Participants of the account thereof and date on which such advance was made (the Disbursement Date").

8. Affirmative Covenants

8.3 Other Loan Documents and Additional Security Agreements: In case either Datawave Participant acquires one or more shares in the Company, or becomes by any way entitled to acquire shares in the Company then it shall, within 10 (ten) Business Days as of the date such acquisition takes place, grant a commercial pledge over all such shares to Xstrata in the terms and conditions set out in Exhibit 5 herein.

9. Negative Covenants

Starting on the date hereof and until such date as the obligation of Xstrata to make Loan Advances has terminated and the Carried Funding Loan and any secured interest thereon has been paid in full each and every one of the Obligations contained herein have been completely and totally fulfilled, each of Finco and Datawave, as applicable, undertakes the following negative covenants:

9.1 Neither Finco nor Datawave shall furnish, create, grant or permit the existence of any Lien over all or any part of any Collateral, other than Liens in favour of Xstrata and Permitted Encumbrances.

9.2 Finco shall conduct no business or corporate activity different from the finance of the Company.

10.A Assignment by Datawave Participants

Datawave Participants may make Permitted Transfers. In the event that a Permitted Transfer is made of any of the Rights and Interests of the Datawave Participants under

this Agreement, the Parties will execute and deliver all such further agreements and documents and do all such further acts and things as may be required to give effect to such transfer and to maintain and preserve the priority of the [Xstrata Chile Security Interests]….

12. Default Events and Acceleration:

A. Default.

The following events constitute Default Events of the Carried Funding Loan:

12.1 If (a) Finco or Datawave is in default of its obligations under Sections 5.2 or 5.3; (b) Finco fails to reimburse Xstrata for any stamp taxes paid or payable by Xstrata in accordance with section 8.1; (c) Finco fails to fulfill any other necessary requirement within its power or control in order to have any Notes and/or any Acknowledgment of Debt signed by Xstrata pursuant to the Power of Attorney for other Loan Documents be "executive titles" or "titulo ejecutivo" against Finco and such failure remains unremedied 10 Business Days after written notice thereof is given by Xstrata to Finco; (d) Finco or Datawave defaults in the payment of an increased amount payable to Xstrata pursuant to Section 8.2 and such default continues unremedied 10 Business Days after written notice of such default is given to the Datawave Participants; (e) Finco or Datawave fail to execute or deliver any such further agreements or to do any such further acts or things as Xstrata may reasonably require pursuant to Section 8.3 and such default continues unremedied 10 Business Days after written notice of such default is given to the Datawave Participants; (f) a Material Adverse Change occurs and Section 5.3 has ceased to apply; (g) any Lien exists on all or any part of the Collateral, other than the Liens in favour of Xstrata and the Permitted Encumbrance, and in the case of a Lien arising by operation of law such Lien is not discharged or subordinated to the Xstrata Security within 10 Business Days of Datawave first becoming aware of its existence;

…

12.6 If (a) either of the Datawave Participants ceased to be an Affiliate of Datawave Parent Company, (b) Datawave shall cease to have direct ownership of at least 99% of Finco's equity rights and capital and indirect ownership through an Affiliate or employee of the remaining 1% or (c) Datawave or Finco shall transfer all or portion of their Rights and Interests to a non-Affiliate.

The Xstrata/Barrick Sale Agreement

4.1 Conditions Precedent

This agreement is conditional on:

(a) (**Shareholders' Agreement**) each of Datawave, Finco, the Company and the Seller and Buyer agreeing to amend the Shareholders' Agreement in form and substance satisfactory to the Buyer and the Seller, acknowledging and agreeing to:

i. the assignment to the Buyer of Seller's rights under the Shareholders' Agreement; and

ii. the assumption by the Buyer and the release of the Seller of all of the Seller's obligations and undertakings (including personal obligations to Datawave in relation to shareholder loans, carried funding to Finco and any completion guarantee) under the Shareholders' Agreement,

to be incorporated in a deed of assignment, assumption and release delivered by the Seller to the Buyer on Completion pursuant to clause 5.2(c) and executed by the Buyer on Completion pursuant to clause 5.3(d);

(b) **Loan Documents**) each of Datawave, Finco, the Company and the Seller and Buyer agreeing to amend the Loan Documents, in form and substance satisfactory to the Buyer and the Seller, acknowledging and agreeing to:

iii. the assignment to the Buyer of Seller's rights under the Loan Documents, including the transfer to the Buyer of the Carried Funding Loans and the Shareholder Loans; and

iv. the assumption by the Buyer and the release of the Seller of all of the Seller's obligations and undertakings under the Loan Documents,

to be incorporated in a deed of assignment, assumption and release delivered by the Seller to the Buyer on Completion pursuant to clause 5.2(h) and executed by the Buyer on Completion pursuant to clause 5.3(g); and

(c) **(Right of First Refusal)** the first to occur of the following:

i. Datawave delivering to the Seller a letter addressed to theSeller, in form and substance satisfactory to the Buyer and the Seller, confirming that the Right of First Refusal has rexpired in accordance with the terms and conditions of the Shareholders' Agreement;

ii. Datawave delivering to the Seller a letter addressed to the Seller in form and substance satisfactory to the Buyer and the Seller, waiving the Right of First Refusal; or

iii. Datawave failing to exercise the Right of First Refusal within the time period set forth in the Shareholders' Agreement.

4.2 Reasonable Endeavours

Each party must use its reasonable endeavours to obtain the satisfaction of the Conditions Precedent, including procuring performance by a third party. The parties must keep each other informed of any circumstances which may result in any Condition Precedent not being satisfied in accordance with its terms.

4.4 Termination of agreement by either party

If any of the Conditions Precedent are not satisfied, and have not been waived by the parties in accordance with clause 4.3, by January 30, 2010 (or such other date as the Seller and Buyer agree), then either party may terminate this agreement by notice in writing to the other party, provided, that if Datawave exercises or purports to exercise its Right of First Refusal, then the Buyer may terminate this agreement by notice in writing to the Seller at any time.

8.6 Pre-Completion Conduct

During the period from the date of this agreement to Completion, except as consented to in writing by Buyer (which consent of Buyer shall not be unreasonably withheld), Seller shall:

…

(e) not, except in the Ordinary Course of Business, waive, release, or assign any rights or Claims, or modify, amend, or terminate any contract in respect of the Business and to which the Company is a party or by which the Company or any of its assets is bound;

(f) not enter into any merger or capital restructuring of the Company, or amendment of the Constitution;

(g) not waive, release, or assign any rights or Claims, or modify, amend, or terminate any Loan Document as it exists on the date of this agreement;

(h) if the Seller or the Company receives a Notice of Offer (as defined in the Shareholders' Agreement), the Seller, to the extent that it reasonably can, shall itself, or shall cause the Company to, promptly notify the Buyer and the Seller shall promptly waive (in writing) any rights (including, without limitation, any rights of first refusal) associated with such a transaction if such Notice of Offer relates to a transaction involving the Buyer or a Related Body Corporate

of the Buyer or, if such Notice of Offer does not relate to a transaction involving the Buyer or a Related Body Corporate of the Buyer, the Seller shall use reasonable commercial efforts to cooperate with the Buyer in the consideration of the exercise or waiver (including timing related thereto) of any rights (including, without limitation, any rights of first refusal) associated with such transaction; and

(i) not authorize or commit or agree to do any of the foregoing.

12.1 Confidential Information

Each party agrees that it will treat in confidence all documents, materials and other information which it shall have obtained regarding the other party or the Company (and, in the case of the Seller, provided to the Buyer and its Representatives) during the course of the negotiations leading to the consummation of the transactions contemplated hereby (whether obtained before or after the date of this agreement), the preparation of this agreement and its terms and conditions, and other related documents, and, if the transactions contemplated hereby are not consummated, each party will return to the other party all copies of non-public documents and materials which have been furnished in connection therewith. Such documents, materials and information shall not be communicated to any third person (other than to a party's Representatives who have a need to know about such documents, materials and information). No other party shall use any confidential information in any manner whatsoever except solely for the purpose of evaluating the transactions contemplated hereby; provided, however, that after the Completion Date, Buyer may use or disclose any confidential information with respect to or about the Company or otherwise (reasonably related to the Business). The obligation of each party to treat such documents, materials and other information in confidence shall not apply to any information which (i) is or becomes available to such party from a source other than the other party, (ii) is or becomes available to the public other than as a result of disclosure by such party or its Representatives, (iii) is required to be disclosed under applicable Law or judicial process, but only to the extent it must be disclosed, or (iv) such party reasonably deems necessary to disclose to obtain any of the consents or approvals contemplated hereby. Further, Seller shall treat in confidence, and shall cause its Representatives to treat in confidence, all documents, materials and other information with respect to or about the Company or otherwise (reasonably related to the Business) unless any such information is or becomes available to the public other than as a result of disclosure by Seller or its Representative, or is required to be disclosed under applicable Law or judicial process, but only to the extent it must be disclosed.

16.1 No assignment

Except as otherwise provided in the next sentence, no party may assign or otherwise deal with its rights under this agreement or allow any interest in them to arise or be varied in each case without the express written consent of the other party, which consent must not

be unreasonably withheld or delayed. Prior to Completion, the Buyer (but not any assignee of the Buyer) may transfer its rights and obligations under this agreement to any wholly-owned subsidiary upon written notice to the Seller, provided that any such assignment shall not release the Buyer of its obligation under clause 5.3(b) of this agreement.

17.11 Further Steps

Each party agrees, at its own expense, to do anything the other party asks (such as obtaining consents, signing and producing documents and getting documents completed and signed) as may be necessary or desirable to give full effect to the provisions of [the Xstrata/Barrick Sale Agreement] and the transactions contemplated by it.

The New Gold/Goldcorp Agreement

2.1 Xstrata Transaction

2.1.1 Datawave

Immediately upon execution of this Agreement, Datawave agrees to proceed as follows:

(a) Datawave will exercise the Datawave ROFR by delivering to Xstrata, on or prior to the ROFR Expiry Date, an exercise notice in accordance with the provisions of Section 10.4(2) of the Shareholders Agreement in the form set out as Schedule "A" (the "Datawave Notice") advising Xstrata of Datawave's intention to acquire the Xstrata Rights and confirming its desire that the Company acquire the Feasibility Study as set out in the Side Letter and offering to purchase Xstrata's 70% interest in the BHP Royalty (the "70% BPH Royalty") all on the terms and conditions set out in the Offer. The Xstrata Rights, the Feasibility Study, and, if and only if the foregoing offer to purchase is accepted by Xstrata, the 70% BHP Royalty, are referred to collectively as the "Xstrata Interest";

(b) as soon as practicable after delivery of the Datawave Notice, Datawave shall settle the form of sale agreement for the Xstrata Interest, substantially on the terms of the draft agreement appended to the Offer, and enter into such agreement (the "Datawave Purchase Agreement") with Xstrata;

(c) Datawave will incorporate a new subsidiary ("Data Sub") in Chile or such other jurisdiction requested by Goldcorp and approved by Datawave;

(d) immediately following the execution of the Datawave Purchase Agreement by Datawave and the incorporation of Data Sub, Datawave shall assign to Data Sub, and shall cause Data Sub to acquire and assume, all Datawave's right and interest in and to the Datawave Purchase Agreement and shall provide written notice of such

assignment to Xstrata in accordance with the provisions of the Datawave Purchase Agreement;

(e) as soon as practicable after delivery of the notice of assignment to Xstrata as provided in paragraph (d) above, (i) Datawave shall request that Xstrata enter into a restated Datawave Purchase Agreement in order to incorporate Data Sub as the buyer under the Datawave Purchase Agreement, or (ii) alternatively at the request of Goldcorp, Datawave shall make such other requests as Goldcorp and Datawave agree may be necessary or desirable in connection with such assignment;

(f) upon satisfaction by Goldcorp of its obligations under subsection 2.1.2 below and the satisfaction of the conditions set out in subsection 2.1.3, Datawave will cause Data Sub to complete the acquisition of the Xstrata Interest in accordance with the provisions of the Datawave Purchase Agreement (the "Xstrata Transaction").

2.1.2 Goldcorp Committed to Advance the Loan Amount

Subject to the satisfaction of the conditions precedent set out in subsection 2.1.3 below, Goldcorp will loan to Data Sub the amount of US$465,000,000 less US$2,000,000 in the event the 70% BHP Royalty is not included in the Xstrata Interest, (the "Loan Amount") immediately prior to the completion of the Xstrata Transaction. Data Sub will use the Loan Amount exclusively for the purpose of completing the Xstrata Transaction. Goldcorp shall, unless otherwise agreed in writing by Datawave and Goldcorp, pursuant to a written direction from Data Sub, pay the Loan Amount directly to Xstrata in accordance with the payment procedures and at the time and date required for the payment of the purchase price set out in the Datawave Purchase Agreement.

2.1.3 Conditions precedent for the Advance of the Loan Amount

The obligation of Goldcorp to advance the Loan Amount is subject to the following conditions precedent:

(a) Datawave shall have incorporated Data Sub and exercised the Datawave ROFR;

(b) Datawave and Xstrata shall have entered into, executed and delivered the Datawave Purchase Agreement and Datawave shall have assigned to Data Sub the Datawave Purchase Agreement and provided written notice of such assignment to Xstrata in accordance with Datawave Purchase Agreement and shall have delivered an executed copy of such agreement and the assignment to Goldcorp;

(c) Datawave shall provide to Goldcorp the payment instructions received by Datawave from Xstrata in connection with the payment of the Purchase Price under the Datawave Purchase Agreement, as soon as possible following receipt thereof by Datawave and shall notify Goldcorp of the date of closing under the Datawave Purchase Agreement at least two (2) Business Days prior to such date;

(d) Data Sub shall have delivered a demand promissory note (the "Note") in favour of Goldcorp in the form attached to this Agreement as Schedule "B" evidencing the Loan Amount;

(e) Datawave shall have executed and delivered to Goldcorp a guarantee of the obligations of Data Sub under the Note, together with a pledge of all of the issue and outstanding shares of Data Sub (the "Pledge"), which creates a first priority security interest in such shares with recourse under the guarantee limited to realization under the Pledge, and such steps, as may reasonably be taken, shall have been taken to cause Data Sub to grant a first priority security interest in all of Data Sub's assets, each in form and substance satisfactory to Goldcorp and its counsel, acting reasonably and all steps necessary or desirable to register such documents or actions necessary to ensure the priority and the enforceability of such documents and in respect of the security in the assets of Data Sub, such steps as may be reasonably taken, shall have been effected; and

(f) each New Gold Entity shall have delivered a certificate of an officer of such New Gold Entity, respectively, certifying that their respective resignations and warranties set forth in this Agreement and the Datawave Purchase Agreement, as applicable, are true, accurate, and correct as of the date of the advance of the Loan Amount and that each New Gold Entity has fulfilled and/or performed, when required, all of its obligations contained in this Agreement to be fulfilled and/or performed on or before the date of the advance of the Loan Amount.

2.2 Data Sub Share Transaction

2.2.1 Acquisition of Data Sub by Goldcorp

Subject to the terms and conditions of this Agreement, conditional on and forthwith upon completion of the Xstrata Transaction and the registration pursuant to Chilean law of the Xstrata Shares in favour of Data Sub, Datawave and Goldcorp shall enter into an agreement substantially in the form set out as Schedule "C" (the "Data Sub Share Purchase Agreement") pursuant to which Datawave shall transfer and assign to Goldcorp (or a subsidiary of Goldcorp designated by Goldcorp), and Goldcorp (or a subsidiary of Goldcorp designated by Goldcorp) shall purchase and acquire from Datawave, all of the issued and outstanding shares in the capital of Data Sub (the "Data Sub Shares"), together with all intercompany indebtedness of Data Sub with any other entity in the New Gold group of companies, if any, free and clear of all encumbrances, other than encumbrances in favour of Goldcorp (the "Data Sub Share Transaction"). The purchase price for the Data Sub Shares and the intercompany debt, if any, shall be the amount of US $100 (the "Purchase Price") and shall be satisfied by Goldcorp as set out in the Data Sub Share Purchase Agreement.

2.2.2 Payment

Contemporaneously with the Closing of the Data Sub Share Transaction, Goldcorp shall pay an entity to be determined by New Gold, the sum of US $50,000,000, the structuring of such payment to be mutually agreed by Goldcorp and New Gold.

2.3 Structure

The parties agree that the structure set out herein may be amended at the request of Goldcorp or New Gold (i) in order to facilitate tax planning; or (ii) if it is necessary to ensure that the benefit of the representations and warranties made by Xstrata in the Datawave Purchase Agreement is retained by Data Sub following the closing of the Data Sub Share Transaction provided in each case that such restructuring is consented to by the other party, such consent not to be unreasonably withheld.

2.4 Completion

For the avoidance of doubt, the completion of the Xstrata Transaction and the Data Sub Share Transaction shall, to the extent possible, be consecutive transactions with closing the Data Sub Share Transaction to take place immediately following the closing of the Xstrata Transaction on the same Business Day. The closing of the Xstrata Transaction and the Data Sub Share Transaction is expected to occur no later than February 15, 2010, or such other date as mutually agreed in writing between the New Gold Entities and Goldcorp and, in respect of the Xstrata Transaction, as is acceptable to Xstrata.

The parties agree that in the event that Xstrata defaults on its obligations pursuant to the Datawave Purchase Agreement, in a manner which either expressly or as a result of the effect of such default prevents the closing of the Xstrata Transaction, or in the event that a court order or similar prohibition from a governmental authority in a relevant jurisdiction is in place which prohibits the closing of the Xstrata Transaction, Data Sub shall not be required to close the Xstrata Transaction, nor shall Goldcorp be required to fund the Loan Amount until such time as the default is remedied or such court order or prohibition is removed in order that the closing can take place. In such event, the obligations of the parties set out in this Agreement shall continue in full force and effect and the parties agree to co-operate with one another to facilitate closing of the Xstrata Transaction in an expeditious manner; provided that if the closing of the Xstrata Transaction has not occurred on or before twelve months before the occurrence of the relevant event and Datawave is able to terminate the Datawave Purchase Agreement, then either New Gold or Goldcorp may terminate this Agreement upon written notice to the other.

4.1 Positive Covenants

From and after the date of this Agreement, Datawave covenants and agrees until completion of the Transactions as contemplated in subsection 2.4 as follows:

(a) **Keep Proper Books**. It shall keep accurate and complete books of account and records in which full and current entries shall be made of all financial transactions, assets and business of Data Sub and permit representatives of

Goldcorp access thereto at all reasonable times to inspect such books and records and to make extracts therefrom or copies thereof;

(b) **Use of Proceeds.** It shall use the Loan Amount exclusively for the purpose and in the manner set out in Section 2.1.2 and shall obtain such releases from existing security holders and other third parties as may be necessary or desirable for this purpose;

(c) **Maintain Corporate Existence.** It shall preserve and maintain its corporate existence and that of Data Sub and all of their respective rights, privileges and other authority necessary for the conduct of its business;

(d) **Comply with Agreements.** It shall and shall cause Data Sub to comply in all material respects with the Shareholders Agreement, the Datawave Purchase Agreement, the Carried Funding Loan Agreement, the Shareholders Loans, the Side Letter and all other obligations required to implement the Transactions;

(e) **Comply with Laws.** It shall cause Data Sub to comply in all material respects with all laws, regulations and orders applicable to Data Sub and its properties and assets and duly observe all material requirements of governmental authorities and all statutes and regulations, relating to its business and affairs;

(f) **Perform All Obligations.** It shall observe and perform all of its obligations and cause all matters and things necessary or expedient to be done, in order to preserve, protect and maintain all the rights of Goldcorp under this Agreement; and

(g) **Notify Goldcorp**. It shall notify Goldcorp promptly in writing of:

i. any proceeding or litigation against New Gold, Datawave or Data Sub which could have a material and adverse effect on the Transactions;

ii. any material adverse change in the financial position or operations of the Company; and

iii. a breach of, or non-compliance with, any term, condition or covenant contained in this Agreement or any other document required or referred to hereunder.

4.2 Negative Covenants

From and after the date of this Agreement, until the completion of the Transactions as contemplated in subsection 2.4, Datawave shall not do any of the following, without the prior written consent of Goldcorp:

(a) **Issue Interests**. From and after the incorporation of Data Sub, issue any interest in Data Sub or its capital or any rights, warrants or options to acquire any interest in Data Sub or its capital or enter into any agreement to do any of the foregoing other than Datawave capitalizing the Loan Agreement for the purpose of enabling Data Sub to fulfill its obligations under the Datawave Purchase Agreement;

(b) **Create Security Interest**. Make any assignment, create, assume or suffer to exist any security interest, mortgage, pledge, encumbrance, assignment, lien or charge of any kind upon the Data Sub Shares or any property of Data Sub, except as contemplated in subsection 2.1.3(e);

(c) **Consolidate, Merge, etc**. Take any step, act or proceeding, including, but not limited to, any sale or disposition of any property or assets of Datawave or Data Sub, for the purposes of or leading to the consolidation, amalgamation, merger, liquidation, dissolution or winding-up of Datawave or Data Sub;

(d) **File Changes to Constating Documents**. Amend or revoke the constating documents or by-laws of Datawave or Data Sub in whole or in part or enact any additional by-law if the result of such activity will have an adverse or detrimental effect on Goldcorp or the transactions contemplated by this Agreement;

(e) **Affiliate of New Gold**. Cease to be an affiliate of New Gold;

(f) **No Liabilities or Assets**. From and after the incorporation of Data Sub, it shall cause Data Sub not to incur, assume or acquire any liabilities or assets, other than the Xstrata Interest and the borrowing of the Loan Amount and grant of security in connection therewith, as contemplated by this Agreement; or

(g) **Operations of the Company**. It shall not vote for or agree in any manner whatsoever to do, or cause to be done, any of the matters prohibited by Section 8.6 of the Xstrata Sale Agreement.

5.1 Representations and Warranties of New Gold Entities

Each of the New Gold Entities hereby represents and warrants to Goldcorp as follows and acknowledges that Goldcorp is relying on such representations and warranties without independent inquiry in entering into this Agreement.

…

(e) The execution, delivery and performance of this Agreement by it and the consummation of the transactions contemplated hereby will not (i) violate any provision of its constating or governance documents; (ii) except as otherwise set forth in this Agreement, require it to obtain any consent, approval or action of, or make any filing with or give any notice to, any governmental authority having

jurisdiction or any other person pursuant to any instrument, contract or other agreement to which it is a party or by which it is bound; (iii) conflict with, result in any material breach or violation of any of the terms and conditions of, or constitute (whether with notice or lapse of time or both) a default under, any instrument, contract or other agreement to which it is party or by which it is bound; (iv) violate any order, judgment or decree against, or binding upon, it or upon its respective securities, properties or businesses; or (v) violate any law or regulation of its country of organization or any other country in which it maintains is principal office;

CITATION: Barrick Gold Corporation v. Goldcorp. Inc., 2012 ONSC 3725

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

BARRICK GOLD CORPORATION

Plaintiff

– and –

GOLDCORP INC., NEW GOLD INC., DATAWAVE SCIENCES INC., INVERSIONES EL MORRO LIMITADA, XSTRATA COPPER CHILE S.A., XSTRATA CANADA CORPORATION, XSTRATA QUEENSLAND LIMITED AND SOCIEDAD CONTRACTUAL MINERA EL MORRO

Defendants

REASONS FOR JUDGMENT

Wilton-Siegel J.

Released: June 26, 2012

TAB 6

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***B.C. Bottle Depot Association v. Encorp Pacific (Canada),*** 2009 BCSC 403

Date: 20090213
Docket: S068105
Registry: Vancouver

Between:

B.C. Bottle Depot Association

Plaintiff

And:

Encorp Pacific (Canada)

Defendant

Before: The Honourable Madam Justice Griffin

Oral Reasons for Judgment

In Chambers
February 13, 2009

Counsel for Plaintiff	J. Shewfelt
Counsel for Defendant	T.M. Cohen M. Booker
Date and Place of Hearing:	January 20, 2009 February 2 & 5, 2009 Vancouver, B.C.

[1] **THE COURT:**

INTRODUCTION

[2] The plaintiff, B.C. Bottle Depot Association ("BDA"), has brought an application seeking production of documents from the defendant Encorp Pacific (Canada) ("Encorp"). Encorp has responded by bringing its own motion seeking an order that the plaintiff's statement of claim be struck out; in the alternative that the plaintiff provide particulars; in the alternative that Encorp be excused from compliance with Rule 26(1) of the ***Rules of Court***, document discovery obligations; and in the further alternative, an order that certain substantive issues in the lawsuit be determined prior to requiring a further discovery of documents.

BACKGROUND

[3] The essence of this claim is a breach of contract claimed by BDA against Encorp. As its name implies, BDA is an association of bottle depot operators. Its members collect recyclable bottles returned by consumers. The bottle depot owners have contracts with Encorp and receive handling fees and deposit fees for each bottle that the depots collect and sort.

[4] Encorp is the overall agency charged with managing a stewardship plan approved by the British Columbia Ministry of Environment for the collection and recycling of non-alcoholic beverage containers in British Columbia. Encorp contracts with independent business operators such as bottle depot operators, transporters, processors, and retailers to retrieve used beverage containers, pay

deposit refunds on the return of the containers, and to send the containers to recycling facilities.

[5] BDA acts as a collective bargaining agent for its members in contract negotiations with Encorp.

[6] According to the pleadings in this action, by agreement dated March 5, 1998, Encorp and BDA agreed that Encorp would recognize BDA as the representative of BDA members in negotiations with Encorp for any changes to handling fees paid by Encorp to the bottle depot operators (the "Recognition Agreement").

[7] BDA and Encorp entered into an agreement dated December 28, 2000 to establish a mechanism which would fund BDA from fees paid by its members but collected by Encorp (the "Funding Agreement"). The Funding Agreement provided a mechanism for Encorp to deduct BDA membership fees from funds otherwise payable by Encorp to each member of BDA. The BDA membership fees were to be calculated as $0.00055 per beverage container purchased by Encorp from each BDA member. Encorp was to then remit the membership fees to BDA on a weekly basis.

[8] BDA claims in this proceeding that Encorp has failed to remit to BDA all membership fees from all of BDA's members. It alleges, amongst other things, that in some instances Encorp commenced membership fee deductions and remittances on later dates than it should have done and ceased the deductions and remittances too early when members terminated BDA memberships.

[9] Encorp keeps track of the number of containers returned to it by each bottle depot. This is the basis for Encorp paying handling fees and deposits to each depot operator. This is also the basis for calculation of membership fees due to BDA.

[10] However, it was the practice of Encorp to provide only global information to BDA when it paid the membership fees to BDA. The global information would identify the total membership fees collected, but it would not identify which fees were collected from which depot operator (and corresponding bottle returns by that depot operator).

[11] BDA wishes to examine the underlying source information on which Encorp based its payments to BDA for membership fees. This underlying information would identify the membership fee deductions made for each bottle depot that was a member of BDA during the material time, and the corresponding volumes of bottle containers upon which these deductions were calculated. Encorp has this information, but has refused to produce it to BDA.

[12] Encorp takes the position that individual depot operators provided the information to Encorp with the expectation it would be kept confidential. Encorp argues that because of this confidentiality, the court should find that the documents are privileged from production, or the court should exercise its discretion pursuant to Rule 26(1.2) to excuse Encorp from its ordinary document production obligations, or the court should order that the documents should not be produced prior to the determination of number of preliminary issues, pursuant to Rule 26(15).

[13] Encorp also argues that BDA's claim is vexatious and an abuse of process and should be struck pursuant to Rule 19(24). In the alternative, Encorp seeks further particulars of BDA's claim pursuant to Rule 19(11).

[14] There is a secondary element of BDA's breach of contract claim against Encorp. This aspect of the claim alleges that Encorp had a contractual obligation to disclose to BDA the identity of the depots from which membership fees were collected, and the amounts so collected from each depot. In analysing the issues on the document production application, one must be careful not to confuse the issue of the substantive merits of this secondary aspect of the claim with the procedural issue of whether or not BDA is entitled to document discovery from Encorp of this same information. To succeed on its document production motion, BDA does not need to prove on the merits that the Funding Agreement provided BDA with a contractual right to the information it now seeks. To avoid this confusion, I have considered BDA's document production motion on the basis of its main claim only, namely its claim that Encorp breached the Funding Agreement in that it failed to properly deduct and remit to BDA the membership fees from depot operators.

ISSUES

[15] The issues with respect to the plaintiff's application for production of documents are as follows:

1. Are the proposed documents relevant within the meaning of Rule 26?

2. Are the documents privileged from production?

3. Should the defendant Encorp be excused from performance of its document production obligations pursuant to Rule 26(1.2)?

4. Should the court determine preliminary issues in the lawsuit prior to discovery of documents pursuant to Rule 26(15)?

[16] The issues with respect to Encorp's application to strike the plaintiff's claim are as follows:

1. Does Encorp meet the test under Rule 19(24) for striking of the plaintiff's claim on the basis that it is unnecessary, scandalous, frivolous or vexatious or an abuse of process?

2. Ought the plaintiff BDA be ordered to produce further and better particulars of its claim?

Relevance of Documents

[17] The question of relevance of documents is usually determined upon a description of the nature of the documents sought to be produced and a reasonable interpretation of the pleadings, as held in ***Boxer v. Reesor*** (1983), 43 B.C.L.R. 352 (S.C.) at 359.

[18] The documents sought by BDA from Encorp are central to the issues on the pleadings, namely whether Encorp properly performed its obligations under the Funding Agreement. BDA seeks the documents on which Encorp based its calculation of the membership fees that it was supposed to deduct from BDA members and pay to BDA. The documents relate to the identity of the depot operators from whom Encorp collected membership fees, the amounts collected

from each depot operator, the dates of collection and remittance, and the corresponding number of containers upon which the membership fees were based. I conclude that the documents sought by BDA are clearly relevant and fall within the normal scope of document discovery.

Privilege

[19] Encorp argues that the documents sought by BDA are privileged from production, because the documents meet the tests for qualified privilege set out in ***Wigmore on Evidence***, 3rd ed., (McNaughton Revision, 1961), para. 2285, as adopted by the Supreme Court of Canada in ***Slavutych v. Baker***, [1976] 1 S.C.R. 254, (1975), 55 D.L.R. (3d) 224, as follows:

> (1) The communications must originate in a *confidence* that they will not be disclosed.
>
> (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
>
> (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered.*
>
> (4) *The injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.

Do the Communications Originate in a Confidence?

[20] Encorp argues that when it calculated membership fees, it did so based on information supplied by individual depots setting out their volumes of containers. Encorp does not argue that it has any interest in keeping the information sought by BDA confidential. Rather, Encorp argues that the depots expected that this information would be kept confidential from BDA. Encorp submits that individual

members of BDA would not want Encorp to disclose to BDA each member's container volumes as this is business information that could be used by a competitor to either encroach on a depot's territory or to pursue a depot's customers.

[21] Despite the fact that it is not Encorp's privilege to assert, but rather is a privilege belonging to the depot operators, Encorp has not provided any first-hand sworn evidence from a depot operator that supports its position. Encorp has no affidavit from a member of BDA establishing that members of BDA expected that the information that they provided to Encorp, at the time Encorp was deducting BDA membership fees, would be kept confidential from BDA.

[22] This is so despite the fact that by standard form letter dated May 2, 2008, Encorp gave notice to each of the potentially affected depot operators of BDA's wish to obtain information from Encorp in this proceeding that would identify membership amounts deducted by Encorp and remitted to BDA on behalf of each individual depot, including information from which one could "derive depot sales and volume information".

[23] Encorp concedes that although that letter was instigated by interrogatories and not this document production motion, the key concerns of Encorp with respect to document production are identified in the letter.

[24] On the evidence produced by Encorp, the only depot operator who responded to this notice was Mr. Lotzkar, who wrote a letter to Encorp dated May 23, 2008 stating that he did not want volumes or membership payments disclosed to BDA in respect of his three depots. Mr. Lotzkar was a former director of BDA, but his

position was terminated in dispute. He states in his letter to Encorp that he was involved in designing the membership fee structure as a director and negotiator for BDA and that "it was always understood that our members did not want this strategic information turned over to BDA". He did not say how turning over the information could harm his depots, other than describing it as "strategic information".

[25] Mr. Lotzkar's evidence is useful background, but Encorp has conceded it is hearsay evidence, not admissible for the truth of it. Mr. Lotzkar does not swear the evidence as true in an affidavit. Furthermore, he refers to the understanding of undisclosed persons without identifying any specifics, including their names.

[26] Mr. Lotzkar was provided with notice of the hearing of this application by BDA and has not appeared.

[27] Other than Mr. Lotzkar, of the approximately over 100 other past or present BDA members, not a single one has come forward, on the evidence, to object to the disclosure of the information by Encorp in response to Encorp's letter of May 2, 2008.

[28] The key piece of evidence relied on by Encorp as proof that the members of BDA provided information to Encorp on the basis it would be kept confidential from BDA, is a reference in minutes of an annual general meeting of BDA held October 22, 2000, related to the topic of funding BDA, as follows:

> Clare Cassan advised that any funds from Encorp based on volumes would be generic – in other words, no one would ever know the volumes of individual depots.

[29] These minutes predate the actual Funding Agreement and predate the time when members of BDA authorized Encorp to deduct BDA membership fees. When examined for discovery, Mr. Cassan could not recall making this statement, but he did not dispute it. He did point out that the statement was made after the motion was passed to approve deductions of membership fees as a funding mechanism for BDA. The form of funding agreement was still being negotiated. Subsequent to this, BDA informed its members that they would need individual authorizations to Encorp in order to do the membership fee deduction, and BDA membership forms authorizing the same thing. In none of these forms does BDA state that the information provided by members to Encorp would be kept confidential from BDA.

[30] Encorp also submitted evidence of the former executive director of BDA, Brenda Southam. She resigned from BDA in April 2006. She gave unsourced evidence as to "expectations" and "concerns" about confidentiality. Once again, Encorp concedes that this hearsay evidence is inadmissible for the truth of its contents because it does not identify the source, nor does it state that Ms. Southam believes that what she was told by the source of the information was true.

[31] More specifically, she does not address the issue which is before this court, namely whether members of BDA expected that BDA would be prohibited from obtaining source information from Encorp regarding the calculation and remittance of membership fees.

[32] The evidence relied on by Encorp to support its position opposing the document production on the grounds of privilege misses the point, as it is more directed to the substantive merits of BDA’s claim that Encorp had a contractual

obligation to provide this information to BDA. Encorp has introduced evidence to suggest that the state of mind of Encorp was such that it thought that this information should be confidential, and it thought that BDA did not require the information as part of Encorp's duties in remitting the membership fees pursuant to the Funding Agreement. Encorp submits that this evidence supports its position that there was no implied term of contract between Encorp and BDA that Encorp had an obligation to produce this information to BDA.

[33] In this regard, Encorp has filed some affidavit evidence in which it submits that there were discussions between representatives of BDA and Encorp prior to entering into the Funding Agreement which amounted to an agreement that BDA would never be entitled to obtain sales volume information or individual membership fee information from Encorp. The evidence before me falls short of establishing this proposition. At most, there is evidence that there were some discussions about what information BDA expected to obtain from Encorp when it received the membership fees. At most, on the present state of the evidence, it might be said that BDA indicated it was not interested, as a matter of practice, in obtaining reports that identified individual depot sales volumes and the calculation of membership fees per depot. But there is no evidence that Encorp ever demanded, or that BDA ever agreed, that the information would be kept confidential from BDA if it wanted it, or that it would not seek out that information if a dispute arose between Encorp and BDA regarding the calculation and remittance of membership fees by Encorp.

[34] The person primarily responsible for negotiating the funding agreement on behalf of Encorp, and its key principal of operations, was Mr. Bill Chan. Encorp

relies on the affidavit evidence of Mr. Chan sworn October 10, 2008, at paragraph 30:

> It is my recollection that very early on in the discussions a number of depots expressed concern regarding the confidentiality and sensitivity of individual depot sales and volume information. The bottle depots were concerned about confidentiality. They did not want sales or volume information shared amongst and between bottle depots or with any of the executive of the [BDA]. It is my understanding that the bottle depots wanted to keep volume information confidential in part to minimize the risk that a bottle depot owner with low or average volumes would relocate to the neighbouring territory of a high volume depot and compete or encroach on the latter's business. There was also concern expressed that if volume information was shared that bottle depot owners would then be able to determine which depots derived business from wholesale or grocery sort accounts and result in attempts by some to poach wholesale or grocery sort accounts from others.

[35] Mr. Chan failed to specifically identify the people who informed him of these statements, and he did not state that he believed the statements to be true and so the evidence is inadmissible for the truth of it: ***U.(L.M.) v. U.(R.L.)***, 2004 BCSC 95, 25 B.C.L.R. (4th) 171, at para. 22; ***Laxton v. Coglon***, 2006 BCSC 181, 27 R.F.L. (6th) 283 at paras. 51-53; Rule 51(10).

[36] When examined for discovery, Mr. Chan could not provide specific detailed evidence of people actually saying the things to him that he reports in paragraph 30 of his affidavit. Affidavit evidence as to what unspecified bottle depot operators wanted is completely lacking in probative value, to paraphrase ***M.R.W. v. L.M.M.*** (1996), 6 C.P.C. (4th) 51, at para. 9.

[37] Furthermore, Mr. Chan testified on his discovery that when he was negotiating the Funding Agreement and when he executed it, he did so without turning his mind to the issue of confidentiality of container volumes.

[38] Encorp concedes that Mr. Chan's affidavit evidence is inadmissible to establish the truth of its contents, but says that it goes to Mr. Chan's state of mind. But Mr. Chan's state of mind is irrelevant on the question of qualified privilege as what he might have thought does not prove that the individual depot operators who were members of BDA expected that the information they provided to Encorp would be kept confidential from BDA.

[39] The substantive issue of whether or not Encorp thought it did or did not have a contractual obligation to BDA to provide underlying information to BDA is irrelevant to the question of whether or not the documents are subject to qualified privilege. Further, given that BDA was relying on Encorp to properly calculate and remit membership fees, there is certainly room for argument that it may have been an implied term of the Funding Agreement that if there was ever a dispute about those fees, BDA would be entitled to obtain production of the underlying source documents. However, a determination of that contractual issue is for another day.

[40] BDA argues that there is no admissible evidence on this application to support a conclusion that the members of BDA accepted that the information that they provided to Encorp would be kept confidential from BDA members' representative organization. It says that it is significant that all of the agreements that govern the relationship between Encorp and the individual depot operators and the relationship between Encorp and BDA, provided no such term of confidentiality.

[41] In this regard, BDA points out that the members of BDA were each governed by a depot licence agreement with Encorp. The standard terms of the depot licence agreement, which was negotiated between Encorp and BDA, impose no obligation on Encorp to keep member information confidential from BDA. In fact, the terms of the standard form depot licence agreement expressly provided that BDA was the exclusive representative of its members in negotiations with Encorp, and that all notices, consents, approvals, statements, authorizations, documents, or other communications required or permitted to be given under the depot licence agreement were to be delivered to each of Encorp, the depot operator, and BDA.

[42] There were also specific authorizations filled out by each of BDA's members. The form of authorization provided that Encorp could deduct the BDA membership fees from payments due to depot operators and remit those fees to BDA in accordance with the Funding Agreement. There is nothing in the language of the authorization form that gives rise to an obligation on the part of Encorp to keep individual depot information confidential from BDA.

[43] Encorp has the onus of establishing that relevant documents in its possession are privileged from production.

[44] I conclude that Encorp has not satisfied the burden on it to prove that the communications by BDA members to Encorp were expected to be kept confidential from BDA, insofar as those communications related to the matters already identified (i.e., Encorp's calculation and remittance of membership fees under the Funding Agreement). It is therefore not necessary to go on to consider the other elements of the ***Wigmore*** qualified privilege, given that the first element is not established.

However, I will review the other elements because the analysis is useful in determining the alternative positions advanced by Encorp; namely that it should be excused from its document production obligations pursuant to Rule 26(1.2), or that other issues should be decided in the litigation before ordering the documents produced pursuant to Rule 26(15).

Is Confidentiality Essential to the Relationship

[45] With respect to the second and third elements of qualified privilege, namely that confidentiality is essential to maintenance of the relationship between Encorp and the depots and that the relationship ought to be sedulously fostered, Encorp argues that because the integrity of the container recycling system requires the individual depot operators to report accurately to Encorp the volumes of containers collected, disclosure of that information to BDA in the context of this lawsuit would harm and undermine that system. I do not accept this bald assertion.

[46] From a common sense perspective, one cannot simply assume that it is necessary to the relationship between BDA and Encorp that the information provided by BDA members to Encorp would be kept confidential from BDA. BDA was the depot owners' representative organization, meant to be their collective bargaining agent with Encorp. BDA's only means of funding was the membership fees. A depot operator who saw his membership fees deducted by Encorp would surely not be happy if those fees were not properly remitted by Encorp to BDA, or if other depot operators were excused or overlooked by Encorp in the deduction of BDA membership fees. All depot operators who were members of BDA would have a common interest in Encorp accurately deducting and remitting the membership fees

to the BDA. Logically, therefore, the depot operators would also be interested in BDA having the tools to check on Encorp's performance of its contract with BDA, or to challenge Encorp for not fulfilling its contractual obligations. One of these tools has to be the opportunity for BDA to look at Encorp's source information on which it based membership fee deductions.

[47] One key aspect of the integrity of the recycling system is Encorp's integrity. Encorp's position on this application seems to be that its integrity should be free from challenge by BDA. BDA, understandably, does not accept that and does, in this litigation, challenge Encorp's "integrity." By this I do not mean to suggest there is any allegation of dishonesty. However, Encorp may have erred in its accounting and processes, and thus may have breached its obligations to accurately collect and remit membership fees to BDA as required by the Funding Agreement. Surely BDA's ability to delve into this, by looking at source documents, supports the overall goal of a system that has integrity. It does not undermine the integrity of the system.

[48] I also do not accept that the relationship between Encorp and the individual depot operators is one that ought to be "sedulously fostered" for any broad public policy reasons. From the depot operator's perspective, it is a business relationship. The depot operators are in it for profit. There is no evidence to support any suggestion that production of the information sought would harm recycling efforts in this province, in the sense that it could result in less recycling of containers.

Injury From Disclosure Greater than Benefit?

[49] In terms of the fourth element of the ***Wigmore*** qualified privilege, that the injury of disclosure will be greater than the benefit gained by disclosure, Encorp has not established this element on the evidence. Again, it simply makes the bald assertion that there will be grave injury to the relationship between Encorp and the individual depots. The evidence submitted by Encorp falls short of persuading me that this is probable or even a remote possibility.

[50] The only potential harm identified by Encorp from the disclosure sought is the harm caused by business competition between depot operators. Since directors of BDA are representatives of individual depots, the concern is that those directors may learn of other depots' business information and use it for competitive advantages. I do not discount that this might be a concern of some people, but this is speculative and there is not sufficient evidence to support this as a general conclusion across the broad category of BDA members. Perhaps if it was of serious concern, the twelve directors of BDA would have the same concern regarding their own depot operations, and would be capable of developing protocols to avoid misuse of information.

[51] However, as pointed out by BDA, the standard form depot licence agreement between each depot and Encorp granted each depot operator an exclusive geographic business territory. A depot operator cannot simply set up business across the street from another depot operator. There is no evidence to support the conclusion that there would or could probably be actual injury to an individual depot's business operations if BDA was to obtain the sought after information from Encorp.

[52] The documents requested fall clearly within the central core of documents that are relevant to BDA's claim. In my view, the class of documents sought "must be produced to get at the truth and prevent an unjust verdict", to borrow the language of the Supreme Court of Canada in ***A.M. v. Ryan***, [1997] 1 S.C.R. 157, 143 D.L.R. (4th) 1, at para. 33. The interest in producing the documents in order to ensure a correct disposal of this litigation far outweighs any potential competitive prejudice to individual depot operators.

Has BDA Waived its Right to Information?

[53] I will also address a waiver argument by Encorp. Encorp makes the argument that BDA waived the right to obtain the information it now seeks by agreeing not to demand this information when negotiating the terms of its contract with Encorp or subsequently. Encorp conceded in argument that to establish BDA waived its right to document production, Encorp would need to show that BDA agreed there was to be no disclosure of this information from Encorp even if there was a dispute between them on whether or not Encorp had complied with its funding obligations under the Funding Agreement. Encorp also conceded that there is no evidence of such an agreement or discussion.

[54] It is clear that Encorp has not established that BDA waived its right to this information. This argument is simply another way of stating the argument that BDA agreed that Encorp did not have to produce this information in the ordinary course of its funding remittances. This goes to the substantive issue of whether or not Encorp had a contractual obligation to produce the information. This is an issue that goes to

the merits of the action itself. It does not preclude document production and it is inappropriate to decide the issue on this application.

Scope of Production

[55] In terms of the scope of production, if this court finds that privilege does not apply, which I have done, and that the documents should be produced, Encorp asks for terms of production that both limit the scope of production, and impose restrictions on the use of the documents by BDA. The restrictions are sought because of the confidential nature of the information and because, they say, the scope of production is too onerous. It is clear that the court has discretion to impose terms on the method of production so as to protect underlying privacy concerns, as noted by the Supreme Court of Canada in ***A.M. v. Ryan***.

[56] The restrictions Encorp proposes range from not producing the individual depot names but instead numbering them, limiting the documents to a very small category of electronic records, to restricting production to the legal counsel for BDA, its executive director, and any expert hired in the litigation such that individual directors of BDA would be prohibited from seeing the documents.

[57] However, here, based on the evidence, I conclude that there are not sufficient privacy interests to justify the limits on the ordinary rules that apply to production of documents. I conclude that the implied undertaking of confidentiality will sufficiently protect any privacy concerns that individual depots might have in the information that is sought by BDA.

Excuse from Performance with Rule 26

[58] In the alternative, Encorp asks the court to exercise its discretion under Rule 26(1.2) and relieve it of its obligation to produce the documents sought by BDA. Rule 26(1.2) provides:

> The court may order that a party be excused from compliance with subrule (1), (1.4), (2), (7) or (9), either generally or in respect of one or more documents or classes of documents.

[59] The cases that have granted relief from document production obligations pursuant to Rule 26(1.2) are invariably cases where the court considers the documents to be of marginal relevance and not justifying the cost and burden of production. As succinctly argued by Encorp:

> Under Rule 26(1.2) courts have the discretion to exempt a party from Rule 26(1) where time, cost, efficiency and marginal relevance make it impractical to rigidly apply the rule. This discretion must be exercised to do justice between the parties, balancing their interests fairly***;*** ***Stephen v. McGillivray*** 2008 BCCA 472; ***Murao v. Blackcomb Skiing Enterprises*** 2003 BCSC 558.

[60] As well, in exercising discretion under Rule 26(1.2), the courts have weighed the relative marginal relevance of documents against competing interests of confidentiality or practical difficulties in producing large quantities of documents; ***Park v. Mullin***, 2005 BCSC 1813 and ***Laxton v. Coglon***.

[61] Encorp argued that since the information in its possession relevant to the claims by BDA contains confidential information of third parties, the BDA members, it was the obligation of BDA to obtain written authorizations from each of its members for the release of the information by Encorp or, alternatively, that it was the

obligation of BDA to obtain the information from its members itself. There are two flaws in this argument. First, there is no such obligation on BDA to first obtain authorizations from each depot. This lawsuit is between BDA and Encorp based on BDA's allegations that Encorp breached the Funding Agreement with it. The starting position is that BDA is entitled to its normal discovery rights from Encorp. Second, Encorp has not established on the evidence that there was any expectation of confidentiality vis-à-vis individual depot operators who were members of the BDA, and BDA itself.

[62] I decline to exercise my discretion under Rule 26(1.2) in this case, as to do so would deprive the plaintiff of evidence which is highly probative.

[63] I am also not persuaded on the affidavit evidence before me that the documents sought would be too difficult to gather. There is some evidence that the information sought was input by Encorp employees into a computer database and is available in electronic form. I was advised by counsel for Encorp that employees of Encorp will be able to input queries into the database and obtain tables of information in return. There is no evidence before the court that this would be unduly burdensome. Counsel for BDA has indicated that he would be content, as a start, to receive the information in electronic form. One would expect the plaintiff to need some confidence that the information produced in electronic form is unaltered, in the sense that it has not been edited by Encorp other than as to form. It may be that this will satisfy the documents request, but if not, there is no reason the plaintiff should be precluded from looking at the source documents. There is no history in this case to suggest that BDA will use discovery as an instrument of oppression

against Encorp. There also is no imbalance of power. BDA is going to be just as concerned about its own burden and cost of examining the information produced by Encorp. I am satisfied that, working together, both parties have an interest in and will be able to come up with an efficient way of producing the documents.

[64] The category of documents sought is set out in BDA's notice of motion as "all documents in Encorp's possession or control relating to any matter in question in the action, including membership fee deductions and used beverage container volumes". It is not necessary to order production of the first part of this description of the category of documents, because that simply repeats the general obligation under the Rule, and will be difficult to enforce

[65] The second part, in my view, is appropriate, and I so order that Encorp deliver documents in its possession or control relating to membership fee deductions and used beverage container volumes. However, to allow time for production and cooperation between the parties, my order for production will be subject to the term that production of documents can be waived by agreement with the plaintiff, if the plaintiff considers some categories are not necessary after seeing initial tranches of produced documents.

[66] The production should occur in stages, with the most readily available electronic documents to be produced in electronic form, within 30 days of this judgment. Subsequent categories of documents are to be produced on a schedule to be agreed to by counsel, and if no agreement is reached, within 90 days of this judgment. The parties have liberty to reappear before me for further directions if agreement cannot be reached.

DETERMINATION OF PRELIMINARY ISSUES PRIOR TO DOCUMENT DISCOVERY

[67] I now turn to the question of whether preliminary issues should be determined prior to discovery of documents.

[68] Pursuant to Rule 26(15), the court has discretion to reserve the question of discovery or inspection of documents until after an issue or question in dispute is first determined.

[69] Encorp submits that the following issues can and should be determined prior to further document production:

(a) Whether the plaintiff's claim is statute barred pursuant to the ***Limitations Act;***

(b) Whether the plaintiff's claims are barred pursuant to the doctrines of waiver, estoppel and laches;

(c) Whether Encorp had a contractual obligation to disclose to BDA the identity of depots from whom membership fees were collected and the amount collected from each member depot;

(d) At what point was Encorp required to commence membership deductions or remittances for new members;

(e) At what point did the obligation to make deductions cease in circumstances where a member depot ceased operations by selling the depot to a new operator;

(f) Whether Encorp acted on cancellation notices improperly; and

(g) Whether the administration fees charged by Encorp to BDA are unlawful.

[70] I am not persuaded that the issues identified by Encorp ought to be determined first, as preliminary issues. In my view, determining these issues first would be contrary to the object of the rules, which is to secure the just, speedy and inexpensive determination of every proceeding on its merits: Rule 1(5). This is a simple contract case. Dividing the case into multiple preliminary issues to be determined first, in the absence of proper document discovery, would be quite inefficient and costly. It is likely that determination of these issues without full document discovery would prejudice the plaintiff in the preparation of its case. It is also probable that determination of these preliminary issues would not end the litigation, nor would it preclude the need for production of the documents now sought. Quite simply, there are no privacy and confidentiality issues in this case that are significant enough to justify this inefficient and prejudicial approach.

Rule 19(24) Application

[71] As already identified earlier in these reasons, this is a basic breach of contract claim. There is nothing particularly novel or unusual about it. The substance of Encorp's Rule 19(24) application is that the claim by BDA is frivolous, because BDA has no evidence that Encorp breached the contract. Encorp also disputes the terms of the contract as alleged by BDA.

[72] I have concluded, based on all of the evidence before me, the submissions, and the authorities, that these are properly matters to be determined on the merits after a trial or summary trial of the claim. While the submissions by Encorp suggest the claim is a "fishing expedition" and is for "ulterior purposes", the evidence that Encorp submits in support of these allegations is not at all persuasive. The

allegations of abuse of process and ulterior motive are based on inferences that the evidence does not support, at least not to the degree required to make this conclusion "plain and obvious", which is the test on a Rule 19(24) application: ***Citizens for Foreign Aid Reform Inc. v. Canadian Jewish Congress*** (1999), 91 A.C.W.S. (3d) 362 (B.C.S.C.).

[73] Encorp's argument overlooks the fact that BDA's action was based in part on the allegation that the unilateral early termination of the Funding Agreement by Encorp was a breach of the agreement. This aspect of the claim was settled, and the Funding Agreement was continued for a period as part of that settlement. This is some indication that the overall action itself is not an abuse of process. It may be that BDA has less evidence to support other aspects of its claim that there were other breaches of the Funding Agreement by Encorp, but I do not conclude that this means the other allegations of breaches of contract are an abuse of process. BDA has some reasonable basis for believing that Encorp did not calculate the membership fees correctly and charged extra administrative fees to BDA in breach of the Funding Agreement. The limited evidence available to BDA does not permit it to rule out the quite reasonable suspicion that Encorp breached the Funding Agreement, and, in my view, it would be contrary to the fair administration of justice to conclude that BDA has to provide more evidence before it will be entitled to proceed with its claim, when that evidence is in the hands of Encorp, and Encorp has refused to produce it. After the information is produced by Encorp to BDA, the parties may be able to settle their differences. But if not, and if Encorp is ultimately successful in defending BDA's allegations, Encorp will have its remedy in costs.

[74] The court has discretion whether or not to strike a claim for abuse of process. Here, given that Encorp controls the information that would allow BDA to check whether or not Encorp breached the contract, and has not produced that information to BDA, given that this case boils down to a simple contract dispute with no history of oppressive conduct by BDA towards Encorp, and given that there is no evidence of any personal animus or vendetta, this is a case where I would exercise my discretion not to strike the claim as an abuse of process, even if the BDA currently had no evidence in its possession in support of its claim that Encorp breached the Funding Agreement.

REQUEST FOR PARTICULARS

[75] Encorp requested in May 2008 that BDA provide particulars as follows:

> (a) With respect to paragraph 14 of the Statement of Claim, the paragraphs of the Funding Agreement that the Plaintiff says gives rise to an obligation on the part of the Defendant to disclose to the Plaintiff the identity of the depots from which membership fees are collected and the amounts collected from each member depot.
>
> (b) With respect to paragraph 14 of the Statement of Claim, the basis for the allegation that the Defendant has neglected and refused to disclose to the Plaintiff the identity of the depots from whom membership fees were collected.
>
> (c) With respect to paragraph 14 of the Statement of Claim, the particulars of any specific errors or omissions in the list that Encorp Pacific (Canada) provided to the Plaintiff of the depots from which Encorp Pacific (Canada) has deducted and remitted membership dues.
>
> (d) With respect to paragraph 15 of the Statement of Claim, particulars of the alleged failure to remit to the Plaintiff all membership fees from all of the Plaintiff's members.

[76] Rather than provide a response to the demand for particulars, BDA chose to file an amended statement of claim which provided further particulars in the body of the statement of claim.

[77] It is clear to me on the evidence that further provisions of the particulars sought by Encorp ought to await the production of the documents sought by BDA: ***Cominco v. Westinghouse*** (1975), 6 B.C.L.R. 25. The particulars sought are more in the nature of a calculation, which will turn very much on BDA's examination of the source documents requested from Encorp.

CONCLUSION

[78] The motion by BDA for production of documents from Encorp is granted, on the terms I have mentioned.

[79] Encorp's application to strike the amended statement of claim is dismissed.

[80] Encorp's application for particulars is adjourned pending the document production ordered, with liberty for Encorp to reapply in advance of trial.

[SUBMISSIONS RE COSTS]

[81] Costs are in the cause.

"S. Griffin, J."
The Honourable Madam Justice S. Griffin

TAB 7

1999 BCCA 262
British Columbia Court of Appeal

Bell Pole Co. v. Commonwealth Insurance Co.

1999 CarswellBC 903, 1999 BCCA 262, [1999] B.C.J. No. 956, 123 B.C.A.C. 316, 201 W.A.C. 316, 66 B.C.L.R. (3d) 79, 9 C.C.L.I. (3d) 123

Bell Pole Co. Ltd., Plaintiff (Appellant) and Commonwealth Insurance Company, American Home Assurance Company, Gerling Global General Insurance Company, The Sovereign General Insurance Company and Royal Insurance Company of Canada, Defendants (Respondents)

McEachern C.J.B.C., Esson, Lambert JJ.A.

Heard: March 19, 1999
Judgment: April 26, 1999
Docket: Vancouver CA024991

Proceedings: reversing (1998), 55 B.C.L.R. (3d) 189 (B.C. S.C.[In Chambers])

Counsel: *J.E. Gouge, Q.C.*, and *C.M. McEachern*, for Appellant.
G.J. Tucker, for Respondents.

Subject: Insurance; Contracts; Civil Practice and Procedure

APPEAL by plaintiff insured from summary trial decision, reported at (1998), 55 B.C.L.R. (3d) 189, 6 C.C.L.I. (3d) 27 (B.C. S.C.), dismissing claim for indemnity against defendant insurer.

The judgment of the court was delivered by *Esson J.A.*:

1 The plaintiff appeals a summary trial decision on one of several issues in the action, which is for indemnity for loss arising from fire.

2 The loss resulted from the destruction of one part, described as the "full-length treatment tank", of the plaintiff's manufacturing plant at Carseland, Alberta. The insurer has paid some $450,000.00, an amount sufficient to rebuild the tank as it was before the fire. The plaintiff's claim, however, is on the basis of the cost of building a new facility which would satisfy all applicable environmental laws relating to new construction. That cost is about $5 million.

3 The policy, under what is called "by-law coverage" provides indemnity for that increased cost subject, the insurers allege, to the insured declaring the maximum anticipated claim for by-law coverage from any one loss. They further contend that the insured represented that maximum exposure to be $250,000.00 and that, in doing so, it knowingly misrepresented the level of exposure which had a direct effect on the premium charged. They allege that the by-law coverage was rendered void by this condition of the policy: When applying for insurance here has intentionally given, to the prejudice of the insurers, a false description of the property to be insured ... this contract is void as to any property in relation to which the misrepresentation or omission is material.

4 The plaintiff, while denying that the condition applies and denying any misrepresentation, also pleads in reply that the insurer, with knowledge of the alleged misrepresentation, elected to affirm the contract by its conduct following loss, including paying the amount required to replace the tank without improvement.

5 On that state of the pleadings, the plaintiff brought the application under Rule 18A which resulted in the order now appealed from. In its notice of application, it stated the issue thus:

> Assuming for the purposes of this application only that:
>
> a. the Plaintiff made the misrepresentation alleged in paras. 37-44 of the statement of defence; and
>
> b. the Defendants would otherwise be entitled to refuse indemnity to the Plaintiff because of that misrepresentation,
>
> have the Defendants elected to affirm the contract of insurance with knowledge of the misrepresentation in such a way that they are now precluded from refusing indemnity on the ground of misrepresentation?

6 One of the defendants' submissions on the application was that, even if there was an election by conduct to affirm the contract, that cannot be given effect to because of s.11(1) of the *Insurance Act*, R.S.B.C. 1996, c. 226. Section 11 reads:

> 11(1) A term or condition of a contract is not deemed to be waived by the insurer in whole or in part unless the waiver is stated in writing and signed by a person authorized for that purpose by the insurer.
>
> (2) Neither the insurer nor the insured are deemed to have waived any term or condition of a contract by any act relating to the appraisal of the amount of loss or to the delivery and completion of proofs or to the investigation or adjustment of any claim under the contract.

Because the plaintiff can allege no detrimental reliance arising out of the defendants' conduct, it has not pleaded estoppel and relies entirely on the doctrine of election. The chambers judge accepted the submission that any conduct which constituted election would necessarily also be a waiver and would therefore be subject to the requirements of s.11(1). As she put it:

> In set theory terminology, election is a sub-set of waiver.

In other words, the judge concluded that the events relied on by the plaintiff as an election could preclude the defendants from refusing indemnity on the ground of misrepresentation only if made in writing and signed by a duly authorized person. On that basis, the question was answered in the negative.

7 Prior to the appeal coming on for hearing, the court drew to the attention of counsel the question whether a summary trial can be decided on assumed facts. Counsel's attention was drawn particularly to *Buckley v. B.C.T.F.* (1992), 65 B.C.L.R. (2d) 155 (B.C. C.A.). Counsel for both sides submitted that, in the particular circumstances of this case, it was appropriate to proceed on assumed facts. That question was considered at some length at the opening of the hearing. Finally, we agreed to hear the appeal but made it clear that we might ultimately decide that the issue could not properly be decided under Rule 18A.

8 In the course of the hearing, two difficulties of a more specific nature emerged. The first is that the two sides are not ad idem as to the scope of the "misrepresentation alleged in paras. 37-44" which the court was invited to assume, and were therefore not ad idem as to the submissions on law which could properly be advanced.

9 The second difficulty which emerged is that some aspect of the conduct alleged by the plaintiff to constitute an election to affirm could not, because they involve issues of credibility, have been decided at the summary trial and cannot be decided by this court. Mr. Gouge, for the appellant, submitted that that is not a difficulty because he might succeed on some of the other aspects of conduct on which he relies, in which event the disputed ones would be moot. He also suggested that even if he did not succeed on that basis, it would be open to him to raise the issue of election again at trial on the basis of the disputed facts. In my view, that is not an appropriate basis upon which to proceed with a summary trial. That means the facts cannot be found.

10 Mr. Tucker, for the respondents, urged us to decide a question of law which requires no analysis of the facts, i.e., the ground on which the chambers judge found for the defendants. I would decline that invitation. The issue as to the scope of s.11 is one of some general importance and much uncertainty. The section was enacted in its present form in 1969 and was in the Insurance Act for at least 40 years before that in the form of a statutory condition with almost identical wording. See: *Cadeddu v. Mount Royal Assurance Co.*, 41 B.C.R. 110, [1929] 2 W.W.R. 161 (B.C. C.A.). It has been the subject of very few decisions, the only decisions of this court being *Cadeddu, supra*, and *Cadboro Investments Ltd. v. Canada West Insurance Co.* (1987), 19 B.C.L.R. (2d) 352, 45 D.L.R. (4th) 470 (B.C. C.A.).

11 The chambers judge referred to *Cadboro* for the finding that "waived" in s.11(1) does not include estoppel but made on reference to what may be the more significant aspect of the decision, i.e., the finding as to what is intended by the words of the section. In referring to a submission similar to that accepted by the judge in this case, Macfarlane J.A. for the court said at p. 473-474:

> Madam Justice Proudfoot's reference in her reasons to waiver has led counsel for the defendants to make this submission: he submits that under s. 13 of the *Insurance Act*, R.S.B.C. 1979, c. 200, a condition cannot be deemed to be waived unless the waiver is stated in writing. He submits that is an end to the plaintiff's case because if there was a waiver it was not given in writing during the running of the limitation period. I think that section to be inapplicable to a case where estoppel by conduct is the basis for finding that a condition cannot be relied upon. It appears to me that this is a case of estoppel by conduct, not waiver, despite the language used in the summary prepared by plaintiff's counsel.
>
> . . . . .
>
> A waiver is in the nature of an agreement to forego legal rights, and it is understandable that it is required that such an agreement be in writing if for no other reason than to ensure certainty. Conduct justifying estoppel, however, is not something which lends itself to confirmation in written form. It is for that reason that I do not think that s. 13 of the *Insurance Act* is of any assistance in this case.

What was s.13 is now s.11.

12 Whether any set of facts which creates an election also creates a waiver is a question which has long been the subject of much learned debated. Assuming that the chamber judge's conclusion on that point is correct, there remains the question whether s.11 has any application to a waiver by conduct. In reaching the conclusion that it does, the chambers judge relied on two decisions at first instance which dealt, not with s.11(1), but with s.11(2) and its Saskatchewan equivalent. Assuming those cases to have been correctly decided, there remains room for argument whether the analysis applicable to s.-s (2) is applicable to the much broader and more general language of s.-s. (1).

13 The specific question which arises under s.-s. (1) is whether the conduct alleged by the defendants, even if it is a waiver, is a waiver of a "term or condition of a contract". The type of situation to which those words would clearly apply is the not uncommon one in which parties agree after the policy has come into effect that a particular term or condition will no longer be in effect. In such circumstances, it is entirely reasonable to require that such a deletion will not be effective unless it meets the formalities of s.11. That, I think, is what Macfarlane J.A., in the passage quoted in para. 11, *supra*, was adverting to when he said "it is understandable that such an agreement be required to be in writing if for no other reason than to ensure certainty". I should not be taken as expressing a concluded view on the issue. The point is that the issue sought to be raised cannot be resolved without considering whether the language of s.-s. (1) can be extended to cover a breach of a condition as distinct from the condition itself. That is an issue which can best be decided after the facts have been determined.

14 As the difficulties to which I have referred establish that the attempt to isolate an issue and decide on assumed facts was misconceived, it is unnecessary to reach any final conclusion on the question whether it was open to the parties, in the circumstances here, to rely on assumed facts. Before us, counsel referred to *Steyns v. Manitoba Public Insurance*

Corp. (1995), 7 B.C.L.R. (3d) 106 (B.C. C.A.) as authority for the proposition that there is no absolute bar to a summary trial proceeding on assumed facts. In that case, which appears to be the most recent decision of this court touching on the point, Finch J.A.; after referring to two earlier authorities said, at p.120:

> Sometimes it will be appropriate to use R. 18A to decide a question of law on assumed facts and sometimes not.

The more important point to be taken from that case may be that the result of proceeding with a summary trial on assumed facts was that this court found that the facts were not sufficient to determine the issue and, as a result, ordered a trial of the factual issues.

15 This is not an appropriate case in which to make a definitive statement on the matter. I will say that to proceed with a summary trial on assumed facts is likely to result in the kind of confusion which arose here, and that such a procedure seems inconsistent with the principle that a summary trial is a trial. Finally, and with the greatest respect, I wish to express my reservations with respect to the observation in para. 46 of *Steyns*, *supra*, that:

> Rule 18A is frequently used to decide limitation issues on the assumption that the cause of action could be established.

I agree that it is common and proper for limitation issues to be decided as a preliminary issue under Rule 18A but I query whether it is correct to say that summary trials on that issue proceed on the assumption that the cause of action could be established. A limitation defence is essentially a plea that the action was begun out of time. The question it raises is whether the action can be maintained. It arises irrespective of the question whether the cause of action could be established. I therefore suggest that, in respect of that issue, no assumption of facts need be made.

16 I would allow the appeal by setting aside the order appealed from and remitting the action for trial on all issues. In the circumstances, I would order that the costs of the appeal and of the Rule 18A application be costs in the cause.

Appeal allowed; matter remitted for trial on all issues.

End of Document

TAB 8

1981 CarswellBC 41
British Columbia Court of Appeal

Block Brothers Realty Ltd. v. Mollard

1981 CarswellBC 41, [1981] 4 W.W.R. 65, [1981] B.C.J. No. 4, 122 D.L.R. (3d) 323, 27 B.C.L.R. 17, 7 A.C.W.S. (2d) 373

BLOCK BROS. REALTY LTD. v. MOLLARD and DETRA HOLDINGS LTD.

Nemetz C.J.B.C., Seaton and Craig JJ.A.

Heard: January 29, 1981
Judgment: March 5, 1981
Docket: Vancouver CA800658

Counsel: *E. E. Bowes*, for plaintiff (respondent).
R. J. Smith, for defendants (appellants).

Subject: Contracts; Torts; Property; International

Headnote

Agency --- Real estate agents — Listing agreement — Proper law of contract

Conflict of Laws --- Substantial versus procedural law

Conflict of Laws --- Contracts — Illegality — Contract illegal by lex fori

Conflict of laws — Contracts — Jurisdiction — Proper law of contract — S. 37 of British Columbia Real Estate Act substantive, not procedural in nature — Evidence indicating parties' intention that law of Alberta to govern contract — Alberta law applicable.

The defendant land-owners listed their British Columbia land for sale with the predecessor of the plaintiff, which was duly licensed as a real estate agent in the province of Alberta, but not in the province of British Columbia. The parties executed the listing agreement in the province of Alberta. An employee of the agent licensed only under Alberta legislation sold the property to Alberta residents. The defendants did not pay the commission stipulated in the listing agreement. An action was commenced to

recover the commission in the province of British Columbia. The defendants alleged in their pleadings that the action was barred by s. 37(1) of the Real Estate Act of British Columbia, and applied to have the action dismissed. The chambers judge refused to dismiss the lawsuit holding that s. 37(1) was substantive, not procedural, and that the applicable law was the law of Alberta, compliance with s. 37(1) being, therefore, unnecessary. The defendants appealed.

Held:

Appeal dismissed.

S. 37 of the Real Estate Act was categorized as being substantive in nature and not procedural. The legislation should be categorized as procedural only if the question was beyond any doubt. Where there was doubt, such doubt should be resolved by holding that the legislation was substantive. There was cogent evidence to infer that the parties intended the law of Alberta to govern the contract. An action should be barred on grounds of public policy only where it would be contrary to essential public or moral interest, or contrary to conceptions of essential justice and morality.

Appeal from a refusal of an application to dismiss action in British Columbia.

The judgment of the court was delivered by *Craig J.A.*:

1 The defendants appeal from the refusal of a chambers judge to dismiss this action on a point of law, set down for determination pursuant to the provisions of R. 34 of the Supreme Court Rules.

2 The defendants, the owners of land situate in British Columbia, listed the land for sale with the predecessor of the plaintiff which was duly licensed as a real estate agent in the Province of Alberta, but not in British Columbia. The parties executed the listing agreement in Alberta. An employee of the agent, licensed as a salesperson under the Alberta real estate legislation but not under the British Columbia legislation, sold the property to Alberta residents. Apparently, the defendants failed or refused to pay the commission stipulated in the listing agreement. The plaintiff commenced this action in British Columbia to recover the commission, basing the action on the listing contract. The parties made the contract in Alberta. The plaintiff performed the contract in Alberta. Other than the fact that the land which was the subject of the contract, was situate in British Columbia, the contract did not have any connection with British Columbia. The defendants alleged in their statement of defence that neither the agent nor its salesperson "were licensed to engage in the listing and sale of real estate" in British Columbia and pleaded the Real Estate Act, R.S.B.C. 1979, c.

356. Contending that s. 37(1) of the Act was a bar to the action, the defendants, with consent of the plaintiff, applied under the provisions of R. 34 to have the point determined and to have the action dismissed. The judge, relying particularly on *Can. Accept. Corp. Ltd. v. Matte* (1957), 22 W.W.R. 97, 9 D.L.R. (2d) 304 (Sask. C.A.), and *Bateman & Litman Real Estate Ltd. v. Big T. Motel Ltd.* (1964), 46 W.W.R. 604, 44 D.L.R. (2d) 474, affirmed 51 W.W.R. 127, 49 D.L.R. (2d) 480 (Sask. C.A.), dismissed the application holding that s. 37(1) was substantive, not procedural, that the applicable law was the law of Alberta and that, therefore compliance with s. 37(1) was unnecessary.

3 The defendants' grounds of appeal are:

4 (1) The requirements of s. 37 of the Real Estate Act of British Columbia are procedural;

5 (2) Even if substantive, the proper law of the contract (the subject matter of this action) is British Columbia and

6 (3) Even if the proper law is Alberta the British Columbia courts ought not to give effect to the rights acquired under the contract by the respondent because to do so would be contrary to public policy in British Columbia.

7 Section 37 of the Real Estate Act provides:

> 37. (1) A person shall not maintain an action in any court for the recovery of compensation for any act done or expenditure incurred by him as an agent or salesman without proving that he was duly licensed under this Act as an agent or salesman, as the case may be, at the time the alleged cause of action arose.
>
> (2) This section does not apply to an action brought against a licensed agent by an agent duly licensed or otherwise authorized by law as such in a jurisdiction other than British Columbia for the recovery of any commission or other compensation, the payment of which is not prohibited by section 30.

8 In the *Matte* case, supra, the Saskatchewan Court of Appeal had to interpret s. 18(1) of the Limitation of Civil Rights Act, R.S.S. 1953, c. 95, which provided that a vendor's right to recover the unpaid purchase money was restricted to a lien upon the article sold. The defendants had signed a promissory note and a chattel mortgage in Manitoba relating to the purchase of two motor vehicles. Subsequently, the plaintiff repossessed and sold the vehicles and then brought an action in Saskatchewan, where the defendants were residing, for the balance of the purchase price contending that the action was governed by the law of Manitoba which permitted this remedy. The issue was whether s. 18(1) of the Saskatchewan Act barred the plaintiff from recovering in an action in Saskatchewan. The trial judge and

the majority of the Court of Appeal held that s. 18(1) was substantive, not procedural, that the applicable law was the law of Manitoba and that s. 18(1) was not a bar to the action.

9 The Supreme Court of Canada affirmed this interpretation of s. 18(1) in *Traders Finance Corp. v. Casselman*, [1960] S.C.R. 242, 22 D.L.R. (2d) 177.

10 Basically, the essential facts in the *Big T. Motel* case, supra, were the same as the facts in this case. The defendants listed some Saskatchewan land for sale with a licensed real estate agent in Alberta and the parties made the listing agreement in Alberta. The plaintiff sold the land in Alberta and, subsequently, the plaintiff brought an action in Saskatchewan for the real estate commission. The defendant contended that the plaintiff could not bring the action in Saskatchewan relying on s. 28 of the Real Estate Agents Licensing Act, R.S.S. 1953, c. 294, which provided that "no action shall be brought" for real estate commission unless the "person bringing the action was licensed ... or was not required ... to be licensed". Bence C.J.Q.B., relying mainly on the *Matte* case, supra, held that s. 28 was substantive, not procedural, that the law of Alberta governed the case and that s. 28 was inapplicable. The Court of Appeal affirmed this decision.

11 The law of the jurisdiction in which the legal proceedings take place always governs procedural matters. On the other hand, the law of another jurisdiction may govern substantive matters. Generally, if there is no conflict of laws involved, it is unnecessary to distinguish between what is procedural and what is substantive, but if it is necessary to consider the laws of another jurisdiction it may be necessary to distinguish between a matter of procedure and a matter of substance: Falconbridge, Conflict of Laws, 2nd ed. (1954), p. 301. The characterization of what is procedural and what is substantive is a vexing problem, perhaps because there is no single definitive test. An often expressed view is that a matter is substantive if it relates to a right or to the nature of a right; it is procedural if it relates to the remedy or to the nature of the remedy. In discussing the subject, Falconbridge says the common English test with regard to statutes of limitation (p. 283) is that a "statute which extinguishes the 'right' is substantive, whereas a statute which merely bars the 'remedy' is procedural". He contends that this is not a completely accurate basis upon which to distinguish between the two.

12 In Dicey and Morris, The Conflict of Laws, 8th ed. (1967), the author states [p. 1089]:

> The term "procedure" includes (*inter alia*) certain aspects of the following matters: 1. Remedies and Process; 2. Damages; 3. Statutes of Limitation; 4. Evidence; 5. Parties; 6. Priorities; 7. Set-off and Counterclaim.

13 At p. 302, Falconbridge discusses the difficulty in distinguishing between a procedural matter and a substantive matter and suggests that the court should not categorize a matter as procedural or substantive "in the abstract or for all purposes". He goes on to say at p. 304:

> If the successful prosecution of an action is prevented by reason of a procedural rule of the law of the forum, there can be no resort to the law of another country and any conflict rule of the law of the forum which indicates that the proper law of the cause of action is the law of that country, or that the merits of the controversy should be decided by that law, is frustrated. Therefore a court should not, without due consideration of the consequences, characterize a rule of the law of the forum as procedural in the conflict of laws, even though the rule may be characterized as procedural for some domestic purpose.

This appears, too, to be the approach of Dicey and Morris: see pp. 1090-91.

14 At p. 306, Falconbridge criticizes what he refers to as the "tendency of English courts to characterize a statute as procedural because it is expressed in the form 'no action shall be brought' " and says that this provision, "or other similar provision should not be characterized as procedural for any purpose of the conflict of laws, but should be construed merely as denying a cause of action for domestic purposes". This approach seems eminently sound to me, particularly if the conflict of laws involves another Canadian jurisdiction. That being so, should s. 37, in the circumstances, be characterized as procedural or substantive?

15 The present wording of s. 37 has been in effect since 1st June 1958 [enacted as the Real Estate Act, 1958 (B.C.), c. 47, s. 38]. Before then, the relevant provision was s. 39 [of the Real-estate Agents' Licensing Act, R.S.B.C. 1948, c. 189] which provided, in effect, that a person could not "bring or maintain" any action without "alleging and proving" that he was duly licensed under the Act. Under the former s. 39, a writ of summons which failed to allege that the plaintiff was duly licensed under the Real Estate Act was a nullity and was not amendable, so an action could be dismissed at trial solely on this basis. Under the present s. 37 the validity of the writ does not depend upon the writ containing an allegation that at the time the cause of action arose the plaintiff was duly licensed under the Act, but to succeed the plaintiff must prove that at the time the cause of action arose he was duly licensed under the Act.

16 Looking at s. 37(1) in one aspect, it may be reasonably argued that the legislature has merely barred the remedy and that the matter is procedural. Looking at it from another aspect, it may be reasonably argued, also, that the legislature has extinguished a right of action and that, therefore, the matter is substantive. In the initial stages of the oral argument, I inclined to the view that the legislation was procedural on the analogy of the English cases dealing with a statute which provided that "no action shall be brought". On reflection, however, I have concluded that I should categorize the legislation as substantive. If this case were governed solely by the law of British Columbia, it would be unnecessary to categorize s. 37 as procedural or substantive because the characterization would not affect the result.

If, however, the contract is governed by the law of Alberta and if the contract is valid under the law of Alberta, the characterization of s. 37 as procedural would deprive the plaintiff of the opportunity to enforce his legal rights in a British Columbia court. The only purpose of s. 37 is to enforce the licensing sections and it should be examined in this context. I think that legislation should be categorized as procedural only if the question is beyond any doubt. If there is any doubt, the doubt should be resolved by holding that the legislation is substantive. In the circumstances of this case, I think that s. 37 should be characterized as substantive law.

17 Counsel for the appellant submits that even if the legislation is substantive "the proper law of contract" is the law of British Columbia, not the law of Alberta, contending that because the land is situate in British Columbia the British Columbia law is the system of law with which the transaction has "its closest and most real connection". Generally, the "proper law of contract" is the law of the jurisdiction in which the contract was made on the theory that, normally, the parties must have intended that the contract should be governed by the law of the jurisdiction in which it was made. If, however, this intention cannot be reasonably inferred from the circumstances, the proper law of contract is the "system of law with which the transaction has its closest and most real connection": Dicey and Morris, at p. 691. In this case, the parties made the contract in Alberta with the view, obviously, that a purchaser would be found in Alberta. This is cogent evidence upon which to base an inference that the parties intended the law of Alberta to govern the contract. Alberta would be the place where the contract would be performed. The conveyance of the property in British Columbia would be only incidental to the performance of the contract in Alberta. I agree, therefore, with the view of the chambers judge that the proper law of contract in this case is the law of Alberta.

18 The final argument of the appellant is that even if the proper law of contract is the law of Alberta a British Columbia court ought not to recognize the contract because to do so would be contrary "to public policy in British Columbia". Counsel submits that the requirement that a person may not maintain an action for real estate commission unless he has proved that he was licensed under the British Columbia Act is based upon the premise that it is in the public interest that anyone selling real estate as an agent or a salesperson be subject to control and disciplinary action and that the public policy requires that a person unlicensed under the British Columbia Act not be permitted to obtain a judgment on a contract in a British Columbia court. He relies particularly on the judgment of MacDonald J. in *Ross v. McMullen* (1971), 21 D.L.R. (3d) 228 (Alta. T.D.), in which MacDonald J. held in interpreting legislation similar to s. 37(1) in the Alberta Real Estate Agents' Licensing Act, R.S.A. 1970, c. 311, said at p. 233:

> It is clear to me that the Act is a statute declaratory of public policy that is, that all real estate trading in Alberta is only to be carried on by persons licensed under the Act to do so and that no action for real estate commission can be successful unless brought by

> a licensed person and that no licensed person shall pay a commission to an unlicensed person, unless the transaction falls within a specific exemption of the Act.
>
> This is the *lex fori* and is a matter of public policy. Therefore, if the contract between the plaintiff and the defendant is illegal in Alberta, then no matter what the contract was, and no matter what law the parties intended to apply in interpreting the contract, it is still unenforceable in Alberta.

19 In that case the plaintiff contended that the contract was made in Toronto and that the parties intended that the Ontario law apply. MacDonald J. held, however, as indicated, that notwithstanding the law the parties intended to apply the contract was illegal and unenforceable in Alberta because the plaintiff was not licensed under the Alberta Act.

20 Defining what is, or what should be, public policy is, generally, a very perplexing task because there are so many variable and subjective factors involved in the decision. Because of this difficulty a court should give careful consideration before deciding that something is illegal, or is unenforceable, because of public policy, particularly in the area of the conflict of laws. In referring to the doctrine of public policy, Falconbridge said, at p. 387, that "this doctrine must be used with caution". In the case of *Nat. Surety Co. v. Larsen*, 42 B.C.R. 1, [1929] 3 W.W.R. 299, [1929] 4 D.L.R. 918, this court dealt with the problem of public policy with regard to the enforceability of a contract valid in another jurisdiction. At p. 300 Macdonald C.J.B.C. said:

> ... there is no reason for disregarding the settled law that a contract good in the foreign country will be enforced here unless prohibited or unless it be contrary to our conceptions of essential justice and morality.

At p. 320 Macdonald J.A. said that public policy had been described in various ways including "essential public or moral interest", "founded in moral turpitude", and "inconsistent with the good order and solid interests of society".

21 These views are even more apposite when the "foreign law" is that of another jurisdiction in Canada. There is no doubt that the British Columbia Real Estate Act is legislation in the public interest. One of the objects of the legislation is to control who may act as an agent or salesperson for real estate in British Columbia for compensation. One method of exercising this control is to provide that a person shall not maintain an action for the recovery of compensation without proving that he was duly licensed as an agent or a salesperson at the time the cause of action arose: s. 37(1). This restriction does not apply, however, to an action brought against a licensed agent in British Columbia by "an agent duly licensed ... in a jurisdiction other than British Columbia for the recovery of any commission or ... compensation, the payment of which is not prohibited by s. 30": s. 37(2).

22 The fact that the Real Estate Act is legislation in the public interest does not require a court to declare that every contract for the payment of a real estate commission is unenforceable in British Columbia merely because the plaintiff is not licensed under the British Columbia Act.

23 In this case had an agent, duly licensed in British Columbia, entered into the contract with the plaintiff in Alberta the plaintiff could have brought an action in British Columbia for commission without being faced with any defence based on s. 37(1) or without being faced with the defence that the action was unenforceable in British Columbia because of public policy. Does public policy in British Columbia require that we bar this action in British Columbia merely because the owner rather than his agent in British Columbia entered into the contract with the plaintiff? In my opinion, the answer is an unequivocal "No". I think that we should bar an action on the ground of public policy only if we could say it was contrary to "essential public or moral interest" or "contrary to our conceptions of essential justice and morality". We could not say either of those things in this case. In fact, if anything, the converse is true.

24 In the circumstances, I would dismiss the appeal.

Appeal dismissed.

TAB 9

trust. Counsel for Amoco says that this applies also to money paid under mistake which is also recoverable.

I hold that in the present instance the funds mistakenly paid by Amoco/Dome to Twin Richfield were trust moneys which can be traced into the assets of Twin Richfield taken over by the Receiver on February 5, 1991.

Counsel for the Receiver asks the final question. Even if the Hatton wells amount is the subject of a trust, is Amoco entitled to set off the Hatton wells amount against an unrelated sum, the twin working interest amount (the sum of $67,667.74 applied against Twin Richfield's account balance arising out of operations for the month of May, 1991)? This question engages the prohibition set out in para. 5 of the order of Master Alberstat dated February 5, 1991, quoted above. The answer is no. In retrospect the proper course of action for Amoco/Dome would have been to make an application to the bankruptcy court for a determination of its rights as a secured or unsecured creditor and a direction for the payment of such moneys as the court deemed appropriately payable to it. I am not clear as to whether Amoco/Dome was aware of the terms of the receivership order prior to setting off the funds which have come to be known as the twin working interest amount ($67,667.74).

The result of this application is that I have found that no right of set-off existed at the instance of Amoco/Dome against the Receiver of Twin Richfield, but that Amoco/Dome is a secured creditor to the extent of the Hatton wells amount ($67,310.13). The matters of interest and costs and any other issues which may arise out of the conclusions reached in this judgment are expressly reserved unless they can be otherwise resolved by the parties.

Judgment accordingly.

Boardwalk Regency Corp. v. Maalouf

Ontario Court of Appeal, Lacourcière, Carthy and Arbour JJ.A.
January 10 and March 3, 1992.

Conflict of laws — Foreign judgments — Defences — Public policy — Foreign judgment for gambling debt obtained in jurisdiction where gambling was legal — Enforcement of judgment not contrary to Ontario public policy.

The defendant lost money by gambling in New Jersey where gambling is lawful. The defendant gave to the plaintiff, which operated a casino in New Jersey, a cheque, in order to consolidate earlier cheques that he had written to cover his gambling debts. Further credit was also extended to the defendant. The defendant's cheque was not honoured. The plaintiff commenced an action on the cheque, or alternatively, on a judgment obtained in New Jersey on the cheque. By

s. 4 of the *Gaming Act*, R.S.O. 1980, c. 183, gaming contracts are void and by s. 1: "Every ... bill ... the consideration for which ... is money ... won by gaming ... shall be deemed to have been ... drawn ... for an illegal consideration." Operating a common gaming house is an offence under ss. 197 and 201(1) of the *Criminal Code*. The action was dismissed, and the plaintiff appealed to the Ontario Court of Appeal.

On appeal, **held**, Lacourcière and Carthy JJ.A. concurring, the appeal should be allowed. The proper law of the contract was New Jersey law, and the *Gaming Act* did not apply directly. Gambling, being permitted in some circumstances in Canada, was not so contrary to Ontario public policy as to defeat the action on the New Jersey judgment.

Per Arbour J.A. dissenting: The action on the New Jersey judgment, or on the debt itself, is governed by the law of contract and thus escapes the provisions of the *Gaming Act*. The *Gaming Act* does not have extraterritorial application and, therefore, does not stand in the way of recovery in Ontario for a debt validly incurred under New Jersey law. The plaintiff is seeking to recover in the Ontario courts money advanced to the defendant for the purpose of engaging in an activity which, if conducted in Ontario would be criminal. It is against public policy in this jurisdiction to enforce a foreign judgment which allows for the recovery of a debt incurred in the context of an activity which, although legal where it took place, is criminal here.

Cases referred to

Moulis v. Owen, [1907] 1 K.B. 746; *Saxby v. Fulton*, [1909] 2 K.B. 208; *Société Anonyme des Grands Etablissements de Touquet Paris-Plage v. Baumgart* (1927), 96 L.J.K.B. 789; *Harold Meyers Travel Service v. Magid* (1977), 77 D.L.R. (3d) 32, 16 O.R. (2d) 1, [1977] 1 A.C.W.S. 820; *Canadian Acceptance Corp. Ltd. v. Matte* (1957), 9 D.L.R. (2d) 304, [1956-60] I.L.R. ¶43,423, 22 W.W.R. 97; *Fender v. St. John-Mildmay*, [1938] A.C. 1; *R. v. Furtney* (1991), 66 C.C.C. (3d) 498, 8 C.R. (4th) 121, 129 N.R. 241, 14 W.C.B. (2d) 35; *Intercontinental Hotels Corp. (Puerto Rico) v. Golden*, 203 N.E. 2d 210 (1964); *Block Bros. Realty Ltd. v. Mollard* (1981), 122 D.L.R. (3d) 323, [1981] 4 W.W.R. 65, 27 B.C.L.R. 17; *Desert Palace, Inc. v. Zigdon* (1987), 5 A.C.W.S. (3d) 210; *Resorts International Hotel Inc. v. Auerbach*, Que. C.A., September 23, 1986; aff'd 30 A.C.W.S. (3d) 501; *Boardwalk Regency Corp. v. Newman* (1987), 15 C.P.C. (2d) 102; *M & R Investment Co. v. Marsden* (1987), 63 O.R. (2d) 509, 8 A.C.W.S. (3d) 261; *Boardwalk Regency Corp. v. Portelance*, Ont. Dist. Ct., April 12, 1988

Statutes referred to

Bills of Exchange Act, R.S.C. 1985, c. B-4, ss. 159, 160
Constitution Act, 1867, s. 91(27)
Courts of Justice Act, 1984, S.O. 1984, c. 11, s. 131, 139(3) — now R.S.O. 1990, c. C.43, s. 121, 129(3)
Criminal Code, R.S.C. 1985, c. C-46, ss. 172 [am. 1987, c. 24, s. 6], 197, 201(1), 204 [am. R.S.C. 1985, c. 47 (1st Supp.), s. 1], 207(1)(*a*) [rep. & sub. *idem*, c. 52, s. 3]
Gaming Act, 1710, 9 Anne, c. 14
Gaming Act, R.S.O. 1980, c. 183, ss. 1, 4, 5 — now R.S.O. 1990, c. G.2

APPEAL from a judgment of O'Brien J., 59 D.L.R. (4th) 760, 43 B.L.R. 83, 68 O.R. (2d) 753, 15 A.C.W.S. (3d) 131, dismissing an action on a cheque or alternatively, on a foreign judgment.

W.L.N. Somerville, Q.C., and *Mary Margaret Fox*, for appellant.

Mark B. Koreen and *M. Reid*, for respondent.

January 10, 1992.

LACOURCIÈRE J.A.:—I have had the benefit of reading the reasons prepared by my two colleagues who arrive at different conclusions with respect to the disposition of this appeal. While I agree with the reasons of my colleague, Mr. Justice Carthy, I find it necessary to further analyze some issues, particularly the public policy involved in the enforcement of the underlying debt or of the default judgment of the Superior Court of New Jersey against the respondent, in respect of a gaming or wagering agreement. Apart from the issue of public policy involved in the enforcement, the authenticity of the judgment and the jurisdiction of the foreign tribunal have not been questioned.

Few Canadian courts have dealt with the enforceability, in a Canadian province, of a debt resulting from loans made by a casino, licensed and operated in the United States, to a Canadian visitor for the purpose of gaming at the casino. In the reported trial level decisions reviewed by my colleagues, the Ontario courts have generally refused to enforce foreign gambling debts on grounds of public policy, whereas some Quebec and British Columbia courts have not objected to the enforcement of foreign gambling debts on that ground.

Let me say at the outset that I am in full agreement with Carthy J.A. that the appellant's action is governed by the proper law of the contract, in this case the law of New Jersey. It follows that the *Gaming Act*, R.S.O. 1980, c. 183, as amended (now R.S.O. 1990, c. G.2), which was never intended to apply to gaming transactions in other jurisdictions and cannot be given extraterritorial effect, is not applicable. It matters not, in my opinion, whether the statute renders the gaming agreement void or whether it merely prevents recovery on the security given, since the *Gaming Act* applies only to domestic, as opposed to foreign agreements. Furthermore, the Act does not express public policy so as to preclude the enforcement in Ontario of a judgment obtained in the State of New Jersey, where the debt was legally incurred originally. The *Gaming Act* would unconstitutionally trench on criminal law if it represented an attempt to control morality: see *R. v. Furtney*, a judgment of the Supreme Court of Canada, released September 26, 1991 [reported 66 C.C.C. (3d) 498, 8 C.R. (4th) 121, 129 N.R. 241] at p. 15 [pp. 507-8 C.C.C.].

I find it unnecessary to express any firm opinion on the appellant's alternative claim based on the cheque drawn on a Canadian bank. However, I do not think that the mode of payment, by cheque, would affect the action based on the underlying debt, which is governed by the proper law of the contract, the *lex loci contractus*: see ss. 159 and 160 of the *Bills of Exchange Act*, R.S.C. 1985, c. B-4, which govern the validity and interpretation of a negotiable instrument, and Castel, *Canadian Conflict of Laws*, 2nd ed. (1986), paras. 446-8, at p. 575. In any event, even if the alternative claim based on the cheque should fail on the basis of the majority judgment in *Moulis v. Owen*, [1907] 1 K.B. 746 (C.A.), in my opinion, there is nothing to prevent recovery of the underlying debt in the present case. See *Saxby v. Fulton*, [1909] 2 K.B. 208 (C.A.), which stands for the proposition expressed in the three-line headnote:

> Money lent in a foreign country for the purpose of being used by the borrower for gaming, the game not being illegal by the law of that country, may be recovered in the English Courts.

See also *Société Anonyme des Grands Etablissements de Touquet Paris-Plage v. Baumgart* (1927), 96 L.J.K.B. 789, and *Harold Meyers Travel Service v. Magid* (1977), 77 D.L.R. (3d) 32, 16 O.R. (2d) 1, [1977] 1 A.C.W.S. 820 (C.A.). I adopt what was said by the learned authors in *Cheshire & North's Private International Law* (1987), at p. 485:

> Incongruous though it may seem, one result of drawing the distinction between a security and the contract in respect of which it has been given is that a person, who receives an English cheque in payment of a gambling loan made in a country where gambling is lawful, may disregard the cheque and successfully maintain an action on the loan. His possession of an unenforceable security does not preclude him from recovering the money on the alternative ground.

Subject therefore to policy considerations, I am of the opinion that the action based on the debt underlying the cheque could be successfully pursued in Ontario.

The policy issue

In my opinion, the respondent has not satisfied the burden of showing that the enforcement of the contract or of the New Jersey judgment would be contrary to public policy. I agree that the foreign judgment should not be declared unenforceable on grounds of public policy unless its enforcement would violate conceptions of essential justice and morality. I am here referring to domestic public policy as well as national public policy at the international

level. Where the foreign law is applicable, Canadian courts will generally apply that law even though the result may be contrary to domestic law. Professor Castel's discussion of public policy regarding the application of foreign law or the enforcement of a foreign judgment is helpful in this respect (para. 91, pp. 153-9):

> Canadian courts will not recognize or enforce a foreign law or judgment or a right, power, capacity, status or disability created by a foreign law that is contrary to the forum's stringent public policy or "essential public or moral interest" or "our conception of essential justice and morality."
>
> It is almost impossible to give a precise definition of public policy; nor can a general statement be made about its scope. Evidence of public policy can be found in the total body of the constitutional and statute law as well as the case law of the forum, since it will reflect the local sense of justice and public welfare. It is not enough to deny recognition of the claim that the local law on the same point differs from the foreign law.
>
> In the conflict of laws, public policy must connote more than local policy as regards internal affairs. It is true that internal and external public policy stem from the national policy of the forum but they differ in many material respects. Rules affecting public policy and public morals in the internal legal sphere need not always have the same character in the external sphere. Also, there should be a difference of intensity in the application of the notion of public policy depending upon whether the court is asked to recognize a foreign right or legal relationship or to create or enforce one based on some foreign law. *Public policy is relative and in conflicts cases represents a national policy operating on the international level.*
>
> If foreign law is to be refused any effect on public policy grounds, it must at least violate some fundamental principle of justice, some prevalent conception of good morals, or some deep-rooted tradition of the forum . . . .
>
> In the absence of legislation establishing the stringency of public policy, it is for the courts to define its precise limits according to their judgment and good conscience.

(Emphasis added.)

In this appeal, this court is not directly concerned with the ethics of gambling, the regrettable social consequences of excessive or compulsive gambling, or the effectiveness of the New Jersey regulation of casinos. Neither are sympathy for the respondent, whose gambling intoxication resulted in ruinous losses, nor lack of sympathy for gambling casino operators, relevant considerations.

It would be anomalous and, it seems to me, contrary to the international aspect of national policy in this regard, to conclude that Part VII of the *Criminal Code* reflects a policy applicable on the international level. This would be the result of refusing to give effect to the law of New Jersey on grounds of public policy. It cannot be said that the enforcement of a debt, valid by the law of New Jersey, which is the proper law of the contract, would violate any fundamental principle of justice or the Canadian conception of good morals. I must assume that a sovereign country or state

which licenses casino operations has enacted regulations and controls for the general protection of participants and of society. The essential question to be resolved is whether the *Gaming Act*, which is inapplicable, none the less effectively represents public policy, and whether the strictures of the *Criminal Code* of Canada against gaming houses reflect the public policy issue.

It has been submitted, on behalf of the respondent, that the social morality has not been tested for commercial gambling. In my view, this submission is based on a misconstruction of the recommendations flowing from the 1956 parliamentary report referred to by Carthy J.A., *post*, p. 623. The report had recommended that, since gambling was like drinking, it should be treated similarly — by control. The means used to control the urge for gambling was to limit gambling by licensing, generally for charitable purposes. However, there is no basis for saying that public morality is reflected by the imposition or the methods of control. The licensing controls delegated by Parliament to the Attorney-General of the province or his nominee represent a justifiable way in which to channel and satisfy the demand for gambling. The policy of the Government of Canada, as reflected in Part VII of the *Criminal Code*, is to prohibit the operation of common gaming or common betting houses and other unlawful forms of wagering, while providing a broad category of exemptions from and exceptions to the provisions creating criminal liability.

For more than 20 years since the 1970 amendments to the *Criminal Code*, there has been a significant increase in various forms of legitimate gambling in this province and everywhere in Canada. Governments not only have condoned gambling activities, but also have actively promoted and derived substantial revenue from them. Charities and public-spirited social clubs have also benefited. Since the amendment to the *Criminal Code*, gambling has been decriminalized to a large extent and legalized gambling has become, on the basis of provincial statistics, a multi-billion dollar industry: see Colin S. Campbell and John Lowman, eds., "Gambling in Canada: Golden Goose or Trojan Horse?", Proceedings of the First National Symposium on Lotteries and Gambling (May, 1988). This court takes judicial notice of the fact that a large number of Canadians participate in games of chance, even though other Canadians disapprove of such activities.

It should be pointed out that the distinction between commercial gambling for profit, on the one hand, and government-licensed and regulated gambling activities for charitable or desirable social purposes, on the other hand, is not an all-encompassing distinction. Section 197(2)(*b*) of the *Criminal Code* exempts, from the

definition of common gaming house, a gaming house "occupied and used by an incorporated genuine social club . . ." under the authority of a provincial licence, without any mention of charitable purposes. The social club exemption is clearly dependent only on the *bona fides* of the club and its compliance with the requisite licence issued by the Attorney-General of the province. Thus, gaming houses could, theoretically, be licensed in Ontario, although it is improbable that licensing of casinos would be extended at this time. While provincial licensing has been limited generally for charitable purposes, it is clear that pari mutuel betting on horse-racing and off-track betting are, as a rule, purely commercial enterprises.

The ethics or morality of licensed gambling abroad, and the recovery of gambling debts incurred in jurisdictions where gambling is legal, are best left to a community standard. There is nothing to indicate that the general Canadian public would be offended by the enforcement of foreign judgments for debts incurred in jurisdictions where commercial gambling is licensed and legal. Consequently, I am satisfied that, in accordance with the Canadian community standard, the participation in licensed gaming abroad, and the enforcement of a foreign judgment based on a gaming debt incurred in a licensed and regulated casino, are neither immoral nor unjust: see Professor Rafferty's helpful comment on the trial judgment under appeal in "The Effect of Ontario's Gaming Laws on Foreign Gambling Transactions" (1990), 5 B.F.L.R. 233. In my opinion, the contemporary Canadian community standard of morality would prefer that personal responsibility be attached to Canadians who engage in licensed gaming activities abroad and that these citizens not be sheltered from enforcement proceedings when debts result.

Disposition

I am, therefore, of the view that the learned trial judge erred in concluding that the agreement between the parties, or the enforcement of the New Jersey judgment, would contravene the public policy of Ontario. For reasons given by Carthy J.A. and these additional reasons, I would allow the appeal and dispose of it as he proposed.

CARTHY J.A.:—The respondent, a resident of Ontario, borrowed money and built up a gambling debt at the appellant's casino in Atlantic City, New Jersey, failed to honour a cheque representing the ultimate debt of $43,000, permitted a default judgment to be entered in New Jersey, and now resists an action on that judgment in Ontario. The trial judge, in a judgment

reported at 59 D.L.R. (4th) 760, 43 B.L.R. 83, 68 O.R. (2d) 753, found that the Ontario *Gaming Act*, R.S.O. 1980, c. 183, and particularly ss. 1, 4 and 5, represent a public policy in Ontario discouraging gambling and, accordingly, that the action based upon the New Jersey judgment should be dismissed. The appellant says that the loan agreement was not a wagering agreement within s. 4 of the *Gaming Act*, that the proper law of the contract is that of New Jersey and s. 1 of the Act therefore has no application and, finally, that it is not contrary to public policy in Ontario to enforce the New Jersey judgment. The respondent takes the contrary position on each of these three issues. For convenience of reference I will here set out the relevant sections of the *Gaming Act*:

> 1. Every agreement, note, bill, bond, confession of judgment, *cognovit actionem*, warrant of attorney to confess judgment, mortgage or other security, or conveyance, the consideration for which, or any part of it, is money or other valuable thing won by gaming, or by playing at cards, dice, tables, tennis, bowls or other game, or by betting on the sides or hands of the players, or for reimbursing or repaying any money knowingly lent or advanced for such gaming or betting, or lent or advanced at the time and place of the game or play to a person so gaming, playing, or betting, or who, during the game or play, so plays games or bets, shall be deemed to have been made, drawn, accepted, given or executed for an illegal consideration.
>
> . . . . .
>
> 4. Every contract or agreement by way of gaming or wagering is void, and no suit shall be brought or maintained for recovering any sum of money or valuable thing alleged to be won upon a wager, or that has been deposited in the hands of any person to abide the event on which a wager has been made, but this section does not apply to a subscription or contribution, or agreement to subscribe or contribute for or towards any plate, prize, or sum of money to be awarded to the winner of any lawful game, sport, pastime or exercise.
>
> 5. Any promise, express or implied, to pay any person a sum of money paid by him under or in respect of a contract or agreement rendered void by section 4, or to pay a sum of money by way of commission, fee, reward or otherwise in respect of such a contract or agreement, or of any services in relation thereto or in connection therewith, is void, and no action shall be brought or maintained to recover any such sum of money.

It might be thought that an Act with roots traceable for centuries through English statute law would have surrounding it a well-developed and consistent theme of application by the courts. That is certainly not the case. Judgments can be found going in every direction, usually on somewhat different facts from previous authorities, and it is difficult to identify any comprehensive and consistent principle. On the present facts there is no authority that is binding on this court and, rather than seek to rationalize from everything that has been said on the subject, I prefer to approach

the issues armed only with some simple principles that seem appropriate in the year 1991.

A few further facts are needed before turning to the issues. The respondent visited the casino regularly over a two-year period, arranging credit from time to time, against which he signed counter-cheques at the tables to receive playing chips. Eventually, the outstanding debt was $40,000 and a cheque was written by the respondent in that amount to consolidate earlier cheques. That cheque was not honoured but in the meantime a further $10,000 credit was extended and lost in wagering, and then a repayment of $7,000 was made, leaving a balance owing of $43,000 U.S. This became an obligation under the judgment in New Jersey of $48,805 U.S. including interest.

Proper law of the contract

There is no doubt in my mind that these parties intended to be bound by the laws of New Jersey. The only connection to Ontario was that the cheques were drawn on an Ontario branch of a Canadian bank. On the other hand, the parties were in New Jersey, the purpose of the transaction related to New Jersey, and it would take clear words to overcome the inference that they chose not to be bound by the laws of a jurisdiction which questions the legality of the consideration for the transaction: see in this respect Castel, *Canadian Conflict of Laws*, 2nd ed. (1986), paras. 404 and 406; and *Saxby v. Fulton*, [1909] 2 K.B. 208 (C.A.) at pp. 231-2.

Public policy and enforcement of judgments

Having found that the proper law of the contract was New Jersey, the Ontario *Gaming Act* becomes irrelevant in any consideration of the issues unless it stands as a representation of public policy which prevents enforcement of a properly founded foreign judgment. It is not necessary to determine whether s. 4 applies to an arrangement which is not a wager but an accommodation to permit a wager, or applies to a cheque given after the wagering was ended. Nor is it necessary to decide whether the consideration was illegal under s. 1. These sections do not reach into the New Jersey litigation and the only question is whether there is any basis in the language of the sections to refuse to enforce a judgment, the factual basis for which was credit being extended in association with gaming. The trial judge found that the legislature has declared a public policy saying, in effect: "We do not like gambling and do not like to encourage persons to lend money for that purpose."

There is no doubt that public policy can be a basis for denying recovery under a foreign judgment. At common law a foreign judgment will not be recognized or enforced in Canada if its recognition or, as the case may be, enforcement, would be contrary to public policy: see Castel, *op. cit.*, para. 156, rule 251. However, the mere existence of the *Gaming Act* and its apparent restraints upon gambling contracts is not necessarily a reflection of public policy. The Act does not purport to have extraterritorial effect. The legal issue to be addressed is whether the language of the *Gaming Act*, apart from its direct impact on domestic contracts, is to be taken as an expression by the legislature which bears the mantle of public policy to the point of making it offensive to participate in enforcement of the foreign judgment. It cannot be every statutory statement or prohibition which raises this defence or little would be left of the principle of comity underlying conflict of laws jurisprudence.

In passing I observe that in *Harold Meyers Travel Service v. Magid* (1977), 77 D.L.R. (3d) 32, 16 O.R. (2d) 1, [1977] 1 A.C.W.S. 820, this court gave a very narrow reading to the *Gaming Act* and held that s. 1 had no application to an agreement between the gambler and a third party to repay what the third party paid to the casino. The present case is different because the agreement was made between the gambler and the casino for "reimbursing . . . money knowingly lent or advanced for such gaming", and thus falls squarely within the language of s. 1. However, in treating the Act as penal and giving it a restricted interpretation, the court was certainly not treating the Act as representing a broad statement of provincial policy intended to label as discreditable any conduct associated with gambling anywhere.

The Saskatchewan Court of Appeal accurately summarized the public policy concerns which may stand in the way of enforcement of foreign contracts or judgments. In *Canadian Acceptance Corp. Ltd. v. Matte* (1957), 9 D.L.R. (2d) 304 at p. 312, [1956-60] I.L.R. ¶43,423, 22 W.W.R. 97 (Sask. C.A.), Martin C.J.S. states:

> In Dicey's Conflict of Laws, 6th ed., pp. 19-20, the learned author states: "English courts refuse to give legal effect to transactions, even when governed by foreign law, which our tribunals hold to be immoral. Thus a promise made in consideration of future illicit cohabitation, or an agreement which, though innocent in itself, is intended by the parties to promote an immoral purpose, or a promise obtained through what our courts consider duress or coercion, champertous contracts and contracts in restraint of trade are according to English law based on an immoral consideration. Such a promise or agreement, therefore, even were it valid under the law of the country which governs the contract, will not be enforced by English judges."

> The cases cited in support of this statement are *Robinson v. Bland* (1760), 2 Burr. 1077 at p. 1084, 97 E.R. 717; *Kaufman v. Gerson, supra*, and *Grell v. Levy, supra*. The authorities referred to warrant the conclusion that the "law and policy" of the *lex fori* is limited in its application to cases where the *lex loci contractus* conflicts with what are deemed in England to be essential public or moral interests; in such cases the *lex loci contractus* cannot be enforced under the *lex fori*, although the contract may have been valid under the law of the contract.

To emphasize the care which courts must exercise in relying upon public policy as a ground for refusing enforcement, I refer to the speech of Lord Atkin in *Fender v. St. John-Mildmay*, [1938] A.C. 1 (H.L.) at pp. 11-12, where, after quoting from earlier authorities as to the dangers of judges expounding public policy he says:

> On the other hand, it fortifies the serious warning illustrated by the passages cited above that the doctrine should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds. I think that this should be regarded as the true guide. In popular language, following the wise aphorism of Sir George Jessel cited above, the contract should be given the benefit of the doubt.

The common ground of all expressed reasons for imposing the doctrine of public policy is essential morality. This must be more than the morality of some persons and must run through the fabric of society to the extent that it is not consonant with our system of justice and general moral outlook to countenance the conduct, no matter how legal it may have been where it occurred. If that be so, the *Gaming Act* must be viewed in the context of the community's sense of morality. An important element of that sense of morality is what the community has consensually determined is not to be tolerated, as found in the *Criminal Code*. The *Gaming Act* may reflect that general morality or may, upon analysis, appear to have a very narrow focus related to recovery of debts with no present relevance as a moral statement.

If this case concerned enforcement of a judgment based upon a contract relating to the corruption of children, our instinctive moral repugnance would find confirmation in s. 172 of the *Criminal Code*, declaring such corruption a criminal offence. It is not so easy with gaming laws because of the history of their development and the unique form they take in the *Criminal Code*. In an article entitled "Recent Amendments to Canadian Lottery and Gaming Laws" (1988), 26 Osgoode Hall L.J. 19, Judith A. Osborne and Colin S. Campbell describe the background to our present legislation. It is founded in English statute law rather than the common law, and one of the earliest of these is a statute of 1338 [12 Richard II, c. 6] prohibiting all games except archery. It is said that this

prohibition was occasioned by the fear of Richard II that his skilled archers were losing their talents by spending time playing games of dice. This general prohibition, in revised form, was incorporated in the *Criminal Code* of 1892.

In 1956, a joint committee of both Canadian Houses of Parliament recommended new gaming laws emphasizing supervision and control by workable laws in order to avoid abuses such as had been experienced under alcohol prohibition laws. In other words, the prohibitions against gambling were seen as not being consonant with the public perception of morality. In 1969, the *Criminal Code* was amended to permit the federal or the provincial government to conduct lottery schemes (encompassing gaming enterprises generally): see the present s. 207(1)(*a*). Then, in what the authors characterize as a political contract, the federal government divested itself of the power in 1985, leaving the provinces as the sole licensors. The authors summarize at pp. 23-4:

> For present purposes, it is sufficient to say that since 1969, the gaming provisions of the *Code* have been unique. Criminal laws generally conform to a pattern of prohibition plus sanction, with legally recognized excuses and justifications. With gaming, however, while there is a prohibition plus a sanction, these do not apply to a broad range of provincially regulated exemptions.

The broad range of power to license and control vested in the Lieutenant-Governor in Council by ss. 204 and 207 of the *Criminal Code* is undoubted. No question of constitutionality arises in the present case (and, in any event, was resolved in *R. v. Furtney* (S.C.C.), released September 26, 1991 [reported 66 C.C.C. (3d) 498, 8 C.R. (4th) 121, 129 N.R. 241]) and the only question is how this development of the law and its application reflect social morality.

Returning to the example of corrupting children, it is unimaginable to consider an amendment to make this an offence only if not licensed by a provincial body or conducted at an annual fair, but that very fact makes the point that the morality of gambling as a part of our social fibre is very different from other offences in the *Criminal Code*. In 1991 $10 bets were made at blackjack tables at the Canadian National Exhibition. Those participating cannot be generally viewed as engaged in an immoral venture, although some persons may so view it. If money is loaned by a friend to enable another to play the games, which is inevitable in any gaming situation, is that to be considered immoral? The provincial legislature may bar recovery of the loan, but the statute doing so can hardly be interpreted as establishing a moral policy when the same government licenses the opportunity.

In my view, activities occurring in an enterprise licensed by the State of New Jersey cannot carry a different colour of morality. The federal Parliament would be inconsistent in decreeing that what is licensed by Ontario or under the auspices of an annual exhibition has moral integrity, while what is licensed and regulated by New Jersey does not.

It is, therefore, my conclusion that an Ontario court cannot say that a judgment founded upon a contract related to gambling is tainted by immorality and should be refused enforcement.

I find comforting support for this approach to the issue in a judgment of the New York Court of Appeals, *Intercontinental Hotels Corp. (Puerto Rico) v. Golden*, 203 N.E. 2d 210 (1964), and particularly in the observations of Burke J. at pp. 212-3:

> [3,4] Public policy is not determinable by mere reference to the laws of the forum alone. Strong public policy is found in prevailing social and moral attitudes of the community. In this sophisticated season the enforcement of the rights of the plaintiff in view of the weight of authority would not be considered repugnant to the "public policy of this State". It seems to us that, if we are to apply the strong public policy test to the enforcement of the plaintiff's rights under the gambling laws of the Commonwealth of Puerto Rico, we should measure them by the prevailing social and moral attitudes of the community which is reflected not only in the decisions of our courts in the Victorian era but sharply illustrated in the changing attitudes of the People of the State of New York. The legalization of pari-mutuel betting and the operation of bingo games, as well as a strong movement for legalized off-track betting, indicate that the New York public does not consider authorized gambling a violation of "some prevalent conception of good morals [or], some deep-rooted tradition of the common weal" (Loucks v. Standard Oil Co., supra, p. 111, 120 N.E. p. 202.)
>
> The trend in New York State demonstrates an acceptance of *licensed* gambling transactions as a morally acceptable activity, not objectionable under the prevailing standards of lawful and approved social conduct in a community. Our newspapers quote the odds on horse races, football games, basketball games and print the names of the winners of the Irish Sweepstakes and the New Hampshire lottery. Informed public sentiment in New York is only against unlicensed gambling, which is unsupervised, unregulated by law and which affords no protection to customers and no assurance of fairness or honesty in the operation of the gambling devices.

Accordingly, I would allow the appeal with costs, set aside the trial judgment and in its place award judgment to the plaintiff in an amount in Canadian currency equivalent to $48,920 U.S. currency as of the date of the trial judgment, pursuant to the terms of s. 131 of the *Courts of Justice Act, 1984*, S.O. 1984, c. 11, plus trial costs. Section 139(3) of that Act limits interest on the judgment to that provided for in the foreign judgment. While this section addresses itself to postjudgment interest it seems sensible that where, as here, the judgment of the foreign court makes no provision for

interest there should be none, before or after judgment. It may be that there is provision in New Jersey law apart from the judgment for postjudgment interest. If so, the court may be addressed in writing.

ARBOUR J.A. (dissenting): I have had the advantage of reading the reasons of my colleague Mr. Justice Carthy and, like him, I have come to the conclusion that this case rests on the question of whether it is against public policy in Ontario to enforce a New Jersey judgment granted to the appellant for moneys lent to the respondent for the purpose of enabling him to gamble at the appellant's casino in Atlantic City. With respect, however, I have reached a different conclusion on that issue.

The facts were substantially admitted by the respondent and were summarized as follows by the trial judge [59 D.L.R. (4th) 760 at p. 762, 43 B.L.R. 83, 68 O.R. (2d) 753]:

> The plaintiff is an American corporation operating a casino in Atlantic City which is known as "Caesars". The defendant, a Toronto businessman, went to that casino on numerous occasions on "junkets" over a two-year period in 1981 and 1982. The defendant applied to the plaintiff for credit which was extended to him. The arrangements permitted the defendant to gamble at the casino and to sign counter cheques or "markers". The defendant gambled and lost heavily. He paid most of these losses.
>
> This action is for the sum of $43,000 which is admittedly unpaid. The New Jersey judgment in the amount of $48,805 is for that amount, but includes interest.
>
> On April 24, 1982, the defendant gave the plaintiff a cheque for $40,000 and, in return, received some of his counter cheques and markers totalling that amount. The plaintiff agreed to hold the cheque for some time, probably 90 days, to allow the defendant to make arrangements to see the cheque would be honoured. The cheque was eventually deposited on July 24 or 25, 1982. Between April 24th and that time the defendant applied for additional credit on two occasions and was refused. When the defendant's cheque was deposited, the defendant again asked for credit and an additional $10,000 credit was given. He used markers or counter cheques again and lost that $10,000 by the end of July. The total amount owing then was $50,000. The defendant made a $7,000 payment reducing the debt to the amount now claimed.

The appellant commenced an action in Ontario for non-payment of the $40,000 cheque which had been drawn on an Ontario branch of a Canadian bank and, in the alternative, for satisfaction of a judgment obtained in a New Jersey court on the basis of that debt. The action was dismissed.

The defence raised was that both the cheque and the judgment were based on a gambling debt and were therefore unrecoverable by virtue of the *Gaming Act*, R.S.O. 1980, c. 183, as amended. The relevant sections of that Act are as follows:

1. Every agreement, note, bill, bond, confession of judgment, *cognovit actionem*, warrant of attorney to confess judgment, mortgage or other security, or conveyance, the consideration for which, or any part of it, is money or other valuable thing won by gaming, or by playing at cards, dice, tables, tennis, bowls or other game, or by betting on the sides or hands of the players, or for reimbursing or repaying any money knowingly lent or advanced for such gaming or betting, or lent or advanced at the time and place of the game or play to a person so gaming, playing, or betting, or who, during the game or play, so plays, games or bets, shall be deemed to have been made, drawn, accepted, given or executed for an illegal consideration.

. . . . . .

4. Every contract or agreement by way of gaming or wagering is void, and no suit shall be brought or maintained for recovering any sum of money or valuable thing alleged to be won upon a wager, or that has been deposited in the hands of any person to abide the event on which a wager has been made, but this section does not apply to a subscription or contribution, or agreement to subscribe or contribute for or towards any plate, prize, or sum of money to be awarded to the winner of any lawful game, sport, pastime or exercise.

5. Any promise, express or implied, to pay any person a sum of money paid by him under or in respect of a contract or agreement rendered void by section 4, or to pay a sum of money by way of commission, fee, reward or otherwise in respect of such a contract or agreement, or of any services in relation thereto or in connection therewith, is void, and no action shall be brought or maintained to recover any such sum of money.

The history of the provisions of the *Gaming Act*, which embodies some of the content of various English statutes, is conveniently traced in "An Annotation on Gaming and Betting Debts in Ontario" (1922), 68 D.L.R. 237, which was cited with approval by this court in *Harold Meyers Travel Service v. Magid* (1977), 77 D.L.R. (3d) 32, 16 O.R. (2d) 1, [1977] 1 A.C.W.S. 820, *per* Brooke J.A. I note at the outset that the author of that annotation remarked that the Ontario *Gaming Act* was evidently intended to deal with gaming and betting debts without encroaching upon the exclusive federal legislative power over criminal law and bills of exchange.

Section 1 of the *Gaming Act* is distinctly different than its English ancestor in that the Ontario provision deems both the agreement and the security given for repaying money lent for gambling to have been entered into for an illegal consideration: *Harold Meyers Travel Service*, *supra*, at p. 33. In contrast, the Statute of Anne of 1710, the *Gaming Act* (U.K.), c. 14, drafted in somewhat similar language, contained the important distinction that it purported to void only the security, not the agreement itself for the lending or repaying of money lent for gambling. Much of the English case law is concerned with the distinction: *Moulis v. Owen*, [1907] 1 K.B. 746 (C.A.); *Saxby v. Fulton*, [1909] 2 K.B. 208 (C.A.) *per* Buckley L.J. at pp. 228-9; *Société Anonyme des*

Grands Etablissements de Touquet Paris-Plage v. Baumgart (1927), 96 L.J.K.B. 789.

Though the distinction between the agreement and the security is not maintained under the Ontario statute, the conflict of law principle which follows that distinction is equally applicable in both jurisdictions. The validity of a negotiable instrument payable in England but issued abroad for payment or security for a gambling debt incurred abroad is governed by English law and thus unenforceable in England: *Moulis v. Owen*, *supra*, Dicey and Morris, *The Conflict of Laws*, 11th ed. (1987), vol. 2, at pp. 1347-8). In so far as the action in this case is based on the cheque, which is drawn on a Canadian bank and payable in Ontario, I see no reason to depart from the English authorities. I would hold that the *Gaming Act* applies and that recovery is barred by the provisions of s. 1 of the Act: Castel, *Canadian Conflict of Laws*, 2nd ed. (1986), at p. 557.

However, the action on the New Jersey judgment, or on the debt itself, is governed by the law of the contract and thus escapes the provisions of the *Gaming Act*: Dicey and Morris, *loc. cit.*; Castel, *op. cit.*, at pp. 532-5. The *Gaming Act* does not have extraterritorial application and therefore does not stand in the way of recovery in Ontario for a debt validly incurred under New Jersey law.

This brings me to the central issue in this case of whether the enforcement of the New Jersey judgment is against public policy in Ontario. Even if legally entered into in a foreign jurisdiction, contracts will not be enforced by Ontario courts if they are contrary to public policy or morality: Castel, *op. cit.*, p. 556. Of course, the burden is on the respondent resisting the application of the foreign law to show that its application is contrary to Ontario public policy. Generally, the doctrine of public policy should be applied sparingly and with caution: *Canadian Acceptance Corp. Ltd. v. Matte* (1957), 9 D.L.R. (2d) 304, [1956-60] I.L.R. ¶43,423, 22 W.W.R. 97 (Sask. C.A.); *Block Bros. Realty Ltd. v. Mollard* (1981), 122 D.L.R. (3d) 323, [1981] 4 W.W.R. 65, 27 B.C.L.R. 17 (C.A.). Craig J.A. remarked in that case that defining public policy is a perplexing task which involves many variables and subjective factors. I agree that contracts valid under foreign law, and even more so contracts valid in another Canadian jurisdiction, should be enforced unless it would be contrary to our conception of essential justice or morality to do so, or unless enforcement would be an affront to the local social order. This is embodied in the concept of public policy.

This concept of public interest or public policy should not, however, be construed solely in moral terms. There has been a

legitimate difference of opinion expressed in recent years, as to whether contemporary Canadian moral standards are so offended by gambling that it would be against public policy to enforce a foreign judgment for a gambling debt. Hardinge Co. Ct. J. in *Desert Palace, Inc. v. Zigdon*, a judgment of the County Court of Vancouver, B.C., delivered April 6, 1987 [summarized 5 A.C.W.S. (3d) 210], expressed the view shared by my colleague Justice Carthy that contemporary morality accommodates gambling. Quesnel J. expressed the same view in *Resorts International Hotel Inc. v. Auerbach*, an unreported judgment of the Quebec Provincial Court released September 23, 1986. This decision was upheld by the Quebec Court of Appeal on December 10, 1991 [summarized 30 A.C.W.S. (3d) 501]. Madam Justice Mailhot considered whether the requirements of public policy constitute a bar to the procedure for exemplification of foreign judgment in view of art. 1927 of the *Civil Code* of Quebec which, not unlike the Ontario *Gaming Act*, denies a right of action for gaming or betting debts. She and Rothman J.A. concluded that it does not.

The opposite conclusion has been reached by the trial judge in this case. Although not specifically approached in moral terms, in three other Ontario decisions courts have refused to enforce similar foreign gambling-based contracts on grounds of public policy: *Boardwalk Regency Corp. v. Newman* (1987), 15 C.P.C. (2d) 102 (Ont. Dist. Ct.); *M & R Investment Co. v. Marsden* (1987), 63 O.R. (2d) 509, 8 A.C.W.S. (3d) 261 (Dist. Ct.); *Boardwalk Regency Corp. v. Portelance*, an unreported decision of the District Court of Ontario, released April 12, 1988.

It is helpful, in my view, to examine the question of public policy in terms somewhat broader than the moral acceptability of various forms of gambling practices. In 1988, a symposium on lotteries and gambling was held at Simon Fraser University, the proceedings of which have been published in the form of a report entitled "Gambling in Canada: Golden Goose or Trojan Horse?" (Campbell and Lowman, eds.). In the introduction, the editors remark that there has been little public debate in Canada over gambling, in contrast to the detailed public attention given to "vices" such as prostitution, pornography and the non-medical use of drugs, and express their surprise over this state of affairs in view of what they term the morally controversial nature of the subject-matter.

In the wake of an expansion of legal gambling, still relatively limited in Canada, other countries, such as Great Britain, Australia and the United States, have undertaken some review of the social costs arising from increased accessibility to legal gambling. These include pathological and compulsive gambling, particularly among

minorities, women and the relatively poor (Campbell and Lowman, eds., p. xx), as well as organized crime and the corruption of public officials (Eadington, "Issues and Trends in World Gambling", Campbell and Lowman, eds., *op. cit.*, p. 22).

It is helpful to draw a second distinction between government-run and charitable gambling allowed under the *Criminal Code*, and for-profit commercial gambling of the sort at issue in this case. The world trends that have produced an expansion of legalized gambling have not translated in Canada into an acceptance of commercial or private sector gambling, but merely into a legalization of regulated gambling activities for charitable or religious fund-raising purposes and as a means for governments to generate funds for cultural, recreational or sporting activities. This, in itself, may explain the current moral tolerance towards activities that are linked historically and today in the *Criminal Code* to morality concerns, such as keeping a common gaming house and keeping a common bawdy house.

In "Current Law Enforcement Issues in Canadian Gambling" Campbell and Lowman, eds., *op. cit.*, p. 178, Margaret E. Beare writes:

> Moral arguments about the nature of gambling, ethical arguments that question the propriety of government involvement, and criminological arguments about the relationship between gambling and criminal activities, all tend to give way to the realization that significant funds are being raised for all sorts of "good" causes via this voluntary (if not necessarily victimless) activity.

I cannot accept the argument that the involvement of government in gambling or, more to the point, government's virtual monopoly over legal organized gambling in Canada, is conclusive as to the morality of gambling generally and thus sufficient reason to decline to invoke public policy as a bar to enforcement of foreign gambling debts. In "The Ethics of Gambling", Campbell and Lowman, eds., *op. cit.*, p. 275, Charles Singer addresses ethical issues arising in the context of commercial gambling. In reference to the facts of this case, I need only mention what Singer refers to as "the ethics of excess" and "the ethics of inducement". The respondent's evidence in this case is that during 1981-82 he attended the appellant's casino in Atlantic City about 100 times and lost about half a million dollars. That money came from his business in Toronto. The appellant was extending credit to the respondent as part of its operation of the casino, as a way of doing business. These facts test the morality of commercial gambling and it is on these facts that we are asked to deny recovery to the appellant on grounds of public policy.

In my opinion, it is unnecessary to resolve the morality debate since, in Canadian terms, the issue is not so much whether the gambling operations conducted by the appellant are immoral but whether they are criminal. If conducted in Ontario, the appellant's business would constitute operating a common gaming house and would therefore be prohibited under ss. 197 and 201(1) of the *Criminal Code*. The appellant is seeking to recover in the Ontario courts money advanced to the respondent for the purpose of engaging in an activity which, if conducted in Ontario, would be criminal. I have no difficulty in concluding that it is against public policy in this jurisdiction to enforce a foreign judgment which allows for the recovery of a debt incurred in the context of an activity which, although legal where it took place, is criminal here.

Ultimately, I find little assistance, in determining the public policy issue, in discussing the morality of an activity that is proscribed under criminal sanction. Absent a challenge to Parliament's legislative competence, I assume that s. 201(1) of the *Criminal Code* was validly enacted by Parliament by virtue of its criminal law power under s. 91(27) of the *Constitution Act, 1867*. In order to have been validly enacted under the criminal law power, the prohibition against keeping a common gaming house must be viewed as serving a valid public purpose, such as the protection of public peace, order, security or morality, or the proscription of undesirable commercial practices, any of which may serve as a foundation for the federal exercise of the criminal law power: Hogg, *Constitutional Law of Canada*, 2nd ed. (1985), at pp. 399-402. The provisions of the *Gaming Act* must be read in that context and the English authorities must be received with caution for this additional reason.

Many of the cases to which we have been referred stress the fact that betting or gaming was not illegal at common law, or that the activity which took place in a foreign jurisdiction was not illegal under English law, but was only denied a remedy. In *Saxby v. Fulton*, [1909] 2 K.B. 208 (C.A.), the plaintiff was a friend of one Brook, since deceased, and was suing Brook's executrix to recover money that he had advanced to Brook for the purpose of gambling at the roulette tables of Monte Carlo. The Court of Appeal found that the debt was recoverable in England. The words of Buckley L.J. [at p. 227] stand in sharp contrast to the present case:

> Two propositions lie at the root of this case. The first is that the contract of loan was made at Monte Carlo and that the money was advanced for a purpose which at that place is legal. The second, which is of cardinal importance, is that by the common law of England gaming and wagering are not per se illegal. There are many statutes (some of them were recently

> considered by this Court in *Hyams v. Stuart King*, [1908] 2 K.B. 696, which make certain gaming contracts and securities given in connection with gaming void and render the consideration for the contract illegal, but there is no principle of common law and no statute which makes betting or wagering in itself illegal. Coming then to the question of public policy, I cannot see that it is contrary to public policy for the English Courts to recognize a debt contracted for the purpose of wagering abroad in a place where such wagering was legal.

In my opinion, it is incorrect to suggest that since the appellant was carrying on a *licensed* gambling operation in New Jersey, a similar *licensed* operation on his part in Ontario would be neither illegal nor criminal. The fact is that under existing Canadian criminal law, the operations conducted by the appellant in New Jersey could not be licensed in Ontario and, therefore, if carried on here, would not escape criminal sanction. Section 207 of the *Criminal Code* exhaustively governs the circumstances where provincial licensing is available so as to exempt from criminal liability. In substance, s. 207 provides that it is lawful:

- for the government of a province to conduct and manage a lottery scheme;
- for a charitable or religious organization, pursuant to a licence issued by the government of a province, to conduct and manage a lottery scheme;
- for the board of an annual fair or exhibition, previously designated for such purpose, to obtain a licence to do so, and
- for any person, pursuant to a licence issued by the province, to conduct and manage a lottery if the value of each prize does not exceed $500 and the ticket does not exceed $2.

There is no suggestion in this case that the appellant could lawfully operate its casino in Ontario pursuant to the licensing scheme in place to exempt from criminal liability. In that sense, it is incorrect to suggest that since it is only unlicensed gambling that is criminal in Canada, and since the appellant was conducting a licensed operation in New Jersey, its conduct should not be viewed as offensive to public policy. The proper characterization of the appellant's conduct is that it was engaged in an activity that it could not carry out lawfully in Ontario. There is no scheme available in Ontario for the licensing of commercial gambling of the type practised by the appellant in this case.

The *Gaming Act* declares void a contract or agreement entered into in Ontario by way of gaming or wagering; it also prohibits recovery of money won upon a wager (s. 4). Yet, betting or gaming is not, in itself, illegal or criminal in Ontario. It would not be sound public policy, in my opinion, to permit recovery of a debt incurred

outside Ontario under circumstances that would be criminal under the same circumstances in Ontario, and yet to deny recovery for gambling debts legally incurred here. To decide otherwise, in my opinion, is to force Ontario public policy, as expressed in part in the *Criminal Code* of Canada, to yield to foreign law.

For these reasons, I would dismiss the appeal.

SUPPLEMENTARY REASONS

March 3, 1992.

CARTHY J.A.:—In reasons released January 10, 1992, I disallowed prejudgment and postjudgment interest on an Ontario judgment based upon an earlier New Jersey judgment dated November 26, 1985, because the New Jersey judgment made no provision for interest. The parties were invited to make further submissions if New Jersey law provided for such interest apart from the provisions of the judgment. Such proves to be the case, as evidenced by detailed submissions filed by the appellant. The respondent indicates that he has no submissions in response either to the entitlement or the calculated amounts and I would therefore add to the judgment to be issued pursuant to the earlier reasons a provision that the Canadian dollar equivalent at the time of the Ontario judgment of $48,920 U.S. is $59,550.32 Canadian and that the judgment should award a total of $28,535.41 for interest from November 26, 1985 to January 10, 1992, and at the rate of 7.5% per annum on the amount of the judgment thereafter until payment. I appreciate that the applicable rate in New Jersey may change in 1993 but in the interest of finality I would hold to the rate of 7.5% until payment, whenever.

Appeal allowed.

Re Adler et al. and The Queen in right of Ontario et al.; Metropolitan Toronto School Board et al., Moving Parties

[Indexed as: Adler v. Ontario]

Ontario Court (General Division), Anderson J. February 4, 1992.

Civil procedure — Parties — Intervention — Parents bringing application for declaration that failure to fund Jewish day school education in Ontario violates Canadian Charter of Rights and Freedoms — Various groups bringing motion for leave to intervene in proceedings — Considerations in determining intervener status — Rules of Civil Procedure, O. Reg. 560/84, rules 13.01, 13.02.

Parents of children attending Jewish day schools brought an application for a declaration that failure to fund such education in Ontario violates the *Canadian*

TAB 10

Her Majesty The Queen in Right of the Province of British Columbia as represented by the Attorney General of British Columbia *Appellant*

v.

Ripudaman Singh Malik, Raminder Malik and Jaspreet Singh Malik *Respondents*

INDEXED AS: BRITISH COLUMBIA (ATTORNEY GENERAL) *v.* MALIK

2011 SCC 18

File No.: 33266.

2010: October 15; 2011: April 21.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Civil procedure — Anton Piller order — Evidence — Admissibility — Crown bringing action against respondents to recover monies advanced to fund defence costs — Crown obtaining ex parte Anton Piller order — Chambers judge relying on facts found against respondents in prior judicial proceedings — Whether Superior Court judge hearing ex parte application for interlocutory order may admit findings and conclusions of prior judicial decision into evidence — Whether prior decision admissible only where respondents precluded by issue estoppel or abuse of process from relitigating the facts adduced — Whether sufficient admissible evidence adduced to justify order.

The Province seeks reimbursement of more than $5.2 million it paid to fund Mr. Malik's defence in the Air India bombing trial in which Mr. Malik and a co-accused were acquitted. The Province's action is based on claims of debt, breach of contract, conspiracy, and fraud. In granting an *Anton Piller* order authorizing the search of the business and residential properties of the Malik family for evidence that they helped conceal Mr. Malik's assets, the chambers judge relied in part on facts found against the Malik family in prior judicial proceedings brought by Mr. Malik to obtain non-repayable

Sa Majesté la Reine du chef de la province de la Colombie-Britannique représentée par le procureur général de la Colombie-Britannique *Appelante*

c.

Ripudaman Singh Malik, Raminder Malik et Jaspreet Singh Malik *Intimés*

RÉPERTORIÉ : COLOMBIE-BRITANNIQUE (PROCUREUR GÉNÉRAL) *c.* MALIK

2011 CSC 18

N[o] du greffe : 33266.

2010 : 15 octobre; 2011 : 21 avril.

Présents : La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein et Cromwell.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Procédure civile — Ordonnance Anton Piller — Preuve — Admissibilité — Action intentée par la province contre les intimés en vue d'obtenir le remboursement des fonds versés pour financer leur défense — Ordonnance Anton Piller obtenue ex parte par la province — Juge siégeant en cabinet se fondant sur des faits défavorables aux intimés constatés dans le cadre de procédures judiciaires antérieures — Le juge de la Cour supérieure saisi d'une demande d'ordonnance interlocutoire présentée ex parte peut-il recevoir en preuve les conclusions d'une décision judiciaire antérieure? — La décision antérieure n'est-elle recevable que si les intimés ne pouvaient, en raison de la préclusion découlant d'une question déjà tranchée ou de l'abus de procédure, débattre de nouveau les faits présentés? — La preuve recevable était-elle suffisante pour justifier l'ordonnance?

La province réclame le remboursement d'une somme de plus de 5,2 millions de dollars versée pour financer la défense de M. Malik dans le procès relatif à l'attentat d'Air India, à l'issue duquel M. Malik et un coaccusé ont été acquittés. L'action de la province repose sur des allégations de dette, de violation de contrat, de complot et de fraude. Pour accorder l'ordonnance *Anton Piller* autorisant la perquisition des locaux commerciaux et résidentiels de la famille Malik à la recherche d'éléments de preuve indiquant qu'elle avait aidé à dissimuler les actifs de M. Malik, le juge siégeant en cabinet s'est fondé

provincial funding for his defence (the "*Rowbotham* application"). The British Columbia Court of Appeal set aside the *Anton Piller* order because in its view the *Rowbotham* findings and conclusion were, for the most part, inadmissible even on an interlocutory application. In the absence of the *Rowbotham* facts there was insufficient admissible evidence to justify the order.

Held: The appeal should be allowed.

The requirements for an *Anton Piller* order were set out by this Court in *Celanese Canada Inc. v. Murray Demolition Corp.* to include (i) a strong *prima facie* case; (ii) serious damage to the plaintiff as a result of the defendant's alleged misconduct, potential or actual; (iii) convincing evidence that the defendant has in its possession incriminating documents or things; and (iv) a real possibility that the defendant may destroy such material before the discovery process can do its work. This stringent test was met in this case.

In December 2000, Mr. Malik applied for bail. It was in his interest at that time to show that he was a man of substance. He filed evidence that he and his wife had a net worth of over $11 million. Less than a year later, claiming to be without resources, Mr. Malik sought non-repayable government funding on *Rowbotham* principles. The application was rejected by the B.C. Supreme Court on the basis that "Mr. Malik remains a multimillionaire despite leading evidence to suggest his net worth is zero". Further, it was held, "[t]he assets of Mr. Malik and his family are so interconnected as to be fused" and "Mr. Malik was, and still remains the patriarch of the Malik family which operated as a single financial entity. Mr. Malik jointly owns with his wife two businesses that gross millions each year". In summary, the *Rowbotham* judge concluded, "[t]he evidence shows that Mr. Malik and his family have tried to arrange his financial and business affairs to minimize the value of his estate, to render him insolvent, and to therefore limit the amount of his contribution [to the costs of his defence], or to eliminate that obligation entirely". The question is whether these findings and conclusions were admissible in the interlocutory proceedings.

en partie sur des faits défavorables à la famille Malik constatés dans le cadre de procédures judiciaires antérieures engagées par M. Malik en vue d'obtenir de la province un financement non remboursable lui permettant d'assurer sa défense (la « demande *Rowbotham* »). La Cour d'appel de la Colombie-Britannique a annulé l'ordonnance *Anton Piller* parce qu'à son avis, la plupart des conclusions sur la demande *Rowbotham* étaient inadmissibles, même dans le cadre d'une demande d'ordonnance interlocutoire. En l'absence des faits *Rowbotham*, les éléments de preuve recevables n'étaient pas suffisants pour justifier l'ordonnance.

Arrêt : Le pourvoi est accueilli.

La Cour a énoncé les conditions suivantes pour l'obtention d'une ordonnance *Anton Piller* dans *Celanese Canada Inc. c. Murray Demolition Corp.* : (i) une preuve *prima facie* solide; (ii) le préjudice causé ou risquant d'être causé au demandeur par l'inconduite présumée du défendeur est grave; (iii) une preuve convaincante que le défendeur a en sa possession des documents ou des objets incriminants; et (iv) il est réellement possible que le défendeur détruise ces pièces avant que le processus de communication préalable puisse être amorcé. Ce critère exigeant a été satisfait en l'espèce.

En décembre 2000, M. Malik a demandé sa mise en liberté sous caution. À l'époque, il avait intérêt à montrer qu'il était un homme fortuné. Il a déposé des éléments de preuve selon lesquels la valeur nette de ses avoirs et de ceux de son épouse dépassait les 11 millions de dollars. Moins d'un an plus tard, affirmant être sans ressources, M. Malik a demandé un financement gouvernemental non remboursable en se fondant sur les principes établis dans *Rowbotham*. La Cour suprême de la Colombie-Britannique a rejeté cette demande au motif que « M. Malik est toujours un multimillionnaire, même s'il a tenté de prouver que la valeur nette de ses avoirs est égale à zéro ». La cour a aussi conclu que « [l]es actifs de M. Malik et de sa famille sont liés les uns aux autres au point d'être fusionnés » et que « M. Malik était et est toujours le patriarche de la famille Malik, qui fonctionnait comme une seule et même entité financière. M. Malik possède conjointement avec son épouse deux entreprises qui génèrent chaque année des millions en recette brutes ». En résumé, le juge saisi de la demande *Rowbotham* a conclu que « [l]a preuve montre que M. Malik et sa famille ont essayé d'organiser ses affaires financières et commerciales de façon à minimiser la valeur de son patrimoine, à le rendre lui-même insolvable et à limiter ainsi le montant de sa contribution [au financement de sa défense], ou à éliminer totalement cette obligation ». Il s'agit de savoir si ces conclusions étaient admissibles dans les procédures interlocutoires.

An *Anton Piller* order is, in effect, a private search warrant and should only be granted on clear and convincing evidence. Such an order is available in British Columbia under the inherent jurisdiction of the Superior court. The Province comes before the Court as an ordinary civil litigant and its application for an *Anton Piller* order should be judged by the same rules as any other litigant. The Province enjoys no special Crown privilege or priority.

A judgment of a prior civil or criminal case is admissible, if considered relevant, as evidence in subsequent interlocutory proceedings as proof of its findings and conclusions, provided the parties are the same or were themselves participants in the prior proceedings on similar or related issues. The weight to be given to the earlier decision will rest not only on the identity of the participants, the similarity of the issues, the nature of the earlier proceedings and the opportunity given to the prejudiced party to contest it but on all the varying circumstances of the particular case. The issue of admissibility is separate and distinct from whether, once admitted, the prior decision is conclusive and binding. The prejudiced party or parties will have an opportunity before the reviewing judge to lead evidence to contradict the earlier findings or lessen their weight unless precluded from doing so by the doctrines of *res judicata*, issue estoppels or abuse of process.

There is a strong public interest in the avoidance of an unnecessary multiplicity of proceedings. Duplicative litigation creates the potential risk of inconsistent results. Inefficient procedures not only increase costs unnecessarily, but result in added delay, and can operate as an avoidable barrier to effective justice. The view that earlier judicial pronouncements should be inadmissible on the basis of concerns about hearsay and opinion evidence — the so-called rule in *Hollington v. F. Hewthorn & Co.* — is based on indefensible technicalities and its extension to interlocutory proceedings in a civil case is not consistent with more modern concerns about the avoidance of a needless multiplicity of proceedings.

In this case, the *Rowbotham* judgment was properly put before the chambers judge keeping in mind, of course, that it was for him, taking into account the whole of the interlocutory record, to make the factual and legal determinations necessary to issue or to

L'ordonnance *Anton Piller* est en fait un mandat de perquisition privé qui devrait être accordé seulement si la preuve est claire et convaincante. En Colombie-Britannique, la Cour supérieure a compétence inhérente pour accorder une ordonnance de ce genre. La province se présente devant le tribunal en tant que plaideur civil ordinaire et sa demande visant l'obtention d'une ordonnance *Anton Piller* doit être jugée selon les mêmes règles que pour tout autre plaideur. La province ne jouit d'aucun privilège ni d'aucune priorité de la Couronne.

Un jugement rendu dans une affaire civile ou criminelle antérieure est — si le tribunal le juge pertinent — admissible en preuve dans des procédures interlocutoires subséquentes et fait foi de ses conclusions, dès lors que les parties sont les mêmes ou qu'elles ont pris part à une instance antérieure concernant les mêmes questions ou des questions connexes. Le poids devant être attribué à la décision antérieure tiendra non seulement à l'identité des participants, à la similitude des questions en litige, à la nature des procédures antérieures et à la possibilité donnée à la partie lésée de la contester mais aussi à toutes les circonstances différentes de chaque cas. La question de l'admissibilité est séparée et distincte de celle de savoir si, une fois admise, la décision antérieure est concluante et contraignante. La partie ou les parties subissant un préjudice auront la possibilité de présenter des éléments de preuve devant le juge siégeant en révision en vue de contredire les conclusions antérieures ou d'en atténuer la portée, à moins que les règles relatives à la *res judicata*, à la préclusion découlant d'une question déjà tranchée ou à l'abus de procédure les en empêchent.

Il est clairement dans l'intérêt public d'éviter une multiplicité inutile des instances. Les instances faisant double emploi risquent d'entraîner des résultats contradictoires. Des procédures inefficaces font non seulement augmenter inutilement les coûts, mais elles ont pour effet de retarder les choses et peuvent constituer un obstacle inévitable à une justice efficace. La thèse voulant que les décisions judiciaires antérieures devraient être inadmissibles en raison des craintes relatives au ouï-dire et à la preuve d'opinion — la règle dite de l'arrêt *Hollington c. F. Hewthorn & Co.* — repose sur des formalités indéfendables et l'extension de cette règle aux procédures interlocutoires en matière civile ne cadre pas avec le souci plus contemporain d'éviter une multiplicité inutile des procédures.

En l'espèce, le juge siégeant en cabinet a été saisi à juste titre de la décision sur la demande *Rowbotham* étant donné, bien entendu, qu'il lui appartenait, en prenant en considération l'ensemble du dossier de la demande interlocutoire, de statuer sur les questions

decline to issue the orders sought by the Province. It was for him to determine, at the interlocutory stage, what weight to place on the *Rowbotham* findings and conclusions.

The earlier proceeding had been initiated by Mr. Malik and involved the other members of his family. The same series of family transactions, and allegations of asset manipulation, had thus earlier been examined by a judge of the Supreme Court of British Columbia. The issue before the chambers judge was (the Province claims) whether Mr. Malik was without funds to pay his debt to the Province as a result of asset manipulation and fraudulent dealings within the Malik family as initially explored in the *Rowbotham* application.

The court's earlier decision was a judicial pronouncement after the contending parties had been heard. It had substantial effect on their legal rights. It would have been wasteful of litigation resources and potentially productive of mischief and inconsistent findings to have required the chambers judge to require the Province to litigate the *Rowbotham* facts *de novo* at the *ex parte* stage of an interlocutory motion.

On the interlocutory record considered admissible, the *Anton Piller* order was properly granted. It is evident that the chambers judge made his own decision on the matters he was required to determine in relation to the *Anton Piller* application and did not abdicate his judgment to the *Rowbotham* judge. It was open to the chambers judge on the whole of the interlocutory record to issue the *Anton Piller* order *ex parte*. On the facts of this case, the four "essential conditions" that must be met to justify an *Anton Piller* order were satisfied. First, it was open to the chambers judge to conclude that the Province had made out a strong *prima facie* case to establish Mr. Malik's debt and the Malik family's conspiracy to defraud the Province and to assist Mr. Malik to avoid his obligations under the Defence Counsel Agreement. Secondly, a claim of over $5.2 million against a debtor who, *prima facie*, exhibits a continuing history of evading payment by fraud and conspiracy with other members of his family to cover their financial tracks is very serious. Thirdly, it was open to the chambers judge to conclude on the *ex parte* application that incriminating documentation was in the possession of the Malik family. Finally, the evidence suggests, on a *prima facie* basis, that Mr. Malik has failed to respect court orders before, and that there

de fait et de droit qu'il lui fallait trancher pour être en mesure de délivrer ou de refuser les ordonnances sollicitées par la province. Il lui appartenait de décider, au stade de la demande interlocutoire, du poids à accorder aux conclusions sur la demande *Rowbotham*.

La procédure antérieure avait été engagée par M. Malik et faisait intervenir les autres membres de sa famille. La même série d'opérations familiales et les allégations de manipulation des actifs avaient donc été examinées auparavant par un juge de la Cour suprême de la Colombie-Britannique. Selon la province, la question soumise au juge siégeant en cabinet consistait à savoir si M. Malik était dépourvu des fonds nécessaires pour rembourser sa dette à la province par suite d'une manipulation d'actifs et d'opérations frauduleuses au sein de la famille Malik — des agissements examinés initialement dans le cadre de la demande *Rowbotham*.

La décision antérieure rendue par le tribunal constitue une déclaration judiciaire faite après que les parties adverses ont été entendues. Elle produit des effets substantiels sur leurs droits. Obliger le juge siégeant en cabinet à contraindre la province à plaider *de novo* les faits de la demande *Rowbotham* au stade d'une requête interlocutoire présentée *ex parte* aurait constitué une mauvaise utilisation des ressources judiciaires et aurait pu causer un préjudice et donner lieu à des conclusions contradictoires.

L'ordonnance *Anton Piller* a été accordée légitimement d'après le dossier interlocutoire tenu pour admissible. Il est évident que le juge siégeant en cabinet a pris sa propre décision sur les questions qu'il était appelé à trancher à propos de la demande *Anton Piller* et qu'il n'a pas renoncé à son indépendance de jugement par rapport au juge ayant statué sur la demande *Rowbotham*. Il lui était loisible, en se fondant sur l'ensemble du dossier interlocutoire, de délivrer *ex parte* l'ordonnance *Anton Piller*. Vu les faits de l'espèce, les quatre « conditions [qui] doivent être remplies » pour justifier une ordonnance *Anton Piller* étaient réunies. Premièrement, il était loisible au juge siégeant en cabinet de conclure que la province avait établi l'existence d'une solide preuve *prima facie* établissant la dette de M. Malik et le complot de la famille Malik en vue de frauder la province et d'aider M. Malik à se soustraire aux obligations qui lui incombaient en vertu de l'entente relative aux avocats de la défense. Deuxièmement, une créance de plus de 5,2 millions de dollars envers un débiteur qui, selon ce qu'il appert *prima facie*, s'est soustrait d'une façon continue au paiement en usant de fraude et de complot avec des membres de sa famille pour dissimuler leurs traces financières constitue quelque chose de très grave. Troisièmement, le juge siégeant en cabinet était fondé

was a "real possibility" that he and members of his family would do so again if they consider it is in their financial advantage. Given a history of refusal to provide proper disclosure of financial information despite an agreement and court orders to do so, it was open to the chambers judge to conclude that the Malik family might if forewarned continue the pattern of refusal and obfuscation by destroying relevant material before the discovery process could do its work.

It was open to the Malik family to challenge any of the "*Rowbotham* facts" when they brought before the chambers judge their application to set aside the *Anton Piller* order. They did lead some evidence, but their evidence did not relate to the financial transactions said to demonstrate the manipulation of family assets that lay at the heart of the *ex parte* order. The chambers judge was entitled to take into account this lack of any contest in affirming his *ex parte* orders and dismissing the Malik family's review application.

Cases Cited

Applied: *Celanese Canada Inc. v. Murray Demolition Corp.*, 2006 SCC 36, [2006] 2 S.C.R. 189; **not followed:** *Hollington v. F. Hewthorn & Co.*, [1943] 1 K.B. 587; **discussed:** *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460; *Toronto (City) v. Canadian Union of Public Employees, Local 79* (2001), 55 O.R. (3d) 541, aff'd *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77; **referred to:** *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1; *Anton Piller KG v. Manufacturing Processes Ltd.*, [1976] 1 Ch. 55; *Yousif v. Salama*, [1980] 3 All E.R. 405; *R. v. Smith*, [1992] 2 S.C.R. 915; *Re Del Core and Ontario College of Pharmacists* (1985), 51 O.R. (2d) 1; *Saskatoon Credit Union Ltd. v. Central Park Enterprises Ltd.* (1988), 47 D.L.R. (4th) 431; *Arthur J.S. Hall & Co. v. Simons*, [2000] U.K.H.L. 38, [2002] 1 A.C. 615; *Jorgensen v. News Media (Auckland) Ltd.*, [1969] N.Z.L.R. 961; *Harvey v. The King*, [1901] A.C. 601; *Memphis Rogues Ltd. v. Skalbania* (1982), 38 B.C.L.R. 193; *Litchfield v. Darwin* (1997), 29 B.C.L.R. (3d) 203; *Capitanescu v. Universal Weld Overlays Inc.* (1996), 46 Alta. L.R. (3d) 203; *Catalyst Partners Inc. v. Meridian Packaging Ltd.*, 2007 ABCA 201, 76 Alta. L.R. (4th) 264.

à conclure, dans le cadre de la requête *ex parte*, que les documents incriminants étaient en possession de la famille Malik. Enfin, la preuve donne lieu de croire, de façon *prima facie*, que M. Malik a déjà contrevenu à des ordonnances judiciaires et qu'il « est réellement possible » que lui et des membres de sa famille y contreviendront encore s'ils y voient un avantage financier pour eux. Étant donné les refus antérieurs de fournir l'information financière requise malgré l'engagement et les ordonnances judiciaires en ce sens, il était loisible au juge siégeant en cabinet de conclure que la famille Malik, si elle était prévenue, pourrait continuer son manège de refus et de faux-fuyants en détruisant des documents pertinents avant que le processus de communication préalable puisse être amorcé.

Il était loisible à la famille Malik de contester les « faits *Rowbotham* » lorsqu'elle a soumis au juge siégeant en cabinet sa requête en annulation de l'ordonnance *Anton Piller*. Elle a certes présenté certains éléments de preuve, mais ceux-ci ne concernaient pas les opérations financières dont il était allégué qu'elles démontraient la manipulation d'actifs familiaux au centre des ordonnances *ex parte*. Le juge siégeant en cabinet était en droit de tenir compte de cette totale absence de contestation pour confirmer ses ordonnances *ex parte* et rejeter la demande de réexamen présentée par la famille Malik.

Jurisprudence

Arrêt appliqué : *Celanese Canada Inc. c. Murray Demolition Corp.*, 2006 CSC 36, [2006] 2 R.C.S. 189; **arrêt non suivi :** *Hollington c. F. Hewthorn & Co.*, [1943] 1 K.B. 587; **arrêts analysés :** *Danyluk c. Ainsworth Technologies Inc.*, 2001 CSC 44, [2001] 2 R.C.S. 460; *Toronto (City) c. Canadian Union of Public Employees, Local 79* (2001), 55 O.R. (3d) 541, conf. par *Toronto (Ville) c. S.C.F.P., section locale 79*, 2003 CSC 63, [2003] 3 R.C.S. 77; **arrêts mentionnés :** *R. c. Rowbotham* (1988), 41 C.C.C. (3d) 1; *Anton Piller KG c. Manufacturing Processes Ltd.*, [1976] 1 Ch. 55; *Yousif c. Salama*, [1980] 3 All E.R. 405; *R. c. Smith*, [1992] 2 R.C.S. 915; *Re Del Core and Ontario College of Pharmacists* (1985), 51 O.R. (2d) 1; *Saskatoon Credit Union Ltd. c. Central Park Enterprises Ltd.* (1988), 47 D.L.R. (4th) 431; *Arthur J.S. Hall & Co. c. Simons*, [2000] U.K.H.L. 38, [2002] 1 A.C. 615; *Jorgensen c. News Media (Auckland) Ltd.*, [1969] N.Z.L.R. 961; *Harvey c. The King*, [1901] A.C. 601; *Memphis Rogues Ltd. c. Skalbania* (1982), 38 B.C.L.R. 193; *Litchfield c. Darwin* (1997), 29 B.C.L.R. (3d) 203; *Capitanescu c. Universal Weld Overlays Inc.* (1996), 46 Alta. L.R. (3d) 203; *Catalyst Partners Inc. c. Meridian Packaging Ltd.*, 2007 ABCA 201, 76 Alta. L.R. (4th) 264.

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Supreme Court Rules, B.C. Reg. 221/90, rr. 46(1), 51.

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APPEAL from a judgment of the British Columbia Court of Appeal (Finch C.J.B.C., Frankel and Tysoe JJ.A.), 2009 BCCA 201, 92 B.C.L.R. (4th) 78, 53 C.B.R. (5th) 1, 270 B.C.A.C. 178, 454 W.A.C. 178, 69 C.P.C. (6th) 205, [2009] 7 W.W.R. 61, [2009] B.C.J. No. 915 (QL), 2009 CarswellBC 1193, setting aside the *Anton Piller* order affirmed by McEwan J., 2008 BCSC 1027, 46 C.B.R. (5th) 41, [2008] B.C.J. No. 1454 (QL), 2008 CarswellBC 1621. Appeal allowed.

Jonathan Noel Eades, *Matthew S. Taylor* and *Robert N. Hamilton*, for the appellant.

Bruce E. McLeod, for the respondents Ripudaman Singh Malik and Raminder Malik.

Jaspreet Singh Malik, on his own behalf.

The judgment of the Court was delivered by

BINNIE J. —

I. Introduction

[1] The issue on this appeal is whether the Supreme Court of British Columbia erred in issuing an *Anton Piller* order to permit the Province to conduct a "private search" of the respondents' premises on the basis of an "information and

Lois et règlements cités

Charte canadienne des droits et libertés, art. 24(1).
Règles de procédure civile, R.R.O. 1990, Règl. 194, règle 45.01.
Supreme Court Civil Rules, B.C. Reg. 168/2009, règle 22-2(13).
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POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (le juge en chef Finch et les juges Frankel et Tysoe), 2009 BCCA 201, 92 B.C.L.R. (4th) 78, 53 C.B.R. (5th) 1, 270 B.C.A.C. 178, 454 W.A.C. 178, 69 C.P.C. (6th) 205, [2009] 7 W.W.R. 61, [2009] B.C.J. No. 915 (QL), 2009 CarswellBC 1193, qui a annulé l'ordonnance *Anton Piller* confirmée par le juge McEwan, 2008 BCSC 1027, 46 C.B.R. (5th) 41, [2008] B.C.J. No. 1454 (QL), 2008 CarswellBC 1621. Pourvoi accueilli.

Jonathan Noel Eades, *Matthew S. Taylor* et *Robert N. Hamilton*, pour l'appelante.

Bruce E. McLeod, pour les intimés Ripudaman Singh Malik et Raminder Malik.

Jaspreet Singh Malik, en personne.

Version française du jugement de la Cour rendu par

LE JUGE BINNIE —

I. Introduction

[1] La question à trancher dans le présent pourvoi est celle de savoir si la Cour suprême de la Colombie-Britannique a commis une erreur en délivrant une ordonnance *Anton Piller* pour permettre au gouvernement provincial (« la province ») d'effectuer une

belief" affidavit. The Province sought this interlocutory order in connection with its action against the respondents alleging debt, breach of contract, conspiracy, and fraud. It is seeking reimbursement of more than $5.2 million it paid to fund the respondent Ripudaman Singh Malik's defence in the Air India bombing trial, in which Mr. Malik and a co-accused were acquitted. The other respondents are Mr. Malik's wife Raminder, and their son Jaspreet Singh Malik ("Jaspreet"), a Vancouver lawyer.

[2] In granting the *Anton Piller* order to search the business and residential properties of the respondents for evidence that they helped conceal Mr. Malik's assets, and a *Mareva* injunction to freeze their existing assets, the chambers judge relied in part on facts found against the Malik family in prior judicial proceedings brought by Mr. Malik to obtain non-repayable provincial funding for his defence. Mr. Malik's *Rowbotham* application had been rejected on the basis that "Mr. Malik remains a multimillionaire despite leading evidence to suggest his net worth is zero" (2003 BCSC 1439, 111 C.R.R. (2d) 40, at para. 71).

[3] The current proceedings are still at the interlocutory stage. The seizure of documents has occurred but the documents are in the control of the independent solicitor and have not been seen by the Province. The British Columbia Court of Appeal set aside the *Anton Piller* order and limited the *Mareva* injunction to Mr. Malik himself (2009 BCCA 201, 92 B.C.L.R. (4th) 78). The Province appeals only the refusal of the *Anton Piller* order to this Court.

[4] The procedural question that divided the courts below is whether a Superior Court judge

« perquisition privée » dans des locaux appartenant aux intimés sur la base d'un affidavit « fait sur la foi de renseignements tenus pour véridiques ». La province avait demandé cette ordonnance interlocutoire dans le cadre d'une action intentée par elle contre les intimés, dans laquelle elle allègue une dette, une violation de contrat, un complot et une fraude. Elle réclame le remboursement d'une somme de plus de 5,2 millions de dollars versée pour financer la défense de l'intimé Ripudaman Singh Malik dans le procès relatif à l'attentat d'Air India, à l'issue duquel M. Malik et un coaccusé ont été acquittés. Les autres intimés sont l'épouse de M. Malik, Raminder, et leur fils Jaspreet Singh Malik (« Jaspreet »), un avocat de Vancouver.

[2] Pour accorder l'ordonnance *Anton Piller* relative à des perquisitions dans des locaux commerciaux et résidentiels des intimés à la recherche d'éléments de preuve indiquant qu'ils avaient aidé à dissimuler des actifs de M. Malik, ainsi qu'une injonction *Mareva* autorisant le gel de leurs actifs, le juge siégeant en cabinet s'est fondé en partie sur des faits défavorables à la famille Malik constatés dans le cadre de procédures judiciaires antérieures engagées par M. Malik en vue d'obtenir de la province un financement non remboursable lui permettant d'assurer sa défense. La demande d'une ordonnance de type *Rowbotham* (la « demande *Rowbotham* ») présentée par M. Malik avait été rejetée au motif que [TRADUCTION] « M. Malik est toujours un multimillionnaire, même s'il a tenté de prouver que la valeur nette de ses avoirs est égale à zéro » (2003 BCSC 1439, 111 C.R.R. (2d) 40, par. 71).

[3] Les procédures en l'espèce en sont encore à l'étape interlocutoire. Les documents saisis sont entre les mains de l'avocat indépendant et la province ne les a pas encore vus. La Cour d'appel de la Colombie-Britannique a annulé l'ordonnance *Anton Piller* et a restreint l'injonction *Mareva* à M. Malik lui-même (2009 BCCA 201, 92 B.C.L.R. (4th) 78). La province interjette appel à notre Cour uniquement à l'égard du refus de l'ordonnance *Anton Piller.*

[4] La question de procédure qui a divisé les tribunaux de juridiction inférieure est celle de savoir si

hearing an *ex parte* application for an interlocutory order may admit into evidence the findings and conclusions of a prior judicial decision (here the *Rowbotham* proceeding between Mr. Malik and the Province) or whether, as the Court of Appeal held, the prior decision was *not* admissible to prove the truth of its contents *unless* the Province could establish that the respondents were precluded by issue estoppel or abuse of process from relitigating the facts thus adduced. On that basis the Court of Appeal permitted only three "facts" to be extracted from the *Rowbotham* judgment, namely "that Mr. Malik could look to his own assets to raise funds, that Mr. Malik could look to the income and assets of his family to fund his defence costs because their assets were fused and that, as a result, Mr. Malik had the means to pay for, or make a contribution towards, his defence costs" (para. 63). On the record thus truncated the Court of Appeal held that there was insufficient admissible evidence to justify the *Anton Piller* order.

un juge de la Cour supérieure saisi d'une demande d'ordonnance interlocutoire présentée *ex parte* peut recevoir en preuve les conclusions d'une décision judiciaire antérieure — en l'espèce, la demande *Rowbotham* opposant M. Malik et la province — ou si, comme l'a conclu la Cour d'appel, la décision antérieure *n*'était *pas* recevable pour établir la véracité de son contenu *à moins que* la province soit en mesure d'établir que les intimés ne pouvaient, en raison de la préclusion découlant d'une question déjà tranchée ou de l'abus de procédure, débattre de nouveau les faits ainsi présentés. La Cour d'appel a donc permis que seuls trois « faits » soient dégagés du jugement sur la demande *Rowbotham*, soit [TRADUCTION] « que M. Malik pouvait puiser dans ses propres actifs pour se procurer des fonds, que M. Malik pouvait puiser dans les revenus et les actifs de sa famille pour financer les frais de sa défense parce que leurs actifs étaient fusionnés, et que M. Malik avait de ce fait les moyens de payer les frais de sa défense ou d'y contribuer » (par. 63). En se fondant sur un dossier ainsi tronqué, la Cour d'appel a conclu qu'il n'y avait pas suffisamment d'éléments de preuve recevables pour justifier l'ordonnance *Anton Piller.*

[5] An *Anton Piller* order is an exceptional remedy and should only be granted on clear and convincing evidence. It is a highly intrusive measure that, unless sparingly granted and closely controlled, is capable of causing great prejudice and potentially irremediable loss. The fact the Province was the applicant here conferred no special Crown privilege or priority. The Province comes before the Court as an ordinary civil litigant and its application should be judged by the same rules as any other litigant, as should be the merits of the position taken by the Malik family respondents.

[5] L'ordonnance *Anton Piller* est une mesure exceptionnelle qui devrait être accordée seulement si la preuve est claire et convaincante. Cette ordonnance constitue une mesure hautement intrusive et, si elle n'est pas accordée avec modération ni soumise à des contrôles serrés, elle est susceptible de causer d'importants préjudices et des pertes irrémédiables. Le fait que la province soit la demanderesse ne lui confère aucune priorité ni aucun privilège de la Couronne. La province se présente devant le tribunal en tant que plaideur civil ordinaire et sa demande doit être jugée selon les mêmes règles que pour tout autre plaideur, tout comme le bien-fondé de la position adoptée par les intimés de la famille Malik.

[6] Nevertheless, I believe that the Court of Appeal was wrong to insist that the same series of financial transactions as had been exhaustively reviewed on the *Rowbotham* application had to be, in effect, tried *de novo* and *ex parte* by the chambers judge as if the *Rowbotham* proceedings had

[6] La Cour d'appel a malgré tout eu tort, selon moi, de considérer que la série d'opérations financières ayant fait l'objet d'un examen approfondi dans le cadre de la demande *Rowbotham* devait être de fait jugée de nouveau et *ex parte* par le juge siégeant en cabinet, comme si, mis à part les

never taken place, apart from the three "facts". These facts, as the Court of Appeal held, shed little light on what the chambers judge had to decide here.

[7] In my view, for the reasons that follow, a judgment in a prior civil or criminal case is admissible (if considered relevant by the chambers judge) as evidence in subsequent interlocutory proceedings as proof of its findings and conclusions, provided the parties are the same or were themselves participants in the prior proceedings on similar or related issues. It will be for that judge to assess its weight. The prejudiced party or parties will have an opportunity to lead evidence to contradict it or lessen its weight (unless precluded from doing so by the doctrines of *res judicata*, issue estoppel or abuse of process).

[8] On the interlocutory record thus considered admissible, the *Anton Piller* order was properly granted, in my view. The chambers judge was entitled to evaluate, as with any affidavit based on information and belief, the reliability and probative value of the sources relied on by the affiant. The chambers judge was entitled to have regard to the judgment of Stromberg-Stein J. in the *Rowbotham* proceedings brought by Mr. Malik himself — a contested hearing in which he and members of his family gave evidence and examined witnesses. This was permissible provided of course that the chambers judge himself, taking into account the whole of the interlocutory record, made the factual and legal determinations necessary to issue or to decline to issue the order. It is evident in this case from his reasons that the chambers judge made up his own mind and, in my view, it was open to him on the whole of the interlocutory record to issue the *Anton Piller* order *ex parte*.

trois « faits », l'audition de la demande *Rowbotham* n'avait jamais eu lieu. Ces faits, comme l'a estimé la Cour d'appel, n'éclairaient pas beaucoup la question sur laquelle le juge siégeant en cabinet devait statuer en l'espèce.

[7] Pour les motifs exposés ci-après, je suis d'avis qu'un jugement rendu dans une affaire civile ou criminelle antérieure est — si le juge siégeant en cabinet le considère pertinent — admissible en preuve dans des procédures interlocutoires subséquentes et fait foi de ses conclusions, dès lors que les parties sont les mêmes ou qu'elles ont pris part à une instance antérieure concernant les mêmes questions ou des questions connexes. Il appartiendra à ce juge d'en apprécier la portée. La partie ou les parties subissant un préjudice auront la possibilité de présenter des éléments de preuve en vue de contredire ce jugement ou d'en atténuer la portée (à moins que les règles relatives à la *res judicata*, à la préclusion découlant d'une question déjà tranchée ou à l'abus de procédure les en empêchent).

[8] L'ordonnance *Anton Piller* a été accordée légitimement selon moi, d'après le dossier interlocutoire ainsi tenu pour admissible. Le juge siégeant en cabinet pouvait évaluer, comme pour tout affidavit fait sur la foi de renseignements tenus pour véridiques, la fiabilité et la force probante des sources sur lesquelles se fondait le souscripteur de l'affidavit. Il pouvait aussi tenir compte du jugement rendu par la juge Stromberg-Stein sur la demande *Rowbotham* introduite par M. Malik lui-même — à l'issue d'une audition contestée au cours de laquelle lui et des membres de sa famille ont témoigné et interrogé des témoins. Le juge siégeant en cabinet pouvait le faire à la condition bien sûr que lui-même, prenant en considération l'ensemble du dossier de la demande interlocutoire, statue sur les questions de fait et de droit qu'il lui fallait trancher pour être en mesure de délivrer ou de refuser l'ordonnance. En l'espèce, il ressort de façon évidente de ses motifs que le juge siégeant en cabinet s'est fait sa propre idée et il lui était loisible à mon avis, en se fondant sur l'ensemble du dossier interlocutoire, de délivrer *ex parte* l'ordonnance *Anton Piller*.

[9] It was also of course open to Mr. Malik or his wife and Jaspreet to challenge any of the "*Rowbotham* facts" when they brought before the chambers judge their application to set aside the *Mareva* injunction and the *Anton Piller* orders. They did lead some evidence, but their evidence did not relate to the financial transactions said to demonstrate the manipulation of family assets that lay at the heart of the *ex parte* orders. The chambers judge was entitled to take into account this lack of any contest in affirming his *ex parte* orders and dismissing the respondents' review application. I would therefore allow the appeal.

[9] Il était également loisible bien sûr à M. Malik ou à son épouse et à Jaspreet de contester les « faits *Rowbotham* » lorsqu'ils ont soumis au juge siégeant en cabinet leur requête en annulation de l'injonction *Mareva* et des ordonnances *Anton Piller*. Ils ont certes présenté certains éléments de preuve, mais ceux-ci ne concernaient pas les opérations financières dont il était allégué qu'elles démontraient la manipulation d'actifs familiaux au centre des ordonnances *ex parte*. Le juge siégeant en cabinet était en droit de tenir compte de cette totale absence de contestation pour confirmer ses ordonnances *ex parte* et rejeter la demande de réexamen présentée par les intimés. Je suis par conséquent d'avis d'accueillir le pourvoi.

II. Facts

II. Les faits

[10] On October 27, 2000, Mr. Malik and a co-accused were charged with multiple counts of murder arising out of bomb explosions on Air India flight 182, which was blown out of the air off the coast of Ireland on June 23, 1985, and a second bomb that exploded on the same date at Narita Airport, Japan, which killed two baggage handlers. Mr. Malik's criminal trial commenced April 28, 2003 and continued for almost two years. In December 2000, Mr. Malik applied for bail. At the time it was in his interest to show that he was a man of substance. He filed evidence that he and his wife had a net worth of over $11 million. Less than a year later, claiming to be without resources to pay for his own defence, Mr. Malik sought government funding.

[10] Le 27 octobre 2000, M. Malik et un coaccusé ont été inculpés de multiples chefs de meurtre découlant de l'attentat à la bombe ayant détruit en plein vol au large des côtes irlandaises, le 23 juin 1985, un appareil assurant le vol 182 d'Air India, et de l'explosion d'une deuxième bombe le même jour à l'aéroport de Narita, au Japon, qui a tué deux bagagistes. Le procès criminel de M. Malik a débuté le 28 avril 2003 et a duré presque deux ans. En décembre 2000, M. Malik a demandé sa mise en liberté sous caution. À l'époque, il avait intérêt à montrer qu'il était un homme fortuné. Il a déposé des éléments de preuve selon lesquels la valeur nette de ses avoirs et de ceux de son épouse dépassait les 11 millions de dollars. Moins d'un an plus tard, affirmant ne pas avoir les moyens nécessaires pour payer sa propre défense, M. Malik demandait un financement gouvernemental.

A. *The Provincial Funding Agreements*

A. *Les ententes de financement par la province*

[11] Public money was made available to Mr. Malik under a series of funding agreements with the Province. The "Indemnity Agreement", dated March 21, 2002, contained an acknowledgment that Mr. Malik was not entitled to funding unless he committed all of his resources to his defence, and covenanted not to encumber his assets. The Indemnity Agreement was replaced a few months later by the "Defence Counsel Agreement", dated

[11] Des fonds publics ont été mis à la disposition de M. Malik en vertu d'une série d'ententes de financement conclues avec la province. L'entente relative à la garantie intitulée « *Indemnity Agreement* », datée du 21 mars 2002, stipulait que M. Malik n'avait pas droit au financement à moins d'avoir affecté la totalité de ses ressources à sa défense et de s'engager à ne pas grever ses actifs. Cette entente a été remplacée quelques mois plus tard

August 6, 2002, which contained similar provisions but provided as well that Mr. Malik would transfer all his assets to the Province and for that purpose would assist in the identification of those assets. The Province's claim for approximately $5.2 million relates to funds paid out under the August 6, 2002 agreement.

[12] In January 2003, being of the view that Mr. Malik was not living up to his undertakings, the Province notified him that it would terminate his defence funding unless he executed an indemnity. Mr. Malik refused to do so unless he could obtain a *Rowbotham* funding order under s. 24(1) of the *Canadian Charter of Rights and Freedoms.*

[13] On May 14-15, 2003, Tysoe J., then of the Supreme Court of British Columbia, ordered Mr. Malik to provide financial disclosure. Some disclosure was made, but not to the Province's satisfaction.

B. *The Rowbotham Application*

[14] In August 2003, Mr. Malik brought an application seeking relief pursuant to the decision in *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1 (Ont. C.A.), seeking to compel the Province to provide funding or to stay the criminal proceedings. The other respondents provided supportive testimony.

[15] On September 19, 2003, the applications judge, Stromberg-Stein J., held that Mr. Malik had not demonstrated that he was financially eligible for funding and dismissed his application. As stated, she found that "Mr. Malik remains a multimillionaire despite leading evidence to suggest his net worth is zero" (para. 71). In particular, she held:

> The assets of Mr. Malik and his family are so interconnected as to be fused. The Malik family has conducted its affairs such that all assets were jointly held

par une entente relative aux avocats de la défense intitulée « *Defense Counsel Agreement* », datée du 6 août 2002, qui renfermait des clauses semblables mais stipulait aussi que M. Malik céderait tous ses actifs à la province et qu'il prêterait à cette fin son concours à l'identification de ces actifs. La somme de quelque 5,2 millions de dollars réclamée par la province a trait à des fonds versés en vertu de l'entente du 6 août 2002.

[12] En janvier 2003, la province, estimant que M. Malik manquait à ses engagements, l'a avisé qu'elle mettrait fin au financement de sa défense à moins qu'il ne signe une entente d'indemnisation. M. Malik a refusé de le faire à moins de pouvoir obtenir une ordonnance de financement de type *Rowbotham* en vertu du par. 24(1) de la *Charte canadienne des droits et libertés.*

[13] Les 14 et 15 mai 2003, le juge Tysoe, qui siégeait alors à la Cour suprême de la Colombie-Britannique, a ordonné à M. Malik de fournir un état de sa situation financière. M. Malik a fourni certains renseignements à ce sujet, mais la province ne les a pas jugé suffisants.

B. *La demande Rowbotham*

[14] En août 2003, M. Malik a présenté une demande fondée sur la décision *R. c. Rowbotham* (1988), 41 C.C.C. (3d) 1 (C.A. Ont.), par laquelle il voulait contraindre la province à lui verser des fonds ou à mettre fin aux procédures criminelles. Les autres intimés ont témoigné à l'appui de sa demande.

[15] Le 19 septembre 2003, la juge des requêtes Stromberg-Stein a rejeté cette demande, estimant que M. Malik n'avait pas démontré son admissibilité financière à un financement. Je le rappelle, elle a conclu que [TRADUCTION] « M. Malik est toujours un multimillionnaire, même s'il a tenté de prouver que la valeur nette de ses avoirs est égale à zéro » (par. 71). Elle a notamment apporté les précisions suivantes :

> [TRADUCTION] Les actifs de M. Malik et de sa famille sont liés les uns aux autres au point d'être fusionnés. La famille Malik a géré ses affaires de telle

for the benefit of all. Assets and income are pooled for one common enterprise. Title is meaningless. [para. 25]

[Further,] Mr. Malik was, and still remains the patriarch of the Malik family which operated as a single financial entity. Mr. Malik jointly owns with his wife two businesses that gross millions each year. He and his wife jointly own millions in real estate, although there is little equity because it is heavily mortgaged. [para. 31]

The legitimacy of Mr. Malik's claims that he owes more than $1 million to family members is questionable. The claims are imprecise, none were documented until after Mr. Malik's arrest, and there is no proper proof of legitimacy. [para. 72]

[16] In summary, Stromberg-Stein J. concluded, "[t]he evidence shows that Mr. Malik and his family have tried to arrange his financial and business affairs to minimize the value of his estate, to render him insolvent, and to therefore limit the amount of his contribution, or to eliminate that obligation entirely" (para. 82).

[17] In support of these conclusions Stromberg-Stein J. made a number of findings of fact regarding the Malik family finances (the "*Rowbotham* facts"). It is the attempted use in the *Anton Piller* proceedings of the *Rowbotham* findings and conclusions that lies at the heart of this appeal.

C. *The "Rowbotham Facts"*

[18] The findings of Stromberg-Stein J. that informed the belief of Mr. Gordon Houston, who filed the Province's principal affidavit on the interlocutory motions, were summarized by the chambers judge as follows:

At his bail hearing in December, 2000, a Personal Net Worth Statement was filed on behalf of Mr. and Mrs. Malik indicating a net worth of $11,648,439.85 [p. 3, para. 5];

manière que tous les actifs étaient détenus conjointement pour le bénéfice de tous. Les actifs et les revenus sont mis en commun pour une même entreprise commune. Le titre de propriété ne signifie rien. [par. 25]

[En outre,] M. Malik était et est toujours le patriarche de la famille Malik, qui fonctionnait comme une seule et même entité financière. M. Malik possède conjointement avec son épouse deux entreprises qui génèrent chaque année des millions en recettes brutes. Son épouse et lui possèdent ensemble des biens immobiliers valant des millions, mais dont la valeur nette réelle n'est pas élevée parce qu'ils sont lourdement hypothéqués. [par. 31]

M. Malik prétend devoir plus d'un million de dollars à des membres de sa famille mais la légitimité de ses dires est douteuse. Ses affirmations sont imprécises, aucune n'a été documentée avant l'arrestation de M. Malik et il n'existe pas de preuve adéquate de légitimité. [par. 72]

[16] En résumé, la juge Stromberg-Stein a conclu que [TRADUCTION] « [l]a preuve montre que M. Malik et sa famille ont essayé d'organiser ses affaires financières et commerciales de façon à minimiser la valeur de son patrimoine, à le rendre lui-même insolvable et à limiter ainsi le montant de sa contribution, ou à éliminer totalement cette obligation » (par. 82).

[17] À l'appui de ces conclusions, la juge Stromberg-Stein a énoncé plusieurs conclusions de fait touchant les finances de la famille Malik (les « faits *Rowbotham* »). C'est la tentative un vue d'utiliser, dans la demande d'ordonnance *Anton Piller*, les conclusions du jugement sur la demande *Rowbotham* qui se trouve au centre du présent pourvoi.

C. *Les « faits Rowbotham »*

[18] Les conclusions de la juge Stromberg-Stein sur lesquelles s'est fondé M. Gordon Houston, souscripteur du principal affidavit produit par la province dans le cadre des requêtes interlocutoires, ont été résumées de la façon suivante par le juge siégeant en cabinet :

[TRADUCTION] Lors de l'enquête sur remise en liberté provisoire en décembre 2000, un état de la valeur nette personnelle indiquant une valeur nette de 11 648 439,85 $ a été déposé au nom de M. et M^me^ Malik [p. 3, par. 5];

In November, 2001, Mr. Malik approached the AG to fund his defence and asserted that he had assets but those assets were not in cash form and liquidating them would require time [p. 4, para. 6];

In February, 2002, negotiations between Mr. Malik's counsel and the AG led to an interim funding agreement [p. 4, para. 6];

The funding agreement was entered into so funding could commence immediately and the AG advanced funds in good faith based on Mr. Malik's representations [p. 4, para. 7];

Subsequently, Mr. Malik claimed he was insolvent because his assets were insufficient to discharge his liabilities, including debt owed to unsecured creditors who were all family member [p. 5, para. 10];

The evidence establishes a collective effort by Mr. Malik and the Malik family members to diminish the value of his estate [p. 10, para. 21];

The assets of Mr. Malik and his family are so interconnected as to be fused. The Malik family has conducted its affairs such that all assets were jointly held for the benefit of all. Assets and income are pooled for one common enterprise [p. 16, para. 25];

Title to the Marguerite Street home is in Mrs. Malik's name alone. The land was purchased and the home constructed from joint funds. The Maliks shared all expenses [p. 19, para. 35];

It appears that since Mr. Malik's arrest, Papillon's annual earnings dropped from $4 million to $2.5 million per year [p. 22, para. 42];

Regarding property in India, the Maliks provided numerous contradictory explanations concerning both the value and the ownership of this property [p. 23, para. 45];

Regarding the allegation that Gurdip Malik loaned Mr. Malik $330,000 US, the evidence shows these funds were received from Gurdip Malik's company, Papillon Eastern Imports Ltd. in Los Angeles, and used to pay business and personal expenses, and to reduce the line of credit [p. 24, para. 48];

En novembre 2001, M. Malik est entré en contact avec le PG en vue du financement de sa défense et a affirmé qu'il avait des actifs mais que ceux-ci n'étaient pas liquides et que leur liquidation prendrait du temps [p. 4, par. 6];

En février 2002, des négociations entre les avocats de M. Malik et le PG ont abouti à une entente de financement provisoire [p. 4, par. 6];

L'entente de financement a été conclue, si bien que le financement pouvait commencer immédiatement et le PG a avancé les fonds de bonne foi, en se fondant sur les déclarations de M. Malik [p. 4, par. 7];

Par la suite, M. Malik a prétendu être insolvable parce que ses actifs n'étaient pas suffisants pour qu'il puisse acquitter ses dettes, y compris ses dettes envers des créanciers non garantis qui étaient tous des membres de sa famille [p. 5, par. 10];

La preuve établit l'existence d'un effort collectif, de la part de M. Malik et des membres de la famille Malik, visant à diminuer la valeur de son patrimoine [p. 10, par. 21];

Les actifs de M. Malik et de sa famille sont liés les uns aux autres au point d'être fusionnés. La famille Malik a géré ses affaires de telle manière que tous les actifs sont détenus conjointement pour le bénéfice de tous. Les actifs et les revenus sont mis en commun pour une même entreprise commune [p. 16, par. 25];

Le titre de propriété de la maison de la rue Marguerite est établi au nom de M^{me} Malik seulement. Le terrain a été acquis et la maison a été construite au moyen de fonds communs. Les Malik partageaient toutes les dépenses [p. 19, par. 35];

Il semble que depuis l'arrestation de M. Malik, les bénéfices réalisés par Papillon sont passés de 4 million de dollars à 2,5 millions de dollars par année [p. 22, par. 42];

En ce qui concerne la propriété en Inde, les Malik ont donné de nombreuses explications contradictoires au sujet de sa valeur et de l'identité des propriétaires [p. 23, par. 45];

En ce qui concerne l'allégation selon laquelle Gurdip Malik a prêté à M. Malik la somme de 330 000 $ US, la preuve montre que ces fonds ont été versés par la société de Gurdip Malik, Papillon Eastern Imports Ltd. à Los Angeles, et ont été utilisés pour payer des dépenses d'affaires et personnelles ainsi que pour diminuer la marge de crédit [p. 24, par. 48];

Jaspreet Malik was instrumental in obtaining and arranging the registration of a security agreement against Mr. Malik's shares in the hotel [p. 25, para. 49];

There is evidence of collusion to secure Gurdip Malik's loan before [the *Rowbotham*] hearing and to reduce Mr. Malik's equity in the hotel [p. 25, para. 50];

There is no record of outstanding wages now claimed [by the Malik children] dating as far back as 1994 up to 1997. No formal records were kept regarding the hours worked by the children [p. 25, para. 51];

Although confusing, the evidence establishes the Maliks never intended to pay their children and the children never contemplated they would be paid [p. 26, para. 53];

Following Mr. Malik's arrest his family continued to transfer, give away and buy luxury vehicles. A 1999 $108,000 Mercedes, purchased by Mr. Malik with joint funds, was transferred to Mrs. Malik while he was incarcerated. Mrs. Malik elected to repay the car loan before it was due [p. 27, para. 56];

Mrs. Malik gave away her 1998 Land Rover of unknown value [p. 28, para. 57];

Evidence about the purchase of the Lexus is inconsistent and confusing. In March 2001 Hardeep purchased a $35,000 Lexus with joint funds. He then borrowed that amount and lent it to Khalsa Developments Ltd. The loan was paid off by Khalsa Developments Ltd. [p. 28, para. 58];

Darsham purchased a $22,000 Chevy Blazer with joint funds in 2003 [p. 28, para. 59];

The Maliks reported charitable donations for the years 1994 to 2000 of $564,729.97. Of that amount, $512,612.97 was donated to either Satman Education Society or Satnam Trust, which were headed by Mr. Malik [p. 28, para. 60];

In violation of a court order not to dispose of any assets, $72,000 from Mr. Malik's income tax refund was placed in a joint account and used to pay business debt. This money was repaid to the Province during this application [p. 29, para. 63];

Jaspreet Malik a joué un rôle-clé dans l'obtention et l'enregistrement d'un contrat de sûreté portant sur les actions de M. Malik dans l'hôtel [p. 25, par. 49];

Il existe des preuves d'une collusion visant à obtenir le prêt à Gurdip Malik avant l'audition [de la demande *Rowbotham*] et à réduire la part de la valeur nette de l'hôtel détenue par M. Malik [p. 25, par. 50];

Il n'existe aucun document faisant état des salaires impayés maintenant réclamés [par les enfants Malik] qui remontent aussi loin que de 1994 à 1997. Aucun registre officiel n'a été tenu à l'égard des heures travaillées par les enfants [p. 25, par. 51];

Même si elle n'est pas très claire, la preuve établit que les Malik n'ont jamais eu l'intention de rémunérer leurs enfants et que ces derniers ne se sont jamais attendus à être rémunérés [p. 26, par. 53];

Après l'arrestation de M. Malik, sa famille a continué de transférer, de donner et d'acheter des véhicules de luxe. Une Mercedes 1999 de 108 000 $, acquise par M. Malik avec des fonds communs, a été transférée à M^me^ Malik pendant qu'il était incarcéré. M^me^ Malik a décidé de rembourser avant l'échéance l'emprunt pour l'achat de l'automobile [p. 27, par. 56];

M^me^ Malik a donné sa Land Rover 1998 d'une valeur inconnue [p. 28, par. 57];

La preuve relative à l'acquisition de la Lexus est contradictoire et prête à confusion. En mars 2001, Hardeep Malik a fait l'acquisition d'une Lexus de 35 000 $ avec des fonds communs. Il a ensuite emprunté cette somme et l'a prêtée à Khalsa Developments Ltd. L'emprunt a été remboursé par Khalsa Developments Ltd. [p. 28, par. 58];

En 2003, Darsham a fait l'achat d'un véhicule Chevy Blazer de 22 000 $ avec des fonds communs [p. 28, par. 59];

Les Malik ont déclaré pour les années 1994 à 2000 des dons de bienfaisance de 564 729,97 $. De ce montant, une somme de 512 612,97 $ était destinée soit à la Satman Education Society, soit au Satnam Trust, tous deux dirigés par M. Malik [p. 28, par. 60];

En contravention d'une ordonnance judiciaire interdisant l'aliénation de quelque bien que ce soit, une somme de 72 000 $ provenant du remboursement d'impôt de M. Malik a été placée dans un compte conjoint et utilisée pour payer une dette commerciale. Cette somme a été remboursée à la province depuis l'introduction de la présente demande [p. 29, par. 63];

About the end of December 2000, the Maliks voluntarily elected to pay a franchise cancellation penalty of $100,000 when the hotel changed its affiliation from the Quality Inn to the Executive Inn [p. 29, para. 64];

Mr. Malik's agreement to contribute to the cost of his defence, as outlined in the Defence Counsel Agreement is a compelling consideration. Malik failed to liquidate his assets [p. 30, paras. 69-70];

Mr. Malik and Mrs. Malik have manipulated facts to suit their particular needs as evidenced by the representations at the bail hearing about the value of the Malik's assets [p. 31, para. 75];

The evidence shows that Mr. Malik and his family have tried to arrange his financial and business affairs to minimize the value of his estate, to render him insolvent, and to therefore limit the amount of his contribution, or to eliminate that obligation entirely [p. 34, para. 82];

Any perceived cash shortage is artificial and contrived [p. 34, para. 83].

(2008 BCSC 1027, 46 C.B.R. (5th) 41, at para. 43)

[19] In respect of the value and ownership of certain properties in India Stromberg-Stein J. noted that

[a]t the bail hearing Mr. and Mrs. Malik provided affidavits claiming to own property in India valued at $200,000. Two years later their in-house accountant, Mr. Singh, provided a letter indicating the property was burdened with a tenant who had failed to pay rent. Mr. Malik maintains he does not know whether he owned it, whether he made lease payments, or whether it earned rental income. This is inconsistent, and unlikely behaviour for an astute business person, particularly one looking for a potential source of income. [para. 45]

D. *The Payment Agreement*

[20] Following the dismissal of the *Rowbotham* application, the Province and Mr. Malik entered into the "Payment Agreement", dated October 17, 2003, which set out terms for the provision of

Vers la fin du moins de décembre 2000, les Malik ont volontairement choisi de payer une somme de 100 000 $ à titre d'annulation de franchise lorsque l'hôtel est passé de la chaîne Quality Inn à la chaîne Executive Inn [p. 29, par. 64];

Le fait que M. Malik ait accepté de contribuer au coût de sa défense, de la façon décrite dans l'entente relative aux avocats de la défense, revêt une importance déterminante. M. Malik n'a pas procédé à la liquidation de ses actifs [p. 30, par. 69-70];

M. Malik et M^me^ Malik ont manipulé les faits en fonction de leurs besoins particuliers, comme en témoignent les déclarations faites lors de l'enquête sur remise en liberté provisoire quant à la valeur des actifs des Malik [p. 31, par. 75];

La preuve montre que M. Malik et sa famille ont essayé d'organiser ses affaires financières et commerciales de façon à minimiser la valeur de son patrimoine, à le rendre insolvable et à limiter ainsi le montant de sa contribution, ou à éliminer totalement cette obligation [p. 34, par. 82];

Tout manque d'argent liquide est artificiel et découle d'un stratagème [p. 34, par. 83].

(2008 BCSC 1027, 46 C.B.R. (5th) 41, par. 43)

[19] En ce qui a trait à la valeur de certains biens situés en Inde et à l'identité de leur propriétaire, la juge Stromberg-Stein a fait remarquer ce qui suit :

[TRADUCTION] Lors de l'enquête sur remise en liberté provisoire, M. et M^me^ Malik ont présenté des affidavits dans lesquels ils affirmaient être propriétaires d'un immeuble en Inde évalué à 200 000 $. Deux ans plus tard, leur comptable, M. Singh, a fourni une lettre indiquant que la propriété était grevée par un locataire qui n'avait pas payé le loyer. M. Malik affirme ne pas savoir s'il en était propriétaire, s'il faisait des paiements de location ou s'il touchait un revenu de location. Il s'agit d'un comportement incohérent et peu plausible de la part d'un homme d'affaires astucieux, particulièrement lorsqu'il est à la recherche d'une source de revenu potentielle. [par. 45]

D. *L'entente relative au paiement*

[20] Après le rejet de la demande *Rowbotham*, la province et M. Malik ont conclu une entente relative au paiement intitulée « *Payment Agreement* », datée du 17 octobre 2003, qui établissait les

future fees and required Mr. Malik to provide security for these fees and to acknowledge his indebtedness to the Province for the sums advanced under the previous agreements.

[21] The Province paid Mr. Malik a total of $5,200,131 under the Defence Counsel Agreement and $1,681,526 under the Payment Agreement. The latter has been repaid. However, the Province claims that Mr. Malik has not transferred the assets (alleged to be his at least beneficially) to the Province. The debt of $5,200,131 under the Defence Counsel Agreement is still outstanding. The Province demanded repayment on December 13, 2005.

[22] In March 2007, Mr. Malik issued a writ against the Province for malicious prosecution. At the time of the Province's application for the *Mareva* injunction and *Anton Piller* order that writ had not been served.

[23] On October 23, 2007, the Province commenced the present action in debt, breach of contract, conspiracy, and fraud against six members of the Malik family and four corporations owned by them. It claims that all these individuals made false statements (mainly concerning debts said to be owed by Mr. Malik to other members of the family) and conspired to conceal Mr. Malik's assets. On the same day the Province applied *ex parte* to obtain an *Anton Piller* order authorizing independent lawyers to enter three business and residential premises to search for and take away any documents or computer files relating to the assets and liabilities of the respondents, including numerous specified documents. The three premises were the home of Mr. Malik and his wife; the law office at which their son Jaspreet practices law; and the office of Papillon Eastern Imports Ltd. (where Jaspreet also previously carried on the practice of law).

conditions relatives au financement des honoraires futurs et obligeait M. Malik à fournir des garanties à l'égard de ces honoraires et à reconnaître sa dette envers la province relativement aux sommes avancées en vertu des ententes précédentes.

[21] La province a versé à M. Malik une somme totale de 5 200 131 $ en vertu de l'entente relative aux avocats de la défense, et une somme de 1 681 526 $ en vertu de l'entente relative au paiement. Cette dernière somme a été remboursée. La province soutient toutefois que M. Malik ne lui a pas transféré les actifs (dont il est au moins, selon elle, le propriétaire bénéficiaire). La dette de 5 200 131 $ contractée dans le cadre de l'entente relative aux avocats de la défense demeure impayée. La province en a réclamé le remboursement le 13 décembre 2005.

[22] En mars 2007, M. Malik a assigné en justice la province pour poursuite abusive. Lorsque la province a demandé l'injonction *Mareva* et l'ordonnance *Anton Piller*, cette assignation n'avait pas été signifiée.

[23] Le 23 octobre 2007, la province a engagé la présente action pour dette, violation de contrat, complot et fraude contre six membres de la famille Malik et quatre sociétés leur appartenant. Elle reproche à ces personnes d'avoir fait de fausses déclarations (concernant principalement des sommes qui seraient dues par M. Malik à d'autres membres de la famille) et d'avoir comploté pour dissimuler des actifs de M. Malik. Le même jour, la province a présenté une demande *ex parte* en vue d'obtenir une ordonnance *Anton Piller* autorisant des avocats indépendants à pénétrer dans trois locaux commerciaux et résidentiels pour y chercher et y saisir tous documents ou fichiers informatiques liés aux actifs et aux dettes des intimés, y compris de nombreux documents désignés. Les locaux en question étaient la résidence de M. Malik et de son épouse, le cabinet d'avocats où leur fils Jaspreet exerce le droit et les bureaux de la société Papillon Eastern Imports Ltd. (où Jaspreet avait également exercé le droit auparavant).

III. Relevant Enactments

[24] *Supreme Court Rules*, B.C. Reg. 221/90, r. 51

Rule 51 — Affidavits

. . .

(10) **Contents of affidavit —** An affidavit may state only what a deponent would be permitted to state in evidence at a trial, except that, if the source of the information is given, an affidavit may contain statements as to the deponent's information and belief, if it is made

(a) in respect of an application for an interlocutory order, or

(b) by leave of the court under Rule 40(52)(a) or 52(8)(e).

IV. Judicial History

A. *Supreme Court of British Columbia (McEwan J.), 2008 BCSC 1027, 46 C.B.R. (5th) 41*

[25] On the respondents' motion to set aside the *Anton Piller* order and *Mareva* injunction, the Maliks claimed "witness immunity" in respect of their earlier testimony in the *Rowbotham* proceedings. The chambers judge distinguished between the factual findings in the *Rowbotham* proceedings, which he held were admissible to establish a *prima facie* case, and the legal arguments that the Province sought to base on these facts, including issue estoppel and abuse of process. In his view, the latter issues did not need to be decided on the interlocutory application in light of the respondents' decision not to lead evidence to contradict the *Rowbotham* findings:

The facts which the Province outlined in its original [*ex parte*] submissions have not been shown to be materially misleading.

From the perspective of a court assessing the evidence with a view to ensuring that the positions of the

III. Texte réglementaire applicable

[24] *Supreme Court Rules*, B.C. Reg. 221/90, règle 51

[TRADUCTION]

Règle 51 — Affidavits

. . .

(10) **Contenu de l'affidavit —** L'affidavit peut énoncer uniquement ce que le déposant serait autorisé à déclarer s'il témoignait dans le cadre d'un procès. Toutefois, si la source de l'information est indiquée, l'affidavit peut comporter des déclarations sur des renseignements tenus pour véridiques par le déposant, à la condition qu'il concerne une demande d'ordonnance interlocutoire ou qu'il soit fait en vertu d'une autorisation donnée par le tribunal en conformité avec la règle 40(52)a) ou la règle 52(8)e).

IV. Décisions des juridictions inférieures

A. *Cour suprême de la Colombie-Britannique (le juge McEwan), 2008 BCSC 1027, 46 C.B.R. (5th) 41*

[25] Lors de l'audition de la requête des intimés en annulation de l'ordonnance *Anton Piller* et de l'injonction *Mareva*, les membres de la famille Malik ont invoqué « l'immunité des témoins » relativement à leur témoignage antérieur lors de l'audition de la demande *Rowbotham*. Le juge siégeant en cabinet a fait une distinction entre les constatations de fait contenues dans le jugement sur la demande *Rowbotham*, admissibles selon lui à titre de preuve *prima facie*, et les arguments juridiques que la province entendait invoquer sur la base de ces faits, y compris la préclusion découlant d'une question déjà tranchée et de l'abus de procédure. À son avis, ces dernières questions n'avaient pas à être tranchées dans le cadre de la requête interlocutoire étant donné la décision des intimés de ne pas présenter des éléments de preuve à l'encontre des conclusions du jugement sur la demande *Rowbotham* :

[TRADUCTION] Il n'a pas été démontré que les faits exposés par la province dans ses arguments initiaux [*ex parte*] comportaient des renseignements trompeurs.

Du point de vue du tribunal qui apprécie la preuve avec le souci de faire en sorte que les positions des

parties are protected until the facts can be determined at trial, arguments about the legal limits of *res judicata* and witness immunity will not defeat a strong fact based *prima facie* case that the defendants have acted in ways that are inconsistent with their contractual and other legal obligations. The allegation that aspects of the defendants' dealings or behaviour have been the subject of a series of adverse rulings in another proceeding, will not, in the absence of material facts demonstrating that the rulings were effectively unfounded or irrelevant, be negated by abstract arguments unattached to actual findings of fact. [paras. 60-61]

[26] Accordingly, the chambers judge affirmed the *Anton Piller* order and the *Mareva* injunction.

B. *Court of Appeal (Finch C.J.B.C. and Frankel and Tysoe JJ.A.), 2009 BCCA 201, 92 B.C.L.R. (4th) 78*

[27] Tysoe J.A., writing for a unanimous court, set aside the *Anton Piller* order in its entirety and the *Mareva* injunction against all respondents but Mr. Malik. In that court's view, the chambers judge should not have relied on the *Rowbotham* proceedings apart from the three findings already mentioned, namely "that Mr. Malik could look to his own assets to raise funds, that Mr. Malik could look to the income and assets of his family to fund his defence costs because their assets were fused and that, as a result, Mr. Malik had the means to pay for, or make a contribution towards, his defence costs" (para. 63). However, Tysoe J.A. held:

The remaining *Rowbotham* findings were not admissible because the doctrines of issue estoppel and abuse of process do not prevent the defendants from relitigating those facts. [Emphasis added; para. 38.]

[28] In the court's view, the limited admissible *Rowbotham* findings, together with the supplemental facts contained in the affidavits filed by the

parties soient protégées jusqu'à ce que les faits puissent être déterminés au procès, des arguments sur les limites juridiques de la *res judicata* et de l'immunité des témoins ne neutraliseront pas une solide preuve *prima facie* fondée sur des faits selon laquelle les défendeurs ont posé des gestes incompatibles avec leurs obligations contractuelles et autres obligations juridiques. L'allégation suivant laquelle certains aspects des opérations ou du comportement des défendeurs ont fait l'objet d'une série de conclusions défavorables dans le cadre d'une autre procédure ne sera pas neutralisée, en l'absence de faits pertinents démontrant que ces conclusions étaient en réalité non fondées ou non pertinentes, par des arguments abstraits sans lien avec des conclusions de fait tangibles. [par. 60-61]

[26] Le juge siégeant en cabinet a par conséquent confirmé l'ordonnance *Anton Piller* et l'injonction *Mareva*.

B. *Cour d'appel (le juge en chef Finch et les juges Frankel et Tysoe), 2009 BCCA 201, 92 B.C.L.R. (4th) 78*

[27] Le juge Tysoe, rédigeant l'opinion unanime de la Cour d'appel, a annulé intégralement l'ordonnance *Anton Piller* et annulé l'injonction *Mareva* contre tous les intimés à l'exception de M. Malik. Selon la cour, le juge siégeant en cabinet n'aurait pas dû se fonder sur le jugement sur la demande *Rowbotham* mis à part les trois conclusions de fait déjà mentionnées, à savoir [TRADUCTION] « que M. Malik pouvait puiser dans ses propres actifs pour se procurer des fonds, que M. Malik pouvait puiser dans les revenus et les actifs de sa famille pour financer les frais de sa défense parce que leurs actifs étaient fusionnés, et que M. Malik avait de ce fait les moyens de payer les frais de sa défense ou d'y contribuer » (par. 63). Le juge Tysoe a cependant déclaré ce qui suit :

[TRADUCTION] Les autres conclusions du jugement sur la demande *Rowbotham* n'étaient pas admissibles parce que les doctrines de la préclusion découlant d'une question déjà tranchée et de l'abus de procédure n'empêchent pas les défendeurs de contester à nouveau ces faits. [Je souligne; par. 38.]

[28] De l'avis de la Cour d'appel, les conclusions limitées du jugement sur la demande *Rowbotham* qui étaient admissibles, jointes aux

Province, did not establish a strong *prima facie* case of fraud or a real risk of dissipation of assets by the Malik family. The appeals were therefore allowed. As stated, only the *Anton Piller* order is in issue before this Court.

V. Analysis

[29] An *Anton Piller* order is, as our Court emphasized in *Celanese Canada Inc. v. Murray Demolition Corp.*, 2006 SCC 36, [2006] 2 S.C.R. 189, a thoroughly "draconian" measure equivalent to a private search warrant reserved for "exceptional circumstances" (para. 30) where "unscrupulous defendants" may if forewarned make "relevant evidence disappear" (para. 32). Accordingly:

> There are four essential conditions for the making of an *Anton Piller* order. First, the plaintiff must demonstrate a strong *prima facie* case. Second, the damage to the plaintiff of the defendant's alleged misconduct, potential or actual, must be very serious. Third, there must be convincing evidence that the defendant has in its possession incriminating documents or things, and fourthly it must be shown that there is a real possibility that the defendant may destroy such material before the discovery process can do its work . . . . [para. 35]

It bears repeating that the Province enjoys no special status in this application. It appears as a civil litigant and is to be treated no differently than any other applicant for an *Anton Piller* order.

[30] The Province's argument is that this is a case of "exceptional circumstances" because Mr. Malik and other members of his family have, over a period of 8 years, misrepresented his net worth and conspired to move assets around within the family to create the appearance that Mr. Malik is without financial resources. It alleges that Mr. Malik breached his undertakings in the Indemnity Agreement of March 21, 2002 not to encumber

faits supplémentaires contenus dans les affidavits déposés par la province, ne constituaient pas une preuve *prima facie* solide de fraude ou de risque réel de dilapidation des actifs par la famille Malik. Les appels ont donc été accueillis. Je rappelle que seule l'ordonnance *Anton Piller* est en cause dans le cadre du pourvoi dont est saisie notre Cour.

V. Analyse

[29] Comme l'a souligné la Cour dans *Celanese Canada Inc. c. Murray Demolition Corp.*, 2006 CSC 36, [2006] 2 R.C.S. 189, une ordonnance *Anton Piller* constitue une mesure tout à fait « draconienne » équivalente à un mandat de perquisition privé, réservée aux cas « exceptionnels » (par. 30) dans lesquels des « défendeurs sans scrupules » pourraient profiter d'un préavis pour « fai[re] disparaître des éléments de preuve pertinents » (par. 32). Pour cette raison :

> Quatre conditions doivent être remplies pour donner ouverture à une ordonnance *Anton Piller*. Premièrement, le demandeur doit présenter une preuve *prima facie* solide. Deuxièmement, le préjudice causé ou risquant d'être causé au demandeur par l'inconduite présumée du défendeur doit être très grave. Troisièmement, il doit y avoir une preuve convaincante que le défendeur a en sa possession des documents ou des objets incriminants, et quatrièmement, il faut démontrer qu'il est réellement possible que le défendeur détruise ces pièces avant que le processus de communication préalable puisse être amorcé . . . [par. 35]

Il convient de répéter que la province ne jouit d'aucun statut particulier dans le cadre de cette demande. Elle se présente en qualité de plaideur civil et ne doit pas être traité différemment d'un autre plaideur qui demande une ordonnance *Anton Piller*.

[30] Selon l'argument invoqué par la province, il s'agit d'un cas « exceptionnel » parce que M. Malik et des membres de sa famille ont, pendant une période de 8 années, présenté de façon inexacte la valeur nette des avoirs de M. Malik et ont comploté pour transférer des biens au sein de la famille afin de donner l'impression que M. Malik est financièrement démuni. La province plaide que M. Malik a manqué à son engagement de ne pas grever ses

his assets. Nor, according to the Province, did Mr. Malik respect the undertaking in the Defence Counsel Agreement of August 6, 2002 to identify and transfer assets to the Province. Although at his bail hearing in December 2000, a Personal Net Worth Statement was filed on behalf of Mr. and Mrs. Malik indicating a net worth of $11,648,439.85, Mr. Malik took the position at his *Rowbotham* application in August 2003 that he was unable to contribute anything to his own defence. Stromberg-Stein J. rejected this claim on the basis of detailed factual findings in respect of intra-family transactions. The Province alleges that the *Rowbotham* application itself was an act in furtherance of the family conspiracy. The Province claims the Malik respondents, given their track record, cannot be trusted to produce relevant documents in the ordinary way. In the absence of an *Anton Piller* order "there is a real possibility that the defendant[s] may destroy such material before the discovery process can do its work" (*Celanese Canada*, at para. 35).

biens, pris dans l'entente relative à la garantie du 21 mars 2002. Selon la province, M. Malik n'a pas non plus respecté son engagement, pris dans l'entente relative aux avocats de la défense du 6 août 2002, d'identifier et de transférer des actifs à la province. Alors qu'à l'enquête sur remise en liberté provisoire tenue en décembre 2000, un état de la valeur nette personnelle indiquant des actifs d'une valeur nette de 11 648 439,85 $ a été produit au nom de M. et M^me^ Malik, M. Malik a déclaré, à l'audition de la demande *Rowbotham* en août 2003, qu'il était incapable de payer quoi que ce soit pour sa propre défense. La juge Stromberg-Stein a rejeté cette affirmation en se fondant sur les conclusions de fait détaillées relatives à des opérations faites au sein de la famille. La province soutient que la demande *Rowbotham* constituait elle-même un geste concourant au complot familial. Elle prétend que l'on ne peut pas compter sur les intimés Malik, vu leur comportement passé, pour qu'ils produisent les documents pertinents de la façon habituelle. Sans une ordonnance *Anton Piller*, « il est réellement possible que le[s] défendeur[s] détruise[nt] ces pièces avant que le processus de communication préalable puisse être amorcé » (*Celanese Canada*, par. 35).

[31] An issue was raised in the court below whether *Anton Piller* orders were available in British Columbia to preserve evidence relevant to a dispute as opposed to preserving property that is the subject matter of the dispute. *Celanese Canada* was an appeal from Ontario, and a difference was noted in wording between r. 46(1) of the British Columbia *Supreme Court Rules*, which deals with preservation of "property that is the subject matter of a proceeding or as to which a question may arise", and r. 45.01 of the Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, which deals somewhat more broadly with the preservation of "property in question in a proceeding or relevant to an issue in a proceeding". I agree with Tysoe J.A. that *Anton Piller* orders for the preservation of evidence are available in British Columbia under the inherent jurisdiction of the Superior Court, which indeed is the source identified by Lord Denning in the eponymous case of *Anton*

[31] La Cour d'appel a été saisie de la question de savoir s'il était possible en Colombie-Britannique d'obtenir une ordonnance *Anton Piller* afin de préserver des éléments de preuve concernant un litige plutôt que de préserver les biens qui sont l'objet du litige. Dans *Celanese Canada*, le pourvoi provenait de l'Ontario, et l'on a relevé une différence de formulation entre le par. 46(1) des règles de la Cour suprême de la Colombie-Britannique, où il est question de la conservation d'un [TRADUCTION] « bien qui est l'objet d'une instance ou à l'égard duquel une question peut être soulevée », et l'art. 45.01 des *Règles de procédure civile* de l'Ontario, R.R.O. 1990, Règl. 194, qui traite de façon un peu plus générale de la conservation des « biens en cause dans une instance ou se rapportant à une question en litige dans une instance ». Je suis d'accord avec le juge Tysoe pour conclure qu'il est possible en Colombie-Britannique d'obtenir une ordonnance *Anton Piller* en vue de la conservation d'éléments

Piller KG v. Manufacturing Processes Ltd., [1976] 1 Ch. 55 (C.A.), and endorsed in *Yousif v. Salama*, [1980] 3 All E.R. 405 (C.A.). Accordingly, the particular wording of British Columbia's r. 46(1) does not assist the respondents.

A. *The Evidentiary Record*

[32] The issue on this appeal is whether the plaintiff (the Province) adduced sufficient admissible evidence on which the chambers judge could make the necessary findings on a balance of probabilities. The Province was required to show that it had a strong *prima facie* case and that absent such an order, there was a real possibility that relevant evidence would be destroyed or made to disappear: *Celanese Canada*, at para. 1. I agree with the respondents that if the Province failed to adduce sufficient admissible evidence at the *ex parte* hearing to justify the orders there was no obligation on them to adduce any evidence at all at the hearing before the chambers judge to set aside the *ex parte* orders.

[33] The Province's principal affiant in the *Anton Piller* application, Mr. Gordon Houston, based his information and belief respecting the material facts largely (though not entirely) on the findings of Stromberg-Stein J. in the *Rowbotham* proceedings. However, Mr. Houston also included additional evidence concerning property dealings subsequent to the *Rowbotham* application with the Malik family home (6475 Marguerite Street), commercial properties in Vancouver belonging to the Maliks, and further details of a summary judgment motion for $330,000 allegedly orchestrated by Jaspreet against his father at the suit of Mr. Malik's brother, Gurdip Malik, intended (the Province alleges) to reduce artificially Mr. Malik's net worth just prior to the *Rowbotham* application. In the result, based on Mr. Houston's "review of the file, the Malik family's actions leading up to the Rowbotham hearing, the

de preuve en vertu de la compétence inhérente de la Cour supérieure, qui constitue du reste la source mentionnée par lord Denning dans la décision éponyme *Anton Piller KG c. Manufacturing Processes Ltd.*, [1976] 1 Ch. 55 (C.A.), et approuvée dans *Yousif c. Salama*, [1980] 3 All E.R. 405 (C.A.). C'est pourquoi la formulation particulière du par. 46(1) des règles de la Colombie-Britannique n'aide pas les intimés.

A. *La preuve au dossier*

[32] La question à trancher dans le présent pourvoi est celle de savoir si la demanderesse (la province) a présenté des preuves admissibles suffisantes pour que le juge siégeant en cabinet puisse dégager les conclusions nécessaires selon la prépondérance des probabilités. La province devait démontrer qu'elle disposait d'une preuve *prima facie* solide et qu'il y avait tout lieu de croire qu'à défaut de cette ordonnance, des éléments de preuve pertinents risquaient d'être détruits ou supprimés : *Celanese Canada*, par. 1. Je suis d'accord avec les intimés pour dire que si la province n'a pas présenté à l'audition *ex parte* des preuves admissibles suffisantes pour justifier les ordonnances, ils n'étaient tenus de présenter aucune preuve à l'audition, tenue devant le juge siégeant en cabinet, de la demande d'annulation de l'ordonnance rendue *ex parte*.

[33] Le principal déposant de la province dans le cadre de la demande *Anton Piller*, M. Gordon Houston, a souscrit son affidavit, en ce qui concerne les faits pertinents, dans une large mesure (mais pas entièrement) sur la foi de renseignements qu'il tenait pour véridiques en raison des conclusions de la juge Stromberg-Stein dans son jugement sur la demande *Rowbotham*. Mais M. Houston a ajouté des éléments de preuve additionnels relatifs à des opérations postérieures à la demande *Rowbotham* ayant trait à la résidence de la famille Malik (située au 6475, rue Marguerite), à des propriétés commerciales à Vancouver appartenant aux Malik, et d'autres détails ayant trait à une requête en jugement sommaire d'un montant de 330 000 $, qui aurait été orchestrée par Jaspreet contre son père à la demande du frère de M. Malik, Gurdip Malik, en vue (selon la province) de réduire artificiellement la

Reasons for Judgment of Stromberg-Stein J., and the Malik family's property dealings subsequent to the execution of the Payment Agreement", he testified as to his belief that "the financial disclosure made by Mr. Malik was neither complete nor accurate" and that "there is a significant risk that evidence relevant to the Province's claims in this action may disappear if an Anton Piller Order is not obtained".

valeur nette des avoirs de M. Malik juste avant la demande *Rowbotham*. Pour ces raisons, en se fondant sur [TRADUCTION] « l'examen du dossier, les mesures prises par la famille Malik ayant mené à la demande Rowbotham, les motifs de jugement de la juge Stromberg-Stein et les opérations relatives à la propriété de la famille Malik postérieures à la signature de l'entente relative au paiement », M. Houston a témoigné croire que « les renseignements de nature financière communiqués par M. Malik n'étaient ni complets ni exacts » et que « sans une ordonnance Anton Piller, il y a un risque important que des éléments de preuve pertinents à l'égard des faits invoqués par la province dans la présente action disparaissent ».

[34] I agree with Tysoe J.A. that if the *Rowbotham* judgment is admissible only in respect of the three "facts" previously noted, the *Anton Piller* order cannot stand.

[34] J'estime comme le juge Tysoe que si le jugement sur la demande *Rowbotham* n'est admissible qu'à l'égard des trois « faits » déjà mentionnés, l'ordonnance *Anton Piller* ne peut être tenue pour valide.

[35] One of the problems that confronted the courts below was that the Province initially put forward the extravagant position that the "*Rowbotham* facts" not only constituted *prima facie* evidence that informed its deponents' information and belief, but were conclusive and binding, not only on Mr. Malik — the applicant in the *Rowbotham* application — but on all the other members of the Malik family and their related corporations named as defendants in the present action — by reason of the doctrines of issue estoppel and abuse of process. In my view, the issue of admissibility is separate and distinct from whether, once admitted, the *Rowbotham* findings were conclusive and binding.

[35] Un des problèmes rencontrés par les tribunaux de juridiction inférieure tenait au fait que la province avait initialement défendu la thèse extravagante voulant que les « faits *Rowbotham* » constituaient non seulement une preuve *prima facie* à la base des renseignements tenus pour véridiques par ses déposants, mais une preuve concluante et irréfutable, non seulement à l'égard de M. Malik — la personne qui avait présenté la demande *Rowbotham* — mais à l'égard de tous les autres membres de la famille Malik et leurs sociétés apparentées cités à titre de défendeurs dans la présente action — en raison des doctrines de la préclusion découlant d'une question déjà tranchée et de l'abus de procédure. À mon avis, la question de l'admissibilité est séparée et distincte de celle de savoir si, une fois admises, les conclusions du jugement sur la demande *Rowbotham* étaient concluantes et irréfutables.

[36] The chambers judge accepted the *Rowbotham* findings as *prima facie* proof of their content, and noted that while Mr. and Mrs. Malik and Jaspreet led evidence at the hearing to set aside the *ex parte* orders, none of this evidence disputed the transactions relied on by the Province to

[36] Le juge siégeant en cabinet a accepté les conclusions du jugement dans l'instance *Rowbotham* à titre de preuve *prima facie* de leur contenu. Il a signalé que, bien que M. et M^me^ Malik et Jaspreet aient présenté des éléments de preuve à l'audition de la demande d'annulation de l'ordonnance rendue

make the factual case against them. The question of whether the *Rowbotham* findings were conclusive and binding on the Maliks in this case (which would only have arisen had they made the attempt to adduce evidence to contradict those findings), was not something the chambers judge believed he was required to decide. I agree with the chambers judge that the admissibility of the *Rowbotham* facts was not dependent on the respondents being foreclosed from challenging them because of issue estoppel or abuse of process.

ex parte, aucun de ces éléments de preuve ne réfutait les opérations sur lesquelles se fondait la province pour étayer sa preuve. Le juge siégeant en cabinet ne s'est pas estimé tenu de décider si les conclusions du jugement *Rowbotham* étaient concluantes et irréfutables à l'égard des Malik dans la présente affaire (la question se serait posée seulement si les Malik avaient tenté de présenter des preuves en vue de contredire ces conclusions). Je suis d'accord avec le juge siégeant en cabinet pour dire que l'admissibilité des faits *Rowbotham* ne dépendait pas de ce qu'il pouvait être impossible pour les intimés de les contester en raison de la préclusion découlant d'une question déjà tranchée ou de l'abus de procédure.

B. *The Concern About a Multiplicity of Proceedings*

B. *La question de la multiplicité des procédures*

[37] The admissibility of prior civil or criminal judgments in subsequent civil proceedings, and the effect to be given to them, must be seen in the broader context of the need to promote efficiency in litigation and reduce its overall costs to the parties. The doctrines of *res judicata*, issue estoppel and abuse of process are all part of this larger judicial policy but they do not exhaust its potential.

[37] L'admissibilité de jugements civils ou criminels antérieurs dans le cadre de procédures civiles, et l'effet qui doit leur être donné, doivent être considérés dans le contexte plus large de la nécessité de favoriser l'efficacité dans le règlement des litiges et de réduire le coût global pour les parties. Les doctrines de la *res judicata*, de la préclusion découlant d'une question déjà tranchée et de l'abus de procédure s'inscrivent toutes trois dans cette politique judiciaire plus générale, sans toutefois en épuiser le potentiel.

[38] It seems clear the *Rowbotham* judgment was properly put before the chambers judge. He was entitled to take judicial notice of prior decisions of the court. Then there is the public documents (or official written statement) exception to the hearsay rule: *McCormick on Evidence* (5th ed. 1999), vol. 2, at §295. Moreover, it was incumbent on the Province to make "full and frank disclosure of all relevant facts" to the chambers judge (*Celanese Canada*, at para. 37). This requirement included drawing the court's attention to the *Rowbotham* decision. Further, as the Province points out, the *Rowbotham* proceeding was itself pleaded as a step in the alleged Malik family conspiracy to defraud the Province. In this aspect, the judgment was tendered for the purpose of proving the *fact* that the proceedings were taken by Mr. Malik, and supported by testimony from his family. In this latter

[38] Il paraît clair que le juge siégeant en cabinet a à juste titre été saisi du jugement *Rowbotham*. Il avait le droit de prendre connaissance d'office de décisions antérieures rendues par la cour. Les documents publics (ou des déclarations écrites officielles) font aussi exception à la règle du ouï-dire : *McCormick on Evidence* (5e éd. 1999), vol. 2, §295. De plus, il incombait à la province « de faire une divulgation fidèle et complète de tous les faits pertinents » au juge siégeant en cabinet (*Celanese Canada*, par. 37). Du fait de cette obligation, la province se devait de signaler à la cour le jugement *Rowbotham*. Et comme le souligne la province, la demande *Rowbotham* a elle-même été invoquée à titre d'élément du complot en vue de frauder la province reproché à la famille Malik. Sous ce rapport, on a produit le jugement dans le dessein de prouver le *fait* que les procédures ont été engagées par

respect, the fact the proceeding itself was taken is *not* hearsay: *R. v. Smith*, [1992] 2 S.C.R. 915, at pp. 924-25.

[39] All of this, of course, does not carry the Province very far. The mere fact the *Rowbotham* decision was properly before the chambers judge does not determine what use may properly be made of it. In my view the chambers judge was *not* required to proceed as if the *Rowbotham* judgment was of merely historical interest and of no probative value to the *Anton Piller* application (apart from the Court of Appeal's "three facts").

[40] In a number of decisions our Court had emphasized a public interest in the avoidance of "[d]uplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings" (*Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460, at para. 18). Inefficient procedures not only increase costs unnecessarily, but result in added delay, and can operate as an avoidable barrier to effective justice:

> Where the same issues arise in various forums, the quality of justice delivered by the adjudicative process is measured not by reference to the isolated result in each forum, but by the end result produced by the various processes that address the issue.
>
> (*Toronto (City) v. Canadian Union of Public Employees, Local 79* (2001), 55 O.R. (3d) 541 (C.A.), *per* Doherty J.A., at para. 74, aff'd 2003 SCC 63, [2003] 3 S.C.R. 77 (*sub nom. Toronto (City) v. C.U.P.E., Local 79*), at para. 44)

When *Toronto (City) v. C.U.P.E., Local 79* reached this Court, Arbour J. pointed out that the judicial concern about duplicative litigation operates equally against a plaintiff or a defendant: "I cannot see what difference it makes" (para. 47). At issue in those cases were the doctrines of *res judicata*, issue estoppel and abuse of process.

M. Malik et que des membres de sa famille ont témoigné pour les appuyer. À ce dernier égard, le fait que l'instance elle-même a été introduite *ne* constitue *pas* du ouï-dire : *R. c. Smith*, [1992] 2 R.C.S. 915, p. 924-925.

[39] Tout cela, bien sûr, ne mène pas la province très loin. Le simple fait que le juge siégeant en cabinet ait été saisi à juste titre de la décision sur la demande *Rowbotham* ne détermine pas l'usage qu'il convenait d'en faire. Selon moi, le juge siégeant en cabinet *n'*était *pas* tenu de faire comme si cette décision ne présentait qu'un intérêt historique et était dénué de valeur probante à l'égard de la demande *Anton Piller* (exception faite des « trois faits » retenus par la Cour d'appel).

[40] Dans plusieurs décisions, la Cour a souligné que l'intérêt public commande d'éviter « [l]es instances faisant double emploi, les risques de résultats contradictoires, les frais excessifs et les procédures non décisives » (*Danyluk c. Ainsworth Technologies Inc.*, 2001 CSC 44, [2001] 2 R.C.S. 460, par. 18). Des procédures inefficaces font non seulement augmenter inutilement les coûts, mais elles ont pour effet de retarder les choses et peuvent constituer un obstacle évitable à une justice efficace :

> [TRADUCTION] Lorsque la même question est soulevée devant divers tribunaux, la qualité des décisions rendues au terme du processus judiciaire se mesure non par rapport au résultat particulier obtenu de chaque forum, mais par le résultat final découlant des divers processus.
>
> (*Toronto (City) c. Canadian Union of Public Employees, Local 79* (2001), 55 O.R. (3d) 541 (C.A.), le juge Doherty, par. 74, conf. par 2003 CSC 63, [2003] 3 R.C.S. 77 (intitulé *Toronto (Ville) c. S.C.F.P., section locale 79*), par. 44)

Lorsque notre Cour a été saisie de l'affaire *Toronto (Ville) c. S.C.F.P., section locale 79*, la juge Arbour a souligné que la préoccupation des juges touchant les procédures répétitives concerne indifféremment les demandeurs et les défendeurs : « je ne vois pas quelle différence il y a » (par. 47). Il était question dans ces affaires des doctrines de la *res judicata*, de la préclusion découlant d'une question déjà tranchée et de l'abus de procédure.

[41] *Danyluk* concerned a civil action by a disgruntled employee whose claim under the *Employment Standards Act*, R.S.O. 1990, c. E.14, had already been dismissed by a government adjudicator. The employer asked for dismissal on the basis of issue estoppel. The Court held that the doctrine of issue estoppel must be applied flexibly, and that from a fairness perspective the employee should be permitted to relitigate the claims arising out of her employment because "[i]t is unlikely the legislature intended a summary procedure for smallish claims to become a barrier to closer consideration of more substantial claims" (para. 78). On the other hand, *Toronto (City) v. C.U.P.E., Local 79*, applied the doctrine of abuse of process, notwithstanding different parties, to prevent the relitigation of a criminal conviction of a municipal employee for sexual abuse of a child in his care. The issue resurfaced in a subsequent grievance arbitration by the employee, who had been fired following his conviction. The respondent City filed before the arbitrator not only a certificate of conviction but a transcript of the boy's evidence at the criminal trial. (The child did not testify at the arbitration.) In holding the arbitrator bound by the earlier criminal proceedings, Arbour J. offered three observations on why relitigation is generally undesirable:

> First, there can be no assumption that relitigation will yield a more accurate result than the original proceedings. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly and additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality. [para. 51]

[41] Dans l'affaire *Danyluk*, une action civile a été intentée par une employée mécontente dont la plainte, déposée en vertu de la *Loi sur les normes d'emploi*, L.R.O. 1990, ch. E.14, avait déjà été rejetée par une agente des normes d'emploi. L'employeur a demandé le rejet de l'action pour cause de préclusion d'une question déjà tranchée. La Cour a jugé que la doctrine de la préclusion découlant d'une question déjà tranchée devait être appliquée avec souplesse et qu'il fallait, par souci d'équité, permettre à l'employée de plaider de nouveau sa cause liée à son emploi parce qu'« [i]l est peu probable que le législateur ait voulu qu'une procédure sommaire applicable à la réclamation de petites sommes fasse obstacle à l'examen approfondi de réclamations plus considérables » (par. 78). Par contre, dans *Toronto (Ville) c. S.C.F.P., section locale 79*, la Cour a appliqué la doctrine de l'abus de procédure, même si les parties étaient différentes, afin d'empêcher la remise en cause de la déclaration de culpabilité prononcée à l'encontre d'un employé municipal pour une agression sexuelle commise sur un enfant qui lui était confié. La question avait refait surface dans le cadre de l'arbitrage d'un grief déposé ultérieurement par l'employé, qui avait été congédié après sa condamnation. La ville intimée avait produit devant l'arbitre non seulement un certificat de condamnation, mais une transcription du témoignage du garçon lors du procès criminel. (L'enfant n'avait pas témoigné lors de l'arbitrage.) En concluant que l'arbitre était lié par l'instance criminelle antérieure, la juge Arbour a cité trois raisons pour lesquelles la réouverture d'un litige n'est généralement pas souhaitable :

> Premièrement, on ne peut présumer que la remise en cause produira un résultat plus exact que l'instance originale. Deuxièmement, si l'instance subséquente donne lieu à une conclusion similaire, la remise en cause aura été un gaspillage de ressources judiciaires et une source de dépenses inutiles pour les parties sans compter les difficultés supplémentaires qu'elle aura pu occasionner à certains témoins. Troisièmement, si le résultat de la seconde instance diffère de la conclusion formulée à l'égard de la même question dans la première, l'incohérence, en soi, ébranlera la crédibilité de tout le processus judiciaire et en affaiblira ainsi l'autorité, la crédibilité et la vocation à l'irrévocabilité. [par. 51]

[42] Of course the weight of the prior judgment will depend on such factors as the similarity of the issues to be decided, the identity of the parties, and (because of the differing burdens of proof) whether the prior proceedings were criminal or civil. As the Sopinka text points out: "The fact that it is a civil judgment only would be significant in terms of weight. The party against whom the judgment was rendered would have a greater opportunity to explain it or suggest mitigating circumstances" (Alan W. Bryant, Sidney N. Lederman and Michelle K. Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada* (3rd ed. 2009), at §19.177).

[43] Here it is objected that the *Rowbotham* issues are different from the fraud and conspiracy case, but Arbour J. in *Toronto (City) v. C.U.P.E., Local 79*, cited the decision of the Ontario Court of Appeal in *Re Del Core and Ontario College of Pharmacists* (1985), 51 O.R. (2d) 1, where Houlden J.A. (dissenting on a different point) observed in the context of an appeal from a decision of a professional disciplinary body, that "lack of identity of issue goes to weight, not to admissibility" (p. 17). Arbour J. also referred to *Saskatoon Credit Union Ltd. v. Central Park Enterprises Ltd.* (1988), 47 D.L.R. (4th) 431 (B.C.S.C.). In that case, it was held that it was an abuse of process for the defendants to deny that a certain transfer was fraudulent where that issue had been determined against them after a full and fair trial in a previous proceeding between different parties.

[44] The Province suggests that the Court of Appeal was influenced — although not expressly referring to it — by the so-called rule in *Hollington v. F. Hewthorn & Co.*, [1943] 1 K.B. 587 (C.A.). In that case, in which damages were claimed arising out of a motor vehicle accident, the English Court of Appeal ruled inadmissible in the subsequent civil action a certificate of conviction of the

[42] Le poids du jugement antérieur dépendra naturellement de facteurs comme la similitude des questions devant être tranchées, l'identité des parties et (en raison des différences quant à la charge de la preuve) le caractère criminel ou civil des procédures antérieures. Comme le soulignent les éditeurs de *The Law of Evidence in Canada*, [TRADUCTION] « [l]e fait qu'il s'agit seulement d'un jugement civil aurait une importance quant au poids devant lui être attribué. La partie contre laquelle le jugement a été rendu aurait davantage l'occasion de l'expliquer ou d'avancer des circonstances atténuantes » (Alan W. Bryant, Sidney N. Lederman et Michelle K. Fuerst, *Sopinka, Lederman & Bryant : The Law of Evidence in Canada* (3e éd. 2009), §19.177).

[43] En l'espèce, on objecte que les questions dans la demande *Rowbotham* sont différentes de l'instance relative à la fraude et au complot. Mais la juge Arbour, dans *Toronto (Ville) c. S.C.F.P., section locale* 79, a cité la décision de la Cour d'appel de l'Ontario dans *Re Del Core and Ontario College of Pharmacists* (1985), 51 O.R. (2d) 1, où le juge Houlden (dissident sur un autre point) a observé, dans le contexte de l'appel d'une décision d'un comité de discipline, que [TRADUCTION] « l'absence d'identité des questions en litige a une incidence sur le poids devant être attribué à la décision, non sur l'admissibilité de celle-ci » (p. 17). La juge Arbour a également mentionné *Saskatoon Credit Union Ltd. c. Central Park Enterprises Ltd.* (1988), 47 D.L.R. (4th) 431 (C.S.C.-B.). Dans cette affaire, le tribunal a conclu à un abus de procédure de la part des défendeurs, qui avaient nié le caractère frauduleux d'un certain transfert alors que cette question avait été tranchée en leur défaveur à l'issue d'un procès complet et équitable dans une instance ayant antérieurement opposé des parties différentes.

[44] La province laisse entendre que la Cour d'appel a été influencée — sans toutefois s'y être référée explicitement — par la « règle » établie dans *Hollington c. F. Hewthorn & Co.*, [1943] 1 K.B. 587 (C.A.). Il s'agit d'une décision relative à des dommages-intérêts réclamés par suite d'un accident d'automobile. La Cour d'appel d'Angleterre avait déclaré inadmissible dans l'action

defendant driver for careless driving because "on the trial of the issue in the civil court, the opinion of the criminal court is equally irrelevant" (p. 595). In its country of origin this rule is "generally thought to have taken the technicalities of the matter much too far" (*Arthur J.S. Hall & Co. v. Simons*, [2000] U.K.H.L. 38, [2002] 1 A.C. 615, at p. 702, *per* Lord Hoffman). The editor of *Cross and Tapper on Evidence* (12th ed. 2010) agrees. After dismissing *Hollington v. F. Hewthorn & Co.* as a bundle of "indefensible technicalities" (p. 109), he comments that the "House of Lords might at some stage reconsider the matter in the light of the modern emphasis on fairness and the abuse of process, especially where the prejudiced party had a full opportunity to contest the finding against him in the earlier proceedings" (p. 110). The editors of the Sopinka text appear to share the same view (§19.158). To similar effect, see *Jorgensen v. News Media (Auckland) Ltd.*, [1969] N.Z.L.R. 961 (C.A.), at p. 980, citing, at p. 971, *Harvey v. The King*, [1901] A.C. 601 (P.C.), and at p. 974, *McCormick on Evidence*:

> Probably the trend of evolution will be toward the admission generally against a present party of any judgment or finding in a former civil or criminal case if the party had an opportunity to defend. The principles on which is founded the hearsay exception for official written statements would justify this extension.

In this appeal we are concerned only with the effect, if any, to be given to *Hollington v. F. Hewthorn & Co.* in *interlocutory* proceedings. In my view the "rule" simply has no application at this stage of proceedings in British Columbia. In addition to the general considerations already referred to, r. 51(10)(a) of the British Columbia *Supreme Court Rules* expressly permits the admission of hearsay on an interlocutory application

civile subséquente un certificat faisant état de la condamnation pour conduite imprudente du conducteur défendeur parce que [TRADUCTION] « dans le cadre du procès tenu devant le tribunal de juridiction civile, l'opinion du tribunal de juridiction criminelle est également sans pertinence » (p. 595). Dans le pays où elle a été établie, [TRADUCTION] « on considère généralement que [cette règle] a poussé bien trop loin les distinctions subtiles » (*Arthur J.S. Hall & Co. c. Simons*, [2000] U.K.H.L. 38, [2002] 1 A.C. 615, p. 702, lord Hoffman). L'éditeur de *Cross and Tapper on Evidence* (12e éd. 2010) est du même avis. Après avoir écarté la décision *Hollington c. F. Hewthorn & Co.*, dans laquelle il voit un ensemble de [TRADUCTION] « subtilités indéfendables » (p. 109), il exprime l'opinion que « la Chambre des lords pourrait à un certain stade reconsidérer la question à la lumière de l'accent mis aujourd'hui sur l'équité et l'abus de procédure, en particulier lorsque la partie lésée a pleinement eu la possibilité de contester la décision rendue contre elle dans l'instance antérieure » (p. 110). Les éditeurs de *The Law of Evidence in Canada* semblent partager cette opinion (§19.158). Une idée semblable est exprimée dans *Jorgensen c. News Media (Auckland) Ltd.*, [1969] N.Z.L.R. 961 (C.A.), p. 980, où l'on cite, à la p. 971, *Harvey c. The King*, [1901] A.C. 601 (C.P.), et à la p. 974, *McCormick on Evidence* :

> [TRADUCTION] Les choses évolueront sans doute vers l'admission d'une manière générale, contre une partie dans une instance en cours, de toute conclusion tirée ou de tout jugement rendu dans le cadre d'une instance civile ou criminelle antérieure, si la partie a eu la possibilité de se défendre. Les principes à la base de l'exception à la règle du ouï-dire relative aux déclarations écrites officielles justifieraient cette extension.

En l'espèce, il s'agit seulement d'examiner l'effet, s'il en est, que peut avoir l'arrêt *Hollington c. F. Hewthorn & Co.* dans des procédures *interlocutoires*. Selon moi, la « règle » n'a tout simplement aucune application à cette étape des procédures en Colombie-Britannique. En plus des considérations générales exposées précédemment, l'al. 51(10)a) des règles de la Cour suprême de la Colombie-Britannique permet expressément l'admission

(as does replacement r. 22-2(13), which came into force on July 1, 2010 (*Supreme Court Civil Rules*, B.C. Reg. 168/2009)).

[45] I do not see how the "indefensible technicalities" of *Hollington v. F. Hewthorn & Co.*, or their extension to interlocutory proceedings in a civil case are consistent with the concerns expressed by this Court in *Toronto (City) v. C.U.P.E., Local 79*, about the need to avoid an unnecessary multiplicity of proceedings.

[46] Whether or not a prior civil or criminal decision is admissible in trials on the merits — including administrative or disciplinary proceedings — will depend on the purpose for which the prior decision is put forward and the use sought to be made of its findings and conclusions. On this point I agree with *Del Core* (which was *not* an interlocutory proceeding) that it "would be highly undesirable to replace this arbitrary rule [in *Hollington v. F. Hewthorn & Co.*] by prescribing equally rigid rules to replace it" (p. 22).

[47] I agree, as well, with the Ontario Court of Appeal in *Del Core* that the prior proceedings may be admissible but the "weight and significance" to be given to them "will depend on the circumstances of each case" (p. 21).

> The law of Ontario is only now emerging from the long shadow cast over it by the decision in *Hollington v. Hewthorn*, *supra*. It would be highly undesirable to replace this arbitrary rule by prescribing equally rigid rules to replace it. The law should remain flexible to permit its application to the varying circumstances of particular cases. [p. 22]

[48] Once admitted, the weight to be given to the earlier decision in subsequent interlocutory proceedings will rest not only on the identity of the participants, the similarity of the issues, the nature of the earlier proceedings and the opportunity given to the prejudiced party to contest it but on

d'une preuve par ouï-dire dans le cadre d'une requête interlocutoire (comme le permet aussi le par. 22-2(13), entré en vigueur le 1er juillet 2010, qui l'a remplacé (*Supreme Court Civil Rules*, B.C. Reg. 168/2009)).

[45] Je ne vois pas comment les [TRADUCTION] « subtilités indéfendables » de *Hollington c. F. Hewthorn & Co.*, ou leur extension à des procédures interlocutoires dans une instance civile, pourraient être compatibles avec les préoccupations que notre Cour a exprimées dans *Toronto (Ville) c. S.C.F.P., section locale 79*, au sujet de la nécessité d'éviter la multiplicité inutile des procédures.

[46] L'admissibilité, au procès sur le fond, d'une décision antérieure en matière civile ou criminelle — y compris les décisions d'un tribunal administratif ou disciplinaire — dépendra des fins pour lesquelles la décision est présentée et de l'utilisation que l'on entend faire de ses conclusions. Sur ce point, je suis d'accord avec la Cour d'appel dans *Del Core* (qui *n'*était *pas* une procédure interlocutoire) qu'il [TRADUCTION] « serait déplorable de remplacer cette règle arbitraire [de l'arrêt *Hollington c. F. Hewthorn & Co.*] par l'imposition de règles tout aussi rigides » (p. 22).

[47] Je suis d'accord également avec la Cour d'appel de l'Ontario, qui a estimé dans *Del Core* que les procédures antérieures peuvent être admissibles mais que [TRADUCTION] « le poids et l'importance » qu'il faut leur attribuer « dépendront des circonstances de chaque cas » (p. 21).

> [TRADUCTION] Le droit ontarien émerge maintenant seulement de la grande zone d'ombre dans laquelle l'avait plongé la décision *Hollington c. Hewthorn*, précitée. Il serait déplorable de remplacer cette règle arbitraire par l'imposition de règles tout aussi rigides. Le droit doit demeurer souple, de façon à pouvoir être appliqué aux circonstances différentes de chaque cas. [p. 22]

[48] Une fois la décision antérieure admise, le poids devant lui être attribué dans les procédures interlocutoires ultérieures tiendra non seulement à l'identité des participants, à la similitude des questions en litige, à la nature des procédures antérieures et à la possibilité donnée à la partie lésée de

all "the varying circumstances of particular cases" (*Del Core*, at p. 22).

C. *The Rowbotham Decision Was Admissible in This Case*

[49] In my view the chambers judge did not err in treating as admissible the *Rowbotham* decision on the interlocutory applications. The earlier proceeding had been initiated by Mr. Malik and involved the other respondents. The same series of family transactions, and allegations of asset manipulation, had earlier been examined by a judge of the Supreme Court of British Columbia. The underlying issue in the *Rowbotham* case, as it is here, is whether the Malik family was playing games with the Province (and the B.C. courts) with respect to their financial affairs. The question in that case was whether Mr. Malik was without financial resources to fund his defence. The issue in this case is whether Mr. Malik is without funds to pay his debt to the Province as a result of asset manipulation and fraudulent dealings within the Malik family as initially explored in the *Rowbotham* application, and according to the Houston affidavit, has continued ever since. These issues cannot be answered at an eventual trial without access to the underlying documents. The history of dealings between the Province and the Malik family justifies serious concern whether such evidence would be made available by the Malik family in the ordinary course of discovery.

[50] On the other hand, the chambers judge (quite properly in my view) did *not* foreclose the Malik family from leading evidence on the return of the motion to explain away or put a different light on their financial transactions.

[51] Undoubtedly, a chambers judge should proceed cautiously with hearsay evidence, particularly where the *ex parte* remedies sought are as

la contester mais aussi à toutes les [TRADUCTION] « circonstances différentes de chaque cas » (*Del Core*, p. 22).

C. *La décision sur la demande Rowbotham était admissible en l'espèce*

[49] Le juge siégeant en cabinet n'a selon moi commis aucune erreur en considérant la décision sur la demande *Rowbotham* comme admissible dans le cadre des requêtes interlocutoires. La procédure antérieure avait été engagée par M. Malik et faisait intervenir les autres intimés. La même série d'opérations familiales et l'allégation de manipulation des actifs avaient été examinées auparavant par un juge de la Cour suprême de la Colombie-Britannique. La question sous-jacente dans la demande *Rowbotham*, comme en l'espèce, est celle de savoir si la famille Malik s'est livrée à des manigances vis-à-vis de la province (et de ses tribunaux) à l'égard de ses affaires financières. Dans le premier cas, il s'agissait de savoir si M. Malik était dépourvu des moyens financiers nécessaires pour assurer sa défense. En l'espèce, il s'agit de savoir si M. Malik est dépourvu des fonds nécessaires pour rembourser sa dette à la province par suite d'une manipulation d'actifs et d'opérations frauduleuses effectuées au sein de la famille Malik — des agissements examinés initialement dans le cadre de la demande *Rowbotham* et qui, selon l'affidavit de M. Houston, n'ont pas cessé depuis lors. Il est impossible de statuer sur ces questions lors d'un éventuel procès sans avoir accès aux documents sous-jacents. Vu l'historique des rapports entre la province et la famille Malik, il est permis de douter sérieusement que de tels éléments de preuve puissent être obtenus des membres de la famille Malik dans le cadre habituel d'un interrogatoire préalable.

[50] Par ailleurs, le juge siégeant en cabinet (à juste titre selon moi) *n*'a *pas* empêché la famille Malik de produire des éléments de preuve lors de la présentation de la requête afin d'expliquer ses opérations financières ou de les éclairer d'un jour différent.

[51] Le juge siégeant en cabinet doit certes faire preuve de prudence en matière de preuve par ouï-dire, en particulier lorsque les mesures demandées

prejudicial to the absent defendants as in the case of an *Anton Piller* order or a summary judgment (*Memphis Rogues Ltd. v. Skalbania* (1982), 38 B.C.L.R. 193 (C.A.), at pp. 194-95), or an injunction (*Litchfield v. Darwin* (1997), 29 B.C.L.R. (3d) 203 (S.C.), at para. 5). However, the need to proceed with caution does not render hearsay as such inadmissible under r. 51(10)(a) on an interlocutory motion.

[52] More significantly in this case, for the reasons already discussed, I do not regard a prior judicial decision between the same or related parties or participants on the same or related issues as merely another controversy over hearsay or opinion evidence. The court's earlier decision was a judicial pronouncement after the contending parties had been heard. It had substantial effect on their legal rights. It would have been wasteful of litigation resources and potentially productive of mischief and inconsistent findings (as discussed in *Toronto (City) v. C.U.P.E., Local 79*) to have required the chambers judge to put aside Stromberg-Stein J.'s judgment and require the Province to litigate the *Rowbotham* facts *de novo* on an interlocutory motion. Of course the *Hollington v. F. Hewthorn & Co.* doctrine and its civil offshoots are not just about hearsay. They are also about inadmissible opinion evidence — opinion piled on hearsay. But for the reasons already discussed I would decline to give effect to the arguments made in *Hollington v. F. Hewthorn & Co.* They give rise to unnecessary inefficiencies and any alleged unfairness can be addressed on a case-by-case basis according to the circumstances.

D. *Did the Chambers Judge Defer Improperly to the Decision of the Rowbotham Judge, Delivered Five Years Earlier?*

[53] The reasons of the chambers judge for granting the *Anton Piller* order and *Mareva* injunction

ex parte sont aussi préjudiciables aux défendeurs absents que dans le cas d'une ordonnance *Anton Piller* ou d'un jugement sommaire (*Memphis Rogues Ltd. c. Skalbania* (1982), 38 B.C.L.R. 193 (C.A.), p. 194 et 195), ou d'une injonction (*Litchfield c. Darwin* (1997), 29 B.C.L.R. (3d) 203 (C.S.), par. 5). Mais la nécessité d'agir avec prudence ne rend pas inadmissible en soi la preuve par ouï-dire en vertu de l'al. 51(10)a) dans le cadre d'une demande interlocutoire.

[52] Plus important en l'espèce, je ne considère pas, pour les raisons déjà exposées, une décision judiciaire antérieure entre des parties ou participants qui sont les mêmes ou apparentés portant sur des questions identiques ou connexes comme simplement une autre controverse au sujet du ouï-dire ou de la preuve d'opinion. La décision antérieure rendue par le tribunal constituait une déclaration judiciaire faite après que les parties adverses eurent été entendues. Elle comportait des effets substantiels sur leurs droits. Obliger le juge siégeant en cabinet à écarter la décision de la juge Stromberg-Stein et la province à plaider *de novo* les faits de la demande *Rowbotham* dans le cadre d'une requête interlocutoire aurait constitué une mauvaise utilisation des ressources judiciaires et aurait pu causer des dommages et donner lieu à des conclusions contradictoires (comme il est expliqué dans *Toronto (Ville) c. S.C.F.P., section locale 79*). Naturellement, la doctrine *Hollington c. F. Hewthorn & Co.* et ses variantes civiles ne concernent pas uniquement la preuve par ouï-dire. Elles ont également trait à la preuve d'opinion qui est inadmissible — l'opinion qui s'appuie sur du ouï-dire. Mais pour les raisons déjà expliquées, je refuserais de donner effet aux arguments invoqués dans *Hollington c. F. Hewthorn & Co.* Ils engendrent des inefficacités inutiles et si une injustice est alléguée, il est possible d'y remédier au cas par cas, selon les circonstances.

D. *Le juge siégeant en cabinet a-t-il fait preuve d'une déférence abusive à l'égard de la décision sur la demande Rowbotham rendue cinq ans auparavant?*

[53] Les motifs de la décision du juge siégeant en cabinet accordant l'ordonnance *Anton Piller* et

are quite brief. He stated that the Province had a "strong *prima facie* case that goes back to the reasons for judgment in 2003 of Madam Justice Stromberg-Stein in this matter" (para. 2), and then didn't refer to the *Rowbotham* case again. He said that his decision to grant the *Mareva* injunction was based on the material and written arguments before him. With respect to the *Anton Piller* order, he stated:

> Similarly, with respect to the Anton Piller order, I am satisfied on the basis of the material placed before me and the written argument that the order as sought . . . is appropriate. . . . [T]he material placed before me suggests, again on a strong *prima facie* basis, that that person may be involved in making arrangements to collude with the other defendants to frustrate the obligation that the defendant [Mr. Malik] has on the face of it with the plaintiff. That is all I will say, inasmuch as I do not think on an *ex parte* motion of this kind the court should discuss or suggest that it's made any finding on the merits except to say that what is before it suggests a very strong case.

(*British Columbia (Attorney General) v. R.S.M.*, B.C.S.C. (in chambers), No. S077088, October 23, 2007, at para. 5)

I therefore turn to the four "essential conditions" set out in *Celanese Canada* that must be met to justify an *Anton Piller* order.

(1) The Plaintiff Must Demonstrate a Strong *Prima Facie* Case

[54] What the chambers judge termed a very strong "case" included evidence that (1) Mr. Malik owed the Province over $5.2 million; (2) Mr. Malik's net worth had gone from a joint interest (with his wife) in $11,648,439.85 in December 2000 to alleged insolvency in August 2003 with no explanation other than intra-family transfers of assets; (3) Mr. Malik had neither identified nor transferred assets to the Province as he had undertaken to do; (4) the Malik family has made numerous transfers of assets including luxury

l'injonction *Mareva* sont très brefs. Il indique que la province dispose d'une [TRADUCTION] « solide preuve *prima facie* qui remonte aux motifs du jugement rendu sur cette question en 2003 par la juge Stromberg-Stein » (par. 2), sans plus faire référence ensuite à la demande *Rowbotham*. Il précise que sa décision d'accorder l'injonction *Mareva* est fondée sur les documents et les observations écrites qui lui ont été présentés. Voici ce qu'il écrit au sujet de l'ordonnance *Anton Piller* :

> [TRADUCTION] De même, en ce qui a trait à l'ordonnance Anton Piller, je suis convaincu, à la lumière des documents qui m'ont été présentés et des observations écrites, que l'ordonnance demandée [. . .] est appropriée. [. . .] [L]es documents qui m'ont été présentés donnent à penser, encore une fois en raison d'une solide preuve *prima facie*, que cette personne prend peut-être des dispositions en vue de s'associer avec les autres défendeurs pour contrecarrer l'obligation que le défendeur [M. Malik] a envers la demanderesse. Je n'en dirai pas davantage : je ne pense pas en effet que dans le cas d'une telle requête *ex parte* le tribunal devrait analyser le fond ou donner à entendre qu'il a tiré des conclusions sur le fond, sauf pour dire que les documents dont il dispose semblent indiquer l'existence d'une preuve très solide.

(*British Columbia (Attorney General) c. R.S.M.*, C.S.C.-B. (en cabinet), nº S077088, 23 octobre 2007, par. 5)

J'aborde donc les quatre « conditions [qui] doivent être remplies » selon *Celanese Canada* pour justifier une ordonnance *Anton Piller.*

(1) Le demandeur doit présenter une preuve *prima facie* solide

[54] Voici les éléments qualifiés de [TRADUCTION] « preuve » très solide par le juge siégeant en cabinet : (1) M. Malik devait à la province plus de 5,2 millions de dollars; (2) la valeur nette des avoirs de M. Malik était passée d'un actif conjoint (avec son épouse) de 11 648 439,85 $ en décembre 2000 à une prétendue insolvabilité en août 2003, sans autre explication que des transferts d'actifs au sein de la famille; (3) M. Malik n'avait ni identifié ni transféré des actifs à la province comme il s'y était engagé; (4) la famille Malik avait effectué de

vehicles and Mr. Malik's $72,000 income tax refund, in violation of a court order not to dispose of any assets (this amount was belatedly repaid to the Province); (5) the particular transfers of property within the family up to the time of the *Rowbotham* hearing had been examined judicially in the course of that proceeding; (6) the pattern of shuffling assets within the family and loading the remaining assets with debt continued after the *Rowbotham* application in respect of Mr. Malik's home at 6475 Marguerite Street and the commercial property on Hamilton Street, where some of the mortgages ranking in priority to the Province's claim had been shuffled back to a Malik family company, 0772735 B.C. Ltd., in an effort to obtain priority over the Province's claim. These mortgages had a combined value of about $1.9 million; (7) the circumstances of the transfers raised a legitimate concern that their purpose was to facilitate Mr. Malik escaping his financial obligations under the agreements for defence funding that he had entered into with the Province; (8) Jaspreet played an active role in attempting to obtain a default judgment against his father at the suit of his uncle Gurdip Malik on a $330,000 loan that was not due for another year; (9) the intra-family transactions included a security interest registered by Jaspreet in favour of Gurdip Malik against Mr. Malik's shares in Khalsa, a company that owned a $3 million hotel, one year before the $330,000 loan was due and one month after Tysoe J. ordered Mr. Malik not to dispose of or encumber any of his assets; and (10) the Malik children claimed unpaid wages in the amount of $260,000 that had never been recorded or claimed before Mr. Malik's legal troubles.

nombreux transferts d'actifs, y compris des véhicules de luxe et le remboursement d'impôt sur le revenu de 72 000 $ reçu par M. Malik, en violation d'une ordonnance judiciaire lui interdisant de se défaire de quelque bien que ce soit (cette somme a été remboursée tardivement à la province); (5) les transferts de propriété en cause ayant eu lieu au sein de la famille jusqu'au moment de l'audition de la demande *Rowbotham* avaient fait l'objet d'un examen judiciaire dans le cadre de cette instance; (6) le procédé consistant à faire des transferts d'actifs au sein de la famille et à grever de dettes les actifs restants s'est poursuivi après la demande *Rowbotham* à l'égard de la résidence de M. Malik située au 6475, rue Marguerite et de la propriété commerciale de la rue Hamilton, où certaines des hypothèques d'un rang prioritaire à la créance de la province étaient revenues à une société de la famille Malik, 0772735 B.C. Ltd., dans une tentative pour obtenir une priorité par rapport à la créance de la province. La valeur totale de ces hypothèques se chiffrait à quelque 1,9 million de dollars; (7) les circonstances des transferts permettaient légitimement de croire qu'ils visaient en fait à aider M. Malik à échapper aux obligations financières découlant des ententes relatives au financement de sa défense conclues avec la province; (8) Jaspreet a joué un rôle actif en essayant d'obtenir un jugement par défaut contre son père à la demande de son oncle Gurdip Malik, à propos d'un prêt de 330 000 $ qui n'était pas exigible avant une année; (9) parmi les opérations effectuées au sein de la famille figurait une sûreté enregistrée par Jaspreet en faveur de Gurdip Malik et grevant des actions de M. Malik dans Khalsa, une société qui était propriétaire d'un hôtel de 3 millions de dollars, un an avant que le prêt de 330 000 $ soit exigible et un mois après que le juge Tysoe eût ordonné à M. Malik de n'aliéner ou de ne grever aucun de ses actifs; et (10) les enfants Malik ont réclamé 260 000 $ au titre de salaires non payés qui n'avaient jamais été inscrits ou réclamés avant les problèmes juridiques de M. Malik.

[55] In my view it was open to the chambers judge on the basis of the whole of the interlocutory

[55] Selon moi, il était loisible au juge siégeant en cabinet, en se fondant sur l'ensemble du dossier

record to conclude that the Province had made out a strong *prima facie* case to establish Mr. Malik's debt and the respondents' conspiracy to defraud the Province and to assist Mr. Malik to avoid his obligations under the Defence Counsel Agreement.

(2) The Damage to the Plaintiff of the Defendant's Alleged Misconduct, Potential or Actual, Must Be Very Serious

[56] A claim of over $5.2 million against a debtor who, *prima facie*, exhibits a continuing history of evading payment by fraud and conspiracy with other members of his family to cover their financial tracks is, in my view, very serious.

(3) There Must Be Convincing Evidence That the Defendant Has in Its Possession Incriminating Documents or Things

[57] In my opinion, it was open to the chambers judge to conclude on the *ex parte* application that incriminating documentation behind the registered and unregistered property transfers was in the possession of the respondents, especially Jaspreet who held himself out as his father's "legal counsel in relation to financial affairs" (chambers judgment, at para. 11). Jaspreet acted for his parents, either personally or in connection with other members of his firm, in at least 18 mortgage transactions since 1996, the majority of which post-date the court order against Mr. Malik not to dispose of his assets. It is alleged, based on the evidence, that Jaspreet is functioning not as an independent lawyer, but as a co-conspirator. I think it was reasonable for the chambers judge to conclude that Jaspreet was "involved in making arrangements to collude with the other defendants to frustrate the obligation that the defendant [Mr. Malik] has on the face of it with the plaintiff" and that, in the circumstances, a good deal of relevant and incriminating evidence would likely be found at the places sought to be searched, namely the Malik

interlocutoire, de conclure que la province avait établi l'existence d'une solide preuve *prima facie* établissant la dette de M. Malik et le complot des intimés en vue de frauder la province et d'aider M. Malik à se soustraire aux obligations qui lui incombaient en vertu de l'entente relative aux avocats de la défense.

(2) Le préjudice causé ou risquant d'être causé au demandeur par l'inconduite présumée du défendeur doit être très grave

[56] Une créance de plus de 5,2 millions de dollars envers un débiteur qui, selon ce qu'il appert *prima facie*, s'est soustrait d'une façon continue au paiement en usant de fraude et de complot avec des membres de sa famille pour dissimuler leurs traces financières constitue à mon sens quelque chose de très grave.

(3) Il doit y avoir une preuve convaincante que le défendeur a en sa possession des documents ou des objets incriminants

[57] À mon avis, le juge siégeant en cabinet était fondé à conclure, dans le cadre de la requête *ex parte*, que des documents incriminants attestant les transferts de propriété enregistrés et non enregistrés étaient en possession des intimés, en particulier de Jaspreet, qui se considérait comme le [TRADUCTION] « conseiller juridique [de son père] en ce qui a trait aux affaires financières » (jugement du juge siégeant en cabinet, par. 11). Jaspreet a représenté ses parents, personnellement ou en lien avec d'autres membres de son cabinet, dans au moins 18 transactions hypothécaires depuis 1996, dont la majorité portent une date postérieure à l'ordonnance judiciaire interdisant à M. Malik de se défaire de ses actifs. Il est allégué, sur la base de la preuve, que Jaspreet agit non pas en qualité d'avocat indépendant, mais en tant que comparse dans le complot. Le juge siégeant en cabinet pouvait raisonnablement conclure, à mon avis, que Jaspreet prenait « des dispositions en vue de s'associer avec les autres défendeurs pour contrecarrer l'obligation que le défendeur [M. Malik] a envers la demanderesse » et que, dans les circonstances, une bonne

family home and Jaspreet's various places of work.

(4) It Must Be Shown That There Is a Real Possibility That the Defendant May Destroy Such Material Before the Discovery Process Can Do Its Work

[58] The Province argued that this is a case of "exceptional circumstances" because Mr. Malik and other members of his family have, over a period of 8 years, misrepresented his net worth and conspired to move assets around within the family to create the appearance that Mr. Malik is without financial resources. The evidence suggests, again on a *prima facie* basis, that Mr. Malik has failed to respect court orders before, and that there is a "real possibility" that he and members of his family will do so again if they think it is to their financial advantage.

[59] It will often be difficult or perhaps impossible for a plaintiff to show that a defendant *will* actually destroy evidence, but it is always open to the court to draw inferences reasonably compelled by the surrounding circumstances. As Paperny J. (as she then was) observed in *Capitanescu v. Universal Weld Overlays Inc.* (1996), 46 Alta. L.R. (3d) 203 (Q.B.):

> Generally, courts have inferred a risk of destruction when it is shown that the defendant has been acting dishonestly, for example where matter has been acquired in suspicious circumstances, or where the defendant has knowingly violated the applicant's rights. [para. 22]

This passage was cited with approval by the Alberta Court of Appeal in *Catalyst Partners Inc. v. Meridian Packaging Ltd.*, 2007 ABCA 201, 76 Alta. L.R. (4th) 264, at para. 13.

[60] Given a history of refusal to provide proper disclosure of financial information despite

quantité d'éléments de preuve pertinents et incriminants seraient sans doute découverts dans les lieux où l'on voulait faire une perquisition, soit la résidence familiale des Malik et les divers lieux de travail de Jaspreet.

(4) Il faut démontrer qu'il est réellement possible que le défendeur détruise ces pièces avant que le processus de communication préalable puisse être amorcé

[58] La province a soutenu qu'il s'agit d'un cas « exceptionnel » parce que M. Malik et d'autres membres de sa famille ont, pendant une période de 8 ans, présenté faussement la valeur nette de ses avoirs et comploté en vue de transférer des actifs au sein de la famille afin de donner l'impression que M. Malik est dépourvu de moyens financiers. La preuve donne lieu de croire, là encore de façon *prima facie*, que M. Malik a déjà contrevenu à des ordonnances judiciaires et qu'il « est réellement possible » que lui et des membres de sa famille y contreviendront encore s'ils y voient un avantage financier pour eux.

[59] Il sera souvent difficile, voire impossible, pour un demandeur de démontrer qu'un défendeur *détruira* effectivement des éléments de preuve, mais il est toujours loisible au tribunal de tirer les conclusions raisonnables qui découlent nécessairement de l'ensemble des circonstances. La juge Paperny (maintenant à la Cour d'appel) a fait remarquer ce qui suit dans *Capitanescu c. Universal Weld Overlays Inc.* (1996), 46 Alta. L.R. (3d) 203 (B.R.) :

> [TRADUCTION] En général, les tribunaux concluent à un risque de destruction s'il est démontré que le défendeur a agi de façon malhonnête, par exemple si le bien a été acquis dans des circonstances suspectes, ou si le défendeur a sciemment violé les droits du demandeur. [par. 22]

La Cour d'appel de l'Alberta a cité et approuvé ce propos dans *Catalyst Partners Inc. c. Meridian Packaging Ltd.*, 2007 ABCA 201, 76 Alta L.R. (4th) 264, par. 13.

[60] Étant donné les refus antérieurs de fournir l'information financière requise malgré

Mr. Malik's agreement (and a court order) to do so, in my opinion it was open to the chambers judge to conclude that the respondents might if forewarned continue the pattern of refusal and obfuscation by destroying relevant material "before the discovery process can do its work" (*Celanese Canada*, at para. 35).

[61] It is evident that the chambers judge made his own decision on the matters he was required to determine in relation to the *Anton Piller* application and did not abdicate his judgment to the *Rowbotham* judge. On the respondents' application to set aside the *ex parte* orders Mr. and Mrs. Malik filed evidence (Jaspreet did not) but their evidence did not seek to contradict the facts relating to their financial affairs on which the *ex parte* orders were based. In these circumstances, it was open to the chambers judge, in my opinion, to affirm his previous orders.

[62] Whether and to what extent the *Rowbotham* issues can properly be relitigated at the eventual trial of this action is a decision for the trial judge to make.

E. *The Solicitor-Client Issue*

[63] Jaspreet appeared in person before this Court to object to the seizure at his law offices on the grounds of solicitor-client privilege. This is an important issue in *Anton Piller* cases, as the judgment in *Celanese Canada* made clear. However, in this case, unlike *Celanese Canada*, the allegation is that Jaspreet is a party to the alleged fraud and conspiracy, and therefore that no privilege attached to the relevant documents.

[64] Moreover, unlike the situation in *Celanese Canada*, the independent solicitors have not made any of the seized documents available to the plaintiff Province. The parties appeared before the

l'engagement en ce sens pris par M. Malik (et une ordonnance judiciaire), il était selon moi loisible au juge siégeant en cabinet de conclure que les intimés, s'ils étaient prévenus, pourraient continuer leur manège de refus et de faux-fuyants en détruisant des documents pertinents « avant que le processus de communication préalable puisse être amorcé » (*Celanese Canada*, par. 35).

[61] Il est évident que le juge siégeant en cabinet a pris sa propre décision sur les questions qu'il était appelé à trancher à propos de la demande *Anton Piller* et qu'il n'a pas renoncé à son indépendance de jugement par rapport au juge ayant statué sur la demande *Rowbotham*. Dans le cadre de la demande des intimés visant à faire annuler les ordonnances *ex parte*, M. et M^me^ Malik ont présenté des éléments de preuve (Jaspreet ne l'a pas fait), mais ces preuves ne visaient pas à contredire les faits concernant leurs affaires financières sur lesquels étaient fondées les ordonnances *ex parte*. Dans ces circonstances, le juge siégeant en cabinet pouvait, à mon avis, confirmer ses ordonnances antérieures.

[62] C'est au juge du procès qu'il appartiendra de décider si, et dans quelle mesure, les questions examinées dans la demande *Rowbotham* peuvent à bon droit faire l'objet d'un nouveau débat lors de l'éventuel procès relatif à la présente action.

E. *Le secret professionnel de l'avocat*

[63] Jaspreet a comparu en personne devant notre Cour pour s'opposer à la saisie effectuée dans ses cabinets juridiques en invoquant le privilège du secret professionnel de l'avocat. Il s'agit d'une question importante dans les affaires *Anton Piller*, comme l'a clairement montré l'arrêt *Celanese Canada*. En l'espèce cependant, contrairement à la situation dans *Celanese Canada*, on soutient que Jaspreet est partie à la fraude et au complot allégués et que, partant, aucun privilège n'est rattaché aux documents pertinents.

[64] En outre, contrairement à la situation dans *Celanese Canada*, les avocats indépendants n'ont mis à la disposition de la province aucun des documents saisis. Les parties ont comparu devant le

chambers judge on October 25th, 2007, two days after the *Anton Piller* order was granted. Counsel raised the issue of solicitor-client privilege, and the parties reached what McEwan J. described as "operating understandings" as to the safeguards that would govern the files seized from the law offices until such time as the Maliks' substantive challenge to the orders was resolved.

[65] In the end Jaspreet was only able to identify three files captured by the search that were subject to proper objections on the ground of solicitor-client privilege. One of those was a file that did in fact belong to one of the Malik family members who was subject to the search but the file was unrelated to the case. The other two files belonged to clients who had the same names as targets of the search. In all three cases the documents were not taken from the premises, and (as stated) none of the documents have been viewed by the Province. In the circumstances, the objection to the *Anton Piller* order based on solicitor-client confidences should also be rejected.

VI. Disposition

[66] I would therefore allow the appeal with costs.

Appeal allowed with costs.

Solicitor for the appellant: Ministry of the Attorney General, Victoria.

Solicitors for the respondents Ripudaman Singh Malik and Raminder Malik: Bruce E. McLeod, Vancouver.

Solicitors for the respondent Jaspreet Singh Malik: Malik Law Corporation, Surrey.

juge siégeant en cabinet le 25 octobre 2007, deux jours après que l'ordonnance *Anton Piller* eût été rendue. Les avocats ont soulevé la question du secret professionnel de l'avocat, et les parties sont arrivées à ce que le juge McEwan a décrit comme des [TRADUCTION] « ententes fonctionnelles » quant aux garanties dont feraient l'objet les dossiers saisis dans les cabinets juridiques jusqu'à ce que la contestation de fond des ordonnances par les Malik ait été résolue.

[65] Finalement, Jaspreet a été en mesure d'identifier seulement trois dossiers saisis lors de la perquisition qui faisaient l'objet d'objections légitimes fondées sur le privilège du secret professionnel de l'avocat. Un de ces dossiers appartenait en fait à un membre de la famille Malik visé par la perquisition, mais le dossier n'était pas relié à l'affaire. Les deux autres dossiers appartenaient à des clients qui avaient des noms identiques à ceux de personnes visées par la perquisition. Dans les trois cas, les documents ont été laissés dans les lieux et (comme je l'ai indiqué) aucun des documents n'a été vu par la province. Dans les circonstances, il y a également lieu de rejeter l'objection fondée sur le secret professionnel de l'avocat qui a été soulevée à l'égard de l'ordonnance *Anton Piller.*

VI. Dispositif

[66] Je suis par conséquent d'avis d'accueillir le pourvoi avec dépens.

Pourvoi accueilli avec dépens.

Procureur de l'appelante : Ministère du Procureur général, Victoria.

Procureurs des intimés Ripudaman Singh Malik et Raminder Malik : Bruce E. McLeod, Vancouver.

Procureurs de l'intimé Jaspreet Singh Malik : Malik Law Corporation, Surrey.

TAB 11

Date: 19980504
Docket: CA022657
Registry: Vancouver

COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA AS REPRESENTED BY THE MINISTER OF FORESTS

PLAINTIFF
(RESPONDENT)

AND:

BUGBUSTERS PEST MANAGEMENT INC.

DEFENDANT
(APPELLANT)

Before: The Honourable Chief Justice McEachern
The Honourable Mr. Justice Lambert
The Honourable Mr. Justice Finch

J. A. Dowler G.E.H. Vanderburgh	Counsel for the Appellant
D. C. Prowse J. D. Eastwood	Counsel for the Respondent
Place and Date of Hearing	Vancouver, British Columbia March 2, 1998
Place and Date of Judgment	Vancouver, British Columbia May 4, 1998

Written Reasons by:

The Honourable Mr. Justice Finch

Concurred in by:

The Honourable Chief Justice McEachern
The Honourable Mr. Justice Lambert

Reasons for Judgment of the Honourable Mr. Justice Finch:

I

[1] The defendant (Bugbusters) appeals the judgment of the Supreme Court of British Columbia pronounced 29 November, 1996 dismissing its motion for judgment on the grounds of issue estoppel. The question for the chambers judge, and for this Court, is whether the plaintiff's claim for damages alleged to result from the defendant's negligence in causing a forest fire, is barred by the decision of a statutory tribunal appointed under the ***Forest Act***, R.S.B.C. 1979 c.140 (the ***Act***) which held that Bugbusters was not shown to have caused the fire. All references to the ***Forest Act*** in these reasons are to that Act as it stood at the relevant time.

II

[2] Bugbusters is a forestry consultant and sometimes provides tree-planting services to the Minister of Forests. In June, 1992 it performed a three-day planting contract for the Minister on a cut block east of Prince George near the Bowron River. At about noon on 29 June, 1992 as Bugbusters' employees were leaving the cut block, the planting crew supervisor, Matthew Whitford saw smoke on the cut block. A forest fire

known as the Eagle Fire subsequently developed in that area and spread, causing considerable damage.

[3] As it was empowered to do by s.12 of the ***Forest Act***, the Prince George Forest District advised Bugbusters on 2 July 1992 that it was required to provide personnel and equipment to fight the Eagle Fire. On the same day, the Forestry Department retained W.R.M. Investigations Inc. (WRM) with a mandate to establish the cause of the fire, the approximate point of ignition, and the party, if any, responsible for causing the fire. Later that month WRM reported that the fire was caused by one of the tree-planters employed by Bugbusters.

[4] On 31 July, 1992 the Prince George Forest District relieved Bugbusters of its obligation to fight the fire. Section 122 of the ***Act*** permitted a person, such as Bugbusters, who had incurred expenses fighting fires at the request of a Forestry District to claim compensation for doing so and authorized the Regional Manager to accept or reject such claims. On 4 September, 1992, in compliance with the requirements of the ***Act***, Bugbusters submitted an invoice to the Ministry claiming reimbursement for its fire fighting expenses in the sum of $96,812.63.

[5] On 22 October, 1993, the Minister provided Bugbusters with a copy of the WRM report, which included a number of witness statements, some signed, some not, taken by the investigators.

In due course, Ministry employees reported to the Regional Manager of the Prince George Forestry District, and on 5 January, 1994 the Regional Manager issued his decision. He said he was satisfied that the fire had been caused by Bugbusters' employees and, relying on s.122 of the ***Forest Act***, he refused Bugbusters' claim for compensation. Section 122(2)(a) of the ***Act*** provided:

> Compensation is not payable if the regional manager determines that
> (a) the fire was caused by the person or by a person employed on the occupied area;...

[6] On 24 March, 1994, the Crown issued the writ in this action claiming damages from the defendant for having negligently caused the fire. We are told the amount of the damages claimed is about $5 million.

[7] An appeal process from the decision of the Regional Manager was provided by s.154 of the ***Act***. Under s.154(2)(b) an appeal lay from the decision of the Regional Manager to the Chief Forester. An appeal from the Chief Forester lay under s.154(2)(c) to the Forest Appeal Board.

[8] In this case the appeal from the Regional Manager was heard by the Deputy Chief Forester. The appeal hearing occupied three days in November, 1994 and ended on 31 January, 1995. The Deputy Chief Forester received oral and written

submissions from counsel for both Bugbusters and the Forest Service, and by agreement of the parties, also received independent legal advice. On 7 April, 1995 she issued her decision. It concludes as follows:

> Conclusion
>
> I find, on the basis of all the evidence, and bearing in mind the limitations of some of it, that the Eagle Fire was more likely than not caused by a discarded match or cigarette. I cannot conclude, however, that the evidence could reasonably be said to establish on a balance of probabilities that the Appellant or its employees were the source or cause of the discarded match or cigarette. My doubts turn on a combination of factors:
>
> 1. nearly all of the testimony used to identify the locations and smoking activities of the planters on June 29 is hearsay evidence that was not tested by cross-examination;
> 2. the only firsthand testimony presented regarding the locations of the planters on June 29 was given by Matt Whitford, and he testified that he didn't see anyone smoking outside the designated areas;
> 3. the two smokers identified as being on site on June 29 signed statements to the effect that they smoked only in designated areas and extinguished their smoking materials; no testimony was presented to contradict this; and
> 4. there is a possibility that the fire may have started on June 28 when there were several smokers on site, including a Forest Service employee who was seen smoking on the half-moon landing.
>
> DECISION
>
> I uphold the appeal and overrule the determination of the Regional Manager. I further recommend that the invoice for expenses submitted by the Appellant be assessed for accuracy and compensation granted.

[9] It is this decision of the Deputy Chief Forester on the issue of the fire's causation which is said to create issue estoppel in the present action by the Crown for damages.

[10] On 27 April, 1995 the Minister of Forests appealed the decision of the Deputy Chief Forester to the Forest Appeal Board as provided for by s.154(2)(c) of the ***Act***. The appeal was heard on 6 and 7 June, 1995, and on 17 July, 1995, the Appeal Board issued its decision. It concluded that "...the most reasonable and probable cause of the fire was through an act of an employee of Bugbusters Pest Management Inc."

[11] Bugbusters appealed the decision of the Appeal Board as provided for by s.156(8) of the ***Act*** to the Supreme Court of British Columbia. Mr. Justice Wilson gave judgment on the appeal on 22 December, 1995. He held that the Forest Appeal Board had, in essence, erred in retrying factual issues which should have been left to the Deputy Chief Forester. In addition, the judge said the Appeal Board asked itself the wrong question, in conducting a general inquiry into "the cause of the fire", and that the Deputy Chief Forester had posed the right question in her hearing, namely: "Is it more likely than not that an employee or employees of the appellant started the fire?" Accordingly, the court set aside the decision of the Appeal Board and restored the decision of the Deputy Chief Forester. There was no appeal from the decision of the Supreme Court of British Columbia to this Court.

[12] Bugbusters then brought an application for judgment dismissing this action, alleging that "the Plaintiff is estopped and precluded from alleging that any acts by the Defendant and/or its employees caused the fire, known as the Eagle Fire, which is the subject matter of this action". That application was heard by Mr. Justice Sigurdson, and on 29 November, 1996 he dismissed the application in written reasons. In his view "The Court has a discretion, to be exercised judicially, when considering if the nature and surrounding circumstances of the administrative decision properly support an issue estoppel."

[13] Mr. Justice Sigurdson held (at para.45) that the decision of the Deputy Chief Forester should not form the basis of an issue estoppel in the action brought by the Crown because in the proceedings before the Deputy Chief Forester the Crown did not have the power to subpoena witnesses, to conduct examinations for discovery, to deliver interrogatories, or to examine witnesses before trial. He found it to be more likely that the correct decision would have been made had those procedures been available. On this issue he concluded:

> Although the Deputy Chief Forester attempted to conduct an appeal which was as fair as possible to both parties, the difference in substance between the procedures followed by the Deputy Chief Forester and those available in a traditional judicial proceeding may well have made a substantive difference to the conclusions of the tribunal. This is therefore a factor that I should take into consideration in determining whether the administrative decision was

> sufficiently "judicial" to form the foundation for an issue estoppel.

[14] He then considered the independence and neutrality of the Deputy Chief Forester as an administrative tribunal. On that issue he said:

> For the purposes of issue estoppel, the question is whether the tribunal is reasonably perceived by all parties as independent and neutral. For the purposes of the doctrine of issue estoppel, it is, in my view, a relevant consideration to examine the apparent distance between the parties and the statutory decision maker. Objectively, it could not be within the reasonable expectation of the parties that the Deputy Chief Forester would decide the issue of causation for all purposes, including for the question of the liability of the defendant in a civil lawsuit for damages.

[15] Finally Mr. Justice Sigurdson considered whether the Deputy Chief Forester had any special expertise in deciding the issue before her, and concluded that it was the court, rather than the administrative tribunal, which had the expertise in deciding questions such as the cause of the fire. In the result, he held that this was not an appropriate case to apply the doctrine of issue estoppel, and he dismissed the defendant's application.

III

[16] In ***Carl-Zeiss-Stiftung v. Rayner and Keeler Ltd. et al. (No.2)***, [1967] 1 A.C. 853; [1966] 2 All E.R. 536 (H.L.) Lord

Guest traced the development of issue estoppel as a form of estoppel by *res judicata*. At 564 he said:

> The doctrine of estoppel *per rem judicatam* is reflected in two Latin maxims, (i) *interest rei publicae ut sit finis litium* and, (ii) *nemo debet bis vexare pro una et eadem causa*. The former is public policy and the latter is private justice. The rule of estoppel by *res judicata*, which is a rule of evidence, is that where a final decision has been pronounced by a judicial tribunal of competent jurisdiction over the parties to and the subject-matter of the litigation, any party or privy to such litigation as against any other party or privy is estopped in any subsequent litigation from disputing or questioning such decision on the merits (SPENCER BOWER ON *RES JUDICATA*, p.3)

[17] He concluded at 565:

> The requirements of issue estoppel still remain (i) that the same question has been decided; (ii) that the judicial decision which is said to create the estoppel was final, and (iii) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

[18] In this case the chambers judge held, and before us the Crown conceded, that the question of whether Bugbusters caused the Eagle Fire is one of the critical issues that will have to be determined in the action brought by the Crown. The Crown also concedes that the parties in both proceedings are identical. Bugbusters contends, however, that the learned chambers judge erred in finding that the decision of the Deputy Chief Forester was not "judicial", and that in exercising his

discretion he did not give effect to overriding considerations of fairness in Bugbusters' favour.

[19] This Court has already held that issue estoppel may arise from the decisions of an administrative tribunal in subsequent litigation between the same parties. In ***Raison v. Fenwick*** (1981), 120 D.L.R. (3d) 622 (B.C.C.A.) a review committee established under the ***School Act*** terminated a teacher's employment on the ground that the "learning situation in the teacher's classes was less than satisfactory", a test for termination stipulated by the Act. The teacher subsequently sued for libel, the essence of the libel being that the learning situation in the teacher's classes was less than satisfactory. This Court supported the chambers judge's conclusion (except for one issue) that there was no merit in the whole of the statement of claim because the review committee had already decided the very issue that was fundamental to the libel action. It is to be noted that under the ***School Act*** the decision of a review committee reviewing a teacher's termination was, by s.135(3) "final and binding upon the teacher and the Board".

[20] More recently, in ***Rasanen v. Rosemount Instruments Limited*** (1994), 17 O.R. (3d) 267; 112 D.L.R. (4th) 683 (Ont.C.A.), leave to appeal to the Supreme Court of Canada refused (1994), 19 O.R. (3d) XVI (note), a majority of the Ontario Court of Appeal held that the decision of a referee under the

Employments Standards Act on the issue of whether an employee was entitled to compensation from an employer arising from termination of his employment gave rise to the defence of issue estoppel in the employee's subsequent action for damages for wrongful dismissal. Counsel for Bugbusters before us relied heavily on the judgment of Madam Justice Abella, one of the two judges who held that issue estoppel applied. At D.L.R. 704, she said:

> The second requirement is that there be a prior, final, judicial decision. The appellant argued that the procedure before the referee was not sufficiently "judicial", and that the absence of discovery, costs, production of documents, and a judge rendered it so dissimilar a process to that of the courts that no decision resulting from it should be binding.
>
> This is an argument, in my opinion, which seriously misperceives the role and function of administrative tribunals. They were expressly created as independent bodies for the purpose of being an alternative to the judicial process, including its procedural panoplies.

[21] And at 705:

> As long as the hearing process in the tribunal provides parties with an opportunity to know and meet the case against them, and so long as the decision is within the tribunal's jurisdiction, then regardless of how closely the process mirrors a trial or its procedural antecedents, I can see no principled basis for exempting issues adjudicated by tribunals from the operation of issue estoppel in a subsequent action. If the purpose of issue estoppel is to prevent the retrial of "any right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction" (***McIntosh v. Parent,*** [(1924), 55 O.L.R. 552 (S.C.A.D.)]), then it is difficult to see why the decisions of an

> administrative tribunal having jurisdiction to decide the issue, would not qualify as decisions of a court of competent jurisdiction so as to preclude the redetermination of the same issues: ***Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*** (1991), 81 D.L.R. (4th) 121, [1991] 2 S.C.R. 5, 50 Admin. L.R. 44; ***Douglas/Kwantlen Faculty Assn. v. Douglas College*** (1990), 77 D.L.R. (4th) 94, [1990] 3 S.C.R. 570, 50 Admin. L.R. 69. On the contrary, the policy objectives underlying issue estoppel, such as avoiding duplicative litigation, inconsistent results, undue costs, and inconclusive proceedings are enhanced in appropriate circumstances by acknowledging as binding the integrity of tribunal decisions.

[22] In that case, the Ontario ***Employment Standards Act*** provided by s.50(7) that "a decision of the referee under this section is final and binding upon the parties...".

[23] The creation of issue estoppel by the decision of an administrative tribunal was again considered by this Court in ***Hamelin v. Davis*** (1996), 18 B.C.L.R. (3d) 85, [1996] 6 W.W.R. 318, additional reasons (1996), 18 B.C.L.R. (3d) 112, [1996] 6 W.W.R. 341 (B.C.C.A.), leave to appeal refused (1997), 211 N.R. 320n (S.C.C.). The majority held that the defendant auditors could not rely on issue estoppel as they were not parties to the proceedings before the Securities Commission which had concluded that the plaintiffs had not relied on the auditors' advice. In dissent, Madam Justice Newbury considered in detail the Ontario Court of Appeal judgment in ***Rasanen***, and concluded that to allow the action to proceed would amount to an abuse of process. She said at B.C.L.R. 102:

> Setting aside the proffered fresh evidence, then, one is left with the core question - was the Chambers judge correct in concluding that because the Commission was not bound by the rules of evidence, it should not be regarded as "equivalent" to a court of law for purposes of the doctrine of abuse of process? Put another way, should a person against whom a finding of fact has been made by a tribunal such as the Commission be permitted to relitigate that issue because of the chance that with the benefit of pre-trial discovery, disclosure of documents, and different rules governing admissibility, a court might reach a different result? In my view, the answer to these questions is no. There is by now considerable Canadian and other authority for the proposition that even in the absence of mutuality, a person who has had a "full and fair" opportunity (per Denning, M.R. in [***McIlkenny v. Chief Constable of West Midlands***, [1980] Q.B. 283, [1980] 2 All E.R. 227, affirmed [1982] A.C. 529 (H.C.)] at 238) to meet the case against him should not generally be permitted to relitigate an adverse finding made as an essential part of the ruling of another court. Where the first adjudicating body is not a court of law but a regulatory tribunal such as the Commission, with a recognized mandate and expertise, the same rule should generally apply, again subject to any particular prejudice being shown.

[24] Bugbusters urges us to accept and adopt this line of reasoning.

[25] We were also referred to ***Saskatoon Credit Union Ltd. v. Central Park Enterprises Ltd.*** (1988), 22 B.C.L.R. (2d) 89, 47 D.L.R. (4th) 431 (B.C.S.C.). The question there was whether the plaintiff could rely on issue estoppel or abuse of process to prevent the defendants from pleading fraud, an issue which had been decided against the defendant in earlier proceedings to which the plaintiff was not a party. Chief Justice McEachern, (then of the Supreme Court) referred with approval

to U.S. authorities holding that even where privity could not be shown "trial courts ought to have a broad discretion to determine whether issue estoppel should be applied. Fairness seems to be a test they applied...." (at B.C.L.R. 96). He concluded in this way:

> Without deciding anything about the question of mutuality, it is my conclusion that, subject to the exceptions I shall mention in a moment, no one can relitigate a cause of action or an issue that has previously been decided against him in the same court or in any equivalent court having jurisdiction in the matter where he has or could have participated in the previous proceedings unless some overriding question of fairness requires a rehearing.
>
> The exceptions to the foregoing include fraud or other misconduct in the earlier proceedings or the discovery of decisive fresh evidence which could not have been adduced at the earlier proceeding by the exercise of reasonable diligence: ***McIlkenny***, *supra*, at p.703. No material has been filed which would create such an exception in the circumstances of this case.
>
> I decline to decide whether the foregoing conclusion represents the application of a species of estoppel by *res judicata* or abuse of process as the result is the same. The fact that the plaintiff in this action was not a party to the earlier proceedings is of no consequence. With the defendants participating fully, it was judicially determined at trial by Spencer J. that the lease and transfers between the defendants were fraudulent and that is the end of that issue. The defendants are stopped from saying otherwise.

IV

[26] Bugbusters says the learned chambers judge erred in concluding that the decision of the District Chief Forester was

not sufficiently judicial or final to give rise to an estoppel on the issue of the fire's causation. Bugbusters says that although the pre-trial proceedings available in the ordinary litigation process were not available to either party prior to the hearing by the Deputy Chief Forester, the Crown has put forward no material to suggest that any other evidence has been discovered which was not then available, and which might affect the resolution of that issue. It says that the Deputy Chief Forester did have special expertise on the issue of fire causation. And it says that the argument that the District Chief Forester was not an independent tribunal, or was tainted with the perception of bias, cannot lie in the mouth of the Crown who created the statutory process and appointed its officers. This is especially so, says Bugbusters, where the decision of the Deputy Chief Forester was subsequently found by the Supreme Court of British Columbia to be within jurisdiction, and without legal error.

[27] Bugbusters points out that the hearing conducted by the Deputy Chief Forester was a hearing *de novo*, and not just an appeal from the Regional Manager. It was the Crown who sought to adduce hearsay evidence in the form of witness statements, when those witnesses were not available for cross-examination, and it was Bugbusters who resisted the admission of such evidence. Bugbusters says it is manifestly unfair for the Crown now to argue that the process was not judicial when the case was decided on the evidence which the Crown adduced.

[28] Bugbusters also points out that it had no choice but to advance its claim for fire fighting expenses by following the statutory process mandated by the ***Forest Act***. When the Regional Manager refused to pay on the grounds that Bugbusters' employees had caused the fire, Bugbusters could not avoid having the issue of causation being decided by the administrative tribunal, and subject to the statutory appeal provisions. So Bugbusters says the third test for issue estoppel, a final judicial decision, has been met, and that it would be unfair not to give effect to it in the circumstances.

[29] The Crown responds by saying that although the decision of an administrative tribunal may satisfy the requirements for final judicial decision in some cases, it does not do so here. It is fundamental to the doctrine of issue estoppel that the parties have a full and fair opportunity to meet the case against it. Here, there was no reasonable expectation by either party that the Deputy Chief Forester would be making a final determination of the Crown's right to recover forest fire losses estimated at $5 million. All the parties thought they were fighting over was Bugbusters' expenses claimed in the sum of $100,000. The resources which one might devote to resisting a claim of $100,000 are in no way commensurate with what might reasonably be devoted to recovery of $5 million. There was no power to subpoena witnesses before the Deputy Chief Forester, and the Crown was therefore forced to rely upon hearsay evidence. Moreover, the Crown says the Deputy Chief Forester

did not have any special expertise on the question of causation. That is a question of fact and of evidence, matters in which the courts are the experts.

[30] In my respectful view the learned chambers judge was right in holding that issue estoppel did not apply in the circumstances of this case. There are two principal reasons for rejecting issue estoppel as a defence in this case. The first is that a final decision on the Crown's right to recover its losses was not within the reasonable expectation of either party at the time of those proceedings. The second is that unlike the relevant statutes in the ***Raison*** and ***Rasanen*** cases, *supra*, the ***Forest Act*** did not provide that the decisions of the Deputy Chief Forester (or other levels of administrative tribunal) would be final and binding. To the contrary, s.129 of the ***Forest Act*** said:

> Nothing in this part[10] limits, interferes with, or extends the right of a person to commence and maintain a proceeding for damages caused by fire.

[31] I do not suggest that either the presence of this provision, or the absence of a provision such as could be found in the ***Teachers Act*** in ***Raison***, or the ***Employment Standards Act*** in ***Rasanen***, is conclusive on the question of issue estoppel. But the statutory provisions touching on the nature and quality of decisions by administrative tribunals are in my view an indicium as to how the court should apply issue estoppel,

because they may be considered as factors which would affect the parties' reasonable expectations.

[32] It must always be remembered that although the three requirements for issue estoppel must be satisfied before it can apply, the fact that they may be satisfied does not automatically give rise to its application. Issue estoppel is an equitable doctrine, and as can be seen from the cases, is closely related to abuse of process. The doctrine of issue estoppel is designed as an implement of justice, and a protection against injustice. It inevitably calls upon the exercise of a judicial discretion to achieve fairness according to the circumstances of each case.

[33] In this case it would be quite unfair to hold the Crown bound by the decision of the Deputy Chief Forester.

[34] I would dismiss the appeal.

"The Honourable Mr. Justice Finch"

I AGREE: "The Honourable Chief Justice McEachern"

I AGREE: "The Honourable Mr. Justice Lambert"

TAB 12

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Canaccord Capital Corp. v. Cumberford,***
2005 BCCA 124

Date: 20050304
Docket: CA31352

Between:

Canaccord Capital Corporation

Respondent
(Plaintiff)

And

**Granger Thomas Cumberford, also known as
Granger T. Cumberford, also known as
Granger Cumberford**

Appellant
(Defendant)

Before: The Honourable Mr. Justice Hall
The Honourable Madam Justice Levine
The Honourable Mr. Justice Thackray

C.C. Cheng — Counsel for the Appellant

G.E.H. Cadman, Q.C. — Counsel for the Respondent

Place and Date of Hearing: Vancouver, British Columbia
February 8, 2005

Place and Date of Judgment: Vancouver, British Columbia
March 4, 2005

Written Reasons by:
The Honourable Mr. Justice Thackray

Concurred in by:
The Honourable Mr. Justice Hall
The Honourable Madam Justice Levine

Reasons for Judgment of the Honourable Mr. Justice Thackray:

[1] This is an appeal of a Supreme Court of British Columbia order entered 16 December 2003 and arising out of reasons for judgment of Madam Justice Sinclair Prowse dated 10 October 2003, reported at (2003) 38 B.L.R. (3d) 201, [2003] B.C.J. No. 2322 (QL), 2003 BCSC 1565.

[2] Canaccord Capital Corporation ("Canaccord") brought this action against Mr. Cumberford based upon a personal guarantee of 20 June 2000 wherein he covenanted to indemnify Canaccord for any indebtedness of the numbered company. The issue over which this appeal is taken is whether the law of Alberta, rather than the law of British Columbia, should prevail.

[3] The facts of this case are fully set forth in the reasons for judgment. In 2000, the defendant 884003 Alberta Inc. opened a trading account with Canaccord. Canaccord faxed to Mr. Cumberford four documents to be completed and returned in order to establish the account. The documents were a Corporate Resolution, a Non-Solicitation Acknowledgement, a Personal Guarantee, and an "account information." The Non-Solicitation Acknowledgement contained the following clauses:

> 4. In respect of any transactions in securities through your accounts with us, you are prepared to rely on the protections of the *Securities Act* (British Columbia), the laws of the jurisdictions in which trades in the securities are made and the rules of the stock exchange or to other securities markets through which the trades are made.

> 5. The law of the jurisdiction in which you reside will not apply to any transactions made through your accounts with us... .

Mr. Cumberford completed and returned these documents.

[4] Another document, entitled “The Guarantees Acknowledgement Act, Province of Alberta Certificate of a Notary Public (the “certificate”), was mailed to Mr. Cumberford. The certificate required that a notary public certify that the transaction had been reviewed with the guarantor and that he was aware of and understood the terms contained in the guarantee.

[5] Mr. Cumberford completed a section of the certificate that acknowledged his obligation to guarantee any indebtedness of the numbered company, but he did not have a notary public complete the certification nor did he return the certificate to Canaccord. The ***Guarantees Acknowledgment Act***, R.S.A. 2000, c.G-11, provides as follows:

> 3. No guarantee has any effect unless the person entering into the obligation
>
> (a) appears before a notary public,
>
> (b) acknowledges to the notary public that the person executed the guarantee, and
>
> (c) in the presence of the notary public signs a statement at the foot of the certificate of the notary public in the prescribed form.
>
> 4.(1) The notary public, after being satisfied by examination of the person entering into the obligation that the person is aware of the contents of the guarantee and understands it, shall issue a certificate under the notary public’s hand and seal of office in the prescribed form.

> (2) Every certificate issued under this Act shall be attached to or noted on the instrument containing the guarantee to which the certificate relates.

[6] In August 2000 the numbered company had indebtedness to Canaccord of $350,599.33. Canaccord, on 10 October 2001, obtained a judgment against the numbered company for the amount of the indebtedness. The trial against Mr. Cumberford was heard in September 2003, resulting in a judgment in favour of Canaccord.

[7] On this appeal the facts as found by the judge are not in dispute. Further, counsel agree that the leading case precedent is ***Imperial Life Assurance Co. of Canada v. Colmenares***, [1967] S.C.R. 443, 62 D.L.R. (2d) 138 [cited to D.L.R.]. Mr. Colmenares, a Cuban resident, applied to the Cuban office of Imperial Life for life insurance. The company's head office was in Toronto where both the application forms and the policies were prepared in a standard Ontario form. The Court held that the contracts were made when the applications were accepted by mailing the policies from Toronto even though the policies did not become effective until delivered in Cuba. However, the place of the making of the contract was not decisive as to the applicable law. What was determinative was a consideration of the law to which the contracts as a whole, in all of the surrounding circumstances, had the closest and most substantial connection.

[8] The judgment of the Court was delivered by Ritchie J. He said, commencing at page 142, as follows:

> ... It has long been recognized that when contracts are to be concluded by post the place of mailing the acceptance is to be treated as the place where the contract was made. ...
>
> . . .
>
> I am ... in agreement with MacKay, J.A., who observed in the course of the reasons for judgment which he delivered on behalf of the majority of the Court of Appeal that [p.406]:
>
> > The place where the contract was made is not by any means decisive in determining the question of what law is applicable to the contract.
>
> It now appears to have been accepted by the highest Courts in England that the problem of determining the proper law of a contact is to be solved by considering the contract as a whole in light of all the circumstances which surround it and applying the law with which it appears to have the closest and most substantial connection.
>
> . . .
>
> While it is clear that all relevant circumstances surrounding the making of a contract are to be given due weight in determining the locality with which it is most closely associated, I am of the opinion that in the present case the fact that both the applications and the policies were prepared in Ontario in a common, standard form which complied with the law of that Province, is to be regarded as of preponderating importance in determining the law governing the contracts.
>
> I think it to be a reasonable inference that a person applying for insurance on a form prepared at the head office of an Ontario company would anticipate that the policies which he was to receive would be governed by the law of that Province, and I think that the form of the policies which were issued in the present case evidences the fact that the insurer intended to be governed by that law.
>
> For these reasons, as well as for those which have been so fully stated in the reasons for judgment of MacKay, J.A., I am of the opinion that the proper law of these contracts is the law of Ontario.

[9] Madam Justice Sinclair Prowse noted that there was “no dispute as to the legal principles governing the determination” of the issue as to the choice of applicable law. She cited ***Colmenares*** and said “the proper law governing the Guarantee is the law with which it has the closest and most substantial connection

after considering it as a whole in light of all of the circumstances." [para.12] She then listed the circumstances to be considered; being the domicile of the parties, the principal place of business of the corporation, the site where the contract is made and is to be performed, the conformity of the language of the contract to the competing systems of law, the validity of a certain stipulation under one law but not under the other, the economic connection with some other transaction, and any other fact which serves to localize the contract. She held:

> [14] Applying these legal principles to the facts of this case, I am satisfied that the Guarantee is governed by the law of British Columbia and that it is enforceable."

[10] She then said that the language of the guarantee was appropriate to the law of British Columbia but not to the law of Alberta; that she was satisfied that if the law of Alberta governed, the guarantee would not be enforceable; that the guarantee was economically connected to British Columbia, and that:

> [41] All of the transactions to which the Guarantee pertains are governed by the laws of British Columbia as is set out in the "Non-Solicitation Acknowledgement".

Madam Justice Sinclair Prowse then enumerated the items that support that finding. In particular, that Mr. Cumberford set up the account in British Columbia and wanted to trade in British Columbia, that all of the transaction to which the guarantee pertained were to be in British Columbia; that the guarantee was written in British Columbia and had to be executed and returned to British Columbia before the numbered company was permitted to open a trading account in British Columbia, that the language of the guarantee was appropriate to British Columbia, that the

failure to have a certificate made it void in Alberta; and that all economic connections of the guarantee were in British Columbia.

[11] On this appeal Canaccord cited ***Morguard Trust Co. v. Affkor Group Ltd.*** (1984) 55 B.C.L.R. 1 (C.A.), [1984] B.C.J. No. 1731 (QL), ***Morguard Trust Co. v. Heritage Horizons Ltd.*** (1987), 36 B.L.R. 16 (S.C.), [1987] B.C.J. No. 210 and ***Central Trust Co. v. Jo-Val Enterprises Ltd.*** (1987), 18 B.C.L.R. (2d) 325 (C.A.), [1987] B.C.J. No. 2031 as supporting the decision in the case at bar.

[12] In ***Affkor*** there was land in British Columbia and guarantors in Alberta who guaranteed a mortgage debt. The mortgage document contained both the covenants of the mortgage and the guarantees. The ***Guarantees Acknowledgment Act*** of Alberta had not been complied with and the guarantors submitted that the law of Alberta should be applied. Mr. Justice Hinkson, for the Court, held, on the basis of ***Colmenares***, that the law of British Columbia, being the province of closest connection to the transaction, would apply.

[13] In ***Heritage Horizons***, Her Honour Judge Boyd, sitting as a Local Judge of the Supreme Court, followed ***Affkor***. The facts were almost identical to those in ***Affkor*** other than that the guarantee was a separate document. She said at page 32:

> ... In my opinion, in terms of the realities of business life and the substance of this transaction, it is impossible to view the assumption agreement and the guarantees as other than integral parts of a single transaction. It would make little sense to apply the law of British Columbia to the assumption agreement, the law of British Columbia to those guarantees executed by British Columbia guarantors and the law of Alberta to those guarantees executed in Alberta by the Alberta

> guarantors. In my opinion, where the contract is silent as to the law which applies, the test to be applied by the Court is an objective one and not a subjective one. Applying such test, I find that the law of British Columbia applies... .

[14] In the ***Central Trust*** case Mr. Justice Taggart gave judgment for the Court. Once again, there was a mortgage over land in British Columbia but a mortgage executed in Alberta by several parties ("in effect their contracts of guarantee"). The mortgage was silent as to the applicable law. The Court cited ***Affkor***, which it noted had "very similar circumstances" and held that the law of British Columbia applied.

[15] The appellant sought to distinguish these cases on the basis that they involved mortgages over land in British Columbia. While this must be taken into account in the determination of the appropriate law, it is but one of the circumstances to be considered. The basic reason for the decisions was, as in the case at bar, that the law of British Columbia had the "closest and most substantial connection" to the transaction.

[16] The appellant asserts that the judge failed to consider the factors that would indicate that Alberta law should apply to the guarantee. The factors pointed to by Mr. Cumberford were that he lived in Alberta, and that the numbered company was an Alberta company. But, using ***Sharn Importing Ltd. v. Babchuk*** (1971), 21 D.L.R. (3d) 349, [1971] 4 W.W.R. 517 (B.C.S.C.) as a basis, he submitted that "the factor that should be first is that the guarantee is to be performed in Alberta."

[17] In ***Sharn*** a guarantee was given by the defendant for trade debts of his Alberta company. The Court held that even if satisfied that the guarantee was executed in Alberta, the law of Alberta was not applicable. Chief Justice Wilson

said, at page 355, that to do so would "confuse the business ... with the guarantee." He said that the guarantee was a separate contract and "would be performed ... either in British Columbia, where the defendant lived, or in Quebec where presumably the debt was payable." In that no evidence was presented as to the law of Quebec it was presumed to be the same as the law of British Columbia, the law that was held to be applicable.

[18] While ***Sharn*** makes for interesting reading, it has little, if any, precedential value in the case at bar. Indeed, I doubt that it would be decided the same way today. The fact that enforcement of the guarantee in the case at bar would "ultimately" be in Alberta is not, in my opinion, of much significance. It would be expected that the courts of Alberta would enforce any judgment based on the guarantee provided the guarantee was found to be valid and enforceable in the jurisdiction in which judgment was rendered.

[19] The appellant points to a paragraph in the reasons for judgment of Madam Justice Sinclair Prowse and submits that she erred in her interpretation of the following paragraph:

> [46] ... the fact that Canaccord faxed the Guarantee to Mr. Cumberford but "mailed" the Certificate and the fact that it opened the Account upon receipt of the Guarantee but did not wait for the return of the Certificate are consistent with Canaccord's belief that the proper law of the Guarantee was British Columbia, and that the Certificate was forwarded out of an abundance of caution.

[20] The evidence to which she was no doubt referring was that of Mr. H. K. Titterton, of Canaccord. It reads, in part, as follows:

> Q. Is it standard practice now, today, to send that Acknowledgement to Alberta residents?
>
> A. Yes, and it was standard practice then.
>
> Q. It was standard practice to send the Alberta Guarantee Acknowledgement Certificate along with the documents to the Alberta client?
>
> A. Yes, that's correct.
>
> ...
>
> [Following more testimony the judge tried to clarify some of the evidence, as follows:]
>
> THE COURT: And I had understood, with respect that [presumably the Certificate], this was a document that you were – you were sending out. In other words, what I'm – I'm not understanding your two answers. It's not necessary to open an account, but is it necessary to have that document completed to meet the requirements, as far as you know, of the Alberta Government? Is –
>
> THE WITNESS: It is – it's required to meet our government - to meet Alberta regulations, but our accounts are governed under British Columbia law.
>
> THE COURT: All right.
>
> THE WITNESS: So we will open up the account with the guarantee in place and then have this document – it's still – it's still required. We still have to have this document signed and sent in to us, but we will open the account without it being present at that time.
>
> THE COURT: Oh, I see. But you may not maintain the account if you don't get it –
>
> THE WITNESS: That's correct.
>
> THE COURT: -- within a reasonable time?
>
> THE WITNESS: Yes.

[21] The appellant asserts that the evidence did not support the finding that the Certificate "was forwarded out of an abundance of caution." That appears to be a fair assertion. Mr. Titterton testified that Canaccord's "accounts" were governed by

the law of British Columbia. The judge interpreted this to mean that Canaccord was of the understanding that the guarantee was governed by British Columbia law. I cannot say that the judge was incorrect in her interpretation. However, regardless of the proper interpretation, it does not go to the heart of the case as presented by either party and if the judge did err I find it to be of no importance in the determination of this case. I do not accept the submission of the appellant, based upon the testimony of Mr. Titterton, that "Canaccord knew that the Act existed and that sending the required Certificate to Cumberford was a factor pointing to Alberta as the governing law."

[22] However, the main contention of the appellant on this appeal was that the judge erred in failing to recognize that the guarantee was a contract separate and apart from the primary debt obligation. He submitted that she "conflated" the contracts, thus overweighting one factor, being the business purpose of the transaction.

[23] In response, Canaccord argued that a rule of construction called the "doctrine of infection" comes into play. This doctrine was adopted in ***Wahda Bank v. Arab Bank PLC***, [1996] 1 Lloyd's L.R. 470 at 472, col. 2 (C.A.) quoting ***Attock Cement Co. Ltd. v. Romanian Bank For Foreign Trade*****,** [1989] 1 Lloyd's L.R. 572 at 580, col. 1:

> The legal or commercial connection between one contract and another may enable a court to say that the parties must be held implicitly to have submitted both contracts to the same law.

[24] On behalf of Mr. Cumberford it was argued that it is not necessary to apply this doctrine. I agree that it is not necessary to apply it as a doctrine, which is but a handy title. Rather, the whole matter might be looked upon, as did Her Honour Judge Boyd in ***Heritage Horizons***, as two contracts that "in terms of the realities of business life" are but "integral parts of a single transaction." Fundamental to this is the argument that the only reason for the guarantee is the primary business contract.

[25] This line of reasoning can be seen in ***Broken Hill Proprietary Co. Ltd. v. Xenakis***, [1982] 2 Lloyd's L.R. 304 (Q.B.) and in ***Turkiye Is Bankasi A.S. v. Bank of China***, [1993] 1 Lloyd's L.R. 132 (Q.B.), wherein it was said at 135, col. 2:

> In the present case, however, the granting of the counter-guarantees by the defendants was coupled with a request to issue performance bonds in favour of ETA and in issuing those bonds the plaintiffs provided the consideration for the counter-guarantees. In my judgment, there is a close and relevant connection between the counter-guarantees and the issuing of the performance bonds. This case is more closely analogous to ***Broken Hill***. ...

[26] The trial judge in ***Wahda Bank***, [1994] 2 Lloyd's L.R. 411 at 418, col. 2 said:

> ... the only reason that the counter guarantees came into existence was in order to persuade the plaintiffs to issue performance bonds. Thus, other things being equal, one would expect the performance bonds and the counter guarantees and the counter counter guarantees all to be governed by the same law.

[27] These cases recognized separate contracts, as did Madam Justice Sinclair Prowse, but found that the purpose of the business transaction was the controlling factor as to the choice of applicable law. Mr. Justice Anderson in ***Central Trust*** added short reasons to those of Mr. Justice Taggart, at 328, which express my sentiments in the case at bar:

> ... in my opinion the proper law governing liability under a mortgage was British Columbia law; as liability under the guarantee is dependent on the liability under the mortgage, it cannot make sense that liability under the guarantee could be governed by other than British Columbia law.

[28] I would dismiss the appeal.

"The Honourable Mr. Justice Thackray"

I Agree:

"The Honourable Mr. Justice Hall"

I Agree:

"The Honourable Madam Justice Levine"

TAB 13

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Central Mountain Air Ltd. v. Corporation of the City of Prince George,* 2012 BCSC 1221

Date: 20120815
Docket: 1139864
Registry: Prince George

Between:

Central Mountain Air Ltd. and Northern Thunderbird Inc., carrying on business as NT Air

Plaintiffs

And

Corporation of the City of Prince George, Prince George Airport Authority Inc., Joe Martin & Sons Ltd., PGBC Consulting Group Inc., Bluewater Business Solutions Ltd., Paul J. Klotz, 623328 British Columbia Ltd., Leslie Joseph Martin, George Roderick Martin and Brian Kirk Martin, personally, and in their capacity as litigation guardian and curator for Vernon Michael Martin, Vernon Michael Martin, and John Doe

Defendants

Before: The Honourable Mr. Justice R. S. Tindale

Reasons for Judgment In Chambers

Counsel for the plaintiffs:	R. P. Saul
Counsel for the Corporation of the City of Prince George:	N.C. Carfra
Counsel for the defendant, Paul J. Klotz:	R.J. Stewart, Q.C.
Place and Date of Hearing:	Prince George, B.C. April 2, 2012
Place and Date of Judgment:	Prince George, B.C. August 15, 2012

INTRODUCTION

[1] This is the defendant Paul J. Klotz's (the "applicant") application to dismiss the plaintiffs' claims against Paul J. Klotz and PGBC Consulting Group Inc. pursuant to Rule 9-7.

[2] The plaintiffs and the defendant, Corporation of the City of Prince George (the "City"), oppose this application. The plaintiffs have brought their own application to dismiss the summary trial application of the applicant, or in the alternative adjourn this hearing until examinations for discovery and the production of documents by the applicant have been completed. There were no other parties that attended this application.

BACKGROUND

[3] The plaintiffs carry on the business of a scheduled and charter air carrier. The plaintiffs occupied a part of the building located at 4245 Hangar Road in the City of Prince George, Province of British Columbia (the "building"). The building is located on the Prince George Airport lands.

[4] The defendant Bluewater Business Solutions Ltd. ("Bluewater") carried on business in the building. The applicant was an officer of Bluewater.

[5] The applicant, in his personal capacity, also occupied space in the office of Bluewater.

[6] On December 19, 2009, a fire broke out in a portion of the building which was occupied by Bluewater.

[7] The plaintiffs filed their notice of civil claim on October 3, 2011. The applicant filed his response to civil claim on February 27, 2012.

[8] The defendant PGBC Consulting Group Inc. has not filed a response to civil claim. There is evidence from the applicant that the defendant PGBC Consulting Group Inc. was dissolved on October 19, 2009, prior to the fire in December 2009.

[9] The plaintiffs have not conducted an examination for discovery of the applicant as he takes the position that he will not be examined until after this application has been heard. He has not produced a list of documents for the same reason.

POSITION OF THE PARTIES

[10] The applicant argues that there is no reasonable cause of action disclosed in the notice of civil claim.

[11] The applicant argues that there are no material facts in the notice of civil claim that support any claim in negligence against the applicant. He also argues that he has provided affidavit evidence to support his position that there is no negligence on his part with regard to this fire.

[12] The plaintiffs argue that really what the applicant is arguing is similar to a Rule 9-5 application to strike pleadings. The plaintiffs argue that the court is obliged to read the notice of civil claim as generously as possible in determining whether it discloses a cause of action.

[13] The City also opposes the defendant's application and adopts the arguments of the plaintiffs.

[14] Both the plaintiffs and the City take the position that I should be cautious to dismiss the claim at this point. They argue I should consider the nature of the claim, the fact that there are numerous defendants involved in this claim and the fact that there has not been any examinations for discovery of, or any disclosure made by, the applicant pursuant to the *Rules of Court*.

DISCUSSION

[15] Rule 9-7 (11) states as follows:

> On an application heard before or at the same time as the hearing of a summary trial application, the court may
>
> (a) adjourn the summary trial application, or
>
> (b) dismiss the summary trial application on the ground that

> (i) the issues raised by the summary trial application are not suitable for disposition under this rule, or
>
> (ii) the summary trial application will not assist the efficient resolution of the proceeding.

[16] In the decision of *Dahl et al. v. Royal Bank of Canada et al.* 2005 BCSC 1263 the Court, at paragraph 10, states the following:

> The test for granting summary judgment is set out in Rule 18A (11). The court may grant judgment in favor of any party, either on an issue or generally, unless the court is unable to find the facts necessary to decide the issues or fact, or it would be unjust to decide the issues on the application.

[17] The issue before me is whether or not it would be unjust to decide this application without allowing the plaintiffs the opportunity to further investigate the applicant's role in this fire.

[18] The applicant correctly argues that he has provided affidavit evidence disputing his negligence or role in the fire which has not been directly contradicted by affidavit evidence filed on behalf of the plaintiffs.

[19] There is evidence, however, that the fire started in the office of the defendant Bluewater. The applicant was not only an officer of that company, but he was also occupying that office in his personal capacity.

[20] There are a number of parties involved in this litigation. It is complex on its face and the applicant has not provided a list of documents pursuant to the *Rules of Court* nor allowed the plaintiffs to conduct an examination for discovery of him.

[21] In the decision of *Coast Foundation Society (1974) v. John Currie Architect Inc.,* 2003 BCSC 1781, the Court, at paragraph 12, states the following:

> A summary trial can serve as an efficient manner of disposing of issues or claims in appropriate circumstances. Where the court has the entire claim before it on a summary trial application, it will generally endeavour to grant judgment unless credibility issues preclude the fair adjudication of matters on affidavit evidence. There are, of course, exceptions. Discoveries, for example, may not have progressed to the point where the court is satisfied that each side has had an opportunity to uncover all of the evidence that might be important to its case. In such a case, it might be unjust to grant judgment: *Bank of British Columbia v. Anglo – American Cedar Products Ltd.*

> (1984), 57 BCLR 350 (BCSC). The court will also decline to grant judgment where the complexity of the issues is such that the court is unable to absorb all of the evidence and legal argument in the compressed time available within the Rule 18 A procedure: *Chu v. Chen*, 2002 BCSC 906, 22 C.P.C. (5th) 73 (BCSC).

[22] I am not satisfied that the plaintiffs or the City has had an opportunity to uncover all of the evidence that might be important to their respective cases. The applicant has refused to provide production of documents to the plaintiffs or submit to examinations for discovery prior to this application.

[23] In the circumstances of this case it would be unjust to grant the applicant's application without giving the plaintiffs any opportunity to conduct examinations for discovery or obtain any discovery of documents.

[24] The plaintiffs have filed a notice of application to dismiss the summary trial application of the applicant, or in the alternative adjourn the summary trial application pending production of documents and the completion of discoveries.

[25] A summary trial application is meant to be an efficient way of disposing of issues or claims. The applicant intentionally decided not to produce documentation pursuant to the *Rules of Court* or to be examined for discovery. To bifurcate this proceeding by adjourning it would defeat the purpose of a summary trial as a means of efficiently resolving the matter.

[26] For the above noted reasons I dismiss the applicant's notice of application.

[27] The plaintiffs and the City are entitled to their costs of this application on Scale B.

"R. S. Tindale, J."

Mr. Justice R. S. Tindale

TAB 14

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Chapman v. Musqueam Indian Band,***
2003 BCCA 664

Date: 20031204
Docket: CA028363

Between:

Kerry-Lynne D. Chapman, Jerry Janes, Diana Janes, Alfred K. Lee, Esther K. Lee, Lisbet Mackay, Irving Glassner, Noreen G. Glassner, William T. Ziemba, Donald Scheideman and Kathryn M. Scheideman

Respondents
(Plaintiffs)

And

Musqueam Indian Band

Appellant
(Defendant)

Before: The Honourable Mr. Justice Hall
The Honourable Madam Justice Saunders
The Honourable Mr. Justice Low

R. Sugden, Q.C. and E.A. Poyner — Counsel for K.-L. D. Chapman

W. Baker and R. Kyle — Counsel for the Musqueam Indian Band

Place and Date of Hearing: Vancouver, British Columbia
November 13 and 14, 2002

Place and Date of Judgment: Vancouver, British Columbia
December 4, 2003

Written Reasons by:
The Honourable Madam Justice Saunders

Concurred in by:
The Honourable Mr. Justice Low
The Honourable Mr. Justice Hall

Reasons for Judgment of the Honourable Madam Justice Saunders:

[1] The general circumstances of this dispute are set out in my reasons for judgment in appeals CA028414 and CA028415. This appeal addresses the Band's failed applications under Rule 18A for declarations that the leases are forfeit.

[2] The learned chambers judge concluded that the Musqueam Indian Band lacked standing to apply for declarations that the leases are forfeit to the Crown. The Band says this conclusion is wrong, and seeks an order that the leases are forfeit or, alternatively, an order remitting this matter to the Supreme Court of British Columbia. Were we to conclude that the chambers judge erred on the issue of standing, it would not be appropriate, in my view, for this Court to entertain the issue of forfeiture as a court of first instance. Rather, the matter would need to be remitted to the trial court for consideration, including on those factors which, in equity, may bear upon the relief sought. The question, therefore, is not whether the leases should be declared forfeit, but whether there is error that should cause that issue to be remitted to the Supreme Court of British Columbia.

[3] I turn to the question of standing. The conclusion of the chambers judge was based upon language in the leases, s.

53 of the ***Indian Act***, R.S.C. 1970, c. I-6, and an appointment granted by the Minister under s. 53 on October 6, 1980 to the Chief and Councillors of the Band to carry out certain responsibilities. The key question is whether that appointment included the power to maintain proceedings against defaulting leaseholders for declarations of forfeiture. The chambers judge concluded it did not.

[4] The appellant Band contends in this appeal that this conclusion is wrong. It submits that it has standing through the appointment and in its own right independent of any delegated authority, considering in particular the nature of the relationship between the Crown and Band and the *sui generis* nature of its interest in the reserve lands.

[5] The chambers judge set out the relevant portions of the leases, from which he concluded that the lessee respondents, as the most recent assignees of the leases, were taken to know that their lease was an arrangement under s. 53. That conclusion is not challenged in these proceedings.

[6] Section 53 of the ***Indian Act*** provides the Minister with the power to appoint a person in these terms:

> **53.**(1) The Minister or a person appointed by him for the purpose may manage, sell, lease or otherwise dispose of surrendered lands in accordance with this Act and the terms of the surrender.

[7] In October 1980 the Minister appointed the Band to carry out certain responsibilities under s. 53. That appointment provided:

> Under the authority conferred on me by Section 53 of the Indian Act, I hereby appoint The Chief and the Councillors of the Musqueam Indian Band, from time to time, jointly, with respect to the signing of leases, rights of way, easements and licences of occupation, to manage, in accordance with the Indian Act and the terms of the surrender, the lands that have been set aside for the Musqueam Indian Band which have been or may hereafter be surrendered. It is understood that:
>
> (1) The Musqueam Band Council shall have the necessary record system and all encumbrances will be submitted to the Indian Land Registry office in Ottawa for registration.
>
> (2) The documents to be signed will first be acknowledged by the Band Council to be in the best interests of the Band;
>
> (3) The maximum term or period of any lease, right of way, easement or licence of occupation will not exceed 21 years;
>
> (4) Forms exemplifying the contract are to be the standard lease/permit forms pre-approved by the Minister or his authorized representative;
>
> (5) The authority granted will extend only to those parcels or tracts of land that are specifically described by a plan of survey.
>
> The Chief and Councillors of the Musqueam Indian Band will have the authority to carry out the powers granted on each occasion the authority is exercised and will be authorized on behalf of, and in the name of the Minister of Indian Affairs and Northern Development to execute such leases, rights of way, easements, licences of occupation and other instruments and documents as may be required in the carrying out of such authority.

1. The Appointment and Section 53 of the *Indian Act*

[8] The Band approaches the issue of the effect of the appointment as an issue of interpretation of a contract, and invokes jurisprudence in the law of agency.

[9] The chambers judge, after setting out the terms of the lease and concluding that the lessees were taken to know that the Minister had the power of s. 53, considered the interpretation of the appointment of October 6, 1980:

> [37] The appointment granted by the Minister on October 6, 1980 “with respect to the signing of leases, rights of way, easements and licences of occupation” is a fairly straight forward statement of specific authority. However, what does the appointment of the authority “to manage” encompass?
>
> [38] The ***Oxford English Dictionary***, vol. VIX, 2d ed., (Oxford: Clarendon Press, 1989) at 292 defines the word “manage” as follows:
>
> > To control and direct the affairs of (a household, institution, state, etc.).
>
> [39] ***Black’s Law Dictionary***, 6th ed. (St. Paul, Minn.: West Publishing Co., 1990) at 960 gives a similar definition:
>
> > To control and direct, to administer, to take charge of. To conduct; to carry on the concerns of a business or establishment. Generally applied to affairs that are somewhat complicated and that involve skill and judgment.
>
> [40] In ***York Condominium Corp. No. 104 v. Supreme Automatic Washing Machine Co.*** (1978), 18 O.R. (2d) 596 (Ont.H.C.J.) Mr. Justice Reid concluded that

"leasing" fell within the definition of "management".

[41] ***R. v. Joseph*** (23 October 1985), Vancouver Registry, C851192 (B.C.S.C.), [1985] B.C.J. No. 651 (Q.L.), Judge Catliff (as he then was) considered "management" in the context of s. 81(o) of the ***Indian Act*** which authorized the Squamish Band Council to make bylaws for the purpose of the preservation, protection and management of fish on its reserve. After reviewing a number of definitions of management, Judge Catliff concluded, at para. 11, that the common thread running through those definitions was "the concept of management as direction or control".

[42] That the Crown intended by the Minister's appointment of the Band and Councillors under s. 53 of the ***Indian Act*** to have a broad power of management and authority is evidenced in a number of ways. The Minister approved the Band's right to make a bylaw for the purpose of raising money by assessment and taxation. This approval was given pursuant to s. 83 of the ***Indian Act*** which provides that such approval can be given "where the Governor in Council declares that a Band has reached an advanced stage of development". (In other words, when the Crown has sufficient confidence in the maturity and responsibility of such a Band.) Further, that the Crown intended the management responsibilities of the Chief and Council of the Band to be more than perfunctory duties such as the approval of assignments of leases (a responsibility listed separately) is illustrated by the hands-off approach taken by the Crown during the negotiations or exchanges between the leaseholders and the Band with respect to trying to determine the renewal rent effective June 8, 1995. Undoubtedly, this was a significant responsibility in the scope of the management of the leases and not one that I would categorize as of lesser importance than the responsibility or authority to enforce non-payment of rent.

. . . . .

[44] On the other hand, (and I find this to be significant), it was not the Chief and Councillors

who gave notice of default to the plaintiffs, but rather the Crown "in consultation with the Band" on September 20, 1999. If the Chief and Councillors had understood the scope of their responsibilities to manage as including giving such notices of default, I find it highly improbable that they would not have done so themselves. In other words, this action of the Band demonstrates that it was implicitly understood by both the Crown and the Band that the appointment of the Chief and Councillors to "manage" (however ill defined that was in the letter of appointment) had its limits. I may well have taken a different view had the Chief and Councillors assumed, without objection from the Crown, this responsibility. That, however, was not what occurred.

[45] The Chief and Councillors, as the lawful appointee of the Minister pursuant to s. 53 of the ***Indian Act***, are not strangers to the contracts of lease. Although they were not appointed at the time the head leases were created, that lease, and all subsequent assignments by virtue of the terms of the head leases being subsumed into the assignments, recognized the rights of the Minister and that the authority for the creation of the head leases was grounded in s. 53 of the ***Indian Act***. I agree with the submission of Mr. Roberts that the Chief and Councillors, having been appointed to act in place of the Minister, therefore have the same powers as the Minister with respect to the leases, *although only within the scope of the appointment*. That is, it was open to the Minister, in his discretion, to make an appointment that was narrow or broad in scope.

[46] In his argument, Mr. Sugden raised the point that the document by which the Band surrendered the 40 acres to the Crown provided that the Crown could decide the terms upon which the lands were to be leased, subject only to its obligation to remit rental income to the Band. That is exactly what the Crown has done by the action of the Minister appointing the Chief and Councillors of the Band to manage the lands. The Minister has appointed the Chief and Councillors to carry out certain of his powers under s. 53 of the ***Indian Act***. Presumably,

> at some point, a Minister can revoke or alter the powers of appointment. There is no evidence of that having taken place, however, and so I must interpret the scope of the powers to manage in light of the actions taken by both the Chief and Councillors and the Crown pursuant to the appointment. I conclude that it is probable that it was not intended by the appointment of May 16, 1980 to confer on the Chief and Council the responsibility, and authority, to maintain proceedings against defaulting leaseholders for declarations for forfeiture and that the Chief and Councillors do not have such authority.

[10] Apart from the significance given by the chambers judge to the negotiations for the renewal rate of rent which he considered was an aspect of management of the leases showing that the management duties assigned to the Band were more than perfunctory, the lessees support these reasons. On that issue, the lessees contend that the Band's function derived from Order in Council, P.C. 1973-24, and was exercised by the Band prior to the appointment of 1980. It follows, they submit, that the function of rent review cannot be strictly tied to the appointment. Although this position appears to be supported by the evidence, it does not, in my view, really impact the interpretation issue, being whether the power to originate legal process to defeat the leases is within the appointment.

[11] The Band contends that the appointment of 1980 unambiguously encompasses the power to take action for

forfeiture and relies upon the agency concept of "usual authority" as discussed in text books including ***Bowstead on Agency***, 15th ed. (London: Sweet & Maxwell, 1985) at 95 and R. Powell, ***The Law of Agency***, 2nd ed. (London: Pitman & Sons, 1961). It cited as an example analogous to this case, ***E. Durno Ltd. v. London and Lancashire Guarantee & Accident Co. of Canada*** (1932), 41 O.W.N. 54 (H.C.), a case in which an assignment of rights arising out of a bond included the right to proceed with litigation arising from the bond.

[12] Although the principles of contract construction provide a useful framework, it is significant that in this case the instrument requiring construction simply assigns power to another as an administrative, not commercial, action. Mutual intention, the target in construing a contract, is not the issue here. The question is what was meant by the Minister when the appointment was made. For that reason, the scheme of the instrument and the objective meaning of the words used assume even more significance.

[13] On my view of its terms the appointment does not unambiguously convey the meaning the Band advances, either plainly, or by necessary implication. The power to commence legal proceedings on behalf of the Crown is nowhere mentioned in the appointment. If it is there, it must be implicit in

the language. The power conferred in the first paragraph is "to manage . . . the lands" and is "with respect to the signing of leases, rights of way, easements and licenses of occupation". Those latter words address the creation and management of the title instruments and management. The five understandings thereafter set out (*supra*, para. 7), address the registration of leases, the form of the instruments and pre-conditions to execution of the leases. None of these provisions address conclusion of the leases. Likewise, the final paragraph of the appointment addresses only the execution, that is the creation, of the leases. Read as a whole, the document authorizes the creation of instruments of title. This does not include, in my view, the right to litigate to bring them to an end.

[14] In his reasons for judgment the trial judge referred to the notices of default given by the Crown to the lessees. The Band submits that the trial judge erred in referring to this extrinsic evidence of post-appointment conduct. It contends that cases including ***Black Swan Gold Mines Ltd. v. Goldbelt Resources Ltd.*** (1996), 25 B.C.L.R. (3d) 285, [1996] B.C.J. No. 1458 (C.A.); ***United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.***, [1993] 2 S.C.R. 316; ***Langley Lo-Cost Builders Ltd. v. 474835 B.C. Ltd.***

(2000), 76 B.C.L.R. (3d) 278, [2000] B.C.J. No. 1187 (C.A.) illustrate the rule concerning admission of extrinsic evidence.

[15] This issue concerns the use of post-instrument conduct. However the proposition may be framed, I do not consider that it assists the Band, for it requires the Court to accept the proposition that the appointment unambiguously bears the meaning for which it contends, a proposition I do not accept for the reasons stated above. Indeed, I would go further and say that it is clear that the appointment does not give the Band the power it seeks. But if I am wrong in that conclusion, evidence of the extrinsic post-instrument conduct is admissible: ***Re Canadian National Railways and Canadian Pacific Ltd*** (1978), 95 D.L.R. (3d) 242. That evidence supports the view that the appointment did not give the Band the power to litigate for a declaration of forfeiture. Not only did the Crown give notice of default shortly after the Band filed its counterclaim, the Crown advised the lessees of its intention to pursue them for legal redress and has since done so. The relief claimed in the Crown's action includes damages, interest, forfeiture of the leases and re-entry on the properties. There is no challenge to the Crown's authority to bring that action. Should the Band also have

standing to bring its counterclaim, the lessees will be obliged to defend against two claims in respect of the same *lis*.

[16] The Band contends, in addressing the interpretation issue, that the *sui generis* nature of its interest promotes an interpretation in favour of a broad authority to claim forfeiture. It relies upon ***Guerin v. The Queen***, [1984] 2 S.C.R. 335; ***Opetchesaht Indian Band v. Canada***, [1997] 2 S.C.R. 119; and ***Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)***, [1995] 4 S.C.R. 344.

[17] In my view this special interest in reserve lands does not compel a different result. The issues here are the effect of a legal instrument, given under s. 53 of the ***Indian Act***, upon the rights of parties to litigate about an instrument of title. I do not see a role for the *sui generis* nature of the Indian interest in this question.

[18] The Band also asserts standing to bring its counterclaim on the basis of its residual interest in the lands. It contends that it has property rights in the subject matter of the leases, and having been appointed “to manage” aspects of the lands, has an irrevocable authority that gives it standing to seek forfeiture of the leases. That submission, in my view, assumes that the appointment gives the Band standing to

litigate to end the leases before their terms are expired, which I conclude is not the case, and that the appointment is irrevocable, which it is not, having been made under s. 53 of the ***Act***.

[19] For these reasons I conclude that the appointment of October 6, 1980 does not, directly or indirectly, give standing to the Band to seek forfeiture.

2. Standing Unrelated to the Appointment

[20] The submissions that the Band has standing outside of any reliance on the appointment focus on these passages of the reasons for judgment of the trial judge:

> [47] In these circumstances, I do not accept that the Band has a parallel or independent right to institute proceedings for forfeiture against the leaseholders as either the beneficiary of a trust or as landowners ultimately entitled to possession. The relationship between the Crown, the Band and the leaseholders with respect to the leased lands is defined in the contracts I have discussed above. Further, while the Crown did not pursue a counterclaim against the leaseholders *in this action*, there is nothing to suggest that it could not pursue the remedy of forfeiture or any other remedy to enforce the leases in other ways or in other actions. In fact, the Crown has done just that. The Band may wish the Crown had proceeded otherwise, but that is surely a matter between the Crown and the Band. The Band has not demonstrated that the Crown has failed to act in its best interests in the sense that would entitle it to initiate independent proceedings against the leaseholders.

> [48] This is not a situation such as that in ***Joe et al v. Findlay et al*** (1980), 109 D.L.R. (3d) 747 (B.C.S.C.), (1981) 122 D.L.R. (3d) 377 (B.C.C.A.). In that case, the question was whether a band had the right to take action in trespass against a member of the band in circumstances where the Crown had declined to participate as a plaintiff in the action. At the trial level, Mr. Justice Wallace (as he then was) concluded that it did. However, the action concerned *unallotted* reserve lands and, as noted, unlike this case, the Crown had declined to do anything. Neither factor is present here.

[21] The Band contends that the trial judge erred, and that it may seek forfeiture of the leases on two bases, independent of the appointment – first under trust law as a beneficiary with a trustee who was not acting (at the time the counterclaim was filed) in its best interests, and second, as a band entitled to assert a right of possession to its reserve lands.

[22] The first submission is based upon the terms of the surrender document which provided that the Crown holds the lands “in trust” for the Band to lease “upon such terms as the Government of Canada may deem conducive to our Welfare and that of our people”. The Band contends that, as the lease rates are based on land valued at one-half of the fair market value of the land had it been fee simple, it is not in the Band’s best interests to affirm the leases where there is a basis for claiming forfeiture or obtaining terms for relief

from forfeiture. Relying upon D.W.M. Waters, ***The Law of Trusts in Canada***, 2nd ed. (Toronto: Carswell, 1984), the Band says that the Crown's failure to act in its best interests allows it either to pursue a remedy against the Crown (which it has not done) or to initiate proceedings against the lessees independently.

[23] The nature of the interest in surrendered lands is discussed in ***Guerin***, *supra*. At p. 386 Dickson J. explained that the Crown does not hold such lands in trust for Indians:

> I agree with Le Dain J. that before surrender the Crown does not hold the land in trust for the Indians. I also agree that the Crown's obligation does not somehow crystallize into a trust, express or implied, at the time of surrender. The law of trusts is a highly developed, specialized branch of the law. An express trust requires a settlor, a beneficiary, a trust corpus, words of settlement, certainty of object and certainty of obligation. Not all of these elements are present here. Indeed, there is not even a trust corpus. As the *Smith* decision, *supra*, makes clear, upon unconditional surrender the Indians' right in the land disappears. No property interest is transferred which could constitute the trust *res*, so that even if the other *indicia* of an express or implied trust could be made out, the basic requirement of a settlement of property has not been met. Accordingly, although the nature of Indian title coupled with the discretion vested in the Crown are sufficient to give rise to a fiduciary obligation, neither an express nor an implied trust arises upon surrender.

[24] Further, he held at pp. 386-387:

> The Crown's fiduciary obligation to the Indians is therefore not a trust. To say as much is not to deny that the obligation is trust-like in character. As would be the case with a trust, the Crown must hold surrendered land for the use and benefit of the surrendering Band. The obligation is thus subject to principles very similar to those which govern the law of trusts concerning, for example, the measure of damages for breach. The fiduciary relationship between the Crown and the Indians also bears a certain resemblance to agency, since the obligation can be characterized as a duty to act on behalf of the Indian Bands who have surrendered lands, by negotiating for the sale or lease of the land to third parties. But just as the Crown is not a trustee for the Indians, neither is it their agent; not only does the Crown's authority to act on the Band's behalf lack a basis in contract, but the Band is not a party to the ultimate sale on lease, as it would be if it were the Crown's principal. I repeat, the fiduciary obligation which is owed to the Indians by the Crown is *sui generis*. Given the unique character both of the Indians' interest in land and of their historical relationship with the Crown, the fact that this is so should occasion no surprise.

[25] It follows, in my view, that the Band cannot invoke the law of trusts to give it standing to sue as a beneficiary whose trustee has failed to act in its best interests. Further, the trial judge found that the Band had not proven that the Crown had failed to act in its best interests. I would not interfere with that conclusion.

[26] I consider that the trial judge was correct in saying that this is a matter between the Band and the Crown, and is

not a basis for according standing to the Band to commence forfeiture proceedings.

[27] Second, the Band contends that it may assert possession of its reserve land independently of the Crown, and relies upon ***Joe v. Findlay*** (1980), 109 D.L.R. (3d) 747 (B.C.S.C.), aff'd (1981), 26 B.C.L.R. 376, 122 D.L.R. (3d) 377 (B.C.C.A.) and ***Custer v. Hudson's Bay Developments Ltd.***, (1982), 141 D.L.R. (3d) 722, [1983] 1 C.N.L.R. 1 (Sask. C.A.). The Band contends that the lessees were entitled to be in lawful possession only while the leases remained in good standing. Once the lessees withheld rent, the Band says, they ceased to be in lawful possession and the Band had a right to sue in trespass. Here, too, it raises the *sui generis* nature of its interest in the lands.

[28] The present case is, as the trial judge observed, unlike ***Joe v. Findlay***, *supra*. Here the Band's right to occupy and possess the lands has been transferred to the lessees through the media of the surrender and the lease. The effect of those instruments is that the Band, so long as the leases continue, has only the right to call on the Crown to deal with the lands for their benefit, not the right to possess the lands. Nor would they be entitled to possession simply upon the ending of the leases, for the lands would still be surrendered to the

Government of Canada for the purpose of leasing. It may be that a way would be found to devolve the possessory right in the lands back to the Band and its members, but I do not understand that to be automatic upon termination of the lease.

[29] This all leads me to the conclusion that the trial judge was not in error in concluding, as he did, that the Band lacks standing to pursue forfeiture. Nor does the *sui generis* nature of its interest, not argued before him, alter that result. I would accordingly dismiss this appeal.

"The Honourable Madam Justice Saunders"

I AGREE:

"The Honourable Mr. Justice Hall"

I AGREE:

"The Honourable Mr. Justice Low"

Correction: December 29, 2003.

On the title page, the style of cause was changed by removing the Attorney General and Canada from the title. As well, the counsel for the Attorney General and Canada were removed.

TAB 15

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Chouinard v. Army & Navy Dept. Store Ltd.,***
2008 BCCA 353

Date: 20080916
Docket: CA035538

Between:

Pierre Chouinard

Appellant
(Plaintiff)

And

Army & Navy Dept. Store Ltd.

Respondent
(Defendant)

Before: The Honourable Mr. Justice Hall
The Honourable Mr. Justice Smith
The Honourable Mr. Justice Lowry

G. Hilliker, Q.C. — Counsel for the Appellant

S.B. Margolis — Counsel for the Respondent

Place and Date of Hearing: Vancouver, British Columbia
20 May 2008

Place and Date of Judgment: Vancouver, British Columbia
16 September 2008

Written Reasons by:
The Honourable Mr. Justice Smith

Concurred in by:
The Honourable Mr. Justice Hall
The Honourable Mr. Justice Lowry

Reasons for Judgment of the Honourable Mr. Justice Smith:

[1] The appellant appeals from an order of Groberman J. (as he then was) following a summary trial in which he dismissed the appellant's action on the basis that it was time-barred by operation of the ***Limitation Act***, R.S.B.C. 1996, c. 266. The reasons for judgment are indexed as 2007 BCSC 1569.

[2] The trial judge summarized the facts as follows:

> [1] … On March 9, 2002, the plaintiff was a customer shopping in the defendant's store at 502 Columbia Street in New Westminster. The plaintiff states that in the course of his shopping he was looking for a Torx screwdriver or tool and that he located one in the shop. He says the package was partially opened and that he removed a tool from the package to determine whether it was the appropriate one for his needs. He determined that it was, returned it to the open package and then took an unopened Torx tool package and went and paid for it. He left the store and was arrested.
>
> [2] He says that he was kept for approximately one hour and that the arrest was a false one. He also states that thereafter statements were made to the effect that he had engaged in mischief. He alleges that those statements were libellous. He also alleges fraudulent misrepresentation, in that on the following day he attended at the store with family members to discuss the incident and he was told that his conduct had been a criminal offence and that the store was unable to do anything to expunge its arrest report. Finally, it is alleged the arrest was negligent and that there was a conspiracy surrounding the arrest and subsequent conduct.

[3] The appellant alleges that on the date in question he was caught up in a scheme carried out by a group of security personnel employed by the respondent at its New Westminster location in which, in order to meet arrest quotas set by the respondent, they falsely arrested a number of customers. There is support for this

allegation in the evidence adduced by the appellant, although the trial judge made no finding on the point.

[4] The respondent's application for judgment on a summary trial came on for hearing before the security personnel, who had also been named as individual defendants, had been served with process. Consequently, they were not parties of record at the time of the trial. Nevertheless, the order now under appeal dismissed the action against them as well as the respondent.

[5] The appellant submits there was no basis upon which the action could properly have been dismissed against the individual defendants since limitation is an affirmative defence that must be pleaded and no statements of defence had been delivered by them. I agree: see ***Hrynenko v. Hrynenko*** (1997), 37 B.C.L.R. (3d) 35 ¶ 9-10, [1998] 2 W.W.R. 412 (S.C.). Since the question whether the action against the individual defendants is time-barred was not adjudicated, the action against them should not have been dismissed. I would therefore accede to the appellant's submission on this ground of appeal.

[6] The appellant led evidence that another customer of the store commenced action against Army & Navy Dept. Store Ltd. and the same individual defendants alleging a false arrest at about the time of the appellant's arrest. The appellant also led evidence that a police investigation was commenced as a result. There was evidence that the claim was settled for a sum of money paid to the customer in 2006 and that the police report to Crown counsel resulting from the investigation recommended criminal charges be laid against the same individual defendants

named in this action in relation to incidents of assault, unlawful arrest and detention, and the providing of false police reports. There was evidence that the appellant's name appeared in the report to Crown counsel as a person who had been falsely arrested. The evidence does not disclose what came of the recommendations made by the police.

[7] There was also evidence that the appellant learned in or about October 2006 from the other customer's lawyer that he too had been unknowingly caught up in the scheme. Shortly thereafter, on January 8, 2007, the appellant commenced the underlying action against the store and the particular security personnel involved.

[8] On the respondent's application for a summary trial the appellant took the position the action was not suitable for summary trial, relying on R. 18A(11) of the *Rules of Court*, which states that the court must not grant judgment under R. 18A if it is unable to find the facts necessary to decide the issues of fact or law or if it would be unjust to do so. The appellant submitted that a summary trial would be premature since the individual defendants had not yet been served with process; the pleadings had not been closed; he wished to apply for the production of documents and evidence from the other action, which, he maintained, would be relevant to the limitation issue; and he wished to have oral and documentary discovery of the defendants in order to obtain further evidence relevant to the limitation issue. Regrettably, the trial judge proceeded with the summary trial without ruling on the appellant's objection that the action was not suitable for summary trial.

[9] The trial judge listed the causes of action pleaded in paragraph 2 of the reasons for judgment: false imprisonment, libel or defamation, fraudulent misrepresentation, negligence, and conspiracy. However, for the purpose of analyzing the limitation issue, he treated the action as comprised of only two causes of action, false imprisonment and defamation. He said,

> [3] The first issue for the purposes of the *Limitation Act*, R.S.B.C. 1996, c. 266 is that of characterization of the matter. Despite the fact that the plaintiff has pleaded a multiplicity of causes of action, some of which appear to be made out in law in the pleading and some of which do not, this is, at base, an action for false imprisonment, combined with an action in defamation.

[10] The trial judge observed that it was common ground that the two-year limitation stipulated in ss. 3(2)(c) and (d) of the ***Act*** is applicable to these causes of action. They provide,

> **3** (2) After the expiration of 2 years after the date on which the right to do so arose a person may not bring any of the following actions:
>
> …
>
> (c) for defamation;
>
> (d) for false imprisonment;
>
> …

[11] Accordingly, he said, the real question was whether the running of time for these claims ought to be postponed under ss. 6(3) and (4) of the ***Act***. Section 6 provides so far as is relevant,

6 (3) The running of time with respect to the limitation periods set by this Act for any of the following actions is postponed as provided in subsection (4):

(a) for personal injury;

…

(d) based on fraud or deceit;

(e) in which material facts relating to the cause of action have been wilfully concealed;

…

(4) Time does not begin to run against a plaintiff with respect to an action referred to in subsection (3) until the identity of the defendant is known to the plaintiff and those facts within the plaintiff's means of knowledge are such that a reasonable person, knowing those facts and having taken the appropriate advice a reasonable person would seek on those facts, would regard those facts as showing that

(a) an action on the cause of action would, apart from the effect of the expiration of a limitation period, have a reasonable prospect of success, and

(b) the person whose means of knowledge is in question ought, in the person's own interests and taking the person's circumstances into account, to be able to bring an action.

(5) For the purpose of subsection (4),

(a) **"appropriate advice"**, in relation to facts, means the advice of competent persons, qualified in their respective fields, to advise on the medical, legal and other aspects of the facts, as the case may require,

(b) **"facts"** include

(i) the existence of a duty owed to the plaintiff by the defendant, and

(ii) that a breach of a duty caused injury, damage or loss to the plaintiff,

…

> (6) The burden of proving that the running of time has been postponed under subsections (3) and (4) is on the person claiming the benefit of the postponement.

[12] The trial judge rejected the appellant's submissions that the actions for false imprisonment and defamation fell within ss. 6(3)(a), (d), or (e) of the ***Act***. Accordingly, he concluded the postponement provisions in s. 6(4) were immaterial and the action was time-barred by operation of ss. 3(2)(c) and (d). He added that, if he was mistaken about the applicability of s. 6(3)(e), he would not apply s. 6(4). He explained,

> [27] I find that given what the plaintiff knew at the time that the cause of action is said to have arisen, a reasonable person would have sought legal advice from a lawyer in order to make the determinations set out in s. 6(4).

In so concluding, he rejected the appellant's submission that he could not be expected to have sought legal advice because he had been duped by the security manager into believing that the arrest was effected in accordance with store policy, that there were lawful grounds for the arrest, that the store detectives did not have an arrest quota, and that there was nothing he could do about the matter. He explained,

> [29] With all due respect, it does not seem to me that a reasonable person in the plaintiff's position would consider the head of security at the Army & Navy Department Store to be someone qualified to give him legal advice, particularly when he must have known that the person was adverse in interest and would not in all likelihood have legal training.
>
> [30] It was not reasonable for the plaintiff to accept the security officer's advice as being of a final nature, nor was it reasonable for him

> to sleep on his rights and not consult a legally qualified person in order to determine whether he had a cause of action.

[13] With respect, I think the trial judge erred in treating the action as if it were comprised only of claims of false imprisonment and defamation. In doing so, he overlooked the claims of negligence, civil conspiracy, and fraudulent misrepresentation, which were asserted and arose as discrete causes of action out of the matrix of material facts pleaded in the statement of claim. In the negligence claim, the appellant alleges that the respondent was negligent in its hiring, training, and supervision of the individual defendants and in its encouragement of careless and false arrests through the institution of a quota system. In the civil conspiracy claim, the appellant alleges that the security personnel involved conspired to falsely arrest and imprison him and to publish to others the false accusation of crime. Thus, the material facts supporting these claims pre-date and are distinct from those underlying the alleged false imprisonment and defamation. The fraudulent misrepresentation claim relates to the statements allegedly made by the security manager to the appellant and members of his family the day following his arrest that he had committed a criminal offence, that the store had no arrest quota, and that nothing could be done to investigate the matter further or to revise the written reports made about it. The appellant alleges that the security manager made these statements knowing they were false in order to dissuade the appellant from investigating the arrest any further.

[14] Counsel for the respondent concedes that the trial judge erred in his treatment of the claims of negligence, conspiracy, and fraudulent misrepresentation

and that he should have considered whether the running of time for these causes of action was postponed under s. 6(4). However, counsel contends it would have made no difference since the trial judge made no error in concluding that the running of time would not have been postponed because the appellant had all the information he needed to seek legal advice immediately after the events in question. He referred to evidence that the appellant believed he had been wrongfully arrested, that he said so to his sister-in-law immediately after he returned home from the store, and that he returned to the store the next day with his brother, his sister-in-law, and their daughter to tell the security manager in order to clear his name. Thus, counsel submits, the evidence supports the conclusion that the appellant knew all the relevant facts at the material time and that a reasonable person, knowing those facts, would have sought legal advice. As well, he notes the finding of the trial judge that the appellant's reliance on the allegedly false and fraudulent statements of the security manager was not reasonable, and submits that we ought not to interfere with that conclusion.

[15] The appellant's position is that in consequence of the fraudulent statements of the security manager he did not pursue legal action for false imprisonment, negligence, civil conspiracy, and defamation and that if these actions are time-barred he has suffered a loss as a result of the security manager's fraud. He submits that the running of time on this fraud action was postponed under s. 6(4) until he learned, shortly before he commenced the underlying action, that he had been deceived by the security manager. The trial judge did not address this question.

[16] The claims of conspiracy and fraudulent misrepresentation bring the action within ss. 6(3)(d) and (e). The trial judge, however, said even if he was mistaken about the applicability of s. 6(3) he would not apply s. 6(4) essentially because he concluded it was unreasonable of the appellant to be duped by the security manager. Assuming that conclusion is sustainable, the trial judge erred in dismissing the action without considering whether the claim for fraudulent misrepresentation was also time-barred.

[17] I, however, do not consider the trial judge's reasons for refusing to apply s. 6(4) to be supportable. It appears that he ruled out the need for receiving any evidence relevant to the postponement of the running of time following his conclusion that the two-year limitation for false imprisonment and defamation could not be postponed as a matter of law. Furthermore, his reasons on the question of postponement were in the alternative and related only to s. 6(3)(e) and to the material facts in the actions for false imprisonment and defamation. Thus, there is no indication that he turned his mind to whether he was able on the evidence before him to find the facts necessary to decide whether the running of time should be postponed for the other causes of action pleaded, or whether it would be unjust to decide the limitation issue in respect of those causes of action summarily in the circumstances.

[18] Had the trial judge ruled against the appellant's objection that the action was not suitable for summary trial, his decision would have been entitled to our deference unless it could be shown that his discretion was not exercised judicially: ***Salem v. Priority Building Services Ltd.*** (2006), 220 B.C.A.C. 139, 2005 BCCA

617 ¶ 19. However, he did not rule on the objection and he gave no reasons for his decision to proceed with the summary trial. In these circumstances, we are not constrained by any findings and are free to visit the question afresh.

[19] In my view, the action was not suitable for summary disposition. The individual defendants, who are the allegedly tortious actors, had not yet been served with process and the pleadings had not been closed. It is reasonable to expect that evidence to be obtained from them by the appellant on oral and documentary discovery, and evidence to be obtained from the action brought by the other customer would shed light on the limitation issue, particularly as it affects the causes of action not considered by the trial judge. Thus, there was important evidence potentially relevant to the limitation question that was not before the court and, in the circumstances, it was unjust to the appellant to dismiss the action before affording him an opportunity to obtain that evidence.

[20] For those reasons, I would allow the appeal and remit the action to the Supreme Court.

"The Honourable Mr. Justice Smith"

I agree:

"The Honourable Mr. Justice Hall"

I agree:

"The Honourable Mr. Justice Lowry"

TAB 16

Citation: CHRISTOPHER et al v. WESTMINSTER SAVINGS CREDIT UNION
2003 BCSC 362

Date: 20030307
Docket: S010372
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

JACK S. CHRISTOPHER, JULIA M. CHRISTOPHER LARRY CISECKI and BARBARA P. RENNIE

PLAINTIFFS

AND:

WESTMINSTER SAVINGS CREDIT UNION

DEFENDANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE HALFYARD

The Plaintiffs appeared in person,
represented by the Plaintiff
Jack S. Christopher

Counsel for the Defendant — G.A. Cuttler

Date and Place of Hearing: December 5, 2002 and February 3, 2003
Vancouver, BC

[1] The defendant Westminster Savings Credit Union has applied for summary trial of the plaintiffs' claim, and for judgment dismissing the claims of all four plaintiffs. The application is made pursuant to Rule 18A, by notice of motion filed August 15, 2002.

[2] The plaintiffs (who are unrepresented and whose spokesman in court was the plaintiff Jack S. Christopher) have opposed the defendant's application for summary judgment, on the ground that this case is not suitable for decision by way of summary trial procedure. The plaintiffs advanced an alternative position which seems inconsistent with their initial position. They say that, if I decide to conduct a summary trial, I should grant judgment for the plaintiffs.

[3] In their statement of claim, the plaintiffs allege that in December 1997, the defendant's branch manager wrongly induced them to personally loan $70,000 from the defendant, to pay out the debt owed to the defendant by the company JNL Contracting Ltd., and to secure repayment of these personal loans by granting two mortgages in the amount of $35,000 each, on their respective homes. It is alleged that these events constituted unconscionable

transactions, and the plaintiffs seek the rescission of the contracts and the return of the parties to their original positions.

[4] The essential fact alleged in the statement of defence is that: "The mortgages were entered into by the Plaintiffs free of any duress, undue influence, coercion, intimidation, or inducement by [the defendant], as alleged, or at all." The defendant has also filed a counterclaim against the plaintiffs Jack Christopher and Larry Cisecki seeking judgment for approximately $20,000, based on their alleged guarantees of the debts of JNL Contracting Ltd. Additional relief is sought in the counterclaim by way of declarations that the mortgages granted by the plaintiffs to the defendant are valid and enforceable. However, the defendant does not seek judgment on its counterclaim, on the present application.

[5] The plaintiffs commenced this action on January 22, 2001, and the statement of defence and the counterclaim were separately filed on February 12 and 21, 2001. In March 2001, the defendant commenced two separate proceedings by way of petition, against Mr. and Mrs. Christopher in one, and Ms. Rennie and Mr. Cisecki in the other, seeking foreclosure of the two mortgages that are

the subject of the plaintiffs' action. The applications for orders nisi have been postponed, pending the outcome of this proceeding.

[6] Before addressing the procedural issue, I will set out the essential background facts which I would summarize as follows:

(a) The plaintiffs Jack M. Christopher and Julia M. Christopher are man and wife, and they reside in Port Coquitlam, B.C.

(b) The plaintiffs Larry Cisecki and Barbara P. Rennie live together in a common-law relationship, in Port Coquitlam.

(c) The plaintiffs Mr. Christopher and Mr. Cisecki were business partners, and equal owners of JNL Contracting Ltd. ("the company"), through which they operated a home renovation business. Their wives were not involved in the business of the company.

(d) The plaintiffs did their personal banking with the defendant credit union, which had its office in Port Coquitlam. The defendant held a mortgage on the home owned by Mr. and Mrs. Christopher,

and also held a mortgage on the home owned by Ms. Rennie, which was guaranteed by Mr. Cisecki.

(e) Mr. Christopher and Mr. Cisecki conducted the banking of JNL Contracting Ltd., through the defendant, and since 1993, the company had a business line of credit in the authorized amount of $10,000.

(f) In or about January 1997, Cisecki asked Rick Cole, the defendant's branch manager, to increase the company's line of credit to $20,000. Mr. Cole did this, but the documents reflect that the increase was only effective until January 31, 1997.

(g) Throughout 1997, Christopher and Cisecki asked Mr. Cole to allow the company line of credit to increase substantially, and Mr. Cole agreed to do so, on the understanding that the company would be receiving a large payment from a construction project later in 1997, which would be used to pay out the company's debt.

(h) By December 1997, the company owed the defendant in excess of $70,000, but had not yet received payment from the large project.

(i) In December 1997, Mr. Cole asked the plaintiffs to take out personal loans totalling $70,000, to be secured by mortgages against their homes, to pay off the company debt, which he said had to be done by December 31, 1997.

(j) The plaintiffs reluctantly agreed to comply with Mr. Cole's request.

(k) Mr. Cole retained a law firm to prepare the mortgage documents, and the plaintiffs attended at the offices of the law firm on December 30, 1997, and executed the mortgage documents. When they did this, the plaintiffs knew that the law firm was acting for the defendant, and not for them.

(l) Ms. Rennie granted a mortgage against her home to the defendant in the amount of $35,000, and Mr. Cisecki signed as guarantor.

(m) Mr. and Mrs. Christopher granted a mortgage on their jointly owned home to the defendant in the amount of $35,000.

(n) The mortgages were registered on December 31, 1997.

(o) The terms and conditions of the mortgages, in themselves, were not unfair in any way.

(p) No money was received by the plaintiffs. The entire mortgage loan proceeds were applied by Mr. Cole to pay down the debt of JNL Contracting Ltd.

(q) At the time of these transactions, the only security held by the defendant for the company debts were the guarantees of Mr. Christopher and Mr. Cisecki dated October 28, 1993, for $5,000 each, and an alleged (but disputed) unlimited guarantee of Mr. Cisecki dated February 21, 1995. Mr. Cisecki had little in the way of personal assets.

(r) None of the plaintiffs obtained independent legal advice before executing the mortgage loan documents, nor did Mr. Cole suggest that any of them should seek such advice.

(s) In 1998, the defendant extended further credit to JNL Contracting Ltd., but it appears that some of that loan money was used to make payments on the Rennie mortgage and the Christopher mortgage.

(t) Mr. Cole is no longer employed by the defendant.

[7] The facts which I have summarized above are not in dispute.

[8] The essence of the plaintiffs' allegations of misconduct on the part of the defendant's branch manager is contained in paragraphs 11, 12, 13, 16 and 18 of the statement of claim. Those allegations were expanded upon in the affidavit of Barbara Rennie sworn November 2, 2002, in paragraphs 10 to 14, which version of events is agreed with by Mr. Cisecki in his affidavit sworn November 29, 2002, at paragraph 39. There is also relevant evidence in paragraph 38 of Mr. Cisecki's affidavit and in those parts of paragraph 40 that do not consist of argument.

[9] In paragraph 22 of the statement of claim, the plaintiffs allege that Mr. Cole "...engineered a scenario to apply undue pressure, intimidation and coerce the Plaintiffs to secure the corporate debt." I would

summarize the facts relied on by the plaintiffs in support of this allegation, as follows:

(a) On December 18, 1997, Mr. Cole, in a state of panic told Mr. Cisecki that something had to be done to reduce the line of credit of JNL Contracting Ltd., and asked Mr. Cisecki and Mr. Christopher to meet with him as soon as possible to discuss it.

(b) On December 22, 1997, Mr. Christopher and Mr. Cisecki met with Mr. Cole at his office. Mr. Cole was in a state of panic. He told them that he had exceeded his authority by extending the company's line of credit without security. Mr. Cole told them that his branch was going to be audited by bank examiners in early January, and that he would lose his job if the company debt was not paid down or secured, before the audit was conducted. Cole said he wanted to keep a good relationship with Cisecki and Christopher, but said that if they did not comply by December 31st, he would put the company out of business, prevent them from renewing their mortgages on

their homes, and demand immediate payment of their personal overdraft accounts.

(c) Cisecki and Christopher told Cole that the company could not pay down the line of credit by December 31st. Mr. Cole then told Cisecki and Christopher that they would have to borrow the money personally by taking out further mortgages on their homes, and told them to get their wives to agree to do this.

(d) On December 23rd, Mr. Cisecki phoned Mr. Cole and told him that Barbara Rennie would not grant a mortgage on her home. Mr. Cole then insisted that Cisecki, Christopher, and their wives meet with him that evening at a local pub.

(e) On the evening of December 23rd, the four plaintiffs met with Mr. Cole at the pub. Mr. Cole repeated the demands and threats he had made to Mr. Cisecki and Mr. Christopher the previous day. Mr. Cisecki suggested that the company's line of credit debt be converted into a demand loan to the company, but Mr. Cole rejected this idea because he said there was not enough time to complete the procedures necessary to obtain such

a loan. Mr. Cole said that he had advanced credit to the company in good faith to facilitate completion of the Stripp project, at the request of Cisecki and Christopher, and he would now lose his job because of it, unless they agreed to do as he asked, which he said was the honourable thing to do.

(f) Mr. Cole also stated that the personal debt he was asking the plaintiffs to incur would exist for only a short time, until after the audit was completed. He told the plaintiffs that their personal loans would then be paid out from the large account receivable from the company's Stripp project or, if that was delayed, then the personal loans would be paid out from the proceeds of a loan which the defendant would advance to the company.

(g) The plaintiffs, particularly Ms. Rennie, continued to resist Mr. Cole's demands, but finally gave in, and said they would do what he wanted.

(h) Mr. Cole had never imposed any deadline for payment of the company debt, until December 19th or 22nd, 1997.

(i) Mr. Cole did not suggest that any of the plaintiffs should obtain independent legal advice before completing the transactions he was proposing.

(j) Mr. Cole did not follow the lending policy and procedure prescribed by the defendant, in arranging for these loans and mortgages.

[10] The defendant's branch manager Rick Cole swore an affidavit on April 23, 2001, which contradicted several of the key allegations in the statement of claim (see paragraphs 16, 21 and 22). There has been no affidavit filed in reply to the affidavits of Ms. Rennie or Mr. Cisecki, which I assume was because they were not delivered until shortly before the hearing date. There has been no cross-examination on any of the affidavits. Only Mr. Cisecki and Mr. Christopher have been examined for discovery.

[11] Counsel for the defendant acknowledged that there are serious conflicts in the evidence which could not be

resolved by way of summary trial. But Mr. Cuttler made a proposal that he said would avoid all issues of credibility and that would permit me to decide this case on the merits under Rule 18A procedure. He invited me to accept the version of the facts asserted in the affidavit evidence presented by the plaintiffs, as being true on the balance of probabilities. In this way, Mr. Cuttler says that I will be able "to find the facts necessary to decide the issues of fact or law." I think it is necessarily implicit in this argument that it would also not be unjust to try this case summarily.

[12] Next, counsel submits that even on the plaintiffs' own version of events, their case is bound to fail in law. I understood this submission to mean that the conduct of Mr. Cole, as complained of by the plaintiffs, could not in law constitute the elements necessary to establish an unconscionable transaction.

[13] Mr. Cuttler's submission was founded on his detailed review of extensive portions of the evidence given on discovery by the plaintiff Cisecki on March 13, 2002, and by the plaintiff Jack Christopher on March 14, 2002. Counsel argued that these two plaintiffs made admissions on discovery which negated or diminished the allegations

relied on to establish an unconscionable transaction. Among other things, counsel contended that the admissions established the following:

(a) Mr. Christopher and Mr. Cisecki knew that Mr. Cole had extended credit without security, to help their company to continue operations, and when Cole told them his job was at risk, they felt morally obligated to assume some risk themselves to help Mr. Cole in return, while believing that their company would soon receive payment from a customer, sufficient to repay all of the mortgage loan money;

(b) Mr. Christopher and Mr. Cisecki chose to enter into the transaction, because they wanted to avoid their liability as guarantors of part of the debt owed by their company, to keep their company operating, and to avoid the risk of Mr. Cole losing his job, and not because of any threats or promises made by Mr Cole.

(c) Mr. Christopher and Mr. Cisecki chose not to seek legal advice, because they knew the nature and effect of the transaction which Cole was demanding that they proceed with; and

(d) Mr. Cole knew or believed that Mrs. Christopher and Ms. Rennie relied on their husbands to make all major financial decisions.

[14] Counsel referred me to the definition of the elements required to establish an unconscionable transaction, as set out in ***Morrison v. Coast Finance Ltd.*** (1965) 55 D.L.R. 2d 710, per Davey, J.A. at 713, and in ***Harry v. Kreutzieger*** (1978) 95 D.L.R. 3d 231, per Lambert, J.A. at 241. In ***Morrison***, Mr. Justice Davey said this:

> "A plea that a bargain is unconscionable invokes relief against an unfair advantage gained by unconscientious use of power by a stronger party against a weaker. On such a claim the material ingredients are proof of inequality in the position of the parties arising out of ignorance, need or distress of the weaker which left him in the power of the stronger, and proof of substantial unfairness of the bargain obtained by the stronger".

In ***Harry***, Mr. Justice Lambert described the test as being:

> "... whether the transaction, seen as a whole, is sufficiently divergent from community standards of commercial morality that it should be rescinded."

[15] I would add that, in ***Harry v. Kreutzieger***, Mr. Justice McIntyre described the test as follows:

> "Where a claim is made that a bargain is unconscionable, it must be shown for success that there was inequality in the position of the parties due to the ignorance, need or distress of the weaker, which would leave him in the power of the stronger, coupled with proof of substantial unfairness in the

> bargain. When this has been shown, a presumption of fraud is raised, and the stronger must show, in order to preserve his bargain, that it was fair and reasonable."

[16] I am not persuaded that the version of facts presented by the plaintiffs could not support a finding that the transactions in question were unconscionable transactions, with respect to any of the plaintiffs. I say this notwithstanding the effect of any admissions made on discovery by Mr. Cisecki and Mr. Christopher, that might be established by evidence and argument, having proper regard for Rule 40(27)(d). There were a number of factors operating simultaneously, and in my view, it will be important to determine the extent to which each of those factors contributed to the decision of each of the plaintiffs, to comply with Mr. Cole's demands.

[17] I think the absence of independent legal advice on the part of Ms. Rennie and Mrs. Christopher is significant. I am also of the opinion that, if the evidence of the plaintiffs is accepted, it would be arguable that the inducements held out by Mr. Cole included deceit. I am referring to the evidence of Barbara Rennie to the effect that Mr. Cole assured the plaintiffs that the mortgages would be for a short duration only, and that if the large account receivable of the company was not forthcoming, the

defendant would advance a loan to the company which would be used to pay out the mortgages, in the very near future.

[18] It is my further opinion that the facts asserted in the evidence presented by the plaintiffs could support a finding that the plaintiffs were subjected to undue influence by Mr. Cole. As Mr. Justice Davey stated in the ***Morrison*** case: "A plea of undue influence attacks the sufficiency of consent." In this case, it seems clear that Mr. Cole deliberately attempted to induce the plaintiffs to borrow money personally and to secure repayment of those loans by mortgages on their homes, to pay the $70,000 debt of JNL Contracting Ltd. I think it is arguable that the plaintiffs only submitted to Mr. Cole's demands, but did not freely and voluntarily consent to them. The purpose of the doctrine of undue influence is said to be "... to protect people from being forced, tricked or misled in any way by others into parting with their property ...." See ***National Westminster Bank v. Morgan*** [1985] 1 All E.R. 821(H.L.), per Lord Scarman. In my opinion, if the plaintiffs (or any of them) were induced to enter the transactions by reason of the threats and false promise of Mr. Cole, then their "consent" to do so would not be effective, in law. This may also be the case with respect

to Mr. Cole's insistence that the plaintiffs should act honourably.

[19] But in this case, I decline to express any final opinion on the merits of the plaintiffs' claim, for reasons which I will explain. First, defence counsel invites me to accept the plaintiffs' version of the facts, for the purpose of deciding this application, but does not admit the truth of those facts, for any additional purpose. Second, as I have mentioned, the plaintiffs have opposed this application on the basis that this action should not be determined by way of summary trial. They have not agreed to the procedure proposed by Mr. Cuttler.

[20] I understood Mr. Cuttler's position to be that, if I found this case to be unsuitable for disposition by summary trial, and dismissed the defendant's application, it would be open to the defendant at a later trial to contest the version of facts advanced by the plaintiffs. In my opinion, the weight of the authorities is that the court should not proceed to the summary trial of an action based on assumed facts, unless all parties agree to that procedure. There is also some authority for the proposition that, even if the parties agree that the court should decide an issue of law on facts that are to be

assumed, the summary trial should not be proceeded with, unless all parties agree that the facts are to be admitted finally and conclusively for all purposes in the proceeding as a whole.

[21] The latest pronouncement on this somewhat troublesome issue appears to be the judgement of the court of appeal in ***Steyns v. Manitoba Public Insurance Corporation*** (1995) 7 B.C.L.R. 3d 106. At p. 120 of the report, Finch, J.A. (as he then was), speaking for the court, said this in paragraph 46:

> "I do not think either ***Hill*** or ***Edgeworth*** (both supra) should be considered as establishing either that R.18A can never be used to decide an issue of law on assumed facts, or that it can always be used in that way. Rule 18A is frequently used to decide limitation issues on the assumption that the cause of action could be established. I would not be disposed to restrict the discretion given to the judge who hears the summary trial application under R.18A. Sometimes it will be appropriate to use R. 18A to decide a question of law on assumed facts and sometimes not."

[22] Other cases that I have found helpful in considering this issue include: ***Buckley v. B.C.T.F.*** (1992) 65 B.C.L.R. 2d 155 (C.A.) at 161-163; ***Tunner v. Novak*** (1993) 76 B.C.L.R. 2d 255 (C.A.) at 260-263.

[23] In my view, the law dictates that I cannot proceed to try this action summarily, based on the assumed facts

proposed by defence counsel. If I am wrong, I would exercise my discretion against the applicant in this case. I conclude that I am "unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law." That conclusion justifies the dismissal of this application.

[24] It is my opinion that there are two reasons why it would also be unjust to decide the issues in this case by way of summary trial. First, there must be a trial of the counterclaim in any event. Mr. Cisecki's credibility will be in issue on the trial of the counterclaim, as well as in the trial of the plaintiffs' claim. It may well be that Mr. Cole's credibility will also be an issue on the counterclaim, concerning the alleged signature of Mr. Cisecki on the unlimited guarantee, and his knowledge of what he was signing. In my view, it would be desirable that the trial of the claim and the counterclaim should proceed at the same time. Second, I think it would be unjust to decide this action on the assumption that Mr. Cole is lying in his affidavit sworn April 23, 2001, without knowing that he agrees with this assumption being made. Such an assumption puts Mr. Cole's reputation at stake.

[25] For these reasons, the application of the defendant is dismissed. The costs of the application will be costs in the cause.

[26] If the plaintiffs intend to rely on the provisions of the ***Consumer Protection Act***, or on undue influence, they should take steps to amend their pleadings. They should also attempt to amend the statement of claim so as to restrict the pleadings to essential facts as opposed to evidence, but this may be asking too much of the plaintiffs who are representing themselves.

"D.A. Halfyard, J."
The Honourable Mr. Justice D.A. Halfyard

TAB 17

Citation: Christopher v. Zimmerman
2000 BCCA 532

Date: 20000929
Docket: CA026805
Registry: Vancouver

COURT OF APPEAL FOR BRITISH COLUMBIA

ORAL REASONS FOR JUDGMENT

Before:

The Honourable Mr. Justice Hollinrake
The Honourable Madam Justice Ryan
The Honourable Madam Justice Saunders

September 29, 2000

Vancouver, B.C.

BETWEEN:

KARIN CHRISTOPHER

PLAINTIFF
(APPELLANT)

AND:

ROBERT I. ZIMMERMAN
aka MACARTHUR ZIM

DEFENDANT
(RESPONDENT)

J.S. Sheppard — appearing for the Appellant

E. Watson — appearing for the Respondent

[1] **SAUNDERS, J.A.:** The appellant Ms. Christopher appeals the order of the learned trial judge on a Rule 18A application that her claim for a declaration of constructive trust is governed by the law of Hawaii.

[2] The parties are not married. They met in Hawaii in 1988 and resided there together until 1993. The degree, if any, to which they cohabited in a spousal relationship is disputed. In 1993 the parties moved together to the mainland of the United States of America, and from then until June of 1997, they resided in various states. In June 1997 they moved from Florida to British Columbia and were together until separation in October 1998. They have thus lived in four states in the United States of America and British Columbia.

[3] The respondent Mr. Zimmerman, also known as Mr. Zim, has moveable assets in his name of some value. Ms. Christopher in this action seeks a declaration of constructive trust as a remedy for unjust enrichment that she alleges Mr. Zimmerman has received from her. It appears at this stage of the evidence that her opportunity to obtain such relief is weaker in Hawaii than in British Columbia.

[4] Mr. Zimmerman sought an order under Rule 18A of the Rules of Court dismissing the action, or alternatively, seeking an

order that the proper law to be applied in the case is the law of Hawaii.

[5] The learned trial judge, accepting the position expressed by then counsel for Mr. Zimmerman, approached the question as one of domicile and treating the matter as analogous to a dispute involving marital property:

> In my view, in a modern context the determination of domicile ought not to rest on whether the parties were married or not. Claims to moveable property are to be governed by the *lex domicilii* or the law of the matrimonial domicile absent some express or implied agreement to the contrary. Given the affidavit evidence of the plaintiff, I am satisfied that she has not established that the defendant changed his domicile of choice to British Columbia.
>
> Accordingly, the British Columbia court should decide the issues of trust on the basis of the law of Hawaii.

[6] On appeal Ms. Christopher contends that the proper law of the claim is to be determined on the basis that she claims in equity, and that it is not to be decided on the rules relating to marital property. Further, she says determination of the law requires findings of fact and cannot be answered on the basis of the filed affidavit materials.

[7] Mr. Zimmerman, through new counsel, agrees that the proper law should be determined on the basis Ms. Christopher claims in equity but says that the trial judge's conclusion

that the proper law is the law of Hawaii is, on the evidence, correct.

[8] The statute law in British Columbia does not address Ms. Christopher's claim and the question of the proper law of the dispute must be answered under the common law.

[9] Determination of the proper law of a claim requires the Court to first characterize the claim and then to identify the choice of law rules that apply to the claim. It is then that the Court considers the evidence to determine what law to apply based upon the applicable choice of law rules. In this I refer to ***Tezcan v. Tezcan*** (1992), 62 B.C.L.R. (2d) 344 (C.A.).

[10] This case must be characterized as one concerning unjust enrichment, that is, it is a claim in equity. It is not and could not be a claim about marital property, a claim which would engage provisions of our statute law, because the parties are not married. On a claim in equity, the substantive law concerns the principles of equity and is not dependent upon the nature of the parties' relationship.

[11] In ***Peter v. Beblow*** (1993), 101 D.L.R. (4th) 621 (S.C.C.), McLachlin J. (now C.J.C.) warned against dividing unjust enrichment cases into two categories: commercial and family.

While this warning was given in the context of the substantive law relating to constructive trust, it is equally apt to issues of the proper law of a dispute. Further, there is no basis on which to treat claims involving relationships loosely termed common-law differently from those involving other personal relationships such as child and parent, as would be necessary if the marital property rules are applied to this case.

[12] I consider that the proper law of the issue is to be resolved on the basis that this is a claim in equity.

[13] What then are the choice of law rules that apply to the claim?

[14] I accept the rules set out in *Dicey and Morris on the Conflict of Laws*, 12th ed. (L. Collins, ed.) (London: Stevens, 1993), at p. 1471, dealing with a claim to restore the benefit of an enrichment where the issue does not involve land and the obligation does not arise in connection with a contract:

> ... its proper law is the law of the country where the enrichment occurs.

[15] This is similar to the test described in J.-G. Castel, *Canadian Conflict of Law*s, 4th ed. (Toronto: Butterworths, 1997), at p. 637-638:

> The obligation to restore the benefit unjustly obtained in an independent obligation which does not arise from the volition of the parties. It is governed by the proper law of the obligation, that is, the law of the legal unit with which the obligation to make restitution has its closest and most real connection. ...
>
> In the absence of any previous contractual relationship between the parties, the obligation to restore the unjust enrichment has its closest and most real connection with the law of the legal unit where the immediate or ultimate enrichment occurred since the enrichment is at the heart of the action.

[16] This takes us to the question of what law applies. In my view, this issue must be remitted to trial. I say this for three reasons:

a) the decision appealed does not contain findings of fact necessary to determine the proper law on the basis that the claim is an unjust enrichment;

b) the evidence before the trial judge is sufficiently contradictory that the facts cannot be found on the affidavits even if I considered that this Court should make the factual findings, which I do not; and

c) some of the information required to decide this case, such as growth of the assets in the various jurisdictions is not found in the affidavits.

[17] For these reasons, I would grant the appeal, set aside the order of the learned Chambers judge that the law of Hawaii applies to the claim in equity, and remit the issue to be tried on the basis that the proper law is to be decided on the rules relating to unjust enrichment. Further, I would deny the applications of both parties to adduce fresh evidence on this appeal.

[18] The appellant is entitled to her costs of the appeal, in my view.

[19] **HOLLINRAKE, J.A.:** I agree.

[20] **RYAN, J.A.:** I agree.

[21] **HOLLINRAKE, J.A.:** The appeal is allowed; that part of the order of the Chambers judge declaring that the law of Hawaii applies to the claim of unjust enrichment is set aside; the issue is remitted to the Supreme Court for a hearing on a trial; the motion to adduce new evidence is dismissed; and the appellant is entitled to her costs of this appeal.

"The Honourable Madam Justice Saunders"

TAB 18

Citation: Chu, et al v. Chen, et al
2002 BCSC 906

Date: 20020617
Docket: C975901
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

**PETER KONG CHU, MEI YEE SUNG,
KAN CHAK WAN, YUN MUI LUI, LAM CHAN,
SHUI YING WONG CHAN and
FRANK CHEUK MAN LAI**

PLAINTIFFS

AND:

**FRANCIS CHOK-YAN CHEN and
MARGARET MING WAI LEE**

DEFENDANTS

**CHEN & LEUNG,
PETER KONG CHU and MEI YEE SUNG**

THIRD PARTIES

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE BOUCK

Counsel for the Applicant Plaintiffs:	Kathleen J. MacDonald
Counsel for the Respondents:	George Gregory
Counsel for the Third Parties:	Grant Ritchey
Date and Place of Hearing/Trial:	24 & 25 April 2002 Vancouver, BC

INTRODUCTION

[1] The plaintiffs bring this Rule 18A application seeking declaratory relief and other remedies. They say a declaratory judgment will give them an interest in certain lands that are the subject matter of the dispute.

[2] Chen & Leung is a law firm named as a third party. It also applies under Rule 18A for an order dismissing the defendants' claim. As third parties Peter Kong Chu and Mei Yee Sung (the Chus) ask for an order dismissing the defendants' third party claim against them

[3] The plaintiffs commenced the action in November 1997. It is set for trial in October 2002.

OUTLINE OF FACTS

[4] First, I will set out a brief description of the various parties.

THE PLAINTIFFS

[5] 1. Peter Kong Chu and Mei Yee Sung are husband and wife. They describe themselves as business persons living in Hong Kong, China. I will refer to them as the "Chus".

2. Kan Chak Wan and Yun Mui Lui are husband and wife. They also describe themselves as business persons living in Hong Kong. I will refer to them as the "Wans".

3. Lam Chan and Shui Ying Wong Chan are husband and wife and business persons living in Hong Kong. I will refer to them as the "Chans".

4. Frank Cheuk Man Lai is a business person residing in Hong Kong. I will refer to him as "Mr. Lai".

THE DEFENDANTS

[6] 1. Francis Chok-Yan Chen is a businessman residing in Vancouver, B.C. I will refer to him as "Mr. Chen".

2. Margaret Ming Wai Lee is a businesswoman residing in Burnaby, B.C. I will refer to her as "Ms. Lee".

THE THIRD PARTIES

[7] 1. Chen & Leung is a law firm located in Vancouver, B.C.

2. The Chus as plaintiffs also are named as Third Parties.

[8] These proceedings concern a land development scheme at 71-77 East Pender Street, Vancouver B.C. (the property). The project began in 1995 when the plaintiffs and the defendant Mr. Chen acquired the land for $1,000,000.00. In October 1996, by separate agreements, the plaintiffs agreed to transfer their interests to the defendants Mr. Chen and Ms. Lee. To secure the amount Mr. Chen owed the plaintiffs for the transfer, he gave them cheques post-dated to 30 June 1997. Depending upon each plaintiff's interest, the amount of the cheques ranged from $247,293.22 to $143,418.22.

[9] Sometime in 1996, the defendants proceeded to construct a building on the property. The scheduled completion date was in June 1997. Apparently, the defendants ran out of money. I am told that unpaid workers and suppliers filed liens against the property to secure their claims. I am also told the property may be sold for unpaid taxes in December 2002.

[10] On 30 June 1997, the plaintiffs presented Mr. Chen's cheques for payment but they were not honoured. They now seek a declaration that the October 1996 agreement entitles them to unpaid vendors' liens or equitable mortgages against the property in the amount of the cheques. If they obtain such a declaration, they ask for an order allowing them to sell the property on the open market. They hope the sale price will

pay for all or part of Mr. Chen's indebtedness to them arising out of the dishonoured cheques. In addition they want judgment against Mr. Chen for the amount of the cheque debt.

[11] By way of reply, Mr. Chen argues that if the plaintiffs do have a right to an unpaid vendor's lien or an equitable mortgage, they waived that right by their conduct.

[12] In the third party proceedings, the defendants claim their former law firm, Chen & Leung, was negligent in failing to protect their interests. Mr. Chen and Ms. Sung contend that Chen & Leung ought to have included clauses in the October 1996 agreements releasing the defendants from any future claims the plaintiffs might have against them for unpaid vendors' liens or equitable mortgages. Mr. Chen says that if the plaintiffs succeed, Chen & Leung ought to indemnify him for his loss.

[13] In the third party proceedings, the defendants claim over against the Chus. They allege the Chus conspired together to induce the other plaintiffs to breach a separate agreement dated 18 November 1994. The defendants also ask for a declaration that they be indemnified by the Chus for any judgment debt.

ANALYSIS

[14] For the most part, no party complained this matter was unsuitable for resolution under Rule 18A. However, that does not bind me in reaching an opposite conclusion. I am entitled to dismiss all or part of the application if it is "unsuitable" for disposition - Rule 18A(8)(b)(i) - or if it would be "unjust" to decide the issues - Rule 18A(11)(a)(ii).

1. Rule 18A(8) and (11) - Interpretation

[15] Is this dispute suitable for disposition under Rule 18A? Alternatively, would it be unjust to decide the disputed matters under the Rule? The Lieutenant Governor in Council (the LGIC) enacts the Supreme Court Rules under what is now called the ***Court Rules Act***, R.S.B.C. 1996, c. 80. The relevant sub-rules of Rule 18A read in part as follows:

> (8) On or before the hearing of an application under this rule, the court may ...
>
> (b) dismiss the application on the ground that
>
> (i) the issues raised by the motion are not suitable for disposition under this rule, or
>
> (ii) the application will not assist in the efficient resolution of the proceeding.
>
> ...

> (11) On the hearing of the application, the court may
>
> (a) grant judgment in favour of any party, either on an issue or generally, unless ...
>
> (ii) the court is of the opinion that it would be unjust to decide the issues on the application ...

[16] The definitions of the word "suitable" in the Shorter Oxford English Dictionary, p. 2183, and Black's Law Dictionary 7th ed., p. 1448, are more or less in agreement to its meaning as: "fit and appropriate for its intended purpose."

[17] In the same authorities, the word "unjust" means: "not acting justly or fairly; not observing the principles of justice or fair dealing;" Oxford, *supra,* at 2422; and "contrary to justice; not just" Black's, *supra,* at 1536. The word "just" means: *inter alia*, "That is such properly, fully, or in all respects; complete in amount or character; full; proper, regular;" Oxford, *supra,* at 1144; and, "legally right; lawful; equitable" Black's, *supra*, at 868.

2. Rule 18A - History

[18] Until Rule 18A came along in 1983 (B.C. Reg. 178/83, s. 3), the LGIC Rules provided for summary disposition of actions or defences under Rule 18. That rule still exists

today. Without proceeding to a conventional trial, a plaintiff may apply for summary judgment against a defendant on the grounds there is no defence to the plaintiff's claim: Rule 18(1). Similarly, a defendant may apply summarily for dismissal of a plaintiff's claim on the grounds there is no merit to the claim: Rule 18(6).

[19] The main difference between Rule 18 and Rule 18A is that under Rule 18, the trial court judge hearing the application cannot decide questions of fact or law. His or her function is to determine whether there is a triable issue: ***Golden Gate Seafood (Vancouver) Co. v. Osborn & Lang Inc.*** (1986), 1 B.C.L.R. (2d) 145 at 171 (B.C.C.A.). Under Rule 18A, however, the hearing judge may enter judgment following an application, even though some of the facts may be disputed and the law may be in conflict: ***Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.*** (1989), 36 B.C.L.R. (2d) 202 at 214-215 (B.C.C.A.). Frequently, counsel and judges disagree as to whether the facts are sufficiently in dispute to deny relief to the Rule 18A applicant.

[20] The question then arises as to what was the intended purpose of Rule 18A when first enacted in 1983? From counsel's perspective, two articles published in *The Advocate* speak positively about Rule 18A's usefulness: M. F. Welsh:

"Judging the Summary Trial Rule" (1988) 44 *The Advocate*, 173; D. W. Roberts Q.C., "Rule 18A Summary Trials - Under Attack Again", (1992) 50 *The Advocate*, 49.

[21] In Mr. Welsh's words, *supra*, apparently the LGIC hoped the Rule would, "weed out those cases that do not (or should not) require a full scale trial." Or using Mr. Roberts' words, *supra*: the LGIC anticipated the Rule would provide a "quick fix" that would "avoid lengthy delays in disposing of unmeritorious defences or claims."

[22] The LGIC Rules are based upon the English Rules of 1883. Under these rules, the parties control the pace of litigation, not the court. The court does not set a trial date until a party applies for one after the close of pleadings: Rule 39(2). Parties may postpone that application to a time when it suits their convenience. Generally, the shorter the estimate of the trial length by counsel, the earlier a trial date can be provided by the court. Rule 39(4) gives the court the right to set an action down for trial at a specific date but, judges rarely exercise that right and only then at a party's request. This is because court administration officials are responsible for co-ordinating the trial list, not individual judges.

[23] As a trial judge since 1974, I have some knowledge about why Rule 18A came into existence. In the mid to late 1970's there was a time interval of about 6 to 9 months from the date a party applied to the court for a trial date and the first day the court assigned for the trial's commencement. When that trial date did arrive, few cases were "bumped", because there was little overbooking. By the early 1980's, the time interval from application for a trial date to the conventional trial date itself increased from about 6 to 9 months to around 12 to 18 months.

[24] Overbooking was tried - about 1000% - in an attempt to shorten the time interval. It often had the unfortunate result of bumping more cases because, when the trial date arrived there were more cases ready for trial than there were judges available to hear them. Sometimes cases would get bumped a second time, after waiting 6 or so months for a second trial date. In this environment, Rule 18A seemed to promise relief from the long waiting period for a trial and the prospects that a trial date could be fictional.

[25] During that era, every weekday in Vancouver there was always a judge (a Chambers judge) sitting to hear motions or applications such as Rule 18A. In most other parts of the province a Chambers judge sat at least once a week. A party

seeking a Rule 18A summary trial could set the application down for hearing on one of those weekly sitting days. Applicants did not have to apply for a hearing date as they did for a conventional trial or be too concerned that a Chambers judge would not be available because of overbooking.

[26] At first Rule 18A worked reasonably well. Most applications did not involve contested issues of fact or require further extensive research and writing by the Chambers judge. In other words, the Rule provided a "quick fix" where the issues were not complex and the facts were simple and generally uncontested. But as time went by, more frequently counsel chose a Rule 18A summary trial over a conventional trial. Rule 18A applications began to involve contested issues of fact and law that counsel suggested the Chambers judge easily could resolve.

[27] Today, a special division of the court exists to hear these and similar types of applications in Vancouver. We are told that Vancouver judges or juries decided 810 conventional civil trials in 1995, while in 2001 that figure had diminished to 390. Perhaps this significant reduction in conventional trials may be due to the convenience offered to the parties by way of Rule 18A summary trials. Perhaps it could also be due

to long lasting conventional trials, some of which may have substantially exceeded their original time estimates.

3. Rule 18A - Administrative Alternatives

[28] For many years in the 1980's and early 1990's the interval from the writ's filing date to the first day of a conventional trial was about 3 to 5 years. Outside the Lower Mainland it was about 2 to 4 years. Those figures may still be true today since trials now take much longer than they once did. That tends to sustain the unsatisfactory interval from the time a plaintiff files a writ until the day the trial begins.

[29] This case is an example of the 5 year estimate. It will be almost 5 years after the plaintiffs filed their writ in November 1997 until the scheduled commencement of the trial in October 2002. Probably, it will be an additional 2 to 3 months after the trial completes before the trial judge delivers reasons for judgment.

[30] That interval contrasts with the much shorter time period between filing and disposition or judgment in many large metropolitan, U.S. state superior trial courts that have case management systems. According to a 1996 U.S. Bureau of Justice survey, 70% of judge alone trials and 56% of jury

trials were disposed of in less than 2 years from filing. The median processing time from filing to verdict was 22.1 months for jury trials and 17.8 months for judge alone trials.

[31] Many of those courts strive to meet the 1984 American Bar Association guidelines recommending that superior state trial courts dispose of 90% of civil cases within 12 months of filing; 98% within 18 months of filing and 100% within 24 months of filing.

[32] The British Columbia Supreme Court does not have a universal case management system. It has what is called the master calendar system (the MCS) where the parties control the pace of litigation. No Canadian bar organization has recommended target times that Canadian superior trial courts should try and meet in processing cases from filing to trial. However, in 1995, British Columbia Supreme Court judges and B.C. lawyers asked the provincial government to finance a pilot project for the purpose of testing the suitability of an individual case management system (the ICS), where the court controls the pace of litigation. The request was denied.

[33] In other common law jurisdictions the ICS system has had the effect of reducing the time from filing to trial and improving trial court efficiency. The 1990's Ontario Commission on Civil Justice acknowledged that "those

jurisdictions which have achieved the most dramatic results with case flow management are those which have used the individual calendar system".

[34] Rule 18A probably would not be necessary if the court had a 100% ICS. Experience proves the ICS results in a much shorter interval from filing to a conventional trial than does the MCS. The ICS would have the effect of reducing or eliminating the need for litigants to seek a Rule 18A summary trial because there would not be such a long wait for a conventional trial.

[35] Frequently, counsel for both sides will ask a Rule 18A hearing judge to render a judgment, even though there are conflicts in the evidence. They say that the parties just want to end the matter rather than wait any longer for a far off conventional trial date.

[36] For hundreds of years our legal ancestors and others struggled mightily to design a civil trial system that would produce a just decision. The result of these efforts is the modern conventional trial, where litigants appear before an independent judge or a judge and a jury and the parties call witnesses who testify to the facts. Those witnesses may be cross-examined by the opponent. The public may attend and view the proceedings. The judge or jury finds the facts,

applies the law to those facts and renders a verdict. This kind of a trial is the envy of many other countries where an independent judiciary and the rule of law have not yet taken root.

[37] Reform of the conventional trial process should be ongoing. Rule 18A has the unfortunate effect of impeding its improvement. If we did not have Rule 18A, perhaps by now the LGIC rules would have modernized the conventional trial system in the way it has been done in the U.S. and England. For example, modern LGIC rules could:

- require each party to disclose the names of their witnesses well before trial (U.S. and English courts);
- allow each party to depose all the other party's witnesses, including experts (U.S. courts);
- postpone interlocutory appeals until after the trial (U.S. courts);
- compel discovery of insurance policies (U.S. and Ontario courts);
- detail the manner in which parties can exercise their right under the ***Jury Act***, R.S.B.C. 1996, c. 242, to

examine potential civil jurors and challenge for cause (U.S. courts);

- experiment with the process called findings of fact and conclusions of law where counsel write the decision for entry and appeal purposes after the trial judge gives his or her oral or written conclusions (U.S. and English courts);

- prescribe a method whereby parties would appear at a pre-trial conference well before every trial (U.S. and English courts);

- require each party to file and exchange a trial brief well before trial (U.S. and English courts);

- allow trial judges to restrict the amount of unnecessary examination in chief and cross-examination (U.S. and English courts).

4. Rule 18A - Summary Trial Defects

[38] A conventional trial does not necessarily result in perfect justice. Given humanity's inherent weaknesses, it is the best we can do. On the other hand, a Rule 18A summary trial is a far less perfect trial than a conventional trial. This is because Rule 18A allows counsel to present the

evidence in affidavit form and the affidavit's deponents seldom are cross-examined before the Rule 18A judge to test their credibility.

[39] In a conventional trial, the trial judge rules on the admissibility of evidence. On a Rule 18A summary trial, the parties present the evidence in affidavit or written form without a judge first ruling on the admissibility of statements contained within the affidavits. These affidavits probably do not reflect the deponent's exact words. For practical reasons they usually are the affidavit drafter's best interpretation of the deponent's words. Without objection from counsel for the other party, drafters often insert into the affidavits inadmissible argument dressed up as evidence or they may add explicit or disguised hearsay. During the later research and writing component of a Rule 18A summary trial judges must sift out these inadmissible words and find the necessary facts from the admissible evidence that remains.

[40] For example, in this instance, Mr. Chu's affidavit contains inadmissible hearsay and opinion statements such as: "to the best of my knowledge;" "I had the impression;" "it was my understanding;" and the like. Mr. Chen's affidavit contains similar defects. I do not mean to imply that

affidavit drafters intentionally decide to ignore the rules of evidence. Rather, they easily may have forgotten those rules because they have been under-exposed to conventional trials. Arguably, Rule 18A has a negative effect on counsel's conventional trial skills of presenting evidence, cross-examining witnesses and persuading juries. Judges' conventional trial skills can suffer in a similar way.

[41] From the point of view of trial court efficiency, in many Rule 18A summary trials the presiding judge often cannot tell whether the issues are suitable for a just disposition under the rule until long after the hearing is over. This is because counsel want to compress the Rule 18A hearing into the shortest time possible. The longer a Rule 18A hearing takes, the more likely it is the application will be dismissed as being unsuitable for resolution.

[42] However, a Rule 18A hearing that takes counsel little time to present does not necessarily result in fewer hours of judicial research and writing time. A Rule 18A hearing judge must still examine all the affidavits and all the authorities, including those that counsel may have just mentioned in passing. This may often require many hours, days, weeks and sometimes even months of research and writing by the Rule 18A judge.

[43] In the end, if a Rule 18A judge decides not to resolve the issues because of unsuitability or unjustness, the judicial time spent hearing the application and explaining the reasons for its dismissal is wasted. It can also result in considerable extra expense to the parties because the dispute must then wait in line for disposition at a future conventional trial.

[44] A Rule 18A hearing effectively excludes the public from the process; few ordinary citizens possess the necessary patience and boredom threshold to sit in the gallery listening to counsel and the court debate dry questions of law based on material the observers never see. Rule 18A tends to distance the public from the justice system to the disadvantage of our democracy.

[45] Another weakness of Rule 18A arises where there is an appeal from the hearing judge's decision dismissing the application. If the Court of Appeal upholds the hearing judge by dismissing the application that does not end the dispute. It must still be tried at a future conventional trial. Again an added expense to the parties in what is already an overly expensive exercise.

[46] Rule 18A can provide the parties with three trials instead of one conventional trial. First, there is a Rule 18A

summary trial application before a hearing judge in the trial court where the judge may dismiss the application because of unsuitability. Second, there is another "trial" in the Court of Appeal. While it is called an appeal, it is in fact a trial because the Court of Appeal decides the issues on the identical written material that was before the Rule 18A hearing judge. Third, if the Court of Appeal upholds the Rule 18A hearing judge's ruling of unsuitability, there is then a conventional or real trial before a judge or a judge and jury.

[47] No one can say for certain that the result of a Rule 18A summary trial would be the same if the dispute were tried by a judge or a jury at a conventional trial. For all these reasons, a conventional trial is a first rate trial when compared to a Rule 18A trial. An impartial observer might ask: "Why should the LGIC rules offer a second rate trial to the public? Should not those rules pursue excellence and shun mediocrity?"

5. Rule 18A - Trial Judges' Sitting Schedules

[48] Something should be said about how trial judges try to administer Rule 18A applications within their own sitting schedules. Lacking empirical data I must again rely on my own experience. Until the early 1970's judges committed themselves to perform their judicial work by sitting in court

for 10 months of the year with 2 months of holidays in July and August. A week long trial was a very long trial. There was no overbooking. If a trial settled, it usually meant the judge could use the time allotted for that trial to complete other judicial duties.

[49] In that pre-1970's era, judges tried cases and gave oral judgments shortly after the trial or handed down written judgments within a few weeks following the trial. Trials and hearings started at 10:30 a.m. and lasted until 4:00 p.m.

[50] Issues were much simpler to resolve than they are today. For example, in personal injury cases, a judge could give a lump-sum damage award without having to apportion the amount under various heads of damages. Trials took less time than today. Correspondingly, trial judge's written decisions were shorter. Most trial judgments were under 10 pages. A 20 to 25 page judgment was rare.

[51] With the increase in litigation in the early 1970's, judges individually agreed to commit themselves to sit for about 33-34 weeks of the year. In order to meet this promise, they agreed to hear cases for 3 weeks and then have 1 week to research and write any reserved judgments they may have accumulated during the previous 3 weeks of sitting. On an annual basis, that worked out to about 46 weeks of sitting and

writing time and 6 weeks of holidays. The holiday time soon became shorter as cases became more complex, took longer to try and longer to decide. Some judges did not get holidays because they used that time to catch up on accumulated reserve decisions.

[52] In the late 1970's, trials commenced at 10:00 a.m. rather than 10:30 a.m. and they ended at 4:00 p.m., for a total sitting time of abut 4.5 hours per day. Those still are the sitting hours. Some might say they are rather short. Given the degree of concentration trial judges must apply to the process and the tiresome business of taking longhand notes of the evidence, the hours are long enough.

[53] In addition to regular or active judges we now have supernumerary judges. These are judges who elected supernumerary status after serving as active judges for at least 15 years and reaching the age of 65. Supernumerary judges commit themselves to sit from 33% of the time, or 11 weeks per year, to 50% of the time, or 16 weeks per year. The 11 week supernumerary judges commit to about 4 weeks of reserve time; for the 16 week supernumerary judges, their reserve week commitment is about 5-6 weeks. Active judges and supernumerary judges often sit more than just their committed sitting weeks.

[54] When the LGIC enacted Rule 18A in 1983, how did it fit into the judges' sitting schedules? At first, it did not impose many difficulties. Counsel usually presented applications that were on the low side of the complexity scale. Many could be disposed of by the judge delivering oral reasons from the bench. Often others could be decided within a relatively few hours of writing and research time. A few required more intensive study. Over the years, the length of many written Rule 18A judgments has increased from just a few pages to 50 pages or more.

[55] A two- to three-day Rule 18A summary trial hearing probably would occupy about 10 to 15 days of conventional trial time. In a conventional trial, the evidence comes in gradually, witness by witness. Judges rule on admissibility questions. They see and hear the witnesses testify and assess their credibility. If necessary, judges can question witnesses to resolve potential misunderstandings. Issues often disappear without credible evidence to support claims or defences. A Rule 18A hearing deprives the judge of these important safeguards for reaching a just result.

[56] It is reasonable to estimate that it takes a Rule 18A judge about two to three times longer to decide the issues on

a Rule 18A application than it would have taken after a conventional trial.

[57] Hence, a significant problem confronting a Rule 18A hearing judge is the lack of reserve time the present three and one sitting system allows for reading, researching and writing. The 1983 Rule 18A drafters probably never contemplated that litigants would choose a summary trial to dispose of the kinds of complex disputes that increasingly come before the court.

[58] In addition, judges now have many more out-of-court duties than they had 20 to 30 years ago. Frequently they are asked to prepare papers for discussion at judicial seminars or at lawyers' educational meetings. They serve on court committees and national judicial committees. They attend judicial educational programs. They often conduct settlement conferences and pre-trial conferences before and after normal court hours. Some take French language instruction. The list goes on.

[59] As best they can, judges must squeeze these extra judicial responsibilities into their 4 to 15 or so annual reserve or research and writing weeks. Most judges now do research and writing in their offices or chambers during their sitting weeks, their lunch and coffee breaks during

conventional trials and in the hours before 10:00 a.m. and after 4:00 p.m. Many judges either take work home at night and on weekends or work in their courthouse chambers.

[60] In effect, the sitting schedule designed for the early 1970's does not meet the real life requirements of the 21st Century. A more realistic schedule would be 20 to 25 weeks of sitting. It exists in at least one other province. However, it is difficult to make such a change because it would have the result of imposing much longer delays on parties who seek a conventional trial.

6. Rule 18A - Judicial Support Services

[61] Something must be said about judicial support services in the Supreme Court of British Columbia. B.C. superior court trial judges do judicial work of a similar nature to that of U.S. Federal District Court trial judges.

[62] By way of support services, U.S. Federal District Court trial judges usually have their own secretaries. B.C. trial court judges share the secretarial services of one person with 3 or 4 other judges. Each U.S. Federal District Court trial judge has at least 2 Law Clerks. They assist judges in researching and drafting their judgments or opinions. British

Columbia trial court judges share the services of one Judicial Law Clerk with about 4 or 5 other judges.

[63] Increasingly the Supreme Court of Canada refers to American authorities in its judgments. That means trial court judges should examine American law when they write their decisions. But of all the courthouse law libraries in British Columbia, only the Vancouver Law Society Library has a relatively small collection of American case law, statutes and texts.

7. Rule 18A (8)(b)(ii) - Suitability in These Proceedings

[64] To determine whether the declaratory relief dispute in these proceedings is suitable for disposition under Rule 18A (8)(b)(ii), it is necessary to keep in mind the preceding remarks. In other words, did the LGIC contemplate that this dispute is fit and appropriate for Rule 18A's intended purpose?

[65] First, I will outline the nature of the written material the parties presented at the hearing.

A. Pleadings

[66] Volumes I and II of the 3-ring binders contain the pleadings and motions. The pleadings come from about 12 documents. They occupy about 45 pages.

B. Affidavits and Exhibits

[67] Volume I contains 10 affidavits. Including the exhibits to the affidavits, they occupy around 400 pages of evidence.

C. Discovery Material

[68] There are 10 excerpts from the examinations for discovery of the parties, including certified translations of exhibits from the Chinese language into the English language. They occupy about 100 or so pages.

D. Outlines of Arguments

[69] Volume I contains about 7 written outlines of arguments occupying approximately 75 written pages. During the hearing counsel added written amendments to those outlines.

E. Legal Authorities

[70] There are 3 bound volumes of legal authorities. They contain photocopies of various rules, statutes and case law. During the course of the hearing, counsel handed up additional

authorities. Altogether, they amount to about 250 pages of reading. As well, counsel handed up photocopies of pages from various legal texts that referenced many other allegedly relevant cases.

[71] The total comes to around 850 to 900 pages of written material. Counsel mentioned a very small portion of that material at the two and one-half day hearing. The remainder I have scanned.

[72] Our Court of Appeal recommends that Rule 18A hearing judges give reasons for judgment in every case: ***Golden Gate Seafood (Vancouver) Co. v. Osborn & Laing Inc.,*** *supra*, at 157:

> It must be obvious that in appeals like this one this Court labours under a distinct disadvantage when it does not have before it reasons for judgment of the trial judge.

[73] I estimate it will take me about 20 to 30 working days to read, absorb, organize and fashion all of this material into an acceptable written judgment for Appeal Court purposes. The law on the right of unpaid vendors to recover a declaration for a lien or an equitable mortgage against the property in these circumstances is not simple to resolve. Nor is the application of the law on waiver. As well, counsel introduced an argument on novation during the hearing.

[74] Taking all of these factors into consideration as best I can, I find that the application for declaratory relief is unsuitable for disposition under Rule 18A because the summary trial procedure is being used by the plaintiff for something other than its intended purpose.

[75] In other words, the intended purpose of Rule 18A was not meant to apply to a dispute involving this amount of material and requiring such a significant amount of judicial out-of-court research and writing time. Therefore, the plaintiffs' Rule 18A declaratory application is dismissed.

8. Rule 18A (11)(a)(ii) - Unjust to Decide the Issues

[76] In addition to the concept of unsuitability, a Rule 18A hearing judge may decide it is "unjust" "to decide the issues" on a Rule 18A application: Rule 18A (11)(a)(ii). In the context of this sub-rule, a judge may find it is unjust to decide the issues if the result may amount to an injustice.

[77] It may be unjust for a judge to decide Rule 18A issues if "the complexity of the action is in issue" or because "any other matters arise for consideration" by the hearing judge: ***Canadian Imperial Bank of Commerce v. Charbonnages de France International S.A.***, [1994] 10 W.W.R. 232 (B.C.C.A.) at 255.

[78] A trial judge has a broad discretion to refuse to proceed with a Rule 18A application if it would be unjust to decide the issues raised in the application: ***Placer Development Ltd. v. Skyline Explorations Ltd.*** (1985), 67 B.C.L.R. 366 (B.C.C.A.) at 385-86;

> ... Rule 18A ... clothe(s) the judge with a broad discretion to refuse to proceed with the application where he decides he cannot find the facts necessary to decide the issues of fact or law or if *it would be unjust to decide the issues raised on the application*.
>
> (emphasis mine)

[79] In the unlikely event a trial judge decided disputed matters at a conventional trial without seeing the witnesses testify under oath and being subjected to cross-examination, there is little doubt an appeal court would find the result unjust. The question then arises as to the meaning of the word "unjust" within the context of Rule 18A. When a Rule 18A judge decides the issues without the advantage of seeing the witnesses, is not that decision just as unjust as if it had happened at a conventional trial? Does Rule 18A mean to excuse this kind of an injustice but not other kinds of injustices?

[80] Counsel did not argue this point at the Rule 18A hearing. Therefore, it will have to wait for others to do so in future cases.

9. Disposition of Other Disputed Matters

[81] There are two other disputed matters that are suitable for resolution under Rule 18A. They are the contests over payment of the dishonoured cheques and the third party negligence claims by the defendants against the law firm of Chen & Leung.

A. The Dishonoured Cheques Dispute

[82] In October 1996, Mr. Chen entered into agreements with the plaintiffs whereby the plaintiffs agreed to transfer their interests in the property in return for his cheques post-dated to 30 June 1997. The plaintiffs completed the transfers but Mr. Chen failed to honour the cheques when they came due. Mr. Chen did not advance any persuasive legal or factual reason as to why judgment should not be entered against him for his failure to honour those cheques.

[83] The amount owing on the cheques to the various plaintiffs is as follows:

The Wans	$247,293.22
The Chus	$247,293.22
The Chans	$247,293.22
Mr. Lai	$143,418.22

[84] Those plaintiffs will recover judgments from Mr. Chen for the amounts shown above with costs.

B. The Application of Chen & Leung to Dismiss the Defendants' Third Party Claim

[85] I now turn to the third party claim by Mr. Chen and Ms. Lee against Chen & Leung. Essentially, Mr. Chen and Ms. Lee allege that their law firm Chen & Leung was professionally negligent. They say that in the October 1996 agreements Chen & Leung should have protected them from the possibility that the plaintiffs might be entitled to a declaration for an unpaid vendor's lien or an equitable mortgage against the property if Mr. Chen dishonoured the cheques.

[86] Mr. Chen did not lead any expert evidence concerning the standard of care Chen & Leung should have met in the circumstances. Nor is there any evidence that the plaintiffs would have waived their claims for unpaid vendors' liens or

equitable mortgages against the property had they been asked to do so by Mr. Chen.

[87] Therefore, I dismiss the defendant's third party claim against Chen & Leung with costs.

C. The Application of the Chus to Dismiss the Defendants' Third Party Claim

[88] Lastly is the issue of the defendants' third party claim against the Chus. On this matter, the defendants allege that the Chus conspired together to induce the other plaintiffs to breach their agreements with the defendants. Mr. Chen's affidavit seems to refer to alleged oral agreements that were entered into before the written agreements of October 1996. The affidavit of Mr. Peter Kong Chu denies there were any such oral agreements.

[89] Counsel for Mr. Chen did not convince me that the oral agreements affected the October 1996 written agreements in any material way. However, given the conflict in the evidence, it is possible that Mr. Chen may have some sort of claim for general damages against the Chus for breach of any alleged pre-October 1996 contracts.

[90] Therefore, the Chus' application for dismissal of the defendants' third party claim against them is not granted and the matter must proceed to be heard at a conventional trial.

10. Suggested Limits on Material for Future Rule 18A Applications

[91] Paraphrasing the reported words of Albert Einstein, the kind of thinking that got us into the predicament arising from Rule 18A, is not the kind of thinking that is going to get us out.

[92] To assist counsel on future Rule 18A applications, I offer the following guidelines. However, I wish to emphasize that each judge will have his or her own level of tolerance depending upon their own individual circumstances; they are in no way bound by my suggestions. Some judges may have considerable out-of-court time available to research and write decisions in complex Rule 18A applications. Others may not.

A. Pleadings

[93] Pleadings should be kept to a maximum of 5 pages per party.

B. Affidavits and Exhibits

[94] Affidavits and exhibits attached to them should be kept to a maximum of 20 pages per party.

C. Discovery Material

[95] Extracts from transcripts of examinations for discovery should occupy no more than 10 pages per party.

D. Briefs or Outlines of Argument

[96] These briefs should be restricted to no more than 10 pages per party.

E. Legal Authorities

[97] Photocopies of relevant rules, statutory sections and case law should occupy no more than 30 pages per party.

[98] Assuming there are only 2 parties, that works out to a total of 75 double spaced, typewritten or printed pages per party. When the amount of material submitted by the parties exceeds that figure, a Rule 18A hearing judge may decide the application should be dismissed as unsuitable because the Rule is being employed for something other than its intended purpose. Counsel should keep in mind that a summary trial implies a summary disposition.

[99] Of course, where the parties cannot confine the quantity of material within the suggested limits, they still retain the right to a conventional trial.

JUDGMENT

[100] 1. The Rule 18A application by the plaintiffs against the defendants for declaratory relief is dismissed.

2. The Rule 18A application by the plaintiffs for judgment arising out of the dishonoured cheques is allowed.

3. Because the plaintiffs failed on item 1 but won on item 2, there will be no order as to costs.

4. The Rule 18A application by the third party Chen & Leung to dismiss the defendants' claim against it is allowed with costs payable by the defendants to Chen & Leung forthwith.

5. The Rule 18A application by the Chus to dismiss the defendants' third party claim against them is referred to the conventional trial set for hearing in October 2002. The defendants will recover their costs of this application from

the plaintiffs if the defendants succeed on this issue at the trial.

"J.C. Bouck, J."
The Honourable Mr. Justice J.C. Bouck

June 28, 2002 - ***Corrigendum to the Reasons for Judgment*** issued by Mr. Justice J.C. Bouck advising that on the first page, Counsel for the Applicant Plaintiffs should have read: Kathleen J. MacDonald, instead of Catherine MacDonald.

TAB 19

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Coast Building Supplies Ltd. v. Superior Plus LP,* 2016 BCSC 1867

Date: 20160824
Docket: S156453
Registry: New Westminster

Between:

Coast Building Supplies Ltd.

Plaintiff

And

Superior Plus LP, carrying on business as Allroc, a Division of Superior Plus LP

Defendant

Before: The Honourable Madam Justice Gropper

Oral Reasons for Judgment on Admissibility of Evidence

In Chambers

Counsel for Plaintiff:	D. Gautam
Counsel for Defendant:	S.R. Andersen
Place and Date of Trial/Hearing:	New Westminster, B.C. August 24, 2016
Place and Date of Judgment:	New Westminster, B.C. August 24, 2016

[1] **THE COURT:** The application before me is by the plaintiff, Coast Building Supplies Ltd., seeking, among other things, disclosure of documents by the defendant.

[2] At the outset of the hearing the defendant raised an objection to the admissibility of evidence contained within the affidavits of Amrik Sangha, the president of Coast, and of Anne Berrie, a paralegal employed by plaintiff's counsel.

[3] This decision addresses the preliminary objection only.

[4] The bases for the objections are in three categories, and I will describe them and the parties' positions in respect of them.

[5] First, Mr. Sangha has referred to representatives of the defendant and certain other companies as sources of information that he was provided. He also refers to documents received from these sources without appending them. The defendant says that the names of the sources must be provided. The plaintiff says that the information was provided to it and to Mr. Sangha in confidence and on the condition of anonymity and that it is sufficient in the affidavit to generally describe the source, but no name is required.

[6] The second area of objection is in relation to certain portions of the affidavits of Mr. Sangha and Ms. Berrie as inadmissible opinion or argument. The defendant says that that must be excised. The plaintiff agrees in some cases with that, but not all of them.

[7] The third category references the affidavit of Ms. Berrie which contains a transcript of a pre-trial deposition of a witness in another, but related, proceeding. The defendant says that the transcript is subject to an implied undertaking of confidentiality and that without the consent or court order the transcript cannot be tendered in evidence or entered by affidavit.

[8] The plaintiff says that an examination for discovery transcript is subject to that implied undertaking, but the transcript appended to Ms. Berrie's affidavit is a pre-trial

deposition of a witness. It is a statement of a witness and there is no property in a witness.

Decision

[9] Mr. Sangha's affidavit referring to his sources as certain representatives of the defendant and others must provide a name and the basis for the person's knowledge in order that it is reliable to be stated on information and belief.

[10] The authorities were helpfully summarized by Mr. Justice Kelleher in *XY, LLC v. Canadian Topsires Selection Inc.*, 2015 BCSC 988, beginning at paragraph 33:

> [33] Affidavit evidence based on information and belief is only admissible if the source is identified, in the sense of "an identified person": *Meier v. Canadian Broadcasting Corporation* (1981), 28 B.C.L.R. 136 at 137-8 [*Meier v. CBC*]. It is not enough to specify the source without naming the individual. If the source wishes to remain anonymous, the evidence in affidavit form is inadmissible: *Meier v. CBC*.
>
> [34] The law in this area was recently summarized by the Court of Appeal. In *Albert v. Politano*, 2013 BCCA 194, the Court stated at paras. 19 - 22:
>
> > [19] Further, I must comment on the affidavit of the legal assistant that is sought to be adduced. In the critical paragraph, she deposes that appellants' counsel has told her that the appellants were not aware of the term requiring Mr. Albert to remain in British Columbia. This is hearsay upon hearsay: Obviously the legal assistant has no firsthand knowledge of what was known by the appellants, and appellate counsel to whom she refers, also has no firsthand knowledge. The information is said to come from the appellants, but the person who gave the information is not identified. By s. 30 of the *Court of Appeal Act*, R.S.B.C. 1996, c. 77, and there being no Court of Appeal Rule dealing with the content of affidavits, Rule 22-2(13) of the *Supreme Court Civil Rules* applies. It is the modern version of the long standing rule laying out the parameters of permitted affidavit evidence:
> >
> > > (13) An affidavit may contain statements as to the information and belief of the person swearing or affirming the affidavit, if
> > >
> > > (a) the source of the information and belief is given, and
> > >
> > > (b) the affidavit is made
> > >
> > > (i) in respect of an application that does not seek a final order, or …
> >
> > [20] In *Scarr v. Gower* (1956), 18 W.W.R. 184 (B.C.C.A.) Mr. Justice O'Halloran stated at 188:
> >
> > > ... failure to state the source of information and belief in an affidavit usable on motions of this kind is not a mere

> technicality. If the source of the information is not disclosed in other material on the motion the offending paragraphs are worthless and not to be looked at by the court.
>
> [21] In *Meier v. C.B.C.* (1981), 28 B.C.L.R. 136 at 137-8 Mr. Justice McKenzie observed that "the word 'source' is equivalent to 'an identified person'". To the same effect is *Trus Joist (Western) Ltd. v. United Brotherhood of Carpenters and Joiners of America, Local 1598*, [1982] 6 W.W.R. 744, wherein Madam Justice McLachlin (now Chief Justice of Canada) said at 747: "The rule permits hearsay evidence, provided the source is given".
>
> [22] The affidavit of the legal assistant does not meet Rule 22-2(13) because it does not identify the source of the information and does not attest to her belief in it. This is more than a mere technical deficiency; by failing to reveal the source, the reliability of the information is put beyond the reach of the respondent. Any cross-examination on the affidavit, by definition, will not be of the foundational source of the information. This affidavit, in this paragraph critical to the application, fails to satisfy Rule 22-2(13), is inadmissible, and fails to meet the third *Palmer* criteria.

[11] I consider that the authorities do not support the plaintiff's position that the name of the source does not have to be provided. Indeed, the authorities demonstrate that it does. Coast did not provide any authority that a confidential source, described generally, is sufficient in an affidavit.

[12] Furthermore, not naming the source is inconsistent with the notion of reliability which is referred to specifically in *Albert*.

[13] I therefore strike those paragraphs of Mr. Sangha's affidavit which do not disclose the source. I can go through them, but I think it is clear on the record. Certainly, an order which is entered will refer to the paragraphs to which the defendant referred, and those paragraphs are struck.

[14] I will move to the next category of objection and that is opinion and argument. The authorities are clear that affidavits cannot contain opinions or argument.

[15] In that regard the defendant refers to paragraph 32 of Mr. Sangha's affidavit as being inadmissible opinion, particularly where it concludes, after going through a description, that Allroc, the defendant, did not pass on to Coast its proportionate share of the rebate. I agree that is an argument. There may be an argument to be

made based on that, but it is not for the affiant to provide the argument. In respect to Ms. Berrie's affidavit at tab 3, the defendant objects to paragraphs 5 through 9 which describe Ms. Berrie's review of the transcript from the examination for discovery. She counts the number of questions that the defendant did not answer on the basis that he did not know, did not recall or was not aware. She counts the number of times during the discovery that counsel for the defendant interrupted the proceedings. She then describes two occasions where the plaintiff's counsel — which I think means defendant's counsel — actually stated an objection to the question and the reason for the objection. In paragraph 8 she talks about the number of occasions where defence counsel interrupted and when those interruptions occurred. In paragraph 9 she counts up the number of occasions when plaintiff's counsel requested a document or information and then describes that defence counsel started an argument.

[16] The counting process is not an opinion. She has reviewed the transcript. In that regard I find that paragraph 5 is admissible.

[17] In respect of paragraph 6, it is not the count that is offensive, but it is the notion of interruption. Interruption is not a neutral term, it is an argumentative term. If paragraph 6 said that there were objections made, that might be different.

[18] I have the same concern with regard to paragraph 7.

[19] Paragraph 8, I find, is a matter of opinion or argument and as counsel for the plaintiff points out, perhaps she should have added "I have been advised by counsel." He says nothing turns on it.

[20] In paragraph 9 there are a number of occasions when document or information was requested and in Ms. Berrie's view defence counsel started an argument. This is a matter of opinion or argument that she is not able to give because she was not there.

[21] I have found paragraph 5 to be admissible but paragraphs 6 to 9 are not for the reasons that I have provided. I note that none of these paragraphs are critical.

The plaintiff can make whatever argument it wishes in respect of what the transcript shows, but it is not a matter of opinion for the paralegal.

[22] The third category of objection is based on the implied undertakings of confidentiality. In that regard I refer to the decision of Mr. Justice Voith in *Chonn v. DCFS Canada Corp.,* 2009 BCSC 1474 where he refers to the general legal framework. Starting at paragraph 16 Mr. Justice Voith, referring to *Juman v. Doucette,* 2008 SCC 8, used the words of Binnie, J. for the Court describing the implied undertaking rule as follows:

> [4] Thus the rule is that both documentary and oral information obtained on discovery, including information thought by one of the parties to disclose some sort of criminal conduct, is subject to the implied undertaking. It is not to be used by the other parties except for the purpose of that litigation, unless and until the scope of the undertaking is varied by a court order or other judicial order or a situation of immediate and serious danger emerges.

[23] I will also refer to paragraph 17 of the *Chonn* decision which in turn refers to paragraph 27 of the *Juman* decision and states:

> [27] … the law imposes on the parties to civil litigation an undertaking to the court not to use the documents or answers for any purpose other than securing justice in the civil proceedings in which the answers were compelled (whether or not such documents or answers were in their origin confidential or incriminatory in nature).

[24] It is agreed that there has been no consent by the defendant to use the transcript which was obtained in a separate but related action (S140621 Vancouver Registry) where Coast was a defendant. I cannot find a distinction between whether the answers are obtained on examination for discovery or by deposition. I concede that there is a distinction in that examination for discovery evidence has to be read in to become evidence in a trial. Deposition evidence is admissible as evidence in the trial. I do not find any authority for the distinction that is made by counsel for the plaintiff. On that basis I must conclude that the transcript which is appended to Ms. Berrie's affidavit must be struck.

"Gropper J."

TAB 20

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Coast Foundation v. Currie,*
2003 BCSC 1781

Date: 20031204
Docket: S74797
Registry: New Westminster

Between:

Coast Foundation Society (1974) and
British Columbia Housing Management Commission

Plaintiffs

And

John Currie Architect Inc., John Robert Currie,
Van Maren Construction Co. Ltd.,
Triwest Development Group Limited and
S.W. Technical Services Ltd.

Defendants

Before: The Honourable Mr. Justice Groberman

Reasons for Judgment

Counsel for the Plaintiffs	James M. Coady Stella D. Frame
Counsel for John Currie Architect Inc. and John Robert Currie	Craig A. Wallace Timothy L. Wong
Date and Place of Trial/Hearing:	September 11-12, 2003 Vancouver, B.C.

[1] The defendants John Currie and John Currie Architect Inc. (collectively referred to in these reasons as the "Architects") bring this application under Rule 18A. They seek a ruling that some of the claims against them are barred by a limitation clause in a contract for architectural services. The plaintiffs resist the application, arguing, firstly, that the issue ought not to be determined under Rule 18A, and secondly, that if it is determined, it ought to be determined in their favour.

[2] The plaintiff Coast Foundation is a non-profit society dedicated to improving the lives of persons suffering from mental illness. It operates a 34-unit apartment complex, known as Frances Court, constructed in 1988 and 1989 with the aid of funding from the plaintiff Commission. The building has developed a leaky envelope and requires extensive repairs. The defendants are the designers and builders of Frances Court.

The Issue Sought to be Determined

[3] Mr. Currie was the designer of the apartment complex. On September 6, 1988, he entered into a written agreement with the Coast Foundation in the "Canadian Standard Form of Agreement Between Client and Architect". That form of agreement is endorsed by the Committee of Canadian

Architectural Councils, an umbrella organization made up of the professional associations of architects in each of the common-law provinces and the Royal Architectural Institute of Canada. Clauses 3.9.1 and 3.9.6 of the contract read as follows:

> 3.9.1. … [T]he Client agrees that any and all claims which he has or hereafter may have against the Architect in any way arising out of or related to the Architect's duties and responsibilities pursuant to this agreement (hereinafter referred to in this Article 3.9 as "claims" or "claim"), whether such claims sound in contract or in tort, shall be limited to the amount of $250,000.00 each claim ….
>
> 3.9.6 The Architect's liability for all claims of the Client arising out of this agreement shall absolutely cease to exist after a period of six (6) years from the date of:
>
> (a) Substantial Performance of the Work,
>
> …
>
> and following the expiration of such period, the Client shall have no claim whatsoever against the Architect. ….

The plaintiff Commission has taken an assignment of the plaintiff Foundation's rights under the contract.

[4] The case at bar is, I am told, one of a number of cases involving leaky buildings constructed with funding from the plaintiff Commission and designed by architects under materially identical contracts. While the current application is not a formal "test case", it is apparent that the decision

of the court in this case could affect a number of other actions, as well.

[5] The six-year limitation period under clause 3.9.6 expired well before the plaintiff commenced this action. If the clause is applicable to the plaintiffs' claims, then the claims are barred. The applicant defendants say that clause 3.9.6 encompasses both claims in contract and tort, and that it covers both the claims of the Foundation and the claims of the Commission insofar as they are based on an assignment of the Foundation's rights.

[6] The plaintiffs, on the other hand, argue that the clause is not broad enough to encompass claims sounding in negligence. In the alternative, they argue that the building failures evidence a fundamental breach of the contract, and that therefore the Architects cannot invoke the limitation clause.

The Issue in the Context of the Litigation

[7] The current application concerns only the interpretation and application of the limitation clause. Even if I determine that issue, there are many matters - including matters between the plaintiffs and the Architects - that will remain outstanding.

[8] Some of the issues that are outside the scope of the current application are largely factual, and could probably be resolved by the court with of a small amount of further evidence. There is, for example, an issue as to whether any part of the plaintiffs' claims arises out of pre-contractual negligence of the Architects, and whether the contractual provision bars such claims. Similarly, there is an issue as to whether any claim arises out of a warranty inspection alleged to have been conducted by the Architects outside the scope of the contract. There is also an issue as to whether John Currie Architect Inc. is a successor of John Robert Currie for the purposes of the contract.

[9] Other issues are more complex - these include the claim of the plaintiff Commission that the Architects owe it a direct duty of care. Any tort claim that the Commission may have against the Architects that does not arise by way of an assignment of the Foundation's claims is beyond the scope of this summary trial.

[10] Finally, the current application does not encompass the plaintiffs' claims against the defendants other than the Architects. This is particularly significant, as those other defendants allege contributory fault on the part of the Architects. At trial, therefore, the court will have to

assess the degree to which any damage is the Architects' fault, even if the limitation clause absolves them of financial responsibility.

Rule 18A and the Determination of a Single Issue

[11] Rule 18A allows a party to apply to the court for judgment, "either on an issue or generally". Rule 18A(8) and (11) set out the circumstances in which judgment may be given:

> (8) On an application heard before or at the same time as the hearing of an application under subrule (1), the court may
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> …
>
> (b) dismiss the application under subrule (1) on the ground that
>
> (i) the issues raised by the application under subrule (1) are not suitable for disposition under this rule, or
>
> (ii) the application under subrule (1) will not assist the efficient resolution of the proceeding.
>
> …
>
> (11) On the hearing of an application …, the court may
>
> (a) grant judgment in favour of any party, either on an issue or generally, unless
>
> (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
>
> (ii) the court is of the opinion that it would be unjust to decide the issues on the application ….

[12] A summary trial can serve as an efficient manner of disposing of issues or claims in appropriate circumstances. Where the court has the entire claim before it on a summary trial application, it will generally endeavour to grant judgment unless credibility issues preclude the fair adjudication of matters on affidavit evidence. There are, of course, exceptions. Discoveries, for example, may not have progressed to the point where the court is satisfied that each side has had an opportunity to uncover all of the evidence that might be important to its case. In such a case, it might be unjust to grant judgment: ***Bank of British Columbia v. Anglo-American Cedar Products Ltd.*** (1984), 57 B.C.L.R. 350 (S.C.). The court will also decline to grant judgment where the complexity of the issues is such that the court is unable to absorb all of the evidence and legal argument in the compressed time available within the Rule 18A procedure: ***Chen v. Chen***, 2002 BCSC 906, 22 C.P.C.(5th) 73.

[13] The question of when the court ought to give judgment on an issue, as opposed to on the claim generally, is more complex. The court is justifiably reluctant to decide cases in a piecemeal fashion. In addition to all of the concerns that arise when the entire claim is before the court, there is a multitude of others. The result is that the court must

exercise considerable caution before coming to the conclusion that it should grant judgment on an issue in a summary trial.

[14] Where a Rule 18A application requires determination of a difficult issue of law that might not need to be resolved in order to decide the claim at trial, for example, the court may conclude that the appropriate development of the common law demands restraint: ***Bacchus Agents (1981) Ltd. v. Phillipe Dandurand Wines Ltd.***, 2002 BCCA 138, 164 B.C.A.C. 300.

[15] The court must also be wary of making determinations on particular issues on a Rule 18A application when those issues are inexorably intertwined with other issues that are to be left for determination at trial: ***Prevost v. Vetter***, 2002 BCCA 202, 210 D.L.R. (4th) 649; inter-relatedness of issues is not always obvious, and caution is necessary whenever a party seeks judgment on an issue as opposed to judgment generally under Rule 18A: ***B.M.P. Global et al v. Bank of Nova Scotia***, 2003 BCCA 534, [2003] B.C.J. No. 2383.

[16] It must be borne in mind that the primary purpose of Rule 18A is the efficient resolution of disputes. Where the court does not consider that the determination of an issue under Rule 18A will assist in the efficient resolution of the dispute, it ought not to make the determination.

[17] There are at least two aspects to be considered in gauging the efficiency of the summary trial process. First, this court must be concerned about the allocation of its own resources: ***North Vancouver (District) v. Lunde*** (1998), 60 B.C.L.R. (3d) 201 at 212 (C.A.) (paragraph 33). Summary trial applications that will not, even if successful, reduce the length of trial, should, in general, be discouraged. The court must recognize the reality that judicial time is a scarce resource.

[18] Second, the court must consider the efficiency of a partial determination from the standpoint of the litigation itself. Piecemeal decision-making is rarely an efficient manner in which to resolve a dispute. It raises the possibility of multiple appeals on individual issues, and this will generally impede rather than hasten the orderly determination of the action.

Ought this Issue to Decided on a Summary Trial

[19] The issue presented by the Architects is an important one from their standpoint. In my view, the evidence on this application is sufficient to determine it. While there would be many issues outstanding even after the limitation issue was decided, I would not be dissuaded from making a determination

simply because, even if I resolved the limitation issues, other issues would remain.

[20] I am also of the view that the limitation issue, at least on its face, is not so closely related to the other issues in the litigation that it could not be decided in isolation.

[21] I am, however, mindful that the *raison d'être* for Rule 18A is the efficient determination of claims. While this court performs an increasing proportion of its work through the summary trial procedure, it remains the case that the trial process is generally more conducive to a full and just determination of disputes. The summary procedure's chief advantages are speed and efficiency. Where the court is not convinced that the determination of an issue will be a speedy or efficient step towards resolution of the dispute, it ought not to accede to an application under Rule 18A.

[22] In this case, neither party suggests that a determination of the limitation issue in a summary trial will reduce the total amount of court time needed to resolve the dispute. There will be no reduction in the evidence presented at trial, and any reduction in the time needed for argument will be more than offset by the court time taken up in arguing the issue in the summary trial application.

[23] The limitation issue is sufficiently important that it is virtually certain that an appeal would be taken - indeed, it is quite likely that an application for leave to appeal to the Supreme Court of Canada would be pursued after a judgment of the Court of Appeal. In the meantime, the trial of the action will either be postponed, or proceed under an awkward uncertainty as to what issues will ultimately need to be decided.

[24] The Architects argue that this court, by determining the limitation issue in advance of trial, will remove uncertainty, and facilitate settlement. I have no doubt that a decision on the limitations issue would change the dynamics of settlement negotiations. Whether it would facilitate or complicate settlement is a matter on which I can only speculate. I accept that the court should, in appropriate cases, consider the prospect of settlement as a factor in determining whether to deal with a substantive issue on a Rule 18A application: ***Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.*** (1989), 36 B.C.L.R.(2d) 202 (C.A.). In many cases, however, it would simply be unjust to allow one party, over the objection of another, to have a single issue determined in advance of all others, in the hope that it will enhance its bargaining position.

[25] In the present case, I am not persuaded that a determination of the limitation issue in advance of the trial would be an efficient procedure to follow. Instead, it is more likely to result in a delayed trial, quite possibly with an awkward presentation of evidence and argument.

[26] In the circumstances, I have concluded that determination of the limitation issue on a summary trial will not assist the efficient resolution of the proceeding. In my view, it would be unjust to decide the limitation issue on this application. The Architect's motion under Rule 18A is dismissed; the limitation issue should be determined at trial.

"H.M. Groberman, J."
The Honourable Mr. Justice H.M. Groberman

TAB 21

1991 CarswellBC 230
British Columbia Court of Appeal

Cotton v. Wellsby

1991 CarswellBC 230, [1991] B.C.W.L.D. 2358, [1991] B.C.J. No. 2783, 29 A.C.W.S. (3d) 317, 4 B.C.A.C. 171, 50 C.P.C. (2d) 138, 59 B.C.L.R. (2d) 366, 9 W.A.C. 171

FREDERICK CLIFFORD COTTON and CLIFFORD EDWARD COTTON v. SHARON DIANE WELLSBY

McEachern C.J.B.C., Taggart and Southin JJ.A.

Heard: September 3, 1991
Judgment: September 13,1991
Docket: Vancouver Doc. CA013068

Counsel: *Keith A. Bowman* and *A.A. Karim*, for appellants.
Stein K. Gudmundseth and *S.C.D. Neylan*, for respondent.

Subject: Civil Practice and Procedure

Headnote

Practice --- Summary judgment — Evidence on application — General

Civil procedure — Summary trial — Availability — Procedure — Trial judge to conduct summary trial in orderly way with due regard to rules of evidence and pleading — Judge required to analyze evidence, address all issues and make specific findings before giving judgment — Judgment not to be based on assumptions as to certain issues.

The plaintiffs sued for specific performance of an alleged agreement for the sale of shares. They alleged that the agreement was partly written and partly oral, but their statement of claim omitted any reference to consideration. Further, contrary to R. 19(11), the plaintiffs failed to plead the necessary particulars of the alleged agreement. Nevertheless, the matter proceeded to trial and the defendant applied for judgment under R. 18A. The plaintiffs argued that the matter fell within R. 18A(5)(*a*) and (*b*) and should go to trial in the conventional way. The trial judge held that the matter could properly be dealt with under R. 18A and stated that the terms of the alleged agreement were vague and inconclusive. He granted judgment in favour of the defendant and the plaintiffs appealed.

Held:

Appeal allowed.

Per SOUTHIN J.A.: Rule 18A is a rule for trial. A trial, whether traditional or summary, must be conducted in an orderly way with due regard to the rules of pleading and evidence. Both the pleadings and the affidavit evidence filed for the summary proceeding were inadequate. The trial judge made assumptions as to the requisite offer, acceptance and consideration for the alleged agreement before concluding that the terms were uncertain. That was not a satisfactory approach. Because there were crucial issues of who said precisely what to whom, the trial judge should have been alive to the possibility that the case was simply not suitable for summary trial. In light of the pleadings and the evidence before him, the trial judge did not properly exercise the discretion conferred on him by R. 18A(5). He ought to have declined to grant judgment.

Per MCEACHERN C.J.B.C.: Evidence must be analyzed carefully in order to decide if a case is suitable for disposition under R. 18A. The trial judge should have addressed all of the issues and made specific findings before dismissing what might have been a just claim, albeit one that was obviously difficult to establish. Because the statement of claim did not plead a valid claim, it could and should have been amended so that the trial judge would have had his attention directed to the real issues.

Per TAGGART J.A.: It is only after making findings of fact which permit a trial judge to conclude that an agreement existed that he or she can say that one or more of the terms are so imprecise as to render the agreement incapable of enforcement. The trial judge erred in assuming the existence of an agreement and in then giving judgment on the issue of the certainty of its terms.

Appeal from judgment dismissing plaintiffs' action for specific performance of agreement for sale of shares.

***McEachern C.J.B.C.*:**

1 Madam Justice Southin has set out the facts of this appeal which I need not repeat. I am in substantial agreement with her judgment but I prefer, with respect, to state my own reasons for allowing this appeal.

2 I wish to say at the outset that in some cases it may be appropriate for a judge hearing an application for judgment under R. 18A, without a detailed analysis of the evidence, to

conclude that, on any view of the evidence, a party cannot succeed on a claim of defence. That, in effect, is what happened here. While that is an option that is open in some cases, it is almost equivalent to giving judgment without reasons which is contrary to our practice. It is highly desirable, where there are complex facts and conflicting affidavits, for the trial judge to analyze the evidence and make specific findings of fact. It is only in this way that the parties will be able to understand the true basis for the judgment given at the trial.

3 In my judgment, however, it is not appropriate for the trial court to proceed immediately to judgment without first examining the evidence and legal issues for the purpose of ascertaining whether it will be possible to find the facts necessary to decide the legal issues, and also to decide whether it will be unjust to decide those issues without a conventional trial: R. 18A(5)(*a*) and (*b*).

4 It is clear from the documentation we have examined that the defendant clearly offered to sell certain shares to the plaintiffs. The only question is whether the documentation, and other admissible evidence, is sufficient in law to create a binding legal obligation.

5 Counsel for the plaintiffs, opposing the application for judgment, argued that the case was really for specific performance of a contract partly written and partly oral. For this reason, discovery of documents and examinations for discovery, which had not been completed, were of fundamental importance. He tells us he unsuccessfully sought an adjournment of the R. 18A application so that those procedures could be completed.

6 The statement of claim does not plead a valid claim but it could and should have been amended so that the trial judge would have had his attention directed to the real issues arising between the parties. The defendant could have demanded particulars so that everyone would know precisely what contract the plaintiff was relying upon and what part was oral and what part was in writing. The defendant declined to do that, believing I suppose, that there was an adversarial advantage in proceeding to a R. 18A application without a clear definition of the plaintiffs' claim.

7 It cannot be said from the reasons for judgment whether the evidence was so vague or uncertain that it could not constitute a contract. The learned trial judge said:

> The evidence of the contract is to be found as I understand it in the two letters on July and November ...
>
> As I look at the two letters it appears to me as it has been submitted by Counsel that certainly the terms are unclear and they are unsure and there are so many matters which have been left unsettled and at best, are vague and inconclusive ...

> I am quite unable to spell from all of the material before me, a contract with sufficient precision ...

8 The evidence does establish, without question, that the defendant in both the letters mentioned offered to sell her shares to the plaintiffs. If, as assumed by the trial judge, the offers were accepted orally, and if the only question was the uncertainty of the two letters, then judgment could well be given under R. 18A.

9 It seems to me, however, that there are other issues including:

10 (a) What specifically was said by these parties to each other which is said to constitute acceptance by the plaintiffs of the defendant's offers (the oral part of the contract), and did those words fill in the gaps in the written letters;

11 (b) what transpired between the parties as a consequence of the memo of instruction given by the defendant to counsel who prepared at least four drafts of a formal agreement memorializing the plaintiffs' offers (this also could be part of the oral component of the contract alleged, and might have filled in the gaps in the documentation); and

12 (c) what is the legal effect, if any, of the alleged part performance of the agreement by the plaintiffs when they caused a cheque for $5,000 to be sent to the defendant as provided for in the November letter offer.

13 The brief reasons for judgment do not mention these matters. I believe the evidence must be analyzed carefully in order to decide if a case is suitable for disposition under R. 18A. In my judgment, it should probably have been decided that this case was not suitable without at least cross-examination on affidavits. But even if the judge thought otherwise, he should have addressed the questions just stated, and made specific findings on them before dismissing what may be a just, although obviously a difficult claim to establish.

14 I am not satisfied such analysis was undertaken, and I believe the plaintiffs are entitled to know what specific findings were made on these questions before their action could be dismissed.

15 For those reasons, I would allow the appeal and direct that the action proceed in the usual way. Subject to obtaining leave, this should not preclude the defendant from bringing another application under R. 18A in due course after the pleadings have been amended or the plaintiffs' allegations are sufficiently particularized. I share the view expressed by Southin J.A. that affidavits on a question such as this should be framed in the words of the deponents rather than merely setting out counsel's summary of the conclusions he draws from his understanding of his instructions.

***Taggart J.A.*:**

16 I have read the reasons for judgment of Chief Justice McEachern and Madam Justice Southin. I agree generally with their reasons but wish to add a few comments.

17 My analysis of the appeal begins with a consideration of the progress made in the action up to the time when the application to dismiss the action was brought by the defendant under the provisions of R. 18A. Most of the significant events giving rise to the issues that divide the parties occurred in 1989. Belair Golf Ltd. was incorporated in February. Each of the plaintiffs, the defendant and Rickey Lee Wellsby held 25 per cent of the issued shares. Varying amounts of money were advanced to Belair by the shareholders and were shown on the books of account of the company as shareholders' loans. The defendant advanced the greatest amount of money.

18 The defendant wished to sell her shares to the other three shareholders and negotiations to that end resulted in the document of July 15. It was prepared by the defendant and appears to set out the basis upon which the sale would take place. The matter was put in the hands of a solicitor who prepared a number of drafts of an agreement for the sale of the shares. On November 21 the defendant prepared another document again setting out a basis for the sale. Further discussions led to an impasse and on April 30, 1990 the plaintiffs issued a writ and statement of claim naming both the present defendant and Rickey Lee Wellsby as defendants. A statement of defence was filed and on July 4, 1990 the present defendant issued her motion to dismiss the action. The motion was returnable on July 18 but a change of solicitors for the plaintiffs caused an adjournment. An amended statement of defence was filed on August 9, I gather primarily because of the dismissal from the action of the defendant Rickey Lee Wellsby because the statement of claim disclosed no cause of action against him.

19 Mr. Bowman, now counsel for the plaintiffs, had taken on the conduct of the action about six weeks before the defendant's motion came on for hearing on September 14. By that date a number of affidavits had been filed in support of, and in opposition to, the motion. Together with their exhibits they occupy about 248 pages in the appeal books. Notwithstanding the quantity of the material no lists of documents had been exchanged, and cross-examination of the deponents and examinations for discovery of the parties had not been completed. It is not surprising that the plaintiffs moved for an adjournment of the application. It was refused and the trial under R. 18A proceeded.

20 As has been said by my colleagues, the issue which lies at the heart of this appeal is whether "the court is unable on the whole of the evidence ...to find the facts necessary to decide the issues of fact or law." For the judge the issues were whether there was a contract for the sale of shares and, if there was, were its terms sufficiently clear to permit its enforcement. He chose to assume the former and gave judgment against the plaintiffs on the latter. With

respect that approach departs from the requirements of the rule. It is only after he has found facts which permit him to say there was an apparent agreement and what were its terms, that he can say whether one or more of them are so imprecise as to be incapable of enforcement. If he is unable to find the facts necessary to decide the issues he ought not to give judgment but should follow one or more of the alternatives set out in the rule. I hasten to add that in this case the judge was severely hampered by the complete failure of the statement of claim to state with clarity and precision what was the contract relied on by the plaintiffs.

21 It was for those reasons as well as for the reasons of my colleagues, with which I generally agree, that I concurred in allowing the appeal, setting aside the order under appeal and remitting the matter to the Supreme Court.

***Southin J.A.*:**

22 This is an appeal from a judgment pronounced the 14th September, 1990 upon application pursuant to R. 18A brought by the defendant on the 3rd July, 1990 and heard on 14th September, 1990 for the dismissal of the plaintiffs' action for specific performance of an alleged agreement for the sale of shares.

23 Upon the conclusion of the hearing of this appeal, we allowed the appeal, reasons to follow. These are my reasons.

24 This appeal turns on the proper application of R. 18A and particularly subr. (5):

> (5) On the hearing of the application, the court may grant judgment in favour of any party either upon an issue or generally, unless
>
> > (*a*) the court is unable on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
> >
> > (*b*) the court is of the opinion that it would be unjust to decide the issues on the application,
>
> and may impose terms respecting enforcement of the judgment, including a stay of execution, as it thinks just, and may award costs.

25 I do not in these reasons address the issues of fact and law arising between the parties on the alleged agreement.

26 On 30th April, 1990, the plaintiffs brought this action against Sharon Diane Wellsby and Rickey Lee Wellsby and pleaded thus:

4. Belair Golf Ltd. is a company incorporated pursuant to the laws of the Province of British Columbia on or about February 28th, 1989.

5. Upon the incorporation of Belair Golf Ltd. there were four registered shareholders in the Company, each holding 25% of the outstanding shares. The four shareholders are:

Clifford Edward Cotton

Frederick Clifford Cotton

Sharon Diane Wellsby

Rickey Lee Wellsby.

6. Belair Golf Ltd. was incorporated for the purpose of being the registered owner of Real Property located in the Township of Langley, more particularly known and described as the West 1/2 of the Northeast Corner of Section 13, Township 11, New Westminster District and the North 1/2 of the Northwest Corner of Section 13, Township 11, New Westminster District.

7. On or about July 15th, 1989 the Defendant Sharon Diane Wellsby agreed to transfer the 25% of the shares registered in the name of Sharon Diane Wellsby into the names of the Plaintiffs and the Defendant Rickey Lee Wellsby. The aforesaid agreement was partly in writing and partly oral.

8. On or about November 21st, 1989 the Defendant Sharon Diane Wellsby, the Plaintiffs and the Defendant Rickey Lee Wellsby agreed in writing to vary the terms of the agreement of July 15th, 1989 so that the Plaintiffs and the Defendant Rickey Lee Wellsby would receive equal shares of the Defendant Sharon Diane Wellsby in Belair Golf Ltd.

9. The Defendant Sharon Diane Wellsby has repudiated the agreement of July 15th, 1989 as varied by the agreement of November 21st, 1989 by refusing to transfer the shares of the Defendant Sharon Diane Wellsby to the Plaintiffs.

10. The Plaintiffs refuse to accept the repudiation of the aforesaid agreement by Sharon Diane Wellsby and the Plaintiffs are ready, willing and able to comply with the terms of the foresaid agreement.

11. The Plaintiffs seek specific performance of the terms of the aforesaid agreement.

WHEREFORE the Plaintiffs claim as follows:

(a) A declaration that the Plaintiffs, Clifford Edward Cotton and Frederick Clifford Cotton each are the registered shareholders of 1/3 of the outstanding shares of Belair Golf Ltd.;

(b) An Order that the shareholders' registry of Belair Golf Ltd. be rectified so that Clifford Edward Cotton and Frederick Clifford Cotton are each the registered owners of 1/3 of the outstanding shares of Belair Golf Ltd.;

(c) Specific performance of the agreement between the Plaintiffs and the Defendant, Sharon Diane Wellsby so that the Plaintiffs shall each be registered owners of 1/3 of the outstanding shares of Belair Golf Ltd. ...

27 This statement of claim does not disclose a cause of action. What the plaintiffs have pleaded in para. 7 was not a contract but a nudum pactum for there is no plea of consideration moving from the plaintiffs to the defendant. Indeed, the plaintiffs have not pleaded that they are parties to the agreement and, contrary to R. 19(11), the plaintiffs do not give the necessary particulars of the alleged agreement. I can only assume the draftsman (not Mr. Bowman) either does not possess a book on pleading or, if he or she does, has never read it.

28 Thus, the defendant was entitled to move under both R. 19(16) and R. 19(24). There are often tactical reasons why counsel choose not to make such applications. But when a matter is going to go to trial under R. 18A, counsel may well consider it to be in the interests of his own client to force the other side to plead properly. I point out that it is the duty of the judges and masters below to enforce R. 19 when asked to do so.

29 When a case goes to trial, as this one did, on a hopelessly inadequate statement of claim, there is nothing upon which the trial judge can concentrate his or her mind. The course of litigation would be much improved if trial judges in stating their findings of fact would address the pleadings and say which pleas are established and which are not. But how can a trial judge address the pleadings when the pleadings do not address anything? In the case at bar, had the learned trial judge grasped the lack of import of para. 7, he might have expressed the opinion at the outset that, on the statement of claim as it stood, the plaintiffs must fail or, in the old phrase, be non-suited on the pleadings. That might have induced counsel for the plaintiffs to apply to amend to put the plaintiffs' tackle in order. If the plaintiffs' tackle had been in order, the judge might have addressed the issues of fact fully and this Court, if an appeal had been brought, could then have addressed itself to the issues of law arising on the findings of fact.

30 Sometime after the plaintiffs had brought this action, the defendant Wellsby applied to be struck out as a defendant, apparently on the ground that no relief was claimed against

him. That application succeeded. As no appeal has been taken from that order, I make no comment on whether this action is properly constituted.

31 The remaining defendant, the present respondent, pleaded in her amended statement of defence thus:

> 1. The Defendant denies every allegation in the Statement of Claim except as expressly admitted herein.
>
> 2. The Defendant admits paragraph 5 of the Statement of Claim.
>
> 3. The Defendant specifically denies that she agreed to transfer any shares of Belair Golf Ltd., whether registered in her name or not, into the names of, or to the Plaintiffs and Rickey Lee Wellsby.
>
> 4. There were negotiations directed at concluding an agreement for the sale of the Defendant's shares to the Plaintiffs and Rickey Lee Wellsby, but no agreement was concluded due to disagreement regarding terms including price, and method, time and guarantee of payment.
>
> 5. In the alternative, if there was an agreement between the plaintiffs, the Defendant and Rickey Lee Wellsby regarding the transfer of shares as alleged or at all, which is not admitted but is expressly denied, then:
>
> (a) it was a term of the agreement that payment be made by the Plaintiffs by a date certain and the Plaintiffs failed to make payment by that date with the result that the agreement was of no force or effect;
>
> (b) the agreement was void for uncertainty;
>
> (c) the agreement was an option to purchase not supported by any consideration and was void and unenforceable; or
>
> (d) the Plaintiffs repudiated the agreement and the Defendant accepted that repudiation.
>
> WHEREFORE the Defendant submits that the Plaintiffs' claim be dismissed with costs.

32 In support of her application pursuant to R. 18A, the defendant filed her affidavit and that of Wellsby, both of which were sworn on the 3rd July, 1990. The plaintiffs filed the affidavit of the plaintiff Clifford Edward Cotton. The defendant then riposted with four other affidavits. In total, the affidavits consumed some 177 pages of a two-volume appeal book.

33 The quality of the evidence is exemplified by the defendant's first affidavit:

2. Attached as Exhibit "A" to this my Affidavit is a true copy of a document dated July 15, 1989. I believe that this is the document referred to in paragraph 7 of the Statement of Claim. Sharon Howe was my name before my marriage to Rick Wellsby in December, 1989.

3. Attached as Exhibit "B" to this my Affidavit is a true copy of a document dated November 21, 1989. I believe that this is the document referred to in paragraph 8 of the Statement of Claim.

4. Attached as Exhibits "C", "D" and "E" to this my Affidavit are counter-offers I received. My offers were never accepted.

5. Negotiations for the sale of my shares continued during the period from approximately April, 1989 until approximately February, 1990 when they broke off.

6. The object of these negotiations for the sale of my shares included finding a way that the share structure of Belair Golf Ltd. ("Belair") could be restructured so that Rick Wellsby, and each of the Plaintiffs would each own one-third of the issued shares of Belair and I would own none of the shares of Belair.

7. No agreement was ever reached with respect to the re-organization of Belair for several reasons. Firstly, there was no agreement regarding such things as the date by which I would be paid for my shareholder loans; there was no agreement as to the rate of interest to be paid to me; there was no agreement as to the date which would trigger a further penalty in the event I was not paid; and there was no agreement as to the amount or nature of the penalty.

8. A further reason why there was no agreement was that I would not agree to sell my shares unless as part of any agreement there was a shareholders' agreement in place between Rick Wellsby and the Plaintiffs. The reason for this is that the dispute with the Plaintiffs was at time acrimonious and I felt that if I was going to agree to sell my shares, then Rick Wellsby's minority position in Belair would have to be protected.

9. A further reason why no agreement was reached between the Parties was that I had no assurance that the Plaintiffs would be able to pay the money required to purchase my shares or to fund the company so my shareholder loans could be repaid. Essentially, the Plaintiffs wanted an agreement for me to sell my shares in Belair in exchange for an unsecured promise of future payment. The ability to pay was therefore effectively dependent on the future financial performance of Belair. In those circumstances, I was unwilling to sell my shares, especially as I contributed most of the capital in order to

purchase the golf course property which is the major asset of Belair. I was being asked to give up future profit in Belair but not any of the risk.

10. There was no agreement as to how monies were to be paid to me, whether by the Plaintiffs or by the company, and there was no agreement as to whether my shares would be sold to the Plaintiffs and Rick Wellsby directly or whether shares would be sold to the company.

11. The company was never a party to any agreement respecting the proposed share purchase or respecting the repayment of any shareholder loans by the plaintiffs. No agreement was reached releasing the company from its obligations to me for the shareholder loans.

12. My shareholder loans have not been repaid and I commenced an action against the company to collect the loans I have advanced in excess of the loans advanced by the Plaintiffs. Now produced and shown to me and marked as Exhibit "F" to this my Affidavit are true copies of the Statement of Claim and Statement of Defence filed in my shareholder loans action.

34 This affidavit is a series of conclusions — it is not an account of what took place. I appreciate the difficulty under which a defendant applying under R. 18A must labour in drawing his affidavit. He must go first in adducing evidence although the burden of proof at the trial is on the plaintiff.

35 But despite that difficulty, his evidence must go to the primary facts in contradistinction to what in the law of pleading are called material facts. Sometimes, of course, the material fact and the primary fact are, for all practical purposes, identical; e.g. there was an accident at a certain time and place. But this is rarely so when an issue is whether laymen have by various discussions and correspondence made a contract in law.

36 Had this action gone to trial in the traditional way, the defendant would not have given her evidence in chief in the terms of this affidavit. She would have given, in response to questions from her counsel, chapter and verse of what took place between her and the plaintiffs. Affidavits used on applications under R. 18A should be in the words of the witness — not the words of counsel. Counsel in drafting such an affidavit should ask himself what he would have been obliged to ask his client had his client given evidence in chief. That evidence should then, in narrative form, be contained in the affidavit.

37 I cannot emphasize too strongly that R. 18A is a rule for trial. A trial, whether traditional or summary, must be conducted in an orderly way with due regard to the rules of pleading and evidence. Judges proceeding under R. 18A are not to think of themselves as cadis under palm trees.

38 At the hearing below, counsel for the defendant asserted that the documents mentioned by the plaintiffs in their statement of claim, even if agreed to by them, which the defendant denied, could not, as a matter of law, constitute a contract.

39 For his part, counsel for the plaintiffs submitted:

40 (a) that the application fell within both branches of subr. (5) and that the action should go to trial in the traditional way;

41 (b) that the plaintiffs should be given leave to amend to claim as an alternative to their claim for specific performance, damages at law for breach of contract. Counsel had in mind my judgment in *304498 B.C. Ltd. v. Garibaldi Whistler Development Co.* (1989), 39 B.C.L.R. (2d) 328, 62 D.L.R. (4th) 252 (C.A.). Whether in the case before us, the parties have done anything under the alleged bargain, or it remains wholly executory, was not addressed in the Court below.

42 (c) that the instrument of 21st November was a sufficiently certain offer from the defendant that if accepted by the plaintiffs a contract was then created.

43 Unfortunately, there is no transcript of this trial. There is no requirement in the rules that a trial pursuant to R. 18A be recorded. But while I have no wish to increase the costs of litigation unnecessarily, a transcript of such a trial would often be of assistance in determining exactly what points are open to counsel in this Court and what rulings, if any, the learned judge made on the evidence.

44 In this case, we do know that the learned judge did not address the second of those points in his reasons for judgment, and all he said on the first point was:

> To begin with I am satisfied that this is a matter which can properly be dealt with under Rule 18(a) [sic].

45 On the third point, he said:

> The action itself is one for specific performance, specific performance of a contract or contracts which were allegedly made between the parties. The evidence of the contract is to be found as I understand it in the two letters on July and November in which the sale of the shares of Mrs. Wellsby was brought up. It is alleged that there was an offer by her to sell certain shares, that this offer was accepted and as a result of the acceptance there was a contract which as I say, is submitted, and is to be extracted from the letters of July and August.

> Now for the purposes of my conclusion, I am assuming that these letters constituted an offer and I am also assuming somewhat doubtfully but nevertheless for the purposes of my conclusions that there was an acceptance.

46 Having then looked at the letters, he concluded there are many matters which are at best "vague and inconclusive".

47 When the issue on the pleadings is contract or no contract, there are a number of sub-issues:

48 (a) Was there an offer? Sometimes what a layman calls an "offer" is, in law, merely an invitation to treat.

49 (b) Was there an acceptance?

50 (c) Was there consideration sufficient to support the promise sued upon?

51 (d) Were the terms sufficiently certain?

52 It is not, I think, satisfactory for the judge to arrive at the fourth point by making assumptions as to the others.

53 It is not satisfactory because it creates a serious difficulty in this Court. The issue of certainty or lack of certainty often is upon a knife edge. Suppose having considered that issue fully we had differed from the learned trial judge. What would we do then? Remit the matter for a further trial on the issue of offer and acceptance?

54 Subrule (5)(*a*) speaks of the facts "necessary to decide the issues of fact ..." The issues of fact are the issues arising on the pleadings. That brings us full circle back to the hopeless state of these pleadings.

55 Rule 18A is a most useful rule as is shown by such cases as *Wolf Mountain Coal Ltd. Partnership v. Netherlands Pacific Mining Co.* (1988), 31 B.C.L.R. (2d) 16, appeal dismissed: 29th May, 1989, 36 B.C.L.R. (2d) xxxvii; *First National Bank of Houston v. Houston E & C Inc.*, 47 B.C.L.R. (2d) 347, [1990] 5 W.W.R. 719 (C.A.), and *Shaw Industries Ltd. v. Greenland Enterprises Ltd.*, 54 B.C.L.R. (2d) 264, [1991] 4 W.W.R. 222, 79 D.L.R. (4th) 641, 16 R.P.R. (2d) 1 (C.A.). In each of those cases, the pleadings were adequate, there was almost no dispute over the primary facts, although there was some dispute on the material facts and issues of law bulked large. They were not cases in which issues of who said precisely what to whom when were significant. Where such issues are crucial, the trial judge must be alive to the possibility that the case is simply not suitable for summary trial. As to this point,

see *Protection Mutual Insurance Co. v. Beaumont* (10th September, 1991), Vancouver Docs. CA010939 and CA010940 (B.C.C.A.) [now reported 58 B.C.L.R. (2d) 290].

56 I would not wish to be misunderstood. It is not every action in which there is a dispute over primary facts which must be tried in the traditional way. There are cases in which one version of what happened is so patently at odds with other evidence that no one could rationally accept it.

57 I am persuaded that the learned trial judge did not properly exercise, in light of the pleadings and the evidence before him, the discretion conferred upon him by subr. (5). He ought to have declined to grant judgment. Whether he should then have given directions under subr. (7) or given leave to bring on a further application, or taken some other course is not before us because no arguments were addressed to such questions.

Appeal allowed.

End of Document

TAB 22

1989 CarswellBC 438
British Columbia Court of Appeal

Doell v. Buck

1989 CarswellBC 438, [1989] B.C.J. No. 2158, [1990] B.C.W.L.D. 038,
[1990] W.D.F.L. 060, 18 A.C.W.S. (3d) 734, 23 R.F.L. (3d) 419, 35 E.T.R. 185

DOELL (BUCK) v. BUCK et al.

Anderson, Toy and Cumming JJ.A.

Judgment: November 15, 1989
Docket: Victoria No. V00868

Counsel: *T.L. Brown, Q.C.*, for appellant (plaintiff).
S.D. Gill and *G.A. Letcher*, for respondents (defendants).

Subject: Family; Estates and Trusts; Property; Civil Practice and Procedure

Headnote

Family Law --- Family property on marriage breakdown — Determination of ownership of property — Application of trust principles — Resulting and constructive trusts — Businesses

Practice --- Summary judgment — Sufficiency of claim as basis for judgment

Unmarried couples — Property — Constructive and resulting trusts — Procedure — Plaintiff claiming constructive trust against cohabitant's property — Judge granting summary judgment dismissing claim — Plaintiff appealing — Plaintiff's evidence not supporting constructive trust claim — Judge being entitled to dismiss action summarily — Appeal dismissed.

Unmarried couples — Property — Constructive and resulting trusts — Parties cohabitating for nine years — Plaintiff receiving competitive salary during employment in defendant's business — Parties executing two cohabitation agreements — Obligations under agreements being fulfilled upon separation — Evidence not supporting plaintiff's claim of unjust enrichment — Appellate court upholding judge's summary dismissal of action.

The parties were involved in a nine-year personal and business relationship. They did not maintain any joint bank accounts but entered into two cohabitation agreements at the plaintiff woman's insistence. The obligations under the agreements were fulfilled upon separation. The plaintiff was paid a fair salary for her work in the defendant's business and saved $42,000. There was no indication that she expected to receive any interest in the defendant's business. The judge granted the defendant's application for summary judgment dismissing the plaintiff's action to share in his assets on the basis of unjust enrichment and constructive trust. The plaintiff appealed.

Held:

Appeal dismissed.

A claim for constructive trust may be tried by way of a summary trial. The plaintiff's own evidence did not support a finding that there had been an unjust enrichment. Accordingly, there was no reason to permit the action to proceed to trial.

Appeal by plaintiff from judgment granting defendant's application for summary judgment dismissing her action for interest in defendant's property on basis of unjust enrichment/ constructive trust.

Cumming J.A. **(Excerpt from the transcript):**

1 This is an appeal from the judgment of Mr. Justice Taylor, pronounced 3rd October 1988, granting the application of the defendants pursuant to R. 18A for summary judgment dismissing the plaintiff's action. At the same time the learned judge refused the plaintiff's application under RR. 26(10) and 27(4) for further discovery of documents and further examination for discovery of the defendant, John Buck.

2 In this latter regard, he said:

> I do not believe that the further information which the plaintiff now seeks of the defendant would assist her in establishing a claim in the light of the arrangements which are shown to have existed between them during their cohabitation. Had the plaintiff been underpaid for the service she rendered, she could readily have demonstrated that in relation to the earnings of other employees in the defendant's employ, or in the employ of similar operations, matters of which she must have had some knowledge in her capacity as bookkeeper for the business. She [may be able to] show that the defendant's business increased in value while she was employed in it, [but] that would not, in my view, assist her in her cause because it seems to me from the material that the arrangement between

> them was that she would work as an employee and be paid as such, and that she would receive the house in return for her contribution to it.

3 As appears from the prayer for relief in the plaintiff's amended statement of claim, the plaintiff claims against the defendants:

> an undivided one-half interest as tenant in common in all of the interests and property of the Defendants in law and in equity, including those interests in property which may be presently unknown to the Plaintiff as follows:
>
> A. The claim of the Plaintiff against each of the Defendants is for a declaration that the Defendants holds [sic] one-half of their interest in all assets, both real and personal owned by them solely, in trust for and on behalf of the Plaintiff, and for an Order for partition and sale of all assets so owned.
>
> B. In the alternative, the claim of the Plaintiff against each of the Defendants is for compensation for unjust enrichment in an amount to be fixed by the Court.
>
> C. The claim of the Plaintiff against the Defendant, John Buck further is for interim, periodic and lump sum maintenance for the Plaintiff pursuant to the provision of the *Family Relations Act*, R.S.B.C. 1979, c. 121.

4 The claim for maintenance was subsequently abandoned.

5 In reaching the conclusion he did with respect to the application for summary judgment the learned trial judge made the following finding:

> The plaintiff was hired by the defendant as a waitress at the camp before they commenced living together. After they started to live together the plaintiff assumed more responsible duties and her salary was increased; it continued to be increased throughout the period of their cohabitation. She was being paid in excess of $3,000 a month at the time that the cohabitation and her employment terminated, two years ago. During the period that they lived together she was able to accumulate savings of $42,000.
>
> Two short agreements were entered into by the parties during the time they lived together. The effect of these was to assure the plaintiff of sole ownership of their floating home and contents if and when they should cease to live together. The agreements deal with no other assets and contain no releases.

I pause to observe that the comments I have just quoted strongly support the submission made by Mr. Gill that the relationship here was not characterized by the atmosphere of trust and confidence that is found in so many relationships of this sort but, indeed, reveal attitudes of a somewhat reverse nature. The learned trial judge continued:

> The plaintiff now claims an interest in the defendant's business by way of constructive trust under the principles laid down in *Pettkus v. Becker*, [1980] 2 S.C.R. 834, 19 R.F.L. (2d) 165, 8 E.T.R. 143, 117 D.L.R. (3d) 257, 34 N.R. 384 [Ont.], and the authorities which have followed from it. The three now familiar requirements for relief laid down by Mr. Justice Dickson (as he then was) in the *Pettkus* case are enrichment, deprivation and absence of juristic reason for enrichment. To succeed, under the principles there applied, the plaintiff must show that she had a reasonable expectation of some share in some benefit conferred on the defendant by her efforts.
>
> The material before me in this case does not establish that there was any such reasonable expectation on the part of the plaintiff. There is nothing in the material to show that the plaintiff worked in the defendant's business for less than a fair wage, or that she performed any service which benefited him personally beyond that for which she was given the house, float and contents by their agreements.
>
> The fact that they had discussed going into business together seems to me to mean no more than that they had contemplated a change in their financial arrangements, and that this did not in fact come about.

6 In the factum filed by the appellant it is asserted that the trial judge erred in using R. 18A to dismiss a claim in constructive trust brought by the plaintiff without allowing the plaintiff the opportunity to give her evidence at trial. The nature of the action does not determine whether or not a summary trial procedure is appropriate. It is the nature of the evidence which must determine whether or not the trial judge is satisfied that the facts can be determined and the law applied.

7 The test to be applied by the court hearing a summary trial pursuant to R. 18A is set out in *Inspiration Mgmt. Ltd. v. McDermit St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 at 215 (C.A.), where Chief Justice McEachern stated:

> The test for R. 18A, in my view, is the same as on a trial. Upon the facts being found the chambers judge must apply the law and all appropriate legal principles. If then satisfied that the claim or defence has been established according to the appropriate onus of proof he must give judgment according to law unless he has the opinion that it will be unjust to give such judgment.

At p. 216 of his reasons for judgment, Chief Justice McEachern said:

> I have no doubt that R. 18A is destined to play an increasingly important role in the efficient disposition of litigation, and experience has already shown that its use is not

> limited to simple or straightforward cases. Many complex cases properly prepared and argued can be resolved summarily without compromising justice in any way.

There is no inherent reason why a case involving a claim of constructive trust cannot be tried by way of a summary trial.

8 The learned trial judge, as I have noted, referred to *Pettkus v. Becker*. In that case Mr. Justice Dickson (as he then was) had this to say, at pp. 273-74:

> How then does one approach the question of unjust enrichment in matrimonial causes? In *Rathwell* I ventured to suggest there are three requirements to be satisfied before an unjust enrichment can be said to exist: an enrichment, a corresponding deprivation and absence of any juristic reason for the enrichment. This approach, it seems to me, is supported by general principles of equity that have been fashioned by the Courts for centuries though, admittedly, not in the context of matrimonial property controversies.

At p. 274, Mr. Justice Dickson went on to say:

> On these facts, the first two requirements laid down in *Rathwell* have clearly been satisfied: Mr. Pettkus has had the benefit of 19 years of unpaid labour, while Miss Becker has received little or nothing in return. As for the third requirement, I hold that where one person in a relationship tantamount to spousal prejudices herself in the reasonable expectation of receiving an interest in property and the other person in the relationship freely accepts benefits conferred by the first person in circumstances where he knows or ought to have known of that reasonable expectation, it would be unjust to allow the recipient of the benefit to retain it.

9 I have read the appeal book in its entirety and I am of the view that the facts of this case bear no similarity to the facts present in *Pettkus v. Becker*, nor are any of the significant indicia of unjust enrichment present. The evidence discloses a nine-year employment and personal relationship, during which Doell and Buck did not maintain any joint bank accounts but entered into two cohabitation agreements at the instance of Doell which were drawn up by Doell's brother, who is himself a lawyer. The agreements dealt with the home in which Doell and Buck resided during most of their time together. The obligations under those agreements were fulfilled at separation. The evidence further discloses that Doell did not make any financial contribution to the respondent companies and, as bookkeeper, paid herself an extra month's salary at the time of separation. During the entire time that Doell and Buck lived together, as was known at all times to Doell, Buck was married to Norma Buck. During the entire period, as also was known to Doell, Norma Buck was a 50 per cent shareholder in the company, Northwest Safaris Ltd.

10 Doell managed to save approximately $42,000 during her nine years with Buck and also received other benefits. The money saved arose from the salary paid by Northwest Safaris Ltd., which the evidence indicates was a fair and competitive salary. Accordingly, there was neither an enrichment to Buck nor a corresponding deprivation of Doell.

11 As to the third requirement the evidence, and most significantly Doell's evidence, does not support any reasonable expectation on her part of receiving an interest in the business or property of the respondents. The circumstances do not disclose any injustice requiring the intervention of the remedial hand of equity.

12 I am therefore satisfied that the learned trial judge applied the proper tests in dealing with the defendant's application for summary judgment under R. 18A and properly concluded that this was not an action that should proceed to a full trial. The plaintiff's own evidence failed to establish any grounds for supporting a reasonable expectation giving rise to an unfairness, or that she had in any way been taken advantage of, or that she had provided the defendant with benefits to her own prejudice. The written agreements negate any assertion of a reasonable expectation for more. She came into the relationship with nothing and left with savings and an R.R.S.P. together amounting to approximately $42,000, as well as substantial property pursuant to the agreements that she had instigated. Through the piece she had available legal advice through her brother, a practising solicitor.

13 There has in my view been no reason demonstrated why this case should proceed to a full trial. The appeal should, accordingly, be dismissed.

***Anderson J.A.*:**

14 I agree.

***Toy J.A.*:**

15 I agree.

***Anderson J.A.*:**

16 The appeal is dismissed.

Appeal dismissed.

TAB 23

Citation: Bankruptcies of Down, Street and Barnes
2000 BCCA 218

Date: 20000329

Docket: CA026197
Registry: Vancouver

COURT OF APPEAL FOR BRITISH COLUMBIA

IN THE MATTER OF THE BANKRUPTCIES OF JAMES BLAIR DOWN, TREVOR GRAHAM STREET and FRASER BARKLEY BARNES et al.

All of the City of Vancouver, In the Province of British Columbia

AND IN THE MATTER OF Section 46 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended

BETWEEN:

INTERCLAIM HOLDINGS LIMITED and THE CO-PETITIONERS listed in Schedule "B" to the Petitions

PETITIONERS
(APPELLANTS)

AND:

JAMES BLAIR DOWN, TREVOR GRAHAM STREET and FRASER BARKLEY BARNES et al.

DEBTORS
(RESPONDENTS)

Before: The Honourable Madam Justice Newbury
(In Chambers)

P.A. Gall and J.R. Sandrelli	Counsel for the Appellants
M.D. Andrews and R.A. Millar	Counsel for the Respondent J.B. Down
H.C.R. Clark, Q.C. and J.A. Dawson	Counsel for the Respondent F.B. Barnes
B. Cramer	Counsel for Tim and Cindy Down and various corporate defendants resident in Alberta (Renoir Group)
G.A. Fulton and M. Stanier	Proposed Intervenors AARP and Public Citizen Inc.
Place and Date of Hearing:	Vancouver, British Columbia March 2, 2000
Place and Date of Judgment:	Vancouver, British Columbia March 29, 2000

Reasons for Judgment of the Honourable Madam Justice Newbury:

[1] In this continuing matter, Mr. Down applies for orders striking affidavits sought to be filed by the proposed intervenors AARP and Public Citizen Inc. (Their status as would-be intervenors in this appeal has not yet been spoken to or decided.) Alternatively, Mr. Down seeks leave to cross-examine the deponents on their affidavits "in order to explore whether these proposed intervenors have been improperly solicited to shore up Interclaim's case."

[2] There are three affidavits in question. I will describe each individually.

Affidavit of Bridgit Small

[3] Ms. Small deposes that she is the "leader of AARP's Anti-telemarketing Fraud Team." She deposes as to the purpose and general operations of AARP (formerly known as the American Association of Retired Persons), which is a non-profit organization dedicated to addressing the needs and interests of people who are over 50 years of age. Its related foundation, the AARP Foundation, in turn administers a litigation foundation which "initiates and supports litigation to protect the rights of older Americans in the U.S. Supreme Court" and at other court levels.

[4] Ms. Small then launches into an explanation of AARP's interest in the issues before the Court. Paragraphs 6 and 9 are representative of the contents of this section:

> 6. The Bankruptcy Court's champerty ruling and the nature of the fraud perpetrated by Mr. Down and his associates are of particular interest to AARP and its members due to the organization's belief in the need to ensure court access and meaningful redress for victims of fraudulent and deceptive practices. In addition, AARP has a longstanding concern about the targeting of older people by fraudulent direct mail and telemarketing solicitors.
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> . . .
>
> 9. As the largest membership organization serving older people, AARP is also greatly concerned about the rampant fraud targeted against them through telemarketing direct mail solicitations. Deceptive and misleading sweepstake and prize promotions constitute one of the leading categories of these scams. The fraudulent enterprises that underlie this appeal are of particular relevance to AARP and its members since, as the Affidavit of Jesse E. May attests, a comparison of AARP's membership with a list of people who sent money in response to one or more of Mr. Down's solicitations, indicates that 100,953 people appear on both lists. It is likely that many more AARP member were victimized by Mr. Down, since this comparison was limited to people who sent money during only a six-month period. AARP thus has a heightened interest in making sure that is members have an opportunity to obtain restitution from Mr. Down and his associates.

The affidavit goes into great detail in describing fraudulent telemarketing and direct mail schemes by which older citizens in the United States have frequently been targeted, and governmental efforts in the United States to protect consumers against telemarketing frauds. The affidavit then concludes:

> 19. The fact that a substantial number of AARP's members are among the millions of Americans targeted by fraudulent direct mail and telemarketing solicitors, as demonstrated in the Affidavit of Jesse E. May, gives AARP a unique interest and perspective in this appeal.

Affidavit of Brian Wolfman

[5] Mr. Wolfman is an attorney with Public's Litigation Group, attorneys for Public Citizen, Inc., also a non-profit public interest organization based in the U.S.A.

[6] At paragraph 12, he deposes that "Public Citizen has a longstanding interest in the general issue presented in this appeal, *i.e.*, redress for corporate financial fraud. Moreover, Public Citizen has expertise in the particular concerns raised by the bankruptcy court's champerty ruling, *i.e.*, whether the victims of corporate abuse will have *meaningful* access to the courts." At paragraph 7, Mr. Wolfman makes several references to "Mr. Down's victims" and the interest that his organization has in seeing that "defrauded American consumers" obtain access to the courts. Like Ms.

Small, Mr. Wolfman goes on to describe various efforts in which his organization is involved in the United States, though in largely unobjectionable terms. At paragraphs 21, 22 and 25, however, he again makes various references to “Mr. Down’s victims” and “defrauded consumers”.

Affidavit of Jesse May

[7] Jesse May is a software analyst employed by AARP who carried out the task of running a computer program to determine whether any of AARP’s member were “among Respondent Blair Down’s victims.” The affidavit essentially describes the process he or she (I know not which) used, and then states that a “match” for 100,953 names between AARP’s membership and “Respondent Down’s customers” resulted.

ANALYSIS

[8] Mr. Andrews argues that all three affidavits are objectionable for many reasons. I do not intend to review his arguments and the arguments of Mr. Fulton in response with respect to each paragraph of each affidavit. I am persuaded that there is much in each of the affidavits that is objectionable either because of the assumption that Mr. Down is guilty of “fraud” and the co-petitioners are his “victims”; because much of the information in the affidavits is argument

or is barely relevant to the questions raised in the appeal and prejudicial or inflammatory; and because of the use of double and triple hearsay. In a case such as this, where "abuse of process" and the rationale behind the rules relating to champerty and maintenance is in issue, these deficiencies must concern the Court.

[9] With respect to the affidavit of Ms. Small, I would strike out paragraphs 6, 7, 8, 9, 10, 11, 12, 13, 17, 18, 19, 21 and 22. While not every line in those paragraphs is objectionable, they are, as Mr. Andrews argues, sufficiently "larded" with objectionable or irrelevant material as to be not worth saving.

[10] With respect to Mr. Wolfman's affidavit, I would strike out:

1. The first two sentences of paragraph 12 and the last sentence of that paragraph;

2. The first sentence of paragraph 14 and the last two sentences of that paragraph;

3. The second sentence of paragraph 17;

4. The second sentence of paragraph 18, sub-paragraphs (b), and (c)(i) of paragraph 18;

5. The last six lines of paragraph 21;

6. The last seven lines of paragraph 22;

7. The second sentence of paragraph 25.

[11] With respect to Jesse May's affidavit, aside from the use of the term "victim" at paragraph 2, the affidavit is not objectionable like the other two, although Mr. Andrews argues that it is "double hearsay" and devoid of analysis of the technical aspects of the work carried out. In my view, whether the affidavit is useful or not is something that could be determined by cross-examining the deponent. Accordingly, I would order that the term "victim" must be struck out but that the rest of the affidavit is admissible, subject to the right of counsel for any of the respondents to cross-examine on it. It may turn out that the affidavit is indeed "double hearsay" and will not ultimately be admissible, but that remains to be seen.

[12] With respect, it seems to me that both would-be intervenor organizations here would have been well advised to make their affidavits much shorter and not to provide the Court with argument or with information that is irrelevant to this case and which may be seen to be prejudicial to the respondents. The purpose of the affidavits is not to make

argument or to state the intervenors' opinions regarding the decision of the court below. Rather, it is to give the court a brief description of the nature of the organization and why it may be directly interested in the point or points being appealed.

[13] The application to strike is therefore allowed to the extent indicated. Except for the respondent's right to cross-examine Jesse May on his/her affidavit, I dismiss the alternative application for the cross-examination of the deponents.

"The Honourable Madam Justice Newbury"

TAB 24

ETLER v. KERTESZ

Ontario Court of Appeal, Porter, C.J.O., MacKay and McGillivray, JJ.A. November 24, 1960.

Conflict of Laws I B, II—Action in Ontario to recover foreign contract debt—What constitutes "proper law of contract"—Illegality of contract by proper law—Whether enforceable in Ontario.

A contract which is illegal by the "proper law of the contract" is unenforceable in Ontario, unless that law is of such a penal or confiscatory nature that it should be disregarded as a matter of public policy, and in the absence of any expressed or apparent intention of the parties the "proper law" of the contract is the law of that jurisdiction with which the transaction has its closest and most real connection and there is no presumption that, as between two jurisdictions, the proper law is that jurisdiction where the contract would be valid.

Plaintiff lent defendant a sum of U.S. currency pursuant to a foreign exchange transaction entered into in Austria, defendant promising to repay the plaintiff from funds in Switzerland at a later date. By Austrian law the transaction was illegal and void. Defendant, although admitting the loan, refused to repay the plaintiff and defended an action brought by the latter in Ontario on the ground that the claim was unenforceable. Plaintiff succeeded at the trial. On appeal by defendant, *held*, that the appeal must be allowed and the action dismissed. Applying the foregoing tests the proper law of the contract was Austrian law, and as the contract was illegal and void according to that law, which was not offensive to domestic public policy (being similar to foreign exchange control legislation adopted in Canada on occasion), the contract is unenforceable in Ontario.

Neither can the plaintiff avail himself of the doctrine of unjust enrichment to recover his money as any such notion is entirely alien to a transaction which has been expressly declared illegal.

[*Kahler v. Midland Bank Ld.*, [1950] A.C. 24; *Boissevain v. Weil*, [1949] 1 K.B. 482, apld; *Mount Albert Borough Council v. Australasian Temperance & Gen'l Mutual Life Ass'ce Society Ltd.*, [1938] A.C. 224; *Bonython v. Commonwealth of Australia*, [1951] A.C. 201; *Linderme Machine Works Co. v. Kuntz Brewery Ltd.*, 21 O.W.N. 51; affd 23 O.W.N. 69, consd; *Vita Food Products Inc. v. Unus Shipping Co.*, [1939], 2 D.L.R. 1, A.C. 277, 48 C.R.C. 262; *The "Torni"*, [1932] P. 78; *Re Missouri Steamship Co.*, 42 Ch. D. 321; *N.V. Handel My. J. Smits Import-Export v. English Exporters (London) Ltd.*, [1955] 2 Lloyd's Rep. 317; *Chatenay v. Brazilian Submarine Telegraph Co.*, [1891] 1 Q.B. 79, distd]

Evidence VII G—Proof of foreign law—Expert witness—Former practitioner in foreign jurisdiction constituting competent expert.

Judgments & Orders IV B—Enforcement of Quebec judgment in Ontario—Defendant not personally served or appearing in Quebec proceedings—Judgment not binding on defendant in Ontario—Judicature Act, R.S.O. 1950, c. 190, s. 52.

APPEAL by defendant from judgment of Currey, Co.Ct.J., in favour of recovery by plaintiff of loan made to defendant pursuant to contract made in Austria. Reversed.

B. Sischy, for defendant, appellant.
S. G. M. Grange, for plaintiff, respondent.

The judgment of the Court was delivered by

PORTER, C.J.O.:—This is an appeal by the defendant from a judgment of His Honour Judge Currey, dated June 8, 1959 in an action tried in the City of Toronto without a jury, against the defendant for $816.41, together with costs of the action, including the costs of examination of witnesses in the Province of Quebec.

The plaintiff's claim was for the recovery of $837.55, being an amount, including interest and costs, awarded to him by a judgment obtained by the plaintiff against the defendant, on June 16, 1954, in the Superior Court of the Province of Quebec. In the alternative, if it should be held that the Quebec judgment were not a judgment valid and binding upon the defendant, the plaintiff claimed that on March 23, 1949, in Vienna, Austria, he loaned to the defendant the sum of $500 in currency of the United States of America, and that the defendant agreed to repay the sum of $500 in U.S. currency, to be made available to the plaintiff at Zurich, Switzerland, but failed to do so. The proceedings in Quebec, arose out of the same transaction.

At the hearing of this appeal, counsel for the defendant contended that upon the evidence the defendant had not been personally served with the writ of summons in the Quebec action, and that no appearance had been entered on his behalf. The record disclosed that the defendant was served with the writ "by leaving a duly certified copy thereof with him by speaking to and leaving the same with a grown and reasonable person, member of his family at his domicile at 3330 Ridgewood Avenue, Apartment 27, City and District of Montreal". There was some evidence indicating that a copy of an appearance had been sent to the solicitors for the plaintiff, but no Court records were produced to show that any appearance had been entered. The evidence as to the copy of an appearance passing between the solicitors was inconclusive, and the defendant swore that he never received a copy of the writ, and had no knowledge of it. The *Judicature Act*, R.S.O. 1950, c. 190, s. 52 provides:

> Where an action is brought on a judgment obtained in the Province of Quebec in an action in which the service was not personal and in which no defence was made, any defence which might have been set up to the original action may be made to the action on the judgment.

This Court then decided that the Quebec judgment was not

binding upon the defendant in Ontario and proceeded to hear argument on the merits.

The plaintiff and defendant were personal friends and had various business contacts over a period of about 20 years. They had both lived in Hungary, and at times resided and worked in Vienna, Austria. The defendant had some experience in currency exchange transactions. In March, 1949 both parties met in Vienna, where the transaction which is the subject-matter of this litigation, took place. There was a conflict of evidence as to the nature of the transaction. The plaintiff stated that he went from Hungary to Vienna with a quantity of money in United States currency. There he met the defendant, who was contemplating departure to the United States and required U.S. currency for the purpose. The defendant, who had been dealing in U.S. currency, had a quantity of it in the keeping of a female relative residing in Zurich, Switzerland, Dr. Maria Eggs-Benes. The plaintiff stated that he then advanced to the defendant the sum of $500 in U.S. currency, and the defendant gave him a letter of identification addressed to Dr. Eggs-Benes, and undertook to direct her to pay to the plaintiff $500 in U.S. currency. The plaintiff subsequently communicated with Dr. Eggs-Benes, who informed him that she had sent the U.S. currency to the defendant, then in the United States. There was some correspondence between the parties in which the plaintiff claimed the repayment of the loan, and the defendant, without denying liability, in effect played for time.

The defendant in his evidence, denied that there was a loan. He said that the plaintiff wished to buy U.S. exchange, and paid the defendant a sum in Austrian exchange, for which he was to receive from Dr. Eggs-Benes $500 in U.S. funds to be delivered to him in Switzerland, Dr. Eggs-Benes to become liable for the payment to the plaintiff, without further recourse against the defendant. However, in answer to a cable from the plaintiff, the defendant wrote to him as follows:

> I confirm the receipt of your cable. First of all I wish to reassure you that you cannot sustain any loss in this matter other than loss of time.
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> When you were kind enough to be on my disposal and I handed over the letter, I did not want to receive its countervalue until my sister did not settle. You did not consider this necessary, because I assured you that I trusted my cousin. I informed you as well, that despite the confidence it is best to take care of our own matters ourselves.

The obscurities in this passage may be due to the translation. The gist of it does not appear to suggest a denial but rather

an admission of responsibility. The defendant in his evidence clearly admitted receiving money from the plaintiff.

The learned trial Judge in his reasons referred to "the loan admitted by the defendant". Counsel for the defendant in his argument accepted the finding that the advance was a loan (and in addressing himself to the merits), relied solely upon the contention that the loan was void by the laws of Austria, in that such a transfer of U.S. funds in Austria was prohibited by the statutes of Austria at the time when the loan was made, and that the claim was therefore unenforceable in the Courts of Ontario.

The argument proceeded upon the basis that the loan was in the form of U.S. funds advanced in Austria and to be repaid in Switzerland.

The only evidence as to the law of Austria was given by the witness Dr. Stephen Pozell, a notary public residing in Toronto, a Hungarian by birth, who had been called to the bar in Hungary, when Hungary and Austria were united as one country. He stated that at the material time he was entitled to practise law in Austria. Counsel for the plaintiff raised the question of the qualifications of this witness to give expert evidence as to the law of Austria as it was in 1949.

Pozell stated in his evidence that he was at the time of the trial a notary public residing in Toronto. He was born in Hungary, where he went to school, then to the University of Budapest, and later passed the bar examinations and was called to the bar in Hungary in 1914. At that time Hungary and Austria were one country. In Hungary a student on his law examinations had to answer questions in Austrian law and similarly in Austria, the Austrian student had to answer questions in Hungarian law. Dr. Pozell was listed in the solicitors' list of Budapest published in 1948. He further stated that he was entitled to practise as a solicitor in Austria without examinations. He lived in Hungary until 1949, when he was forced to leave, and crossed the border into Austria on April 30, 1949. In Austria he was appointed as prosecutor of the American Military Court, in the American Zone. Austrian law was applied in that Court. He held this position for about 8 months. He has since given evidence in the Supreme Court of Ontario as to Austrian procedure. He stated that he had knowledge as to the law as it was in 1949 in Austria with reference to dealings in foreign exchange.

As to the competency of a witness to give evidence of foreign law, it is stated in Dicey, *Conflict of Laws*, 7th ed., pp. 1110-11, as follows:

No precise or comprehensive answer can be given to the question who, for this purpose, is a competent expert (Falconbridge, Chap. 47). A judge or legal practitioner from the foreign country is always competent (*e.g., Baron de Bode's Case* (1845) 8 Q.B. 208). But, although it is highly desirable, it is not absolutely necessary to have a witness of this kind. Thus a former practitioner in the foreign country (*Re Duke of Wellington* [1947] Ch. 506, 514-515; *Re Banque des Marchands de Moscou* [1957] 3 W.L.R. 637; *Kertesz v. Kertesz* [1954] V.L.R. 195), a person who is entitled to practise in the foreign country but has not done so (*Barford v. Barford* [1918] P. 140; *Perlack Petroleum Maatschappij v. Deen* [1924] 1 K.B. 111 (C.A.), and a person who although he has neither practised nor been entitled to practise in the foreign country, has practised in a second foreign country whose law is the same as that of the first (*Reinblatt v. Gold* (1928) Q.R. 45 K.B. 136; affirmed [1929] S.C.R. 74; also reported on another point [1929] 1 D.L.R. 959), have all been held competent. There are conflicting authorities on the question whether an English barrister who has acquired knowledge of a foreign law through practice before the Privy Council is a competent expert (*Wilson v. Wilson* [1903] P. 157 (competent); *Cartwright v. Cartwright* (1878) 26 W.R. 684 (not competent)). A witness may be competent although he is not and never has been a practising lawyer at all. Any person who, by virtue of his profession or calling, has acquired a knowledge of a foreign law, whether it be that of the country in which he exercises his profession or calling, or that of another country, is competent.

I am of the opinion that upon the evidence the witness Dr. Pozell has shown himself to be a competent expert to testify as to the law of Austria as it was in 1949 with reference to foreign exchange.

The evidence of this witness was uncontradicted. He was the sole witness called to give evidence as to Austrian law. I see no reason why the evidence of this witness should not be accepted: *Buerger v. New York Life Ass'ce Co.* (1927), 96 L.J.K.B. 930.

According to his evidence the transaction in question would be void by the law of Austria whether the sum advanced was in U.S. funds or Austrian currency. The agreement to repay in U.S. currency would invalidate it, unless permission had been given by the National Bank of Austria. Dr. Pozell referred to the law of Austria, No. 149, s. 2, para. 2, dealing with foreign currency, published on July 25, 1946, and said that it was still enforceable as an original Austrian law. According to this law, dealing in foreign currency was allowed only by permission of special Austrian National Banks or some special Austrian currency dealers. He said that, contracts relating to dealings in foreign currency, except through such banks or dealers were by this law of Austria unenforceable, void, invalid, and illegal. Such contracts were not allowed: they were prohibited, and the offender was liable to

punishment. Thus the evidence of this witness relates to a positive law of Austria affecting transactions in foreign exchange. There is, in my opinion, no doubt that upon this evidence the contract, if governed by the law of Austria, was illegal, and the promise to repay in Switzerland, would be for an illegal consideration. Further, I think the plaintiff is bound by his evidence and his claim on the pleadings that the advance made in Austria was in U.S. funds. This in itself was illegal by Austrian law, and was part performance of the contract in Austria.

The effect of the illegality upon the rights of the parties to the contract would appear to be the same under Austrian as under English law. In Anson's, *Law of Contract,* 19th ed., pp. 232-3, it is stated:

> It has already been pointed out that the borderline between illegal and merely void contracts is not altogether clear, probably because, the contract being a nullity between the parties in either case, the Courts are not always concerned to distinguish between them. But there are three cases in which it seems certain that a contract is illegal and not merely void, namely, if its object is forbidden by Statute, or constitutes an offence or a civil wrong at Common Law, or is contrary to good morals, but the only aspect of immorality to which the Courts have attached the stigma of illegality is sexual immorality. It is not thought that all contracts which are contrary to public policy, for example, a contract in unreasonable restraint of trade, can properly be described as illegal.
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> The fundamental principles upon which the Courts will act when they have to deal with an illegal contract were long ago explained by Lord Mansfield:
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> "The objection that a contract is immoral or illegal as between plaintiff and defendant sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this: *ex dolo malo non oritur actio.* No Court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa,* or the transgression of a positive law of this country, then the Court says he has no right to be assisted. It is upon that ground the Court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, *potior est conditio defendentis.*"
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> The decision of the Court of Appeal in *Harry Parker Ltd. v. Moon* [1940] 2 K.B. 590 provides a modern illustration of this fundamental principle.

And see the 21st ed., pp. 312 *et seq.* As to severability of an

illegal contract, Anson, 19th ed., p. 233, states: "One point, however, is clear. If any part of the *consideration* for a promise is illegal, that promise cannot be enforced. There can be no severance of the legal from the illegal part of the consideration."

The main issue in this appeal is whether the proper law of the contract is the law of Austria, the *lex loci contractus*, or the law of Switzerland, the *lex loci solutionis*. There being no evidence as to the Swiss law, the Court should, if the Swiss law were the proper law, apply the *lex fori*, which in this case would be the law of Ontario: Dicey, *Conflict of Laws*, 7th ed., p. 1116.

In Dicey, the general rules applicable are stated as follows at p. 717:

> Rule 148.—In this Digest the term "proper law of a contract" means the law, or laws, by which the parties intended, or may fairly be presumed to have intended, the contract to be governed; or (in other words) the law or laws to which the parties intended or may fairly be presumed to have intended to submit themselves. *Lloyd v. Guibert* (1865) L.R. 1 Q.B. 115 at p. 122, Willes, J. *per curiam.*

Dicey at pp. 738-9:

> Sub-Rule 3.—In the absence of countervailing considerations, the following presumptions as to the proper law of a contract have effect:
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> *First Presumption*:—Prima facie the proper law of the contract is presumed to be the law of the country where the contract is made (*lex loci contractus*); this presumption applies with special force when the contract is to be performed wholly in the country where it is made, or may be performed anywhere; but it may apply to a contract partly or even wholly to be performed in another country.
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> *Second Presumption*:—When the contract is made in one country, and is to be performed either wholly or partly in another, then the proper law of the contract may be presumed to be the law of the country where the performance is to take place (*lex loci solutionis*). This presumption may, in exceptional cases, be applicable only to certain aspects of the contract. It will usually apply to the mode of performance as distinguished from the substance of the obligation.

In *Kahler v. Midland Bank Ld.*, [1950] A.C. 24 at p. 28, Lord Simonds adopted, as the ultimate test, the statement of Dicey, 6th ed., p. 579, *viz.*, that the "proper law of a contract" means the law or laws by which the parties intended, or may fairly be presumed to have intended, the contract to be governed". In *Vita Food Products Inc. v. Unus Shipping Co.*, [1939], 2 D.L.R. 1 at p. 8, A.C. 277 at p. 290, 48 C.R.C. 262 at p. 270, Lord Wright said:

> It is true that in questions relating to the conflict of laws rules cannot generally be stated in absolute terms but rather as *prima facie* presumptions. But where the English rule that intention is the test applies and where there is an express statement by the parties of

their intention to select the law of the contract, it is difficult to see what qualifications are possible, provided the intention expressed is *bona fide* and legal, and provided there is no reason for avoiding the choice on the ground of public policy.

In that case the intention was clearly expressed in the contract.

In *Mount Albert Borough Council v. Australasian Temperance & Gen'l Mutual Life Ass'ce Society Ltd.*, [1938] A.C. 224 at p. 240, Lord Wright said:

> The proper law of the contract means that law which the English or other Court is to apply in determining the obligations under the contract. English law in deciding these matters has refused to treat as conclusive, rigid or arbitrary, criteria such as lex loci contractus or lex loci solutionis, and has treated the matter as depending on the intention of the parties to be ascertained in each case on a consideration of the terms of the contract, the situation of the parties, and generally on all the surrounding facts. It may be that the parties have in terms in their agreement expressed what law they intend to govern, and in that case prima facie their intention will be effectuated by the Court. But in most cases they do not do so. The parties may not have thought of the matter at all. Then the Court has to impute an intention, or to determine for the parties what is the proper law which, as just and reasonable persons, they ought or would have intended if they had thought about the question when they made the contract. No doubt there are certain prima facie rules to which a Court in deciding on any particular contract may turn for assistance, but they are not conclusive. In this branch of law the particularly rules can only be stated as prima facie presumptions.

In *Bonython v. Commonwealth of Australia*, [1951] A.C. 201, the contract contained no express intention. At p. 219 Lord Simonds said:

> The *mode of performance* of the obligation may, and probably will, be determined by English law; the substance of the obligation must be determined by the proper law of the contract, i.e., the system of law by reference to which the contract was made or that with which the transaction has its closest and most real connection. In the consideration of the latter question, what is the proper law of the contract, and therefore what is the substance of the obligation created by it, it is a factor, and sometimes a decisive one, that a particular place is chosen for performance.

Dicey, p. 747 states:

> The parties may, however, and normally do intend that, while the substance of all obligations is governed by one law, the mode, or as Bowen L.J. put it (*Jacobs v. Credit Lyonnais* (1884) 12 Q.B.D. 589 at p. 601), the "method and manner" of the performance should, in each case, be regulated by the law of the place in which it occurs; even though that is not the proper law of the contract.

Dicey, p. 919, states:

> Rule 178. (1) A contractual obligation may be invalidated or discharged by exchange control legislation if—

(*a*) such legislation is part of the proper law of the contract; or

(*b*) it is part of the law of the place of performance; or

(*c*) it is part of English law and the relevant statute or statutory instrument is applicable to the contract.

Provided that foreign exchange control legislation will not be applied if it is used not with the object of protecting the economy of the foreign State, but as an instrument of oppression or discrimination.

The words used by Lord Simonds in the *Bonython* case, *supra,* referring to the law "with which the transaction has its closest and most real connection", are no doubt derived from Westlake's Private International Law, 6th ed., p. 288, where it is stated: "In these circumstances it may probably be said with truth that the law by which to determine the intrinsic validity and effects of a contract will be selected in England on substantial considerations, the preference being given to the country with which the transaction has its most real connection, and not the law of the place of contract as such." Westlake seems to state this as a general presumption with respect to the "legality and unexpressed consequences, or intrinsic validity and effects" (p. 285). At p. 290 it is stated:

Section 212. Even where the supposed intention of the parties has nominally been relied on, it has been in fact nothing more than a fictitious intention presumed from following the doctrine of this section, and has been, in itself no substantial guide to the choice of law.

The statement of Lord Simonds in the *Bonython* case, *supra,* follows Lord Wright as to contracts which expressly refer to the system of law to be applied, and adopts the language of Westlake as appropriate to other contracts, presumably those where there was no expressed intention. In the *Kahler* case, *supra,* he made no such distinction. There he adopted Dicey's rule as to intention, and presumed intention, and applied it to a contract in which there was no expressed intention. I do not think, however, that Lord Simond's statement in *Bonython, supra,* is in any sense a departure from his statement in *Kahler, supra.* At most it is a refinement. It is not inconsistent with the proposition that the ultimate test is the presumed intention. A presumed intention is as Singleton, L.J., put it in *The "Assunzione"*, [1954] P. 150 at p. 176, "how a just and reasonable person would have regarded the problem". Dicey at p. 719 suggests as the most satisfactory formulation of the presumed intention is that the proper law is the one "with which the transaction has its closest and most real connection". And see *Falconbridge, Selected Essays on the Conflict of Laws,* 2nd ed., p. 378, where it is pointed out that

the " 'intention' theory seems on its face to be purely subjective in character, but in effect, if the parties to a contract have not expressly selected the proper law, the practice of English courts has been to ascertain the proper law objectively in the light of the facts and circumstances of each case, including the place of contracting, the place of performance, the places of residence or business of the parties respectively, and the nature and subject matter of the contract".

In seeking to ascertain the intention of the parties as to the proper law of the contract in the case at bar, in the absence of any expressed intention, and in the light of these authorities, I think that it should be determined as the one "with which the transaction has its closest and most real connection".

Counsel for the defendant submitted that the proper law of the contract was Austrian law, and as the contract was illegal and void under such proper law, it is unenforceable in the action brought in Ontario. In support of this contention he relied upon *Kahler v. Midland Bank, supra.* In that case, a Czechoslovakian National resident in Czechoslovakia purchased in London, shares in a Canadian company which were for practical purposes, bearer securities. His bankers, a Czechoslovakian firm, informed him that they were crediting him with these shares in his deposit account, noting that they were in safe deposit with the Midland Bank in London. In 1939 the purchaser, wishing to leave Czechoslovakia because of German occupation, was permitted to leave, upon condition that he deposited with a bank in Czechoslovakia, all his securities, including the shares in question. He then left the country and became a naturalized citizen of the United States. The Midland Bank, upon instructions from the Czechoslovakian bank, transferred the shares to the account of the Czechoslovakian bank. Although the ownership of the shares did not change, the Midland Bank, in an action brought against it for the delivery of the shares, contended that it could not deliver them, because the shares were held for the Czechoslovakian bank and under the currency control legislation in effect in Czechoslovakia, it was illegal for the Czechoslovakian bank to part with the securities to a "currency foreigner," without the consent of the National Bank of Czechoslovakia, which had been refused. It was held, (*per* Lord Simonds, Lord Normand and Lord Radcliffe, Lord MacDermott and Lord Reid dissenting), that the proper law of the contract between the plaintiff and the Czechoslovakian bank was Czechoslovakian law, and accordingly the plaintiff could not show that he was entitled

to possession of the share certificates. Lord Simonds said, at p. 28:

> What then is the proper law of the contract that was made with the Zivnostenska Bank and that I have assumed to have been renewed with the Bohemian Bank? In my opinion, it was the law of Czechoslovakia. The contract was made in that country between an individual and a corporation both resident there. At the date of the contract and at the material times thereafter the law of Czechoslovakia included a law regulating transactions in foreign exchange substantially the same as that which prevailed at the date of the issue of the writ. At all material times it was illegal for the bank, Zivnostenska or Bohemian, to part with foreign securities in its custody without the consent of the National Bank or other proper authority, whether those securities were at the date of the contract in fact situate in Czechoslovakia or in some other country. In these circumstances I cannot accede to the contention of the appellant that the proper law of the contract so far as it concerns the delivery of the securities is governed by the law of England or of any other country in which they may chance to be situate.

Further, with respect to the contention that the proper law of the contract in the case at bar, was the *lex contractus*, by which law the contract would be illegal and void, counsel for the appellant referred to *The "Torni"*, [1932] P. 78. This case was considered by the Privy Council in *Vita Food Products Inc. v. Unus Shipping Co.*, [1939], 2 D.L.R. 1, A.C. 277, 48 C.R.C. 262, where in certain aspects the *"Torni"* judgment was overruled. In both of these cases, however, the contracts under consideration expressly provided that contracts were "to be construed," or "governed by" English law. In the case at bar, there was no such express intention of the parties. Thus these cases are distinguishable to this extent. Moreover, the "foreign law" discussed in these cases, (that of Palestine in the *"Torni"* case, and of Newfoundland in *Vita Foods* case) did not "make the contract illegal so as to nullify the contract. There was no sufficient ground for refusing to give effect to the express or implied intention of the parties that the proper or substantive law of the contract, that is the law by which it was to be enforced and governed, should be English law": *Vita Food Products Inc. v. Unus Shipping Co.*, [1939], 2 D.L.R. at p. 15, A.C. at p. 299, 48 C.R.C. at p. 279, *per* Lord Wright.

In the case of *Re Missouri Steamship Co.* (1888), 42 Ch. D. 321, a contract was made in Massachusetts between an American citizen and a British company for the shipment of cattle from Boston to England in a British ship. The contract contained a clause that the company should not be liable for the negligence of the Master or crew of the ship. Such a clause was valid by English law, but void by the law of

Massachusetts as being against public policy. Lord Halsbury, L.C., at pp. 336-7 said:

> I put aside, as Sir Walter Phillimore candidly put aside, questions in which the positive law of the country forbids contracts to be made. Where a contract is void on the ground of immorality, or is contrary to such positive law as would prohibit the making of such a contract at all, then the contract would be void all over the world, and no civilised country would be called on to enforce it. . . .
>
> Now this is a contract for the conveyance of cattle from Boston to England by sea on board a British ship by a British company whose domicil is in England. Those circumstances, though very strong, would perhaps not be conclusive. But when I look at the contract itself and find that the ordinary exceptions to the bill of lading are the Queen's enemies and so on, it is absolutely impossible to resist the conclusion that the parties did contemplate being governed by English law in their contracting relations. If I am to assume that the law of the United States is that this particular stipulation now in dispute is of no validity in the United States and cannot be enforced, when I find that both the parties to the contract make this stipulation a part of the contract into which they enter which is of validity in England and can be enforced, and cannot be enforced in the United States, it seems to me to follow irresistibly that the contract relations into which the parties entered were such that they intended to be governed and regulated by English law; and if that is so the question is free from doubt.

Fry, L.J., at p. 342, referring to an American decision in *The "Montana"* (1889), 129 U.S. 397, said (p. 342):

> That decision, I think, when fairly read, shews what one would expect to be the case, namely, that the Courts have held that this stipulation being obnoxious to their public policy is void, not illegal, exactly in the same way as in this country we hold that stipulations which are in restraint of trade are not illegal, and that the entering into them does not constitute an illegal conspiracy, but they are void.

Lord Wright, in *Vita Food Products Inc. v. Unus Shipping Co.*, [1939], 2 D.L.R. at p. 14, A.C. at p. 297, 48 C.R.C. at p. 277, referring to the first quoted passage in Lord Halsbury's judgment in the *Missouri Steamship* case, *supra*, said:

> In this passage Lord Halsbury would seem to be referring to matters of foreign law of such a character that it would be against the comity of nations for an English Court to give effect to the transaction just as an English Court may refuse in proper cases to enforce performance of an English contract in a foreign country where the performance has been expressly prohibited by the public law of that country.

I think that *The "Torni"*, *Vita Food* and *Missouri* cases are all distinguishable from the case at bar, first in that on the face of the contracts in question the express or apparent intention of the parties was that the Law of England should apply, and secondly, in that in each case by the foreign law under consideration, the contracts were invalid or void, but

not illegal as being prohibited by a positive law. It therefore becomes unnecessary to consider the various questions to which these decisions have given rise, as discussed in the article by Morris and Cheshire in 56 L.Q.Rev. 320 and the review by E. H. Wall, 2 Int. I.Q. 710, and Dicey, pp. 782-3. Nor is it necessary to discuss the authorities dealing with the question of illegality at the place of performance or with *Regazzoni v. K. C. Sethia (1944) Ltd.*, [1957] 3 W.L.R. 752, where the performance of a contract was illegal by the laws of the place of performance, but not by the proper law of the contract.

In support of his contention that the proper law of the contract was the law of the place of performance, *i.e.*, Switzerland, where the loan was to be repaid, counsel for the plaintiff referred to *N. V. Handel My. J. Smits Import-Export v. English Exporters (London) Ltd.*, [1955] 2 Lloyd's Rep. 317, especially the passage from the judgment of Singleton, L.J., at p. 324, as follows:

> The contract which they put forward was based upon the order form; the covering letter of Apr. 24 apears to put upon the sellers the obligation to do something which they would not have to do if this was an ordinary f.o.b. contract, and the sellers who commence an action claiming damages say: "This is our contract; but we want to say that under Dutch law the term 'f.o.b. Rotterdam' cannot be varied by those words in the covering letter of Apr. 24 because Dutch law would not allow it." If that is right—and it is their contention—they have entered into a contract which is in a sense repugnant to the law of Holland. One must not assume they would enter into a contract with English buyers which they knew was a bad contract. It is something one does not expect of the subjects of Holland; and they must be taken to have known the law of their country.

The plaintiffs in that case were a Dutch firm established in Rotterdam. The defendant was an English company. Payment for the goods to be delivered was to be in pounds sterling. The correspondence was carried on in English. The contract was made in England in the sense that the correspondence was initiated there by letter. Although Singleton, L.J., did not place much weight upon these circumstances, and thought the place of performance, Rotterdam, was of more importance, he thought that the considerations mentioned in the above-quoted paragraph, were in that case a "clear evidence of intention . . . that the parties must at the time they entered into the contract have intended that English law should be the law to be applied in construing the contract".

As a further example of weight to be given to a presumption that parties to a contract would intend to make a valid contract, counsel referred to *Chatenay v. Brazilian Submarine*

Telegraph Co., [1891] 1 Q.B. 79 especially to the words of Esher, M.R., at pp. 82-3:

> One inference which has been always adopted is this: if a contract is made in a country to be executed in that country, unless there appears something to the contrary, you take it that the parties must have intended that that contract, as to its construction, and as to its effect, and the mode of carrying it out (which really are the result of its construction), is to be construed according to the law of the country where it was made. But the business sense of all business men has come to this conclusion, that if a contract is made in one country to be carried out between the parties in another country, either in whole or in part, unless there appears something to the contrary, it is to be concluded that the parties must have intended that it should be carried out according to the law of that other country. Otherwise a very strange state of things would arise, for it is hardly conceivable that persons should enter into a contract to be carried out in a country contrary to the laws of that country. That is not to be taken to be the meaning of the parties, unless they take very particular care to enunciate such a strange conclusion. Therefore the law has said, that if the contract is to be carried out in whole in another country, it is to be carried out wholly according to the law of that country, and that must have been the meaning of the parties. But if it is to be carried out partly in another country than that in which it is made, that part of it which is to be carried out in that other country, unless something appears to the contrary, is taken to have been intended to be carried out according to the laws of that country.

In that case the plaintiff, a Brazilian subject, executed in Brazil, a power of attorney to a broker resident in London to buy and sell shares. It was held that the intention appeared to be that the authority should be acted upon in England and that the extent of the authority as to transactions in England, should be determined by English law. At p. 85 Lindley, L.J., said: "We have to deal with a power of attorney, a one-sided instrument, an instrument which expresses the meaning of the person who makes it, but is not in any sense a contract."

The last two mentioned authorities, in my opinion, are distinguishable from the case at bar on the facts. I do not think that either of these authorities laid down any general rule to the effect that the proper law of a contract as between the laws of two countries, by one of which it would be valid, and by the other it would be invalid, should be presumed to be in the country where the contract would be valid. Under certain circumstances such a consideration might have some weight viewed together with all the other evidence from which intention might be inferred.

In *Linderme Machine Works Co. v. Kuntz Brewery Ltd.* (1921), 21 O.W.N. 51, Orde, J., dealt with a contract between a party in Michigan and a party in Ontario, whereby a machine was to be delivered by the Michigan party to Water-

loo, and to be erected there. It was held that the greater portion of the contract was to be performed in Ontario. Payment was to be made in Detroit, "but that was really a minor matter". The *Chatenay* decision, *supra*, was applied, in that the part of the contract to be carried out in Ontario was intended to be carried out in accordance with the laws of Ontario. The decision was affirmed by the Appellate Division —23 O.W.N. 69.

After considering all the authorities above mentioned I would regard the *Kahler* case as the one most closely approximating in its facts the case at bar, for here the parties were both personally present in Austria, entered into the contract there, and performed a substantial part of the contract there. I am of the opinion that upon these facts, the system of law "with which the transaction has its closest and most real connection" is the law of Austria. And I should further add that the law of Austria relating to foreign exchange, under which the transaction without the required consent would be illegal, is not in my opinion, a law of such a penal or confiscatory nature that it should be disregarded by the Courts of this country. This law is similar in its effect to the law in force in Canada in 1947, prohibiting dealings in foreign exchange except through certain authorized dealers. See the *Foreign Exchange Control Act*, 1946 (Can.), c. 53, and P.C. 5215, published in Canada Gazette, vol. 81, p. 97.

Since by the law of Austria the contract was invalid, void, and, being prohibited by positive law, illegal and the promise to repay was thus for an illegal consideration, the plaintiff is not entitled to recover upon the contract.

Counsel for the plaintiff finally contended that it would be inequitable to permit the defendant to retain the money advanced to him under the circumstances and that the doctrine of "unjust enrichment" should apply. I do not agree with this contention. I think that the statement of Tucker, L.J., in *Boissevain v. Weil*, [1949] 1 K.B. 482 at p. 487 clearly indicates that the doctrine would not apply to the facts of the case at bar. The relevant passage is as follows:

> Finally Sir David alternatively argued that if this transaction is hit by reg. 2 none the less the plaintiff ought to be entitled to recover on the principle of unjust enrichment and he referred to and relies on the speech of Lord Wright in the *Fibrosa Spolka Akcyjna v. Fairbairn, Lawson, Combe Barbour Ld.*, [1943] A.C. 32, 61, where in dealing with the doctrine of unjust enrichment the noble and learned Lord says: "The gist of the action is a debt or obligation implied or more accurately imposed by law in much the same way as the law enforces as a debt the obligation to pay a statutory or customary impost." It must be remembered that in

that case Lord Wright was dealing with a contract lawful when made but the performance of which had become impossible and the consideration for which had accordingly failed. But it is said that the transaction in the present case comes within the language which was there used in dealing with this kind of action and that it should be applied in the present circumstances. It is to be observed that in the present action there is no claim whatever based upon fraud or tort, or any alternative claim grounded on any implied obligation imposed by law or otherwise, and if, as I think, this transaction was one forbidden by reg. 2, and binding on a British subject abroad, it would—as Mr. Salmon very forcibly says —be a curious result if we were compelled to say that the law imposed a debt or obligation which had been expressly prohibited by a statutory enactment to which this court is bound to give effect. I think the whole notion of a debt or obligation imposed by law, as contemplated by Lord Wright in the *Fibrosa* case (supra), is alien to a transaction of the kind with which we are dealing, where the regulation, which has the force of law, has, in terms, prohibited the particular transaction.

The appeal should therefore be allowed, and judgment entered dismissing the action.

In view of the fact that the defendant has enjoyed the benefits of the transaction which was entered into as a favour to him, there should be no costs to the defendant of the trial or the appeal.

Appeal allowed.

ONTARIO MOTOR LEAGUE v. MUNICIPALITY OF METROPOLITAN TORONTO AND CORPORATION OF CITY OF TORONTO

Ontario High Court, Wells, J. December 2, 1960.

Taxes III A — Municipal Corporations II G — Liability of Ontario Motor League to pay municipal business taxes — Assessment Act (Ont.), s. 6(1)(m).

The Ontario Motor League, which is composed of members and affiliated associations, all with very limited rights unless such memberships are renewed annually, and whose purpose is not to carry on its operation for gain or profit is not "carrying on a business" and accordingly is not taxable as a "business" under s. 6(1)(*m*) of the *Assessment Act*, R.S.O. 1950, c. 24.

[*Rideau Club v. Ottawa*, 15 O.L.R. 118; *Re Clark & Town of Leamington*, 33 D.L.R. 787, 38 O.L.R. 405; *London v. London Club Ltd.*, [1952], 2 D.L.R. 178, O.R. 177; *University Club of Toronto v. Toronto*, [1953] 1 D.L.R. 65, [1952] O.R. 839, discd & apld]

ACTION by plaintiff to determine liability for municipal business taxes.

TAB 25

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Gichuru v. Pallai,*
2013 BCCA 60

Date: 20130206
Docket: CA040003

Between:

Mokua Gichuru

Appellant
(Plaintiff)

And

Mark Pallai, Vladyslav Mayzel, and
Smart Technologies Consultants Ltd.

Respondents
(Defendants)

Before: The Honourable Mr. Justice Hall
The Honourable Mr. Justice Tysoe
The Honourable Madam Justice D. Smith

On appeal from: Supreme Court of British Columbia, May 14, 2012
(*Gichuru v. Pallai*, 2012 BCSC 693, Vancouver Docket No. S112532)

Appellant Appearing In Person: M. Gichuru

Counsel for the Respondents: D. Burnett
H. Maconachie

Place and Date of Hearing: Vancouver, British Columbia
January 14, 2013

Place and Date of Judgment: Vancouver, British Columbia
February 6, 2013

Written Reasons by:
The Honourable Madam Justice D. Smith

Concurred in by:
The Honourable Mr. Justice Hall
The Honourable Mr. Justice Tysoe

Reasons for Judgment of the Honourable Madam Justice D. Smith:

[1] Mokua Gichuru appeals an order dismissing his damages claim for defamation against the respondents, Mark Pallai, Vladyslav Mayzel, and Mr. Mayzel's company, Smart Technologies Consultants Ltd. He also appeals the order awarding double costs to the respondents. The orders were made following a summary trial application by the respondents to have Mr. Gichuru's claim dismissed.

[2] The order dismissing the claim was granted in the absence of evidence that the alleged defamatory statement had been published by the respondents. The trial judge also found that the respondents had established the defence of fair comment and that Mr. Gichuru had not rebutted the defence by evidence of malice on the part of the respondents.

[3] On appeal, Mr. Gichuru submits that the claim was unsuitable for summary trial. He says that the summary trial hearing was procedurally unfair as the respondents' Notice of Application did not expressly indicate their intention to rely on the lack of evidence of publication of the impugned statement. He also contends that the trial judge erred in applying the test for publication, in applying the defence of fair comment, and in her award of double costs.

[4] For the reasons that follow, I would dismiss the appeal. In my view Mr. Gichuru has not established that the action was inappropriate for determination by summary trial. Nor, in my view, has he established that the trial was conducted unfairly or that the dismissal of his claim was in error. The issue of lack of evidence of publication of the impugned statement was raised by the respondents early in the proceedings; Mr. Gichuru's failure to tender evidence of publication at the trial could not be said to be due to a failure of notice.

[5] As to the substance of Mr. Gichuru's claim, a defamatory statement is actionable only if published. Publication is a threshold issue. At trial (whether conventional or summary), the onus is on the plaintiff to prove publication of the impugned statement: (1) by the defendant; and (2) to a third party other than the

parties to the action. Absent evidence of both elements of publication, a claim in defamation will fail. In these circumstances, any defence raised by the defendant need not be considered. While Mr. Gichuru raised an argument regarding the judge's application of the law with respect to the second element of publication, I find it unnecessary to address that argument as I can dispose of the appeal on the basis of lack of evidence as to the first element. Accordingly, I also find it unnecessary to address the issues raised by Mr. Gichuru in regard to the trial judge's application of the defence of fair comment.

Background

The Alleged Defamation

[6] Mr. Gichuru is a non-practising lawyer who has commenced many actions on his own behalf in the Supreme Court of British Columbia. One of those is the within action, the background of which may be briefly summarized.

[7] In 2009, Mr. Gichuru filed a human rights complaint against Mr. Pallai, his then landlord, alleging that he had been racially discriminated against by Mr. Pallai during his tenancy. The Human Rights Tribunal summarily dismissed Mr. Gichuru's complaint as having no reasonable prospect of success (see 2010 BCHRT 125). Mr. Gichuru has commenced a judicial review proceeding of that dismissal order. In the meantime, in 2010, the Residential Tenancy Board ordered Mr. Gichuru to vacate the rental premises.

[8] Despite having the human rights claim against him dismissed, Mr. Pallai became concerned that a Google search of his name would turn up results linking him to the allegation of racism and discrimination. Mr. Pallai asked his friend Mr. Mayzel, who operated Smart Technologies, what might be done to reduce this exposure in a Google search. Mr. Mayzel advised him that if additional neutral or positive postings about Mr. Pallai were made, any postings about Mr. Gichuru's human rights complaint against him would show up lower in the search results and thereby become more difficult to find.

[9] Mr. Mayzel agreed to help Mr. Pallai in this fashion and instructed Mr. Shkanov, an individual who was doing some work for him, to create online postings about Mr. Pallai. Mr. Mayzel deposed that he did not instruct Mr. Shkanov or anyone else to post anything about Mr. Gichuru.

[10] On October 18 and 19, 2010, several online postings were made about the dismissal of Mr. Gichuru's human rights complaint. Mr. Pallai deposed that Mr. Mayzel had advised him that one of those postings was placed by Mr. Shkanov on the website Craigslist. That posting was an offer to sell for $99 the reasons of the Human Rights Tribunal in dismissing Mr. Gichuru's complaint. Upon learning of this posting, Mr. Pallai and Mr. Mayzel instructed Mr. Shkanov to refrain from making any further postings. None of these postings, including the Craigslist advertisement, are alleged by Mr. Gichuru to have been defamatory.

[11] On October 21, 2010, a posting under the pseudonym "vanishome" was published on the Discover Vancouver website. The posting was contained in a thread entitled "End the hate and bullying rally" and read:

> End the hate and bullying rally, just like the BCHRT 125 - Reasons for Decisions and that Mokua Gichuru's complaint against Mark Pallai was dismissed!

[12] Mr. Gichuru alleges that this posting was defamatory and it is the subject of this action.

Procedural History

[13] In April 2011, Mr. Gichuru filed a Notice of Civil Claim against Mr. Pallai in which he pleaded that Mr. Pallai, or his agent, posted the alleged defamatory statement for the purpose of harming his reputation. He claimed that the thread originally related to a vigil being held in Vancouver for teenagers who had taken their own lives after being subjected to homophobic bullying. Mr. Gichuru submitted that the posting was defamatory because it carried the false innuendo, or "sting", that he bullies individuals in a way that is analogous to the bullying and homophobia that led to the six teenagers taking their lives.

[14] In the Response to Civil Claim, Mr. Pallai pleaded that the statement was not defamatory and that he had not published the impugned statement.

[15] On June 7, 2011, counsel for Mr. Pallai applied to have the claim summarily dismissed pursuant to R. 9-7 of the *Supreme Court Civil Rules* on the basis of an absence of evidence that Mr. Pallai had published the alleged defamatory statement. Mr. Gichuru advised the chambers judge that he was taking steps to add Mr. Mayzel and Smart Technologies to the claim. The chambers judge dismissed the application, without costs, and granted Mr. Pallai liberty to renew the application after 30 days during which Mr. Gichuru had to add Mr. Mayzel and his company as defendants to the action.

[16] On July 28, 2011, Mr. Gichuru added Mr. Mayzel and Smart Technologies as defendants. In the Amended Notice of Civil Claim he alleged that Mr. Mayzel had acted as the agent of Mr. Pallai by publishing the alleged defamatory statement and that both were motivated by malice.

[17] In the Amended Response to Civil Claim, the respondents denied that they had published the alleged defamatory statement and that, in any event, the impugned statement was not defamatory. It was their position that the "sting" from the statement was that Mr. Gichuru was a bully in pursuing an unfounded human rights complaint with impunity and that this was an honestly held opinion with which each of them agreed. In the alternative, they pleaded the defence of fair comment.

[18] During Mr. Mayzel's examination for discovery in September 2011, Mr. Gichuru learned of Mr. Shkanov's involvement with Mr. Mayzel and Mr. Pallai. When apprised of this information, Mr. Gichuru decided to add Mr. Shkanov as a further defendant to the action, claiming now that Mr. Shkanov had posted the alleged defamatory statement while acting as the respondents' agent. As with Mr. Pallai and Mr. Mayzel, he had no evidence to support this allegation.

[19] Mr. Gichuru made several unsuccessful attempts to locate and serve Mr. Shkanov with the application to add him as a defendant. Apparently,

Mr. Shkanov had moved to Isreal. On February 27, 2012, he obtained an order, without notice, for substitutional service; however, this order was not entered until April 4, 2012 and the application to add Mr. Shkanov was adjourned until June 20, 2012, some months after the date set for the summary trial.

The Summary Trial

[20] On April 11, 2012, counsel acting now for all of the respondents, renewed his R. 9-7 application to summarily dismiss Mr. Gichuru's claim. In the Notice of Application, the factual basis for the application was summarized as follows:

> 2. The defendants did not publish or authorize publication of the alleged defamatory posting. There is no evidence from the defendants or the plaintiff that anyone outside the lawsuit has ever read the posting. The defendants do not concede they are publishers or that the posting had the defamatory meaning.
>
> 3. Nevertheless, even if the words meant that the plaintiff is a bully, it is plainly protected by the defence of fair comment, as redefined in the landmark Supreme Court of Canada decision *WIC Radio Ltd. v. Simpson,* 2008 SCC 40, discussed below under "legal basis", such that the action should be summarily dismissed.
>
> 4. The plaintiff has admitted the term "bully" is a matter of opinion on which people may differ and that litigation can be used as a form of bullying.
>
> 5. The plaintiff has also admitted he has no evidence of anyone reading the posting other than himself and the defendant Pallai.

[21] The legal basis for the application was summarized in a manner that gave Mr. Gichuru express notice that, at the hearing of the summary trial application, he had to prove his claim of defamation or risk having it dismissed. The respondents summarized the legal basis for the first issue as follows:

> **Onus on a Summary Trial**
>
> This application is by way of summary trial pursuant to Rule 9-7, and notwithstanding that it is brought by the defence, it places the burden on the plaintiff to discharge his onus or have his action dismissed.
>
> *Miura v. Miura* (1992), 66 BCLR (2d) 345 (CA) at 352
>
> ("There is no reason why the onus should be reversed simply because the defendant moves for judgment under Rule 18A thus requiring the plaintiff to prove her case in a summary trial proceeding")

In the event that Mr. Gichuru was found to have met his burden, the respondents raised the defence of fair comment as an alternative legal basis for the dismissal of the action.

[22] In support of the application, the respondents swore affidavits denying that they: (i) had made or posted the alleged defamatory statement; (ii) had authorized anyone to make it; (iii) knew in fact who had made it; or (iv) had seen the posting on the Internet or knew anyone beyond the parties to the action that had done so. They further deposed that if the sting from the posting was found to be that alleged by the respondents, then they agreed with the opinion that a person who uses human rights proceeding to make a false accusation of racism was a bully. Both deposed that they did not wish to cause Mr. Gichuru any harm, did not bear him any malice, but simply wished he "would stop using litigation to harm [them] and leave [them] alone."

[23] At the hearing, Mr. Gichuru did not tender any evidence to establish that the respondents had posted or asked someone to post the alleged defamatory statement on their behalf. It was his position that the action was not suitable for determination by summary trial and that a conventional trial was required in order for the judge to understand the context in which the alleged defamatory posting gave rise to the sting he alleged, and for him to fully respond to the defence of fair comment. He also argued that he required more time to add Mr. Shkanov as a defendant to the action. Last, he submitted that he had not been given notice that the respondents intended to rely on the absence of evidence of publication to strike his claim and therefore he was not in a position to adduce evidence on that issue.

[24] The trial judge rejected each of these submissions. She was satisfied that the action was suitable for determination by summary trial. In her view there was sufficient evidence to make the necessary findings as to the meaning of the words of the impugned posting and its alleged sting and she found no conflict in the evidence that might require the receipt of oral evidence. She was also satisfied that Mr. Gichuru would not be prejudiced by proceeding with this mode of trial, as in her

view, the fact that Mr. Shkanov had not yet been added as a defendant would not impact her ability to determine the issues in regard to the respondents.

[25] The judge also found that Mr. Gichuru had received notice of the respondents' position on the threshold issue of publication in the factual and legal summaries contained in the Notice of Application, in the original and the amended Response to Civil Claim, and from Mr. Pallai's and Mr. Mayzel's affidavits in support of the summary trial application.

[26] The trial judge provided written reasons for judgment about a month after the hearing, in which she granted the respondents' application and dismissed Mr. Gichuru's defamation claim. She held that he had failed to discharge the onus on him as the plaintiff to prove publication of the alleged defamatory statement by the respondents, and found that, in any event, the respondents had established the defence of fair comment. See *Gichuru v. Pallai,* 2012 BCSC 693. In separate written reasons for judgment she awarded the respondents double costs of the action, relying on their written offer of settlement for $5,000 "all inclusive" that was delivered to Mr. Gichuru three months before the summary trial, and which offer had remained open for acceptance by Mr. Gichuru until the date of the judgment. See *Gichuru v. Pallai,* 2012 BCSC 1316.

Issues on Appeal

[27] I do not propose to address all of the issues raised by Mr. Gichuru on appeal, many of which renew his submissions at trial. In my view the deciding issues are: (i) whether the trial judge properly exercised her discretion in determining the action summarily; and (ii) whether she erred in finding that, in the absence of any evidence of publication of the alleged defamatory statement, Mr. Gichuru's claim must fail. I shall also address Mr. Gichuru's submission that the trial judge erred in awarding double costs to the respondents.

Analysis

Suitability and Nature of Summary Trials Generally

[28] A summary trial is governed by R. 9-7 of the *Supreme Court Civil Rules* (previously R. 18A of the *Supreme Court Rules*). Subrule (2) permits a party to an action, to which a Response to Civil Claim has been filed, to apply to the court for judgment under the rule, either on an issue or generally. In support or response to the application for a hearing by summary trial, subrule (5) provides that a party may tender evidence in a variety of forms: (i) affidavit; (ii) answers to interrogatories; (iii) examination for discovery transcripts; (iv) admissions; and (v) expert reports.

[29] The scope of a summary trial application is set out in R. 9-7(15) of the *Supreme Court Civil Rules*:

> (15) On the hearing of a summary trial application, the court may
>
> (a) grant judgment in favour of any party, either on an issue or generally, unless
>
> (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
>
> (ii) the court is of the opinion that it would be unjust to decide the issues on the application,
>
> (b) impose terms respecting enforcement of the judgment, including a stay of execution, and
>
> (c) award costs.

[30] In *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.), the court confirmed that the court under this rule "tries the issues raised by the pleadings on affidavits", that "a triable issue or arguable defence will not always defeat a summary trial application", and that "cases will be decided summarily if the court is able to find the facts necessary for that purpose, even though there may be disputed issues of fact and law" provided that the judge does not find "it is unjust to do so" (p. 211). In determining the latter issue (whether it would be unjust to proceed summarily), the Chief Justice identified a number of relevant factors to consider (at p. 215):

> In deciding whether it will be unjust to give judgment the chambers judge is entitled to consider, inter alia, the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, the course of the proceedings and any other matters which arise for consideration on this important question.

[31] To this list has been added other factors including the cost of the litigation and the time of the summary trial, whether credibility is a critical factor in the determination of the dispute, whether the summary trial may create an unnecessary complexity in the resolution of the dispute, and whether the application would result in litigating in slices: *Dahl v. Royal Bank of Canada et al.,* 2005 BCSC 1263 at para. 12, upheld on appeal at 2006 BCCA 369.

[32] All parties to an action must come to a summary trial hearing prepared to prove their claim, or defence, as judgment may be granted in favour of any party, regardless of which party has brought the application, unless the judge concludes that he or she is unable to find the facts necessary to decide the issues or is of the view that it would be unjust to decide the issues in this manner. This requirement was underscored by Madam Justice Newbury in *Everest Canadian Properties Ltd. v. Mallmann,* 2008 BCCA 275:

> [34] It is trite law that where an application for summary determination under Rule 18A is set down, the parties are obliged to take every reasonable step to put themselves in the best position possible. As this court noted in *Anglo Canadian Shipping Co. v. Pulp, Paper & Woodworkers of Canada, Local 8* (1988) 27 B.C.L.R. (2d) 378 (B.C.C.A.) at 382, a party cannot, by failing to take such steps, frustrate the benefits of the summary trial process. Where the application is brought by a plaintiff, the defendant may not simply insist on a full trial in hopes that with the benefit of *viva voce* evidence, 'something might turn up': see *Hamilton v. Sutherland* (1992), 68 B.C.L.R. (2d) 115, [1992] 5 W.W.R. 151 (B.C.C.A.) at paras. 66-7. The same is true of a plaintiff where the defence has brought the R. 18A motion. [Emphasis added.]

[33] Newbury J.A. discussed this issue in greater depth in *Brown v. Douglas,* 2011 BCCA 521 at paras. 29 and 30, which passages were relied upon by the trial judge (at para. 24):

> [29] I should also advert briefly to an argument made by the plaintiffs at the oral hearing of this appeal - that the summary trial judge should not have

proceeded at all under Rule 18A in the face of their lack of evidence as to what counsel referred to as "proof of damages". ... It was said that in the circumstances, the summary trial judge should have dismissed the defendants' motion for judgment and permitted the plaintiffs to address this matter on a later occasion. In this regard, the plaintiffs cited the comments of this court in *Placer Development Ltd. v. Skyline Explorations Ltd.* (1985), 67 B.C.L.R. 366, where Taggart J.A. described three options available to counsel faced with an application brought against his or her client under R. 18A. These options were:

> 1. He may agree that the case is an appropriate case for a summary trial and he may decide to seek judgment on the merits in favour of his client.
>
> 2. He may decide that it is a wholly inappropriate case for summary trial and he may decide to oppose the application for summary trial on the basis of material already filed and on the basis of additional material including affidavits that tend to show that the case is inappropriate for disposition under the rule.
>
> 3. He may decide that the case is an inappropriate case for summary trial but he may decide to file affidavits and other material tending to show that while it is not an appropriate case for summary trial, if there is to be a summary trial the judgment should be in favour of his client [At 384-5.]

The Court went on to observe that the language of what was then R. 18A(3) - more latterly, R. 18A(11) and now R. 9-7(11) - clothes the judge with a "broad discretion" to refuse to proceed where the judge is unable to find the facts necessary to decide the issues of fact or law or if it would be unjust to decide the issues.

[30] The authorities are clear, however, that (as counsel for the plaintiffs acknowledged at the hearing of this appeal) counsel acting on behalf of the respondent to an application for summary judgment who takes the second course described in *Placer* "runs a risk". This is the risk that the court will not agree that the case is not appropriate for summary trial and may give judgment against his or her client. This point was made in *Inspiration Management, supra,* where the Chief Justice observed at 214 that "There is no room in the proper construction of R. 18A for a respondent's veto." The point was also made at greater length in *Anglo Canadian Shipping Co. v. Pulp, Paper and Woodworkers of Canada, Local 8* (1988), 27 B.C.L.R. (2d) 378. There a plaintiff had sued for judgment under R. 18A, giving the defendant two months' notice of its application. The defendant did not examine the plaintiff for discovery within that period and on the day scheduled for trial, argued that it had been prevented from exploring arguments it might wish to make with respect to mitigation. The trial judge nevertheless granted judgment to the plaintiff under R. 18A and awarded damages of some $42,000. On appeal, this court rejected the defendant's argument that judgment should not have been granted. Lambert J.A. stated:

> In my opinion, the summary trial procedure contemplated by R. 18A cannot be open to being frustrated by one of the

> parties delaying the pre-trial procedures until it is too late for the summary procedure to use them effectively.
>
> I am not suggesting that there was any intentional delay in this case. But it must be the case that if adequate notice is given to an opposing party that a summary trial application is going to be brought on, there then falls on that party an obligation to take every reasonable step to complete as much of the pre-trial procedures as is necessary to put him in the best mastery of the facts that is reasonably possible before the summary trial proceedings are heard. He cannot, by failing to take those pre-trial procedures, frustrate the benefits of the summary trial rule.
>
> ... In my opinion, it is not in this case appropriate that the judgment be set aside, on the ground that sufficient facts were not available to one of the parties to lay before the court on the summary trial application. [At 381-2.; emphasis added.]

Anglo Canadian Shipping has been cited and applied by this court on many occasions: see, e.g. *Everest Canadian Properties Ltd. v. Mallmann* 2008 BCCA 275 at paras. 34; *Gilmour Estate v. Parchomchuk,* 2011 BCCA 207 at paras. 19; *Dixon v. British Columbia Snowmobile Federation,* 2003 BCCA 174 at para. 5; *Strathloch Holdings Ltd. v. Christensen Bros. Foods Ltd.* (1997), 29 B.C.L.R. (3d) 341 (C.A.) at para. 12.

[34] In summary, the jurisprudence is clear that, subject to certain guidelines, the decision as to the suitability of proceeding by way of summary trial to determine an action (or issue), is a discretionary one. Appellate deference is given to the exercise of discretionary powers in the absence of a clear conclusion that the discretion has been wrongly exercised, in that no weight or insufficient weight has been given to relevant considerations (see *Creasey v. Sweny* (1942), 57 B.C.R. 457 at 459 (C.A.); *Friends of the Oldman River Society v. Canada (Minister of Transport),* [1992] 1 S.C.R. 3 at para. 104; *Stone v. Ellerman,* 2009 BCCA 294, 92 B.C.L.R. (4th) 203 at para. 94, leave to appeal ref'd [2009] S.C.C.A. No. 364; and *Bell v. Levy,* 2011 BCCA 417 at para. 75), or it appears that the decision is clearly wrong and may result in an injustice (see *Taylor v. Vancouver General Hospital* (1945), 62 B.C.R. 42 at 50, [1945] 3 W.W.R. 510 (C.A.)).

[35] The authorities are also clear that a summary trial, although heard on affidavits in chambers, remains a trial of the action for which the plaintiff (even if not the applicant) retains the onus of proof of establishing his or her claim(s) and the

defendant (even if not the applicant) retains the burden of establishing any defence that is raised. Mr. Justice Wood, writing for the Court in *Miura v. Miura* (1992), 66 B.C.L.R. (2d) 345 (C.A.), clarified this issue (at page 352):

> There is no reason why the onus should be reversed simply because the defendant moves for judgment under Rule 18A, thus requiring the plaintiff to prove her case in a summary trial proceeding. ...
>
> ... the onus of proof does not shift simply because a trial is conducted summarily under rule 18A [now R. 9-7]. As in an ordinary trial, the party asserting the affirmative of an issue must prove it on a balance of probabilities. I believe that such a result is also consistent with what was said by McEachern, C.J.B.C. in *Inspiration Management et al. v. McDermid et al.* [citation omitted] at page 215 of the report:
>
> > The test for R. 18A, in my view, is the same as on a trial. Upon the facts being found the chambers judge must apply the law and all appropriate legal principles. If then satisfied that the claim or defence has been established according to the appropriate onus of proof he must give judgment according to the law unless he has the opinion that it will be unjust to give such judgment.

Indeed, the respondents gave express notice to Mr. Gichuru of his burden in the application by referring to the first paragraph of this passage in their summary of the legal basis for their application to strike Mr. Gichuru's action.

Application to this Case

[36] As a preliminary matter, Mr. Gichuru contends that he was prejudiced by the trial judge proceeding summarily to determine the action before Mr. Shkanov was added as a defendant. He submits that since Mr. Pallai's original 9-7 application was dismissed as being unsuitable because he was in the process of adding Mr. Mayzel to the action, this 9-7 application should have also been dismissed as unsuitable. In my view, this is not persuasive; the respective applications fell to be decided on situations existing at the different points in time. Furthermore, Mr. Gichuru provided no evidence to support his allegation about Mr. Shkanov, or any information as to what Mr. Shkanov might add to the denials of both Mr. Pallai and Mr. Mayzel that they had published or instructed an agent (which Mr. Gichuru now alleges was Mr. Shkanov) to publish the alleged defamatory statement. Mr. Gichuru's claim

against Mr. Shkanov is speculative at best, as were his allegations first, against Mr. Pallai, and then against Mr. Mayzel. I agree with the trial judge that based on the uncontradicted evidence before her, the situation at the time was such that Mr. Shkanov's participation in the trial was unnecessary to her determination of the liability of the respondents (para. 31).

[37] As to the suitability of a summary trial otherwise, there was a discrete threshold issue to be determined in this case that did not involve any issues of credibility, complexity or conflicting evidence, i.e., the issue of publication. If it could be determined, it would end the litigation and avoid the expense of a potentially lengthy trial. I can see no error in the trial judge's exercise of discretion to decide Mr. Gichuru's claim against the respondents summarily in these circumstances.

[38] At the summary trial, Mr. Gichuru had to prove his claim. The threshold issue of the publication element of the tort of defamation was front and centre for him to address. The respondents had raised it in their response pleadings, in their affidavits in support of both summary trial motions for judgment, and in the factual and legal summaries provided for in their Notice of Application. Mr. Gichuru's failure to produce any evidence that Mr. Pallai and Mr. Mayzel had published the alleged defamatory statement was a fatal blow to his claim, even if there was some evidence capable of supporting an inference that a third party had read the statement. In my view the trial judge's finding on this issue is unassailable.

The Award of Double Costs

[39] The action was conducted as fast-track litigation and therefore was subject to the costs provisions of R. 15-1(15) and (16) of the *Supreme Court Civil Rules*. Rule 15-1(15)(b) provides for maximum costs of $8,000 (exclusive of disbursements) on a hearing of a trial of one day or less. That is what occurred in this case.

[40] Subrule (16) provides that "[i]n exercising its discretion under subrule (15), the court may consider an offer to settle as defined in Rule 9-1". Rule 9-1(5)(b) provides that where an offer to settle had been made, "the court may ...award double costs of

all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle". Subsection (6) provides a list of factors a court may consider in making an order for double costs. They include whether the offer was a reasonable one that ought to have been accepted, the relationship between the offer to settle and the final judgment of the court, the relative financial circumstances of the parties, and any other factor the court considers appropriate.

[41] The respondents' offer to settle in the amount of $5,000 was compliant with the requirements of R. 9-1(c); that is, it was made in writing, was served on all parties of record, and contained the sentence "The [respondents] reserve the right to bring this offer to the attention of the court for consideration in relation to costs after the court has pronounced judgment on all other issues in this proceeding."

[42] The trial judge awarded the respondents double costs from the date of the offer to settle. She fixed the amount at $9,500. In doing so she found that the offer to settle was clear and unambiguous, had been delivered months before the summary trial, and was reasonable in light of the "fundamental weakness of the case both in terms of the issue of publication and in relation to the defence of fair comment" (para. 22). She also considered the material factors in subrule (6) and reviewed this Court's jurisprudence on awards of double costs generally (see *Hartshorne v. Hartshorne,* 2011 BCCA 29) and in regard to fast-track litigation particularly (see *Anderson v. Routbard,* 2007 BCCA 193).

[43] In these circumstances, I find no error in the judge's exercise of her discretion in the award of costs imposed.

Disposition

[44] In the result, I would dismiss the appeal from both orders.

"The Honourable Madam Justice D. Smith"

I AGREE:

"The Honourable Mr. Justice Hall"

I AGREE:

"The Honourable Mr. Justice Tysoe"

TAB 26

Citation: Golden Capital Securities v. Holmes, et al.
2001 BCSC 1487

Date: 20011029
Docket: C964230
Registry: VANCOUVER

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

GOLDEN CAPITAL SECURITIES LIMITED

PLAINTIFF

AND:

**O. BARRY HOLMES, NORTH SHORE AGGREGATES LTD.,
MICHAEL MITTON, also known as Michael Matt,
McLACHLAN BROWN ANDERSON HOLMES,
a partnership carrying on the practice of law,
JANET MARIE MITTON, CHERYL LYNN HOLMES,
ALFRED REMPEL, ALFRED KAMINSKI, CHARLES DIETRICH WIEBE,
B.B. & H.F. INVESTMENT CORPORATION LTD.
and VALLEY RIDGE INVESTMENT GROUP LTD.**

DEFENDANTS

PROCEDURAL RULING NO.1

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE EDWARDS

Counsel for the Plaintiff: J.B. McLean
S.B. Jackson

Counsel for the Defendant, Holmes: B.G. Baynham, Q.C.

Counsel for the Defendant, North Shore Aggregates Ltd. and Cheryl Lynn Holmes:	D.J.W. Hammond
Counsel for the Defendant, McLachlan Brown Anderson Holmes:	I.D. Mackie
Counsel for the Defendant, Alfred Rempel:	G.J. Dykstra
Date and Place of Hearing:	October 24-26, 2001 Vancouver, BC

[1] This is an action alleging tortious conspiracy in relation to securities trading.

[2] Mr. Baynham, counsel for the defendant Barry Holmes, objects to the plaintiff calling as a witness, Mr. Scott Young, who had dealings with defendants including Barry Holmes. The plaintiffs allege those dealings are evidence of the alleged conspiracy.

[3] It seems common ground that the evidence of Mr. Holmes and Mr. Young will diverge as to the details of their dealings. In other words, the credibility of both will be an issue.

[4] Counsel for the other defendants support Mr. Baynham's objection. The defendants' objection to Mr. Young testifying at the trial is based on the fact that plaintiff's counsel, Mr. Jackson, had Mr. Young swear an affidavit embracing at least part of his anticipated testimony. All counsel have seen the affidavit. It is not before the court.

[5] The practice of taking witness statements in sworn form was disapproved in a number of authorities which are referred to by Mr. Justice Fraser in ***Pierre v. Mount Currie Indian Band*** (1999) 61 B.C.L.R. (3d) 381.

[6] Fraser J specifically characterized this as a “side issue” in that case and noted that his observations about the practice were made without counsel being given the opportunity to comment on the authorities to which he referred.

[7] Fraser J also acknowledged that senior counsel before him were unaware of the “ethical rule” against the practice and assumed the Bar was generally unaware such a rule.

[8] I accept Mr. Jackson’s statement that he was unaware of what Fraser J referred to as the “ethical rule” when he prepared Mr. Young’s affidavit.

[9] Fraser J concluded it is “improper to have a prospective witness provide a statement under oath, before trial, if there is no intention to use it as primary evidence”. This is because binding a witness to a statement sworn before trial compromises society’s interest in obtaining truthful evidence at trial by setting up serious consequences for a witness who wishes to testify truthfully when the truth is in conflict with the sworn statement.

[10] Affidavits are normally crafted by lawyers. They are not the spontaneous statements of witnesses subject to immediate cross-examination. When affidavits concern controversial

matters they tend to present facts in a light favourable to the party on whose behalf they were prepared.

[11] When a witness is cross-examined on an affidavit, or examined under oath about the same subject matter, it is reasonable to anticipate the witness may adhere more tenaciously to the version of facts set out in the affidavit than might otherwise be the case. Cases quoted by Fraser J refer to the "impropriety of attempting to fetter the conscience" of a witness in this way.

[12] In disapproving this practice, Fraser J concluded that "perhaps these reasons will serve as a guide to the treatment of witnesses in future."

[13] This fettering of a witness's conscience potentially undermines the credibility of a witness's testimony at trial.

[14] A further consequence of the practice is that it potentially raises a number of collateral issues about how the affidavit was prepared and the extent to which the witness was helped to recall facts disclosed in the affidavit.

[15] If anything, the taking of the affidavit from Mr. Young compromised the plaintiff's case by opening avenues of inquiry on cross-examination with the potential to undermine his credibility.

[16] After taking the objection to Mr. Young testifying, Mr. Baynham advised the court that Mr. Hammond, counsel for Cheryl Holmes and North Shore Aggregates Ltd., had taken an affidavit from Mr. Ed Rempel, another prospective witness in the case, within the last few weeks.

[17] Cheryl Holmes is Barry Holmes wife. Ed Rempel is Barry Holmes father-in-law. Mr. Holmes had an interest in North Shore Aggregates Ltd.

[18] Mr. Ed Rempel has sworn two earlier affidavits in other actions. One of these was referred to in the plaintiff's opening as indicating Mr. Rempel's anticipated testimony at the trial.

[19] Mr. Rempel, counsel advised the court, would be a defendant in the case but for the fact he settled with the plaintiff and concluded an agreement to co-operate with the plaintiff in prosecuting this action.

[20] The court was further advised that Mr. Rempel is not under subpoena and is in Hawaii. Mr. Hammond advised the court he took the affidavit from Mr. Rempel because Mr. Rempel indicated he might not testify at the trial.

[21] I agree the practice of taking an affidavit from a prospective witness to "nail down" the witness's testimony at

trial is to be disapproved for the reasons expressed by Fraser J. However, I am not persuaded the court's disapproval must or should manifest itself in the remedy sought by the defendants, that is by the court refusing to hear Mr. Young's testimony. Neither the ***St. Pierre*** case nor the authorities referred to in that case indicate such a remedy is appropriate.

[22] The circumstances of this case indicate the potential for mischief if the court were to order that a witness who has sworn an affidavit in anticipation of testifying could not then testify. The result would be that a party could preclude a witness testifying by taking such an affidavit from the witness.

[23] The "ethical rule" applicable here is akin to the "rule", if there is one, that witnesses should not discuss their evidence with counsel while under cross-examination. Both are intended to prevent the compromise of a witness's credibility. On the rare occasions where these situations arise, the proper remedy cannot be that the court must disregard the whole of a witness's testimony. Rather, the court must weigh these circumstances in the balance when determining credibility and assigning weight to the witness's testimony.

[24] The defendants' application to prevent Mr. Scott Young from testifying at the trial is therefore dismissed.

"E.R.A. Edwards, J."
The Honourable Mr. Justice E.R.A. Edwards

TAB 27

1986 CarswellOnt 1869
Ontario Master

Hill v. Church of Scientology of Toronto

1986 CarswellOnt 1869, [1986] O.J. No. 2907, 1 A.C.W.S. (3d) 256, 6 W.D.C.P. 221

S. Casey Hill, Plaintiff and Church of Scientology of Toronto, Morris Manning CFTO-TV Limited, CTV Television Network Ltd., Tim Webber, Canadian Broadcasting Corporation, Canadian Newspapers Company Limited and Peter Moon, Defendants

Peppiatt Master

Judgment: October 27, 1986
Docket: 24079/84

Counsel: *Kent E. Thomson*, for Plaintiff, moving party.
D. Brown, for Defendant, Morris Manning, responding party.

Subject: Civil Practice and Procedure

Master Peppiatt:

Reasons for Decision

1 This is a motion to compel the defendant, Morris Manning, to answer certain questions upon his examination for discovery.

2 Some weeks before hearing of this motion I heard a similar motion also brought by the plaintiff to compel the representative of the defendant, Church of Scientology to answer certain questions upon his examination for discovery. In the written reasons for decision upon that motion I set out the facts and relevant facts and background of the action and need not repeat them here.

3 Questions 17 - 18, 56 - 8, and 60 - 1, seek information or communications to Mr. Manning from the defendant Church of Scientology, which was his client in respect of the events forming the cause of action. Mr. Manning, very properly claimed privilege on behalf of his client.

4 In normal circumstances I should have adjourned this part of the motion and directed that notice be given to the defendant church. However, on the previous motion the same issue was raised and fully argued by counsel for the Church and judgment is being released on that motion simultaneously with these reasons. I therefore considered it unnecessary to have the Church served.

5 I held in the earlier motion that the Church could not claim privilege because the pleadings put the issue of its reliance on legal advice in issue.

6 Counsel for Mr. Manning conceded that if I found that defendant Church had waived the privilege, Mr. Manning could not claim it the privilege, of course, being that of the client, not that of the solicitor. He went on, however, to object to certain of the questions upon the alternative ground that they were not relevant as between the plaintiff and the defendant Manning. This was contested by counsel for the plaintiff who took the position that evidence or information that might be useful as against the defendant Church could be elicited from the co-defendant Manning on his examination for discovery. Before turning to the specific questions I must deal with the general principles in that regard.

7 The obvious starting place is a consideration of the applicable portions of Rule 31.03(1) and 31.06 which is headed "scope of examination". The applicable words are as follows:

> 31.03(1) A party to an action may examine for discovery any other party adverse in interest once, and may examine that party more than once only with leave of the court, but a party may examine more than one person as permitted by subrules (3) to (8).
>
> 31.06(1) A person examined for discovery shall answer, to the best of his or her knowledge, information and belief, any proper question relating to any matter in issue in the action....

8 This may usefully be contrasted with the corresponding Rule of Practice which was Rule 326 as follows:

> 326(1) A party to an action, whether plaintiff or defendant, may, without order, be orally examined before the trial touching the matters in question by any party adverse in interest....

9 That rule has been interpreted as meaning that one party can only examine the other as to issues between them and may not ask questions concerning issues between the examining party and some other party. This is the effect of the judgment of Stewart J., in *Steinberg v. Regent Construction Co. et al*, [1966] 2 O.R. 864, in which His Lordship collected and reviewed the authorities. In that case, Mr. Steinberg had sued for damages for personal injuries which he suffered as a result of a motor vehicle accident while he was occupying the motor vehicle owned by his wife who was a co-plaintiff. She was not in the car at the time of the accident and claimed only for the damages to it. Counsel for the defendant sought to question her on discovery as to the injuries suffered by her husband. Mr. Justice Stewart said at page 865:

> The issue between Mrs. Steinberg and the defendants is simply whether or not they are liable in negligence for her damages and, if so, the quantum of such damages. She can be examined on all matters germane to the issue as I have outlined it, but is a party "adverse in interest" within the meeting of Rule 326(1) only to this extent. As to her husband's health, she is not strictly a party "adverse in interest" but only a witness either for or against her husband and cannot be examined for discovery.

10 This principle has recently been affirmed by White J., in *Guttman et al v. Wilson et al* (1984) 49. O.R. (2d) 279. Although His Lordship reached a different conclusion in that case he did not cast any doubt upon the correctness of the *Steinberg* decision but rather distinguished it upon the basis that the plaintiff husband, who was claiming damages pursuant to section 60 of the *Family Law Reform Act*, R.S.O. 1980 c.152, based his claim upon the physical injuries suffered by his wife and these were therefore relevant to the issue between him and the defendant.

11 The question, therefore, is whether the slightly different wording in the present rule has the wider meaning contended for by Mr. Thomson. In my view it does not. If one considers the purposes of discovery as summarized by Trainor J. in *Ontario Bean Producers Marketing Board v. W.J. Thompson & Sons (1981)* 32 O.R. (2d) 69, which are:

> (a) To enable the examining party to know the case he has to meet;
>
> (b) to procure admissions to enable one to dispense with formal proof;
>
> (c) to procure admissions which may destroy an opponent's case;
>
> (d) to facilitate settlement, pre-trial procedure and trials;
>
> (e) to eliminate or narrow issues and to avoid surprise at trial;

it is apparent that most of these, at least, cannot be obtained by questioning one defendant about issues that relate only to another defendant. Certainly any admissions made by one defendant will not be binding upon a co-defendant; what one defendant says will not eliminate or narrow any issues between the plaintiff and the co-defendant and what

the defendant being examined says about his co-defendant's case will have little or no effect on enabling the examining party to know the case he has to meet in respect of the co-defendant or facilitating settlement, pre-trial procedure or the trial with respect to the co-defendant and while it may help to avoid surprise at trial, a proper examination of the co-defendant will be far more fruitful in accomplishing that purpose.

12 What Mr. Manning says on his discovery will not be evidence against the Church of Scientology. I respectfully adopt the observation of Stewart J. to the effect that whatever Mr. Manning says in his capacity as a witness at the trial will be evidence for all purposes. That is a very different thing.

13 Moreover there is now a procedure for obtaining discovery from a non-party pursuant to Rule 31.10. For the purposes of that rule Mr. Manning would be regarded as a non-party and, if a proper case is made out, the court could grant leave to examine him under that Rule in aid of the case against the Church of Scientology. However, various safeguards are built into the Rule and I do not think these can be avoided simply because Mr. Manning is a co-defendant of the Church. It is therefore my opinion that he can only be examined on issues between himself and the plaintiff.

14 It is necessary to consider one more general principle as it applies to this action.

15 There is no doubt that the plaintiff has pleaded malice as against Mr. Manning. I have held that he has also pleaded malice against the Church. It will be remembered that counsel for the Church in his statement of defence and in argument before me unreservedly accepted responsibility on the part of the Church for whatever Mr. Manning said and its consequences.

16 It follows therefore that the Church will be effected by any malice that is proved against Mr. Manning. I do not think, however, that the converse is true. The Church will of course, be effected by any malice proved against it but Mr. Manning will not be effected by that unless he shared it and therefore also acted with malice. The principle to be applied to this motion, therefore, is that Mr. Manning may be asked any questions relating to his own malice and any questions relating to the Church's malice of which he had knowledge at the time of the alleged libel. Questions which bear upon any malice actuating the Church but which he discovered only after the press conference would not relate to any issue between him and the plaintiff and therefore would not be proper.

17 Turning then to the specific questions, question 17 which asks the terms of his retainer is a proper one. The defendant Church cannot claim privilege, and the precise terms of the retainer may go to prove malice of the Church which Mr. Manning shared.

18 Question 56, asks what documentation was given to Mr. Manning by the Church and Question 60 asks the information received from the Church's solicitor. Upon the same principle these questions must be answered. I wish to make it clear, in case I have not done so, that this relates only to events that took place before the press conference.

19 Question 72 asks why Mr. Manning did not wait for a reply to the letter that Mr. Ruby had written to the plaintiff's superior complaining of the actions which formed the basis for the contempt application and which were the subject of the press conference. Mr. Manning points out in his answer that involves the discussion that he had with the client and the client's other solicitors, but, as I have said, these are no longer privileged. The question is relevant to the issue of malice and must be answered.

20 Questions 127 to 136 relate to whether the Church had files relating to the plaintiff. I have ruled on the previous motion that these questions are relevant to the issue of malice as against the Church. However, their relevance as to malice against Mr. Manning is restricted to what he knew at the time of the press conference. They must therefore be answered but only in respect of what Mr. Manning knew up to that time.

21 Counsel agreed that the undertakings referred in paragraph (a) of the Notice of Motion were to be answered within 20 days, and also that questions 152 - 5 inclusive were to be answered and it is so ordered.

22 The main issue on this motion revolved around the question of privilege and Mr. Manning quite properly asserted it on behalf of his client who had not waived it, and, in fact had earlier asserted it in a motion which had not yet been decided. As to the other matters there has been divided success. I think therefore that this is not a case for costs.

End of Document

TAB 28

2011 BCCA 358
British Columbia Court of Appeal

Houston v. Kine

2011 CarswellBC 2233, 2011 BCCA 358, [2011] B.C.W.L.D. 7348, [2011] B.C.W.L.D. 7368, [2011] B.C.W.L.D. 7426, [2011] B.C.W.L.D. 7500, [2011] B.C.W.L.D. 7502, [2011] B.C.W.L.D. 7509, [2011] B.C.W.L.D. 7517, [2011] B.C.J. No. 1611, [2012] 1 W.W.R. 293, 206 A.C.W.S. (3d) 333, 22 B.C.L.R. (5th) 148, 309 B.C.A.C. 264, 340 D.L.R. (4th) 717, 523 W.A.C. 264

Melanie Catherine Houston (Respondent / Plaintiff) and Laura Anne Kine and Leslie Anne Williams (Appellants / Defendants)

Prowse, Newbury, Hinkson JJ.A.

Heard: May 19, 2011
Judgment: August 25, 2011
Docket: Vancouver CA038481

Proceedings: reversing *Houston v. Kine* (2010), 2010 CarswellBC 2419, 2010 BCSC 1289 (B.C. S.C.)

Counsel: P.M.E. Abrioux, J. Bye for Appellants
B.R. Findlay, M. Sandor for Respondent

Subject: Civil Practice and Procedure; Evidence; Property; Torts

APPEAL by defendants from judgment reported at *Houston v. Kine* (2010), 2010 CarswellBC 2419, 2010 BCSC 1289 (B.C. S.C.), allowing plaintiff's action and refusing to admit defendants' evidence.

Hinkson J.A.:

Introduction

1 This is an appeal from an award of damages for personal injuries arising from a motor vehicle accident that occurred on February 2, 2006, in Coquitlam, British Columbia. Liability for the accident was not in dispute.

2 The essence of the dispute between the parties was described by the trial judge at paras. 2-3 of her reasons for judgment:

> [2] The plaintiff alleges that she suffered multiple injuries in the accident including chronic pain in her upper neck and back which is activity related and restricts her range of motion in her neck; a significant lower back injury which causes chronic and constant pain which is likely life long, although there may be some improvement; and psychological injuries including a major depressive disorder, pain disorder, anxiety disorder and post traumatic syndrome disorder which is in partial remission.
>
> [3] The defendants assert that while Ms. Houston did suffer injury, the issue is the extent, severity and duration of that injury.

3 The trial judge awarded the following damages:

1	Non-pecuniary	$110,000.00
2.	Past wage loss	40,000.00
3.	Diminished earning capacity	275,000.00

4.	Cost of future care	100,000.00
5.	Special Damages	415.72
	Total	$ 525,415.72

Her reasons for judgment are indexed at 2010 BCSC 1289 (B.C. S.C.).

Grounds of Appeal

4 Two grounds of appeal are advanced:

a) That the trial judge erred in refusing to admit videotaped evidence and some *viva voce* evidence proffered by the defendants at the trial; and

b) That the trial judge erred in the assessment of all heads of damages, other than special damages.

The Evidentiary Ruling

5 The trial in this case was initially set for five days beginning October 26, 2009. By October 30, 2009, the plaintiff's case had not been completed, and the trial was adjourned until March 29, 2010. The trial resumed as scheduled, and on March 30, counsel for the defendants applied to introduce a video tape into evidence, and to call ten witnesses who had not been identified in his list of witnesses that he provided pursuant to an order by the trial judge made October 26, 2009. The trial judge explained what next occurred in her evidentiary ruling at Appendix A to her reasons for judgment (the "evidentiary ruling") at paras. 3-5:

> [3] During the hiatus, the defendants undertook surveillance of the plaintiff in two periods, the first between October 30 and November 1, 2009 where investigation operatives recorded the plaintiff's activities while she was in the Lower Mainland, (the "weekend video"); and the second between November 1 and November 6, 2009 when the operatives recorded the plaintiff's activities while she was holidaying in Mexico (the "Mexico video").
>
> [4] Counsel for the defendants describes the Mexico video as showing the plaintiff sitting on the beach and riding an ATV on the beach. He says that both videos will assist me by providing a comparison of the plaintiff's evidence and her courtroom demeanour where she appears to be in pain and have difficulty moving, with how she appears when she is preparing to go on vacation and how she appears while on vacation.
>
> [5] The defendants wish to call the operatives who observed the activity in the weekend video, but do not intend to put actual video into evidence. They wish to call eight or nine witnesses to address the plaintiff's activities that are recorded on the Mexico video and enter the video into evidence. The witnesses' evidence is intended to clarify items that may not be apparent on the video.

6 One of the witnesses who had been identified during the first week of the trial gave some evidence about the plaintiff's activities on the weekend of October 30, 2009. Before us, counsel for the defendants clarified that in addition to that witness, the defendants wished to call not only a witness who made observations of the plaintiff in Mexico, but eight or nine who made observations of the plaintiff on the weekend of October 31 to November 1, 2009.

7 The trial judge explained the objections of the plaintiff to the admission of the evidence at paras. 6-8 of her evidentiary ruling:

> [6] The plaintiff objects to the defendants calling the weekend video witnesses and to the defendants calling the witnesses to the Mexico video, as well as putting the Mexico video into evidence, because of their late disclosure. The Mexico video and notes of the contents of the video were disclosed by the defence on March 4, 2010, and the weekend video notes were disclosed on March 23, 2010 and the weekend video on March 26, 2010.

[7] The basis of the plaintiff's objection is that the defendants did not disclose the existence of the videos on a supplementary list of documents as required under R. 26(13) for both privileged and non-privileged documents, and thus the videos are not admissible at trial under R. 24. The plaintiff's second assertion is that the defendants did not provide "background materials" which include the letters of instruction, field notes, details about the investigators, the investigators' files, and cameras used to record the videos, and the editing program used to prepare the DVD and similar information.

[8] The third point the plaintiff makes is that the late disclosure of the videos and the backup material affects the plaintiff's ability to prepare for trial and to have the trial concluded in a timely way. She asserts that this week of trial was anticipated to conclude the trial. If the evidence is admitted, the plaintiff may have to be recalled, her medical experts may have to be recalled, and she may have to call other witnesses, which would lengthen the trial and probably necessitate scheduling further dates to conclude. She says the prejudicial effect of allowing the videos into evidence outweighs the probative value.

8 The trial judge ruled that the surveillance videos and evidence of the additional surveillance witnesses were inadmissible.

a) The Video Evidence

9 The defendants were in possession of the video evidence in early November, 2009. They did not provide a copy of the Mexico video to the plaintiff until March 4, 2010, and did not disclose that surveillance had been conducted or videotaping undertaken on the weekend of October 31, 2009, until March 23, 2010. A copy of the weekend video was not provided to the plaintiff until March 26, 2010. The trial judge reasoned firstly that, because the defendants had not disclosed "forthwith" the existence of the videos on a supplementary list of documents as required under Rule 26(13) of the *Supreme Court Rules*, B.C. Reg. 221/90, the videos were inadmissible, subject to her discretion to admit them under Rule 26(14).

10 As counsel for the defendants conceded, both Rules 26(13) and 40(13) apply to videotaped evidence. Rule 26(13) requires that, where it comes to the attention of a party who has delivered a list of documents that the list was inaccurate or incomplete, or a document relating to a matter in question in the action comes into the party's possession or control that should be included in the list of documents, that party shall deliver forthwith a supplementary list specifying the inaccuracy or document.

11 Rule 40(13) states that if a party wishes to enter an exhibit into evidence, the other party must have been given opportunity to inspect it at least seven days prior to the commencement of trial. This does not negate the party's responsibility to disclose the video on a list of documents in accordance with Rule 26. Therefore, even though the Mexico video was produced to the plaintiff seven days prior to the recommencement of the trial in accordance with Rule 40(13), the trial judge did not err in finding that the defendants were in breach of Rule 26(13), and then in proceeding to consider the exercise of her discretion under Rule 26(14).

12 In considering whether to exercise her discretion under Rule 26(14) to allow the video to be admitted into evidence, the trial judge referred at para. 15 of her evidentiary ruling to *Stone v. Ellerman*, 2009 BCCA 294 (B.C. C.A.), where the Court, at paras. 30-31, noted the four factors applicable to the exercise of discretion. When applied to this case, these factors can be described as:

a) whether the plaintiff would suffer prejudice if the use of the document was permitted;

b) whether there was a reasonable explanation for the failure to disclose the document;

c) whether excluding the use of the document would prevent the determination of the relevant issue on its merits; and

d) whether, in the circumstances of the case, the ends of justice require that the use of the document be permitted.

13 The trial judge considered each of these factors and declined to exercise her discretion to admit the Mexico video. Based on the brief summary of the Mexico video provided to her by the defendants, the trial judge concluded that its probative value was outweighed by the prejudice to the plaintiff and that refusing to admit the video would not prevent determination of the issues on the merits. She concluded that the plaintiff would be prejudiced by the admission of the video as the late disclosure had impaired her ability to prepare for trial and that admission of the evidence would necessarily extend the trial. She also found that the defendants had provided no reasonable explanation for the failure to comply with Rule 26(13). As a result she concluded that the ends of justice did not require that the video be admitted.

14 A decision on the admissibility or inadmissibility of evidence by a trial judge is entitled to considerable deference from this Court, provided that the decision is not premised on a wrong legal principle or the result of a palpable or overriding error.

15 The defendants contend that the trial judge erred in her consideration of the factors in Rule 24(14) as she determined, without viewing the Mexico video, that the prejudicial effect of allowing the video into evidence outweighed its probative value, and caused prejudice to the plaintiff. The defendants' position is that as the plaintiff had virtually completed her evidence before the video came into existence, no prejudice could result to her ability to prepare for trial and therefore the trial judge erred in her conclusion that its admission would prejudice the plaintiff on that basis.

16 While assessing the prejudice and the probative value of the Mexico video may have been more difficult without viewing the video, a finding of prejudice is not necessary in order to justify the exclusion of evidence where no satisfactory reason has been offered for the late disclosure. In this regard the trial judge set out at para. 11 of her evidentiary ruling the following passage from *Carol v. Gabriel* (1997), 14 C.P.C. (4th) 376 (B.C. S.C.), which was cited with approval by this Court in *Stone* at para. 32:

> [9] A party tendering a previously undisclosed document must establish to the court's satisfaction a justification for the failure to abide by Rule 26(14). The question of whether the opposite party will be prejudiced by the admission of the document is always relevant but is not, in and of itself, decisive. Even in cases where no prejudice will ensue from the admission in evidence of the document, it will be excluded unless there is a reasonable justification for the earlier failure to disclose it. To hold otherwise would be to dilute the disclosure obligation and tempt counsel to refrain from disclosing in situations where they do not expect any prejudice to result.

17 At trial, counsel for the defendants (not counsel on the appeal) advised the Court that failure to disclose the video as soon as it came into his possession was solely a tactical decision. As both of the videotapes were obtained after the plaintiff and her medical and functional capacity experts had completed their evidence, it is difficult to understand the reluctance on the part of counsel for the defendants to disclose the videotapes once he was in possession of them. The trial judge properly concluded at para. 13 of her evidentiary ruling that:

> The defendants' position that it is sufficient that the videos and background materials were disclosed in March 2010, before the recommencement of the trial does not address the requirement of the Rule in 23(13) that the disclosure be "forthwith." Not disclosing, as a matter of strategy, is not a satisfactory explanation to address the "forthwith" requirement.

18 It was open to the trial judge to conclude, as she did, that there was no reasonable explanation for the failure to disclose the Mexico video at an earlier time. The trial judge was also correct in observing that the trial length would be extended by the introduction of the Mexico video, but I do not see that that was a significant factor in her refusal to admit the videotape evidence. I am unable to find any error on the part of the trial judge in refusing to admit the videotape evidence, regardless of whether she erred in her conclusions on the issue of prejudice to the plaintiff.

19 The third and fourth factors in *Stone* would also have been difficult to assess without actually viewing the video; however, given the option of calling a witness who could comment on what might otherwise have appeared on the video, I am not persuaded that the trial judge's assessment of either of these factors was in error. I am therefore unable to

conclude that the trial judge erred in her refusal to admit the Mexico video, and I would not accede to the defendants' arguments on this point.

b) The viva voce evidence

20 The trial judge also refused to hear evidence about the plaintiff's activities during the hiatus in the trial, from other than the one witness who was identified during the first week of trial.

21 The trial judge gave two reasons for refusing to hear such evidence. Her first reason was that to do so would undermine her ruling that the videos themselves were inadmissible because the videos would necessarily be introduced in cross examination. Her second reason was that allowing witnesses to testify about the plaintiff's activities during the hiatus in the trial would undermine her previous order made at the outset of the trial, requiring the defendants' counsel to provide a witness list and contact information to counsel for the plaintiff.

22 I am unable to agree that either of the two reasons given by the trial judge justifies the refusal to permit the witnesses to give *viva voce* evidence as lay witnesses with regard to observations they made of the plaintiff.

23 Counsel for the defendants at trial advised the trial judge what evidence he intended to lead from the observation witnesses and why:

> MR. HULLEY: Yes. My intention is to do this. I want to cover from close of court on Friday, right through Mexico. And from close of court on Friday up to getting on the airplane, I have eye witnesses who will testify to what she did. That's my intention there.
>
> I, I have just made a decision not to, to, to put in the videotape.
>
> . . .
>
> [Counsel for the plaintiff has] that and they can test, to the extent that they want to test the veracity of these witnesses against the videotape, they have the videotape in hand, even though I do not intend to show it. I simply intend to put in viva voce evidence with respect to that.
>
> . . .
>
> The evidence I have chosen to call, because I have the right to determine what evidence I want to put in as part of my case, I've chosen to put in the Mexico video and I've chosen to put in the viva voce of the eye witnesses from Friday and Saturday:
>
> If — as I say, I don't have any evidence from the airplane and I don't understand how a matter of continuity is somehow relevant, but to the extent that it is relevant and my friend wants to make the argument, they can deal with that by way of, of reply evidence.
>
> . . .
>
> Yes. Well, in my submission, they're not expert witnesses. What are they? They're lay witnesses. They may have been retained by the defendant to go out and see what it was that the plaintiff was doing, but once they have done that, you know, I mean, their, again, their credibility can be attacked, if that's what they want to do and say that they're biased. However my friend wants to try and impeach their credibility, they can go about it in the way that you always do with lay witnesses, and they can try to do that.
>
> But what I intend to do is to put an individual on the stand who will swear to tell the truth and then they will recite what they saw the plaintiff doing. They are lay witnesses who are going to testify to what they saw. And notice other

than this — you know, notice was given of these people except for the exceptions that my friend — and I admit that that happened as an oversight and I have suggested ways to cure that.

But it's my submission that, given that this evidence is probative and, and relevant, that, that the answer is not to exclude it for procedural reasons, but to seek a procedural method of curing it, to the extent that that needs to be done. Those are my submissions.

24 It is apparent from her colloquy with counsel at the time when the defendants applied to call the observation witnesses that the trial judge was of the view that the evidence of those witnesses was important to the defendants' case. The following exchange took place between the trial judge and counsel for the plaintiff:

THE COURT: I just don't know that there is any rule that I can prevent the defence from calling witnesses who observed something. I mean, if you, if you need time to investigate it, I can address that. But do I restrict the defence from, from calling evidence of somebody who observed the plaintiff?

MS. SANDOR: Well, I, I don't know —

THE COURT: I don't know the basis that I can do that.

MS. SANDOR: I don't have authority for the proposition that, because this is a paid person to stand on the corner and watch the plaintiff, that we can exclude them. All I can say is look at what was reguired to be disclosed. We have been prejudiced in our ability to prepare it.

What's the remedy? Well, we can put the plaintiff back on the stand. We can adjourn. We don't want to do that. We want to finish the case. What's the remedy? The remedy is not to allow them to use indirectly what they couldn't use directly and that's, that's the video. I mean —

THE COURT: But you have the video. And then they're calling — I recognize there's the lateness problem. I just don't know of any rule, and I'm sorry to be arguing with you, but, but I'm hitting a — I'm not sure how I can find for you in, in respect of the weekend witnesses. I don't know of any authority that says, "I'm sorry, defendant, you can't, you can't call an eye witness." Even if they did have a, a video camera in front of them.

MS. SANDOR: Well, all I can say to that, and I don't want to get into an argument about it, I've said my position on this, is that —

THE COURT: Right.

MS. SANDOR: — is that in the interests of fairness, there was an order to disclose. There wasn't appropriate disclosure. There was late disclosure. We still don't have the notes. We still don't have the field notes. Now there is a new witness again today. I think at some point in — what's, what's the prejudice to the defendant here? We keep looking at — what happens if we exclude those weekend witnesses? Well, he's already put somebody on about the moving weekend. He's done that.

THE COURT: Well, no, he's saying, "I need this evidence" and, and he doesn't have to convince me that, that he will be prejudiced without it. I assume that, that Mr. Hulley has made a, a reasonable conclusion that this is important for the defendants' case and that seems to me sufficient.

MS. SANDOR: Well, it's caused problems for the plaintiff in terms of preparation. It's contrary to the orders made by this court and my friend —

THE COURT: Well, what's contrary to orders made by this Court?

MS. SANDOR: This court — well, first of all, there is the rules that they're required to produce this documentation on a list of documents.

THE COURT: Yes, I understand the document, but I am moving on to the witness now.

MS. SANDOR: Well, they were to advise us the notice of the witnesses.

THE COURT: Yes.

MS. SANDOR: And that was the 23rd or the 24th or the — it was last week.

THE COURT: But I didn't say they had to provide by any particular time and, and —

MS. SANDOR: Well —

THE COURT: — or that even if it wasn't listed, it was — that they would be prevented from calling the witness. I just — I don't —

MS. SANDOR: Well, I think what's, what's happened then, is I think the defendant has violated some pretty fundamental rules under the Rules of Court, and by allowing the documentary evidence, the DVDs, in allowing that in, is basically tearing out the guts of the rules, in my view. I think it's completely, if I could use the term, emasculated them. They're there, but no one follows them and what's the point.

THE COURT: Well, I, I —

MS. SANDOR: That might be a bit — a little — the pregnant prose there aside —

THE COURT: That might be — it's a bit hyperbolic.

MS. SANDOR: Yeah, I, I agree.

THE COURT: But the rules provide for disclosure, but not for exclusion of witnesses.

. . .

MR. FINDLAY: If he put the witnesses on, the videotape is going in. It's that simple. We will have no choice but to play the video to these witnesses. I have no choice but to do that because that's what they observed.

And frankly, your ladyship does have the power and the authority to control your courtroom when the probative value of the evidence is so minimal as to be outweighed by the amount of time that it's going to take to call it. We will end up with an adjournment. I have no difficulty with your ladyship taking the time to briefly review the videotapes and determine for yourself whether or not the probative value —

THE COURT: Well, that is true, I can't —

MR. FINDLAY: — in fact, —

THE COURT: I can't —

MR. FINDLAY: — made sense.

THE COURT: — assess the probative value and the prejudicial effect without actually having a look at them.

MR. FINDLAY: Exactly.

THE COURT: I mean, that's something — I am assuming that they're important to the defendants' case and I am assuming that they're important to the plaintiff's case in —

MR. FINDLAY: Yes, well, some points of it will —

THE COURT: — a negative sense.

MR. FINDLAY: — actually be quite helpful. But I'm quite content —

THE COURT: No, in a negative sense.

MR. FINDLAY: Yes.

THE COURT: I mean, I know that the defendant wants them in and you want them out, so.

MR. FINDLAY: My real concern is the time. We will not finish this trial if all of this evidence goes in. It cannot be done. We have over five hours of video evidence that will have to be dealt with, and frankly, the probative value to that is so utterly minimal in this case —

THE COURT: And that, I just can't —

MR. FINDLAY: — as to outweigh the time.

THE COURT: I just can't comment on that.

MR. FINDLAY: No. You would need to view the actual DVDs. And I am quite content to let your ladyship, to take the afternoon break to, in fact, take that look and make your own determination of whether or not the probative value outweighs the prejudicial effect. And the prejudicial isn't the evidence itself. It's the amount of time we're going to be wasting because we won't finish this trial. That's my concern.

. . .

... videotape is — the videotape is an augmentation, it is a recording of what was seen that someone can come along and say, "Yes, that, that's what I saw. My, my testimony is this, that that person went to that place and I saw them do it and this videotape accurately records what I saw." That's the evidence.

And I then have a choice, depending upon how I choose to run my case, as to whether or not I put a witness up to say, "I saw person X walk through that door" or I put a videotape up showing them walking through that door and someone says, "Yes, that's a recording of what I saw."

Now, with respect to —

THE COURT: Well, the difference is, if you have a recording of it, you have to disclose it.

25 Despite these comments by the trial judge, with which I agree, she refused to admit the *viva voce* evidence of the observers. It does not appear that in doing so, she turned her mind to whether the exclusion would prevent the determination of the issue of the plaintiff's credibility on its merits or whether, in the circumstances of the case, the ends of justice required that the evidence be admitted.

26 At para. 64 of her reasons for judgment, the trial judge identified the credibility of the plaintiff and other witnesses as one of three particular factors for analysis. After discussing the competing evidence that might affect her credibility the trial judge concluded that the plaintiff was credible. The evidence sought to be admitted was relevant to the plaintiff's

credibility, with particular emphasis on her credibility as to her condition at the time of trial, relative to her claims for future diminished earning capacity and future cost of care.

27 The trial judge was correct in her dialogue with counsel for the defendants in stating that she understood the argument relating to the videos, but having made a ruling with respect to the videos, she should have moved on to the proposed *viva voce* evidence as a separate issue. While the videotapes were the best evidence that might have been tendered on the plaintiff's physical abilities during the hiatus in the trial, the option of calling the observers to give evidence remained, even if the videotapes were inadmissible. The first reason given by the trial judge for refusing to allow the defendants to call the *viva voce* evidence, that to do so would undermine her ruling that the videos were inadmissible, is incorrect.

28 Once the Mexico video was found to be inadmissible, the best evidence available was the *viva voce* evidence of the witnesses. At para. 24 of her ruling, the trial judge recognized that "there is no restriction on calling lay witnesses with regard to observations they may have had of the plaintiff", but said that the failure by the defendants to make earlier disclosure of their intention to call the observers prejudiced the plaintiff both in preparation for trial and by the consequent delay of the conclusion of the trial.

29 The trial judge also referred to her order, made at the outset of the trial, that the defendants disclose the names of the witnesses they intended to call. She observed that while the defendants had provided a witness list that referred to the witnesses as "Witness one, Witness two" etc., this was insufficient, and she ordered the defendants to disclose names and contact numbers of the witnesses. In so doing she expressly stated that one of her reasons was to prevent surprise or ambush and to allow both counsel the opportunity to prepare in advance with full knowledge of the intended witnesses.

30 In her comments to counsel for the plaintiff at the time of the application to call the observation witnesses, the trial judge said:

> ... but if the defence intends to call eye witness evidence rather than the video, and I did say when, when I ordered the defence to disclose the list of witnesses, that we don't use that as, as a basis for excluding further witnesses, if there are, I was quite general about the requirement of the will say statements and certain of the rules don't require a will say statement. I, I added that. I, I am not sure how your position affects the defendants' ability to just call evidence about what happened between — what was observed by, by a witness between October — on the October/ November weekend.

31 The obvious difficulty with the *viva voce* evidence was that the observers were unknown to the defendants prior to the hiatus in the trial. The earliest that they could have been identified was in November of 2009. By then, the plaintiff's preparation for trial was all but over. To constrain the defendants' ability to react to the plaintiff's evidence to "prevent surprise or ambush" in my view unfairly restricted their ability to have the proceeding determined on its merits. As the trial judge accepted that there was no restriction on calling lay witnesses, she erred in imposing that restriction respecting witnesses who could comment on the plaintiff's activities during the hiatus in the trial.

32 The trial judge's second reason for refusing to allow the observation witnesses to testify was that:

> It would be inconsistent with my previous order and with the objects of the Rules, expressed in R. 1(5), "to secure the just, speedy and inexpensive determination of every proceeding on its merits," to allow the defendants to, in effect, ambush the plaintiff with this evidence, which has been disclosed only recently.

33 In my view the trial judge here misapplied Rule 1(5), focussing on speed in the completion of the proceedings at the expense of their merits. The Rule and the third factor in *Stone* emphasize the importance of the determination of a proceeding on its merits. In order to determine a proceeding on its merits, the admissible evidence that is tendered by a party and is relevant to matters in issue should be considered.

34 In addition, given that the original trial estimate was exceeded by the plaintiff's case, necessitating the adjournment of the trial that caused the hiatus that brought about the acquisition of new evidence by the defendants, I am unable to accept that the delay resulting from the proposed evidence should have been treated any differently from the delay that was occasioned by the initial inadequate trial time estimate. The failure to do so prevented the determination of these proceedings on their merits. I conclude that the trial judge erred in law in refusing to permit the witnesses to give *viva voce* evidence at the trial.

Resolution

35 In *Dykeman v. Porohowski*, 2010 BCCA 36 (B.C. C.A.), after finding that the trial judge improperly permitted the use of the documents in cross examination, Madam Justice Newbury commented at para. 44:

> The final question is whether a new trial must be ordered. Although retrials are not to be ordered unless the interests of justice plainly require it (see *Arland v. Taylor*, [1955] 3 D.L.R. 358 at 364-5, [1955] O.R. 31 (C.A.), recently discussed in *Knauf v. Chao*, 2009 BCCA 605)), this is not an appeal in which the quantum of an award is all that is at issue ...

36 Here, the credibility of the plaintiff was a critical factor in the trial judge's assessment of quantum, and the evidence of the observers was intended to directly address the plaintiff's credibility. In my view, the refusal of the trial judge to permit the defendants to adduce evidence to challenge the plaintiff's physical abilities at the date of the trial was unfair, and given the importance of this evidence to the ultimate award of damages for future diminished earning capacity and future cost of care, I see no alternative but to order a new trial on damages. I would thus allow the appeal and order a new trial.

The Assessment of Damages

37 As there will be a new trial, it is unnecessary to address the second ground of appeal, and I think it best not to do so lest my comments complicate the new trial.

Costs

38 The usual rule is that a successful party is entitled to the costs of an appeal: *Court of Appeal Act*, R.S.B.C. 1996, c. 77, s. 23.

39 Despite the disposition of this appeal, I am satisfied that this is an appropriate case in which to award the plaintiff her costs in this Court. The defendants' choice at trial to withhold the existence of the videotapes from the weekend of October 31, 2009, and from Mexico, was inappropriate, and placed the plaintiff in a position that she ought not to have faced. While I have concluded that the trial judge erred in refusing to hear *viva voce* evidence from those who observed the plaintiff during the hiatus in the trial, it is my view that the genesis of the appeal must be placed upon the tactical decision made by the defendants, and thus obliges them to face all of the costs consequences of that decision.

***Prowse J.A.*:**

I agree:

***Newbury J.A.*:**

I agree:

Appeal allowed; new trial ordered.

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TAB 29

THE IMPERIAL LIFE ASSURANCE COMPANY OF CANADA (*Defendant*) — APPELLANT;

AND

SEGUNDO CASTELEIRO Y COLMENARES (*Plaintiff*) ..... — RESPONDENT.

1966 *Oct. 14, 17, 18

1967 May 23

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Conflict of laws—Contract—Insurance—Proper law of contract—Factors considered in determination thereof.

Two policies of insurance on the life of the plaintiff were issued through the defendant's branch office in Havana, Cuba, in 1942 and 1947 at a time when the plaintiff was resident and domiciled in that country. The plaintiff had applied for the policies in Cuba and in his applications he agreed, *inter alia,* that the policies should take effect upon delivery. The offers in the applications were irrevocable and the plaintiff specifically agreed to accept the policies if any when they were issued. The applications were addressed to the head office of the company at Toronto and were prepared at that office, where the policies were also prepared. The policies, although written in Spanish, were in the standard Ontario form. Their cash surrender value was payable in American dollars and it was required that the request for such payment be made in writing to the head office.

The plaintiff later became a resident of the United States and in 1961 he applied for payment of the cash surrender value of his policies. Payment of the cash surrender value in dollars to a person resident in the United States was an offence contrary to the Foreign Exchange Contraband Law of Cuba, unless permission was given by the National Bank of Cuba. The question at issue was whether the proper law of the insurance contracts was the law of Ontario or the law of Cuba. The claim was allowed by the trial judge and an appeal by the defendant was dismissed by the Court of Appeal, one member of the Court dissenting. The defendant, with leave, further appealed to this Court.

Held: The appeal should be dismissed.

The contracts were made when the initial irrevocable offers contained in the plaintiff's applications were accepted by the mailing of the policies from the defendant's head office in Toronto. The fact that the parties agreed that the policies were not to become effective until certain conditions were fulfilled in Cuba did not alter the place where that agreement was made. However, the place where the contract was made was not decisive in determining the proper law of a contract. That problem was to be solved by considering the contract as a whole in light of all the circumstances which surrounded it and applying the law with which it appeared to have the closest and most substantial connection.

While it was doubtful as to whether the proper law of a contract of life insurance is necessarily the country in which the head office of the

*PRESENT: Cartwright, Fauteux, Martland, Ritchie and Spence JJ.

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insurer is situated, in the present case it was significant that the actual decision to "go on the risk" was made at the head office in Toronto and could not have been made in Havana.

The fact that both the applications and the policies were prepared in Ontario in a common, standard form which complied with the law of that Province, was of preponderating importance in determining the law governing the contracts. It was a reasonable inference that a person applying for insurance on a form prepared at the head office of an Ontario company would anticipate that the policies would be governed by the law of Ontario. Furthermore, the form of the policies which were issued in the present case evidenced the fact that the insurer intended to be governed by that law.

North American Life Assurance Co. v. Elson (1903), 33 S.C.R. 383; *Milinkovich v. Canadian Mercantile Insurance Co.*, [1960] S.C.R. 830; *Household Fire & Carriage Accident Insurance Co. v. Grant* (1879), 4 Ex. D. 216; *Bonython v. Commonwealth of Australia*, [1951] A.C. 201; *Tomkinson v. First Pennsylvania Banking and Trust Co.*, [1961] A.C. 1007, applied; *Pick v. Manufacturers' Life Insurance Co.*, [1958] 2 Lloyd's Rep. 93; *Rossano v. Manufacturers' Life Insurance Co.*, [1963] 2 Q.B. 352, considered.

APPEAL from a judgment of the Court of Appeal for Ontario[1], dismissing an appeal from a judgment of Stewart J. Appeal dismissed.

B. J. MacKinnon, Q.C., and *B. A. Kelsey*, for the defendant, appellant.

Joseph Sedgwick, Q.C., and *G. Langille*, for the plaintiff, respondent.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal brought with leave of this Court from a judgment of the Court of Appeal for Ontario[1], (Porter C.J., dissenting) dismissing an appeal from a judgment of Mr. Justice Stewart whereby he awarded the respondent the sum of $8,744.22, being the equivalent in Canadian currency of the cash surrender value, payable in American dollars, of two policies of insurance on the life of the respondent which were issued through the appellant's branch office in Havana, Cuba, in 1942 and 1947 at a time when the respondent was resident and domiciled in that country.

The sole question at issue in this appeal is whether the proper law of the contracts of life insurance is the law of Ontario or the law of Cuba. In this regard the parties are

[1] [1966] 1 O.R. 553, 54 D.L.R. (2d) 386.

agreed that if the proper law of the contracts is found to be that of Ontario, the respondent is entitled to succeed, but that if the law of Cuba applies, unless permission has been granted by the National Bank of Cuba, the payment of the cash surrender value in dollars to a person resident in the United States, as the respondent is and was in September 1961 when he surrendered the policies, would be an offence contrary to the Foreign Exchange Contraband Law of Cuba.

The circumstances giving rise to this litigation have been thoroughly reviewed in the Courts below and they are not in dispute, but a brief résumé of the essential facts is, in my opinion, necessary to any intelligible discussion of the law applicable thereto.

The two policies here in question were in identical terms and they were both written in Spanish, which is the language of Cuba, for delivery by the appellant's Cuban agent to the respondent who was then a Cuban national and who had made application for the policies in Cuba pursuant to an application form by which he agreed, *inter alia:*

> That any policy granted pursuant hereto shall take effect only upon its delivery and upon payment of the first premium thereon in full, to be vouched for by the Company's printed official receipt duly countersigned and provided that upon such delivery and payment there shall have been no material change in my health or insurability since the completion of part 2 of my application.

The respondent's offers as contained in his applications for these policies were by their terms irrevocable and he specifically agreed to accept the policies if any when they were issued. Before delivery the policies were duly authenticated before a Notary in accordance with the law of Cuba.

It is contended on behalf of the appellant, on the basis of these facts, that the contracts were made in Cuba and are governed by the law of that country.

On the other hand, it is pointed out by the respondent that the applications were addressed to "The Imperial Life Assurance Company of Canada, Head Office, Toronto, Canada" and were prepared at that office, where the policies were also prepared and that, although these policies were written in Spanish, they were drawn in the common, standard form as used in the Province of Ontario and in conformity with the laws of that Province. These policies stipulated that they could not be varied except by writing

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IMPERIAL LIFE ASSURANCE CO. OF CANADA v. COLMENARES

Ritchie J.

thereon signed at the head office of the company by two of its executive officers and that any interlineations, additions or alterations had to be attested by two of the said officers. It is also to be noted that all payments under the policies, whether to or by the company, were required to be made "by bank draft drawn on New York payable in legal currency of the United States of America" and although it is true that many of the premiums were paid in pesos in Cuba, I think it to be apparent that at the time when the contracts were made it was contemplated that the cash surrender value would be payable in American dollars and it is made clear in the policies themselves that the request for such payment was required to be made in writing to the head office of the company at Toronto.

It is submitted on behalf of the appellant that the determination of the proper law applicable to these contracts is governed by the fact that they were made in Cuba, but I am by no means satisfied that they were so made. I am, on the other hand, of opinion that the time of the making of the contracts was when the initial irrevocable offers contained in the respondent's applications were accepted by the mailing of the policies from the appellant's head office in Toronto. (*See North American Life Assurance Co. v. Elson*[1], *per* Davies J. at p. 392 and *Milinkovich v. Canadian Mercantile Insurance Co.*[2], *per* Fauteux J. at pp. 835 and 836).

The respondent's applications by their terms provided that they were not to be effective until fulfilment of certain conditions which I have set out above and which are almost identical with those required of all contracts of life insurance in Ontario unless the application otherwise expressly provides to the contrary. This appears from the provisions of s. 139(1) of *The Insurance Act*, R.S.O. 1937, c. 256, which reads as follows:

> 139. (1) Unless the contract or the application otherwise expressly provides, the contract shall not take effect or be binding on either party until the policy is delivered to the insured, his assign, or agent, or the beneficiary named therein and payment of the first premium is made to the insurer or its duly authorized agent, no change having taken place in the insurability of the life about to be insured subsequent to the completion of the application.

[1] (1903), 33 S.C.R. 383.

[2] [1960] S.C.R. 830.

The policies here in question both contain the following provision:

> This policy and the applications herefor, a copy of which is attached hereto, taken together shall constitute the entire contract between the parties.

It is thus apparent that although the policies did not become effective until the conditions above referred to were fulfilled, which in fact occurred in Cuba, these conditions were themselves a part of "the entire contract between the parties" which in my opinion was concluded when the policies were mailed in Toronto. The fact that the parties agreed that the policies were not to become effective until conditions were fulfilled in Cuba did not alter the place where that agreement was made. It has long been recognized that when contracts are to be concluded by post the place of mailing the acceptance is to be treated as the place where the contract was made. As was said by Thesiger L.J. in *Household Fire & Carriage Accident Insurance Company v. Grant*[1]:

> ... as soon as the letter of acceptance is delivered to the post office, the contract is made as complete and final and absolutely binding as if the acceptor had put his letter into the hands of a messenger sent by the offerer himself as his agent to deliver the offer and receive the acceptance.

In the course of his dissenting reasons for judgment in the Court of Appeal, the Chief Justice of Ontario advanced the view that because the policies themselves contained certain restrictive provisions relating to war and air travel which were not mentioned in the applications, it followed that the contracts were not concluded by the mailing of these policies. This ground was not relied on by the appellant and with the greatest respect I do not think that under the circumstances the additions to the policies to which the learned Chief Justice refers have the effect of changing the place where the contract was made from the place of acceptance to that of delivery.

I am, however, in agreement with Mr. Justice MacKay who observed in the course of the reasons for judgment which he delivered on behalf of the majority of the Court of Appeal that:

> The place where the contract was made is not by any means decisive in determining the question of what law is applicable to the contract.

[1] (1879), 4 Ex. D. 216 at 221.

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Ritchie J.

It now appears to have been accepted by the highest Courts in England that the problem of determining the proper law of a contract is to be solved by considering the contract as a whole in light of all the circumstances which surround it and applying the law with which it appears to have the closest and most substantial connection.

This test was adopted by the Privy Council in *Bonython v. Commonwealth of Australia*[1], where Lord Simonds said at p. 219:

> ... the substance of the obligation must be determined by the proper law of the contract, *i.e.*, the system of law by reference to which the contract was made or that with which the transaction had its closest and most real connexion.

This approach to the problem was restated in the House of Lords in *Tomkinson v. First Pennsylvania Banking and Trust Co.*[2], *per* Lord Denning at p. 1068 and Lord Morris of Borth-y-Gest at p. 1081.

The many factors which have been taken into consideration in various decided cases in determining the proper law to be applied, are described in the following passage from Cheshire on Private International Law, 7th ed., p. 190:

> The court must take into account, for instance, the following matters: the domicil and even the residence of the parties; the national character of a corporation and the place where its principal place of business is situated; the place where the contract is made and the place where it is to be performed; the style in which the contract is drafted, as, for instance, whether the language is appropriate to one system of law, but inappropriate to another; the fact that a certain stipulation is valid under one law but void under another; ...the economic connexion of the contract with some other transaction; ... the nature of the subject matter or its *situs*; the head office of an insurance company, whose activities range over many countries; and, in short, any other fact which serves to localize the contract.

In referring to the location of the "head office of an insurance company whose activities range over many countries" as a factor to be taken into account in determining the proper law of a life insurance contract, the learned author cites as his authority the cases of *Pick v. Manufacturers' Life Insurance Company*[3], and *Rossano v. Manufacturers' Life Insurance Company*[4], both of which have been extensively reviewed in the Courts below, but he expresses doubts, which I share, as to whether they afford

[1] [1951] A.C. 201.
[2] [1961] A.C. 1007.
[3] [1958] 2 Lloyd's Rep. 93.
[4] [1963] 2 Q.B. 352.

justification for the general proposition that the proper law of a contract of life insurance is necessarily the country in which the head office of the insurer is situated.

In the present case, however, in my view, the significance of the location of the head office of the appellant company is underscored by the fact that the evidence makes it quite plain that the actual decision to "go on the risk" was made there and could not have been made in Havana. In this regard, in the course of his cross-examination, the appellant's general manager gave the following answers:

> Q. We are clear that when the application was made in Havana it was a head office decision whether it could go on the risk?
> A. Yes.
> Q. And that decision could not be made in Havana?
> A. No.

While it is clear that all relevant circumstances surrounding the making of a contract are to be given due weight in determining the locality with which it is most closely associated, I am of opinion that in the present case the fact that both the applications and the policies were prepared in Ontario in a common, standard form which complied with the law of that Province, is to be regarded as of preponderating importance in determining the law governing the contracts.

I think it to be a reasonable inference that a person applying for insurance on a form prepared at the head office of an Ontario company would anticipate that the policies which he was to receive would be governed by the law of that Province, and I think that the form of the policies which were issued in the present case evidences the fact that the insurer intended to be governed by that law.

For these reasons, as well as for those which have been so fully stated in the reasons for judgment of Mr. Justice MacKay, I am of opinion that the proper law of these contracts is the law of Ontario.

It would not be proper to leave this matter without making reference to the alternative argument advanced by Mr. Sedgwick on behalf of the respondent which was based on the case of *Varas v. Crown Life Insurance Company* (Superior Court of Pennsylvania, October term 1964) and which was to the effect that even if other parts of the policy were governed by Cuban law the option to take the

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Ritchie J.

cash surrender value of the policy was an irrevocable offer which was accepted in Ontario and that, treating this phase of the contract separately, it was to be regarded as governed by the law of that Province. It is true that the *Varas* case affords some authority for this proposition, but it appears to me that there is nothing in the circumstances of the present case to support the unprecedented proposition that the proper law of a continuing contract can shift from time to time. The proper law of these contracts is to be determined as of the date when they were made.

Mr. Sedgwick also advanced the argument that as the appellant has always admitted the validity of the contract and its liability thereunder and the sole question at issue is whether the law of Ontario or the law of Cuba applies, the appellant should not have appealed from the judgment of Stewart J. and he points out that no appeal was taken from the judgments at trial in the cases of *Pick* and *Rossano*, *supra*. In this regard, Mr. Sedgwick submitted that a judgment of the Court of Appeal or of this Court is of no more protection to the insurance company in the Republic of Cuba than the judgment of Mr. Justice Stewart and he contended that once the latter judgment was rendered, the *lis*, in so far as the insurance company was concerned, disappeared. This argument appears to me to disregard the realities of the situation. The finding that the law of Ontario applies might well result in steps being taken by the Cuban authorities which would be prejudicial to the appellant and I think that it had a very real interest in pursuing the matter. Under these circumstances, I am of opinion that the appellant clearly had a right to appeal to the Court of Appeal and to this Court.

In view of all the above, I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors for the defendant, appellant: Payton, Biggs & Graham, Toronto.

Solicitors for the plaintiff, respondent: Haines & Thomson, Toronto.

TAB 30

Imperial Oil *Appellant*

v.

Simon Jacques, Marcel Lafontaine, Automobile Protection Association, Attorney General of Quebec and Director of Public Prosecutions of Canada *Respondents*

and

Attorney General of Ontario, Couche-Tard Inc., Alimentation Couche-Tard Inc., Dépan-Escompte Couche-Tard Inc., Céline Bonin, Richard Bédard, Carole Aubut, Ultramar Ltd., Luc Forget, Jacques Ouellet, Pétroles Therrien Inc., Distributions Pétrolières Therrien Inc., Irving Oil Inc./Irving Oil Operations Ltd., Olco Petroleum Group Inc., Coop fédérée, Robert Murphy, Gary Neiderer, 9142-0935 Québec Inc., 9131-4716 Québec Inc., Groupe Denis Mongeau Inc., France Benoît, Richard Michaud, Luc Couturier, Guy Angers, Philippe Gosselin & Associés ltée, André Bilodeau, Carol Lehoux, Claude Bédard, Stéphane Grant, Pétroles Cadrin Inc., Daniel Drouin, Pétroles Global inc./Global Fuels Inc., Pétroles Global (Québec) inc./Global Fuels (Québec) Inc., Provigo Distribution Inc., Christian Payette, Pierre Bourassa, Daniel Leblond, Dépanneur Magog-Orford Inc., 2944-4841 Québec Inc., Société coopérative agricole des Bois-Francs, Gestion Astral Inc., Lise Delisle, 134553 Canada Inc., Garage Luc Fecteau et fils Inc., Station-Service Jacques Blais Inc., 9029-6815 Québec Inc., Garage Jacques Robert Inc., Gérald Groulx Station Service Inc., Services Autogarde D.D. Inc., 9010-1460 Québec Inc., Armand Pouliot, Julie Roberge, Station-Service Pouliot et Roberge s.e.n.c., 9038-6095 Québec Inc., 9083-0670 Québec Inc., Gestion Ghislain Lallier Inc., 2429-7822 Québec Inc.,

Pétrolière Impériale *Appelante*

c.

Simon Jacques, Marcel Lafontaine, Association pour la protection automobile, procureur général du Québec et directeur des poursuites pénales du Canada *Intimés*

et

Procureur général de l'Ontario, Couche-Tard inc., Alimentation Couche-Tard inc., Dépan-Escompte Couche-Tard inc., Céline Bonin, Richard Bédard, Carole Aubut, Ultramar ltée, Luc Forget, Jacques Ouellet, Pétroles Therrien inc., Distributions Pétrolières Therrien inc., Pétroles Irving inc./Opérations pétroles Irving ltée, Groupe Pétrolier Olco inc., Coop fédérée, Robert Murphy, Gary Neiderer, 9142-0935 Québec inc., 9131-4716 Québec inc., Groupe Denis Mongeau inc., France Benoît, Richard Michaud, Luc Couturier, Guy Angers, Philippe Gosselin & Associés ltée, André Bilodeau, Carol Lehoux, Claude Bédard, Stéphane Grant, Pétroles Cadrin inc., Daniel Drouin, Pétroles Global inc./Global Fuels Inc., Pétroles Global (Québec) inc./Global Fuels (Quebec) Inc., Provigo Distribution inc., Christian Payette, Pierre Bourassa, Daniel Leblond, Dépanneur Magog-Orford inc., 2944-4841 Québec inc., Société coopérative agricole des Bois-Francs, Gestion Astral inc., Lise Delisle, 134553 Canada inc., Garage Luc Fecteau et fils inc., Station-Service Jacques Blais inc., 9029-6815 Québec inc., Garage Jacques Robert inc., Gérald Groulx Station Service inc., Services Autogarde D.D. inc., 9010-1460 Québec inc., Armand Pouliot, Julie Roberge, Station-Service Pouliot et Roberge s.e.n.c., 9038-6095 Québec inc., 9083-0670 Québec inc., Gestion Ghislain Lallier inc., 2429-7822 Québec inc.,

2627-3458 Québec Inc., 9098-0111 Québec Inc., 2311-5959 Québec Inc., Gaz-O-Pneus Inc., C. Lagrandeur et fils Inc., University Galt Service Inc., Valérie Houde, Sylvie Fréchette, Robert Beaurivage, 9011-4653 Québec Inc., Pétroles Remay Inc., Variétés Jean-Yves Plourde Inc. and 9016-8360 Québec Inc. *Interveners*

- and -

Couche-Tard Inc., Alimentation Couche-Tard Inc., Dépan-Escompte Couche-Tard Inc., Céline Bonin, Richard Bédard, Ultramar Ltd., Pétroles Therrien Inc., Distributions Pétrolières Therrien Inc., Irving Oil Operations Ltd., Olco Petroleum Group Inc., Coop fédérée, Robert Murphy, Gary Neiderer, 9142-0935 Québec Inc., 9131-4716 Québec Inc. and Groupe Denis Mongeau Inc. *Appellants*

v.

Simon Jacques, Marcel Lafontaine, Automobile Protection Association, Attorney General of Quebec, Director of Public Prosecutions of Canada, France Benoît, Richard Michaud, Luc Couturier, Guy Angers, Philippe Gosselin & Associés ltée, André Bilodeau, Carol Lehoux, Claude Bédard, Stéphane Grant, Pétroles Cadrin Inc., Daniel Drouin, Pétroles Global inc./ Global Fuels Inc., Pétroles Global (Québec) inc./Global Fuels (Québec) Inc., Provigo Distribution Inc., Christian Payette, Pierre Bourassa, Daniel Leblond, Dépanneur Magog-Orford Inc., 2944-4841 Québec Inc., Société coopérative agricole des Bois-Francs, Gestion Astral Inc., Lise Delisle, 134553 Canada Inc., Garage Luc Fecteau et fils Inc., Station-Service Jacques Blais Inc., 9029-6815 Québec Inc., Garage Jacques Robert Inc., Gérald Groulx Station-Service Inc., Services

2627-3458 Québec inc., 9098-0111 Québec inc., 2311-5959 Québec inc., Gaz-O-Pneus inc., C. Lagrandeur et fils inc., University Galt Service inc., Valérie Houde, Sylvie Fréchette, Robert Beaurivage, 9011-4653 Québec inc., Pétroles Remay inc., Variétés Jean-Yves Plourde inc. et 9016-8360 Québec inc. *Intervenants*

- et -

Couche-Tard inc., Alimentation Couche-Tard inc., Dépan-Escompte Couche-Tard inc., Céline Bonin, Richard Bédard, Ultramar ltée, Pétroles Therrien inc., Distributions Pétrolières Therrien inc., Opérations pétroles Irving ltée, Groupe Pétrolier Olco inc., Coop fédérée, Robert Murphy, Gary Neiderer, 9142-0935 Québec inc., 9131-4716 Québec inc. et Groupe Denis Mongeau inc. *Appelants*

c.

Simon Jacques, Marcel Lafontaine, Association pour la protection automobile, procureur général du Québec, directeur des poursuites pénales du Canada, France Benoît, Richard Michaud, Luc Couturier, Guy Angers, Philippe Gosselin & Associés ltée, André Bilodeau, Carol Lehoux, Claude Bédard, Stéphane Grant, Pétroles Cadrin inc., Daniel Drouin, Pétroles Global inc./ Global Fuels Inc., Pétroles Global (Québec) inc./Global Fuels (Québec) Inc., Provigo Distribution inc., Christian Payette, Pierre Bourassa, Daniel Leblond, Dépanneur Magog-Orford inc., 2944-4841 Québec inc., Société coopérative agricole des Bois-Francs, Gestion Astral inc., Lise Delisle, 134553 Canada inc., Garage Luc Fecteau et fils inc., Station-Service Jacques Blais inc., 9029-6815 Québec inc., Garage Jacques Robert inc., Gérald Groulx Station-Service inc., Services

Autogarde D.D. Inc., 9010-1460 Québec Inc., Armand Pouliot, Julie Roberge, Station-Service Pouliot et Roberge s.e.n.c., 9038-6095 Québec Inc., 9083-0670 Québec Inc., Gestion Ghislain Lallier Inc., 2627-3458 Québec Inc., 2429-7822 Québec Inc., Universy Galt Service Inc., 9098-0111 Québec Inc., 2311-5959 Québec Inc., Gaz-O-Pneus Inc., C. Lagrandeur et fils Inc., Valérie Houde, Sylvie Fréchette, Robert Beaurivage, 9011-4653 Québec Inc., Pétroles Remay Inc., Variétés Jean-Yves Plourde Inc., 9016-8360 Québec Inc., Carole Aubut, Luc Forget and Jacques Ouellet *Respondents*

and

Attorney General of Ontario *Intervener*

Indexed as: Imperial Oil *v.* Jacques

2014 SCC 66

File Nos.: 35226, 35231.

2014: April 24; 2014: October 17.

Present: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Moldaver and Wagner JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Evidence — Civil procedure — Disclosure — Plaintiffs in class action filing motion for disclosure of documents in which they requested disclosure by third party of recordings of private communications intercepted in course of criminal investigation — Defendants to class action objecting to disclosure on basis of immunities from disclosure provided for in legislation or established by courts — Whether party to civil proceeding can request disclosure of recordings of private communications intercepted by state in course of criminal investigation — How conditions for and limits on disclosure are to be set — Code of Civil Procedure, CQLR, c. C-25, art. 402 — Criminal Code, R.S.C. 1985, c. C-46, s. 193(2)(a) — Competition Act, R.S.C. 1985, c. C-34, ss. 29, 36.

Autogarde D.D. inc., 9010-1460 Québec inc., Armand Pouliot, Julie Roberge, Station-Service Pouliot et Roberge s.e.n.c., 9038-6095 Québec inc., 9083-0670 Québec inc., Gestion Ghislain Lallier inc., 2627-3458 Québec inc., 2429-7822 Québec inc., Universy Galt Service inc., 9098-0111 Québec inc., 2311-5959 Québec inc., Gaz-O-Pneus inc., C. Lagrandeur et fils inc., Valérie Houde, Sylvie Fréchette, Robert Beaurivage, 9011-4653 Québec inc., Pétroles Remay inc., Variétés Jean-Yves Plourde inc., 9016-8360 Québec inc., Carole Aubut, Luc Forget et Jacques Ouellet *Intimés*

et

Procureur général de l'Ontario *Intervenant*

Répertorié : Pétrolière Impériale *c.* Jacques

2014 CSC 66

N^os^ du greffe : 35226, 35231.

2014 : 24 avril; 2014 : 17 octobre.

Présents : La juge en chef McLachlin et les juges LeBel, Abella, Rothstein, Cromwell, Moldaver et Wagner.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Preuve — Procédure civile — Communication de la preuve — Requête sollicitant la communication de documents déposée dans le cadre d'un recours collectif et demandant la communication par un tiers d'enregistrements de communications privées interceptées dans le cadre d'une enquête pénale — Défendeurs dans le recours collectif s'opposant à la communication au motif qu'il existe des immunités de divulgation de source légale et prétorienne — Une partie à un recours civil peut-elle demander que lui soient communiqués des enregistrements de conversations privées interceptées par l'État dans le cadre d'une enquête pénale? — Comment les modalités et les limites de la communication doivent-elles être établies? — Code de procédure civile, RLRQ, ch. C-25, art. 402 — Code criminel, L.R.C. 1985, ch. C-46, art. 193(2)a) — Loi sur la concurrence, L.R.C. 1985, ch. C-34, art. 29, 36.

To carry out the "Octane" investigation into allegations of a conspiracy to fix gasoline pump prices in certain regions of Quebec, the Competition Bureau of Canada obtained judicial authorizations under Part VI of the *Criminal Code* that enabled it to intercept and record more than 220,000 private communications. As a result of the investigation, charges were laid against 54 persons, including certain of the appellants. In parallel with the criminal proceedings, the respondents instituted a class action against a number of persons, including the appellants, alleging that they had engaged in anti-competitive practices in breach of the duties imposed by art. 1457 of the *Civil Code of Québec* ("*C.C.Q.*") and s. 36 of the *Competition Act*. In support of their action, they filed, under art. 402 of the *Code of Civil Procedure* ("*C.C.P.*"), a motion in which they sought disclosure by the federal Director of Public Prosecutions and the Competition Bureau of the recordings that had already been disclosed to the accused in the parallel criminal proceedings. The appellants contested the motion.

The Superior Court, being of the opinion that the evidence requested by the respondents was relevant and that neither the *Competition Act* nor the *Criminal Code* created an immunity from disclosure, granted the motion. To control the disclosure process and the scope of the disclosure, it ordered that the Director of Public Prosecutions and the Competition Bureau disclose the requested recordings solely to the lawyers and experts participating in the civil proceedings, and that they screen the recordings to protect the privacy of third parties having nothing whatsoever to do with the proceedings. The Court of Appeal refused leave to appeal that decision.

Held (Abella J. dissenting): The appeals should be dismissed.

Per LeBel, Rothstein, Cromwell, Moldaver and Wagner JJ.: A party to a civil proceeding can request the disclosure of recordings of private communications intercepted by the state in the course of a criminal investigation. Although s. 29 of the *Competition Act* provides for confidentiality of the Competition Bureau's record of investigation, it does not prohibit the disclosure of private communications intercepted under Part VI of the *Criminal Code*, as such communications are not among the types of information referred to in s. 29(1)(*a*) to (*e*). Moreover, even though s. 193(1) of the *Criminal Code* lays down the principle that it is unlawful to disclose or use an intercepted private communication without the consent of the originator or the intended recipient of the

Pour mener à bien l'enquête « Octane » sur des allégations de complot en vue de fixer les prix de l'essence à la pompe dans certaines régions du Québec, le Bureau de la concurrence du Canada obtient, en vertu de la Partie VI du *Code criminel*, des autorisations judiciaires qui lui permettent d'intercepter et d'enregistrer plus de 220 000 communications privées. L'enquête conduit au dépôt d'accusations contre 54 personnes, dont certains des appelants. Parallèlement aux procédures pénales, les intimés intentent un recours collectif reprochant à plusieurs personnes, dont les appelants, de s'être livrées à des activités anticoncurrentielles, en violation des devoirs imposés par les art. 1457 du *Code civil du Québec* (« *C.c.Q.* ») et 36 de la *Loi sur la concurrence*. Dans le but d'étayer leur recours, ils déposent, conformément à l'art. 402 du *Code de procédure civile* (« *C.p.c.* »), une requête sollicitant du Directeur des poursuites pénales du Canada et du Bureau de la concurrence la communication des enregistrements déjà communiqués aux accusés dans les procédures pénales parallèles. Les appelants s'y opposent.

D'avis que les éléments de preuve sollicités par les intimés sont pertinents et que ni la *Loi sur la concurrence* ni le *Code criminel* ne créent d'immunité de divulgation, la Cour supérieure accueille la requête. Afin d'encadrer le processus de communication des documents et l'étendue de celle-ci, elle ordonne au directeur des poursuites pénales et au Bureau de la concurrence de communiquer uniquement aux avocats et experts participant aux procédures civiles les enregistrements demandés et de filtrer ceux-ci pour protéger la vie privée des tiers complètement étrangers au litige. La Cour d'appel refuse la permission d'appeler de cette décision.

Arrêt (la juge Abella est dissidente) : Les pourvois sont rejetés.

Les juges LeBel, Rothstein, Cromwell, Moldaver et Wagner : Une partie à un recours civil peut demander que lui soient communiqués des enregistrements de conversations privées interceptées par l'État dans le cadre d'une enquête pénale. Bien que l'art. 29 de la *Loi sur la concurrence* énonce la confidentialité du dossier d'enquête constitué par le Bureau de la concurrence, il n'interdit pas la communication des conversations privées interceptées en vertu de la partie VI du *Code criminel*, car celles-ci ne font pas partie des éléments mentionnés aux al. 29(1)*a*) à *e*). De plus, même si le par. 193(1) du *Code criminel* établit le principe selon lequel il est illégal de divulguer ou d'utiliser une communication privée interceptée sans le consentement de son auteur ou du destinataire, des

communication, this general prohibition is tempered by some exemptions. Section 193(2)(*a*) provides that a disclosure is not an offence under s. 193(1) if it is made "in the course of or for the purpose of giving evidence in any civil . . . proceedings". Nothing in the words of this provision justifies limiting its application to the time when evidence is being given. The documents requested at the exploratory stage of any civil proceeding may be requested "for the purpose" of testifying at the hearing. The provision's object and context admit of no other conclusion. Section 193(2)(*a*) does not have facilitating the fight against crime as its sole purpose; rather, its object is to ensure that courts will have access to all information relevant to the proceedings before them. Similarly, the case law and the academic literature support a broad interpretation of s. 193(2)(*a*). Finally, the admissibility in evidence of recordings of private communications is governed by s. 24(2) of the *Charter* and the various applicable provincial statutes.

Section 193 of the *Criminal Code* creates neither an actual disclosure mechanism nor a right of access. Since this case involves civil proceedings brought under s. 36 of the *Competition Act* and art. 1457 *C.C.Q.*, the procedure for seeking access to the recordings is the one provided for in art. 402 *C.C.P.* The first paragraph of art. 402 *C.C.P.* empowers a judge to order the disclosure of documents relating to the issues between the parties that are in the possession of a third party. Judges have great discretion, but will generally favour disclosure. Nevertheless, a judge must deny a request for disclosure in the face of an immunity from disclosure that is either provided for in legislation or established by the courts. In exercising his or her discretion, the judge may consider, *inter alia*, the relevance of the documents to the issues between the parties, the extent to which the privacy of a party or of a third party to the proceedings is invaded and the importance of remaining sensitive to the duty to protect a person's privacy. The concept of relevance is generally interpreted broadly at the exploratory stage of the proceedings. The impact of disclosure on the rights of innocent persons requires that care be taken in considering motions for disclosure, although it cannot constitute a cause why evidence should not be disclosed in all circumstances. The scope of the protection of the right of the innocent to privacy must always be assessed in light of the various interests at stake. Finally, by giving judges the power to refuse to order disclosure where a barrier to disclosure is provided for in legislation or has been established by the courts, art. 402, para. 1 already provides that, where necessary, the principle of disclosure it codifies will yield to any applicable federal provision that prohibits disclosure.

exemptions tempèrent cette interdiction générale. L'alinéa 193(2)*a*) dispose que l'infraction établie au par. 193(1) ne s'applique pas lorsqu'une divulgation est faite « au cours ou aux fins d'une déposition lors de poursuites civiles ». Rien dans le texte de cette disposition ne justifie de restreindre l'application de celle-ci au seul moment de la déposition. Les documents qui sont demandés durant la phase exploratoire de tout recours civil peuvent l'être « aux fins » de témoigner à l'audience. L'objet et le contexte de cette disposition n'admettent aucune autre conclusion. L'alinéa 193(2)*a*) n'est pas uniquement destiné à faciliter la lutte contre la criminalité, mais a pour objet d'assurer aux tribunaux qu'ils auront accès à toute l'information pertinente aux procédures dont ils sont saisis. De même, jurisprudence et doctrine appuient une interprétation large de l'al. 193(2)*a*). Enfin, l'admissibilité en preuve des enregistrements de communications privées est régie par le par. 24(2) de la *Charte* et les différentes lois provinciales applicables.

L'article 193 du *Code criminel* ne crée pas de mécanisme de divulgation en soi ni un droit d'accès. Puisque la poursuite civile en l'espèce est intentée en vertu de l'art. 36 de la *Loi sur la concurrence* et de l'art. 1457 *C.c.Q.*, c'est l'art. 402 *C.p.c.* qui prévoit la procédure permettant d'accéder aux enregistrements. Le premier alinéa de l'art. 402 *C.p.c.* habilite un juge à ordonner la communication de documents relatifs au litige qui se trouvent entre les mains d'un tiers. Le juge jouit d'une grande discrétion, mais favorisera généralement la communication. Il doit cependant refuser la communication en présence d'une immunité de divulgation de source légale ou prétorienne. Dans l'exercice de sa discrétion, le juge pourra considérer, entre autres, la pertinence des documents à l'égard du litige, le degré d'atteinte à la vie privée d'une partie ou d'un tiers au litige et l'importance de demeurer sensible au devoir de protéger la vie privée. Le concept de pertinence s'apprécie généralement de manière large au cours de la phase exploratoire de l'instance. L'impact de la communication sur les droits de personnes innocentes exige un examen attentif d'une requête en communication, mais ne justifie pas pour autant l'opposition à la communication en toutes circonstances. L'étendue de la protection du droit à la vie privée des personnes innocentes doit toujours être mesurée en fonction des divers intérêts en jeu. Enfin, en octroyant au juge le pouvoir de refuser d'accorder la communication s'il existe une barrière légale ou prétorienne à une telle communication, l'art. 402, al. 1 prévoit déjà que, au besoin, le principe de communication qu'il codifie cèderait devant un texte fédéral prohibitif applicable.

Judges also have great discretion to control the process of disclosing evidence at the exploratory stage of proceedings, and to set conditions for and limits on disclosure. In doing so, they must weigh the interests involved, but must at the same time limit the potential for invasion of privacy and avoid unduly limiting access to relevant documents so as to ensure that the proceedings remain fair, the search for truth is not obstructed and the proceedings are not unjustifiably delayed. Where the requested documents result from a criminal investigation, the judge must also consider the impact of disclosure on the efficient conduct of the criminal proceedings and on the right of the accused to a fair trial. However, at the exploratory stage of a proceeding, the right to privacy, the efficient conduct of criminal proceedings and the right to make full answer and defence are, to some degree, protected by the duty of confidentiality imposed on the parties, their counsel and their experts. Nevertheless, judges have the powers they need to impose other conditions. In every case, the judge must, bearing in mind the proportionality principle that is inherent in art. 402 *C.C.P.* and is also spelled out in art. 4.2 *C.C.P.*, consider the financial and administrative impact of the conditions being imposed and how they will affect the general conduct of the proceedings.

The order of the Superior Court in this case is consistent with these principles. There is no factual or legal impediment to disclosure of the documents requested by the respondents under art. 402 *C.C.P.* Nor is there anything to cast doubt on the Superior Court's finding that the requested evidence is relevant. Furthermore, the scope of the disclosure order is limited so as to protect the right to privacy of all those whose communications were intercepted. The limits also ensure that disclosure of the information will not hinder the efficient conduct of the criminal proceedings or violate the right of the parties still facing criminal charges to a fair trial. There is no indication that the order imposes an undue financial and administrative burden on the third party in question in this case.

Per McLachlin C.J.: The power to obtain disclosure of intercepted private communications in this case arises solely from art. 402 *C.C.P.*, not s. 193(2)(*a*) of the *Criminal Code*. Where the state is otherwise empowered or required to disclose intercepted private communications in civil proceedings, s. 193(2)(*a*) protects the authorities from criminal sanction.

Le juge jouit aussi d'une grande discrétion pour contrôler le processus de communication de la preuve durant la phase exploratoire de l'instance, pour en établir les modalités et en fixer les limites. Pour ce faire, il doit soupeser les intérêts en présence, en limitant les risques d'atteinte à la vie privée et en évitant de restreindre indûment l'accès aux documents pertinents, pour que les procédures demeurent équitables, que la recherche de la vérité ne soit pas entravée et que le déroulement de l'instance ne soit pas retardé de manière injustifiée. Dans les cas où les documents demandés sont le produit d'une enquête pénale, le juge devra aussi considérer l'impact de la communication sur le bon déroulement des procédures pénales et le droit des accusés concernés à un procès juste et équitable. Cependant, au cours de la phase exploratoire de l'instance, le droit au respect de la vie privée, le bon déroulement des procédures pénales et le droit à une défense pleine et entière sont, dans une certaine mesure, protégés par le devoir de confidentialité qui s'impose aux parties, à leurs avocats et à leurs experts. Le juge dispose néanmoins des pouvoirs nécessaires pour fixer d'autres modalités. Dans tous les cas, tout en respectant le principe de proportionnalité qui fait intrinsèquement partie de l'art. 402 *C.p.c.*, en plus d'être consacré à l'art. 4.2 *C.p.c.*, le juge doit considérer l'impact financier et administratif des modalités qu'il impose, de même que leur influence sur le déroulement général de l'instance.

L'ordonnance de la Cour supérieure en l'espèce respecte ces principes. Il n'existe aucun obstacle factuel ou légal à la communication des documents que sollicitent les intimés en vertu de l'art. 402 *C.p.c*. Rien ne permet de remettre en question la conclusion de la Cour supérieure selon laquelle les éléments de preuve sollicités sont pertinents. De plus, la portée de l'ordonnance de communication est limitée de manière à protéger le droit à la vie privée de l'ensemble des personnes dont les conversations ont été interceptées. Ces limites assurent également que la communication ne constitue pas une entrave au bon déroulement des procédures pénales ou une atteinte au droit qu'ont les parties toujours accusées au pénal de subir un procès juste et équitable. Rien n'indique que l'ordonnance crée un fardeau financier et administratif excessif pour le tiers visé en l'espèce.

La juge en chef McLachlin : En l'espèce, le pouvoir d'obtenir les communications privées interceptées découle uniquement de l'art. 402 du *C.p.c.*, et non de l'al. 193(2)*a*) du *Code criminel*. Lorsque l'État a par ailleurs le pouvoir ou l'obligation de divulguer dans une instance civile des communications privées interceptées, l'al. 193(2)*a*) protège les autorités contre toute sanction criminelle.

Per Abella J. (dissenting): It is not legally permissible in Canada to authorize electronic surveillance for the purpose of gathering evidence in civil proceedings. Electronic surveillance can only be authorized in the limited circumstances set out in Part VI of the *Criminal Code* for the investigation of serious crimes, or under the *Canadian Security Intelligence Service Act* for the investigation of threats to national security. Part VI recognizes the uniquely intrusive character of electronic surveillance by permitting state interception of private communications *only* if express safeguards are followed. Until a determination has been made as to the legality of a challenged interception, the communication is not admissible in a criminal proceeding.

Section 193(2)(*a*) should not be interpreted in a way that overrides the privacy protections in Part VI. Section 193(2)(*a*) does not create a right to access intercepted communications and is not available to pre-empt a judicial determination about the validity of an interception. Until those interceptions have been found, or are conceded to be, lawful and admitted into evidence in a criminal proceeding, they retain their private character for all purposes and are not available to the public. Using s. 193(2)(*a*) to permit litigants in a civil case to get disclosure of communications intercepted in the course of a criminal investigation before a challenged interception is found to be lawful, allows those litigants to benefit indirectly from an extraordinary investigative technique they are otherwise not legally entitled to.

The general right to privacy and the specific right not to have confidential information disclosed are expressly protected in Quebec's *Charter of human rights and freedoms*. The discretion in art. 402 of the *Code of Civil Procedure* to order disclosure should therefore not be so interpreted as to extinguish the scrupulous protection for the non-disclosure of intercepted communications found in other parts of the law. This provision gives significant discretion to a trial judge, but it does not give him or her *carte blanche* to order disclosure of communications protected by an almost impermeable legal coating like a privileged communication. Evidence gathered through electronic surveillance is entitled to the same protection and, as a result, is not amenable to a balancing exercise.

La juge Abella (dissidente) : En droit canadien, aucune activité de surveillance électronique ne peut être autorisée à l'occasion d'une instance civile en vue de recueillir des éléments de preuve. La surveillance électronique ne peut être autorisée que dans les circonstances limitées énoncées à la partie VI du *Code criminel*, dans le cadre d'enquêtes relatives à des crimes graves, ou encore en vertu de la *Loi sur le Service canadien du renseignement de sécurité*, en matière d'enquêtes sur des menaces envers la sécurité du Canada. La partie VI reconnaît le caractère exceptionnellement attentatoire de la surveillance électronique, en ce qu'elle permet l'interception de communications privées par l'État *uniquement* si certaines garanties expresses sont respectées. Tant qu'il n'a pas été statué sur la légalité d'une interception contestée, les communications interceptées ne sont pas admissibles dans une instance pénale.

L'alinéa 193(2)*a*) ne devrait pas être interprété d'une manière qui écarte les mesures de protection de la vie privée que prévoit la partie VI. Cette disposition ne crée pas un droit d'accès aux communications interceptées et ne peut être invoquée pour prévenir une décision judiciaire relative à la validité d'interceptions. Tant que la validité de ces interceptions n'a pas été constatée ou concédée et que les communications interceptées n'ont pas été admises en preuve dans une instance criminelle, elles conservent à toutes fins utiles leur caractère privé et le public ne peut y avoir accès. Le fait de se fonder sur l'al. 193(2)*a*) afin de permettre à des plaideurs dans une instance civile d'obtenir la divulgation de communications interceptées dans une enquête criminelle — avant qu'une interception contestée ait été jugée légale — permet à ces mêmes plaideurs de bénéficier indirectement d'une technique d'enquête extraordinaire à laquelle ils n'ont autrement pas droit en vertu de la loi.

Le droit général au respect de la vie privée ainsi que le droit particulier au respect du secret professionnel sont expressément protégés dans la *Charte des droits et libertés de la personne* du Québec. Par conséquent, le pouvoir discrétionnaire conféré à l'art. 402 du *Code de procédure civile* ne devrait pas être interprété d'une manière qui supprimerait la protection scrupuleuse contre la divulgation des communications interceptées prévue par d'autres règles de droit. Cette disposition confère un vaste pouvoir discrétionnaire au juge de première instance, mais ne lui donne pas carte blanche pour ordonner la divulgation de communications jouissant d'une protection légale pratiquement impénétrable, comme c'est le cas pour les communications privilégiées. Les éléments de preuve recueillis au moyen de mesures de surveillance électronique ont droit à la même protection et, en conséquence, ne se prêtent pas à une mise en balance des intérêts opposés.

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By Abella J. (dissenting)

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APPEAL from a judgment of the Quebec Court of Appeal (Morin, Rochon and Vézina JJ.A.), 2012 QCCA 2265, [2012] AZ-50922387, [2012] J.Q. nº 16661 (QL), 2012 CarswellQue 13421, refusing leave to appeal a decision of Bélanger J., 2012 QCCS 2954, [2012] AZ-50869641, [2012] J.Q. nº 6264 (QL), 2012 CarswellQue 6715. Appeal dismissed, Abella J. dissenting.

APPEAL from a judgment of the Quebec Court of Appeal (Morin, Rochon and Vézina JJ.A.), 2012 QCCA 2266, [2012] AZ-50922388, [2012] J.Q. nº 16662 (QL), 2012 CarswellQue 13424, refusing leave to appeal a decision of Bélanger J., 2012 QCCS 2954, [2012] AZ-50869641, [2012] J.Q. nº 6264 (QL), 2012 CarswellQue 6715. Appeal dismissed, Abella J. dissenting.

Billy Katelanos, *Paule Hamelin* and *Guy Régimbald*, for the appellant Imperial Oil.

Jean-Philippe Groleau, *Louis-Martin O'Neill*, *Louis Belleau*, *Julie Chenette*, *Sylvain Lussier*, *Elizabeth Meloche*, *Sidney Elbaz*, *Rachel April Giguère*, *Marie-Geneviève Masson*, *Pascale Cloutier* and *Fadi Amine*, for the appellants Couche-Tard Inc. et al.

Louis P. Bélanger and *Julie Girard*, for the appellant Ultramar Ltd.

Pierre LeBel, *Guy Paquette*, *Nicolas Guimond* and *Claudia Lalancette*, for the respondents Simon Jacques et al.

Dominique A. Jobin, *Patricia Blair*, *Émilie-Annick Landry-Therriault* and *Jean-Vincent Lacroix*, for the respondent the Attorney General of Quebec.

François Lacasse and *Stéphane Hould*, for the respondent the Director of Public Prosecutions of Canada.

Deborah Calderwood and *Megan Stephens*, for the intervener the Attorney General of Ontario.

POURVOI contre un arrêt de la Cour d'appel du Québec (les juges Morin, Rochon et Vézina), 2012 QCCA 2265, [2012] AZ-50922387, [2012] J.Q. nº 16661 (QL), 2012 CarswellQue 13421, qui a refusé la permission d'appeler d'une décision de la juge Bélanger, 2012 QCCS 2954, [2012] AZ-50869641, [2012] J.Q. nº 6264 (QL), 2012 CarswellQue 6715. Pourvoi rejeté, la juge Abella est dissidente.

POURVOI contre un arrêt de la Cour d'appel du Québec (les juges Morin, Rochon et Vézina), 2012 QCCA 2266, [2012] AZ-50922388, [2012] J.Q. nº 16662 (QL), 2012 CarswellQue 13424, qui a refusé la permission d'appeler d'une décision de la juge Bélanger, 2012 QCCS 2954, [2012] AZ-50869641, [2012] J.Q. nº 6264 (QL), 2012 CarswellQue 6715. Pourvoi rejeté, la juge Abella est dissidente.

Billy Katelanos, *Paule Hamelin* et *Guy Régimbald*, pour l'appelante Pétrolière Impériale.

Jean-Philippe Groleau, *Louis-Martin O'Neill*, *Louis Belleau*, *Julie Chenette*, *Sylvain Lussier*, *Elizabeth Meloche*, *Sidney Elbaz*, *Rachel April Giguère*, *Marie-Geneviève Masson*, *Pascale Cloutier* et *Fadi Amine*, pour les appelants Couche-Tard inc. et autres.

Louis P. Bélanger et *Julie Girard*, pour l'appelante Ultramar ltée.

Pierre LeBel, *Guy Paquette*, *Nicolas Guimond* et *Claudia Lalancette*, pour les intimés Simon Jacques et autres.

Dominique A. Jobin, *Patricia Blair*, *Émilie-Annick Landry-Therriault* et *Jean-Vincent Lacroix*, pour l'intimé le procureur général du Québec.

François Lacasse et *Stéphane Hould*, pour l'intimé le directeur des poursuites pénales du Canada.

Deborah Calderwood et *Megan Stephens*, pour l'intervenant le procureur général de l'Ontario.

English version of the judgment of LeBel, Rothstein, Cromwell, Moldaver and Wagner JJ. delivered by

LeBel and Wagner JJ. —

I. Introduction

[1] The question raised by the appeals before the Court is whether a party to a civil proceeding can request the disclosure of recordings of private communications intercepted by the state in the course of a criminal investigation.

II. Origin of the Case

[2] In the early summer of 2004, the Competition Bureau of Canada began an investigation ("the Octane investigation") into allegations of a conspiracy to fix gasoline pump prices in certain regions of Quebec. To carry out the investigation, the Competition Bureau obtained from the Court of Québec, under Part VI of the *Criminal Code*, R.S.C. 1985, c. C-46 ("*Cr. C.*"), seven judicial authorizations that enabled it to intercept and record more than 220,000 private communications.

[3] In 2008, as a result of the Octane investigation, a series of charges were laid against 13 natural persons and 11 legal persons. The Crown alleged that they had conspired to fix pump prices in several cities in the following regions: Estrie, Chaudière-Appalaches and Centre-du-Québec. In July 2010 and September 2012, other charges for the same offences were laid against another 30 persons, bringing the total number of accused to 54. Some of the appellants in this Court were or still are among the accused.

[4] In parallel with the criminal proceedings, the respondents Simon Jacques, Marcel Lafontaine and Automobile Protection Association ("Jacques et al.") instituted a class action in the Quebec Superior Court against a number of persons, including the appellants, alleging that they had breached the duties imposed on them by art. 1457 of the *Civil Code*

Le jugement des juges LeBel, Rothstein, Cromwell, Moldaver et Wagner a été rendu par

Les juges LeBel et Wagner —

I. Introduction

[1] Les pourvois dont nous sommes saisis portent sur la question de savoir si une partie à un recours civil peut demander que lui soient communiqués des enregistrements de conversations privées interceptées par l'État dans le cadre d'une enquête pénale.

II. L'origine du litige

[2] Au tout début de l'été 2004, le Bureau de la concurrence du Canada entreprend une enquête (« l'enquête Octane ») sur des allégations de complot en vue de fixer les prix de l'essence à la pompe dans certaines régions du Québec. Pour mener à bien cette enquête, le Bureau de la concurrence obtient de la Cour du Québec, en vertu de la partie VI du *Code criminel*, L.R.C. 1985, ch. C-46 (« *C. cr.* »), sept autorisations judiciaires qui lui permettent d'intercepter et d'enregistrer plus de 220 000 communications privées.

[3] L'enquête Octane conduit, en 2008, au dépôt d'une série d'accusations contre 13 personnes physiques et 11 personnes morales. L'État reproche à ces personnes d'avoir comploté pour fixer les prix à la pompe dans différentes villes des régions suivantes : Estrie, Chaudière-Appalaches et Centre-du-Québec. En juillet 2010 et septembre 2012, d'autres accusations pour les mêmes infractions sont déposées contre 30 autres personnes, portant ainsi le nombre total d'accusés à 54. Un certain nombre des appelants devant notre Cour ont fait ou font toujours partie de ces accusés.

[4] Parallèlement aux procédures pénales, les intimés Simon Jacques, Marcel Lafontaine et l'Association pour la protection automobile (« Jacques et autres ») intentent, devant la Cour supérieure du Québec, un recours collectif contre plusieurs personnes, dont les appelants. Ils leur reprochent d'avoir violé les devoirs que leur imposent les art. 1457 du

of Québec ("*C.C.Q.*") and s. 36 of the *Competition Act*, R.S.C. 1985, c. C-34, by engaging in anti-competitive practices. On November 30, 2009, the Superior Court authorized the bringing of the class action (*Jacques v. Petro-Canada*, 2009 QCCS 5603 (CanLII)), which would subsequently be amended.

[5] On December 8, 2011, in support of their action, the respondents filed a motion for the disclosure of documents under art. 402 of the *Code of Civil Procedure*, CQLR, c. C-25 ("*C.C.P.*"). They requested that the federal Director of Public Prosecutions ("DPP") and the Competition Bureau disclose to them all the private communications that had been intercepted in the course of the Octane investigation. Shortly before the motion was heard, the respondents narrowed its scope, limiting it to the recordings that had already been disclosed to the accused in the parallel criminal proceedings. The appellants contested the motion.

III. Judicial History

A. *Decision of the Superior Court (2012 QCCS 2954 (CanLII))*

[6] On June 28, 2012, Bélanger J., as she then was, granted the respondents' motion. She ordered that the Competition Bureau and the DPP disclose the requested recordings solely to the lawyers and experts participating in the civil proceedings, and that they screen the recordings to protect the privacy of [TRANSLATION] "third parties having nothing whatsoever to do with the proceedings" (para. 98).

[7] In support of her decision, Bélanger J. began by noting that the courts have the power to order the disclosure of evidence in the possession of a third party as long as it is relevant (arts. 402 and 1045 *C.C.P.*). However, that power is limited if the evidence in question is subject to immunity from disclosure. Belanger J. found that no such immunity applies in this case. Contrary to what the appellants were arguing, neither the *Competition Act* nor the *Criminal Code* provides for one. Section 29 of the *Competition Act* expressly provides that evidence obtained may be disclosed "for the purposes of the

Code civil du Québec (« *C.c.Q.* ») et 36 de la *Loi sur la concurrence*, L.R.C. 1985, ch. C-34, en se livrant à des activités anticoncurrentielles. Le 30 novembre 2009, la Cour supérieure autorise l'exercice de ce recours collectif (*Jacques c. Petro-Canada*, 2009 QCCS 5603 (CanLII)), lequel sera amendé par la suite.

[5] Le 8 décembre 2011, dans le but d'étayer leur recours, les intimés déposent une requête sollicitant la communication de documents conformément à l'art. 402 du *Code de procédure civile*, RLRQ, ch. C-25 (« *C.p.c.* »). Ils demandent au directeur des poursuites pénales du Canada (« DPP »), ainsi qu'au Bureau de la concurrence, de leur communiquer l'ensemble des communications privées interceptées durant l'enquête Octane. Peu avant l'audition de cette requête, les intimés en réduisent la portée aux enregistrements déjà divulgués aux accusés dans le cadre des procédures pénales parallèles. Les appelants s'opposent à cette requête.

III. Historique judiciaire

A. *Décision de la Cour supérieure (2012 QCCS 2954 (CanLII))*

[6] Le 28 juin 2012, la juge Bélanger, alors juge à la Cour supérieure, accueille la requête des intimés. Elle ordonne au Bureau de la concurrence et au DPP de communiquer uniquement aux avocats et experts participant aux procédures civiles les enregistrements demandés et de filtrer ceux-ci afin de protéger la vie privée des « tiers complètement étrangers au litige » (par. 98).

[7] Au soutien de sa décision, la juge Bélanger souligne d'abord que, dans la mesure où un élément de preuve en la possession d'un tiers est pertinent, les tribunaux détiennent le pouvoir d'en ordonner la communication (art. 402 et 1045 *C.p.c.*). Ce pouvoir est toutefois restreint si l'élément de preuve est visé par une immunité de divulgation. Or, estime-t-elle, ce n'est pas le cas en l'espèce. En effet, contrairement aux prétentions des appelants, ni la *Loi sur la concurrence* ni le *Code criminel* ne créent une telle immunité. D'une part, l'art. 29 de la *Loi sur la concurrence* permet expressément qu'une preuve

administration or enforcement" of that Act, which is what was at issue in this case. And under s. 193(2)(*a*) *Cr. C.*, a person may disclose a private communication in the course of or for the purpose of giving evidence in any civil proceedings. In this regard, Bélanger J. stated that this Court's decision in *Michaud v. Quebec (Attorney General)*, [1996] 3 S.C.R. 3, does not limit the application of s. 193(2)(*a*) to situations in which the plaintiff in the civil proceedings is also the "target" of the wiretap. As a result, there was no impediment to disclosing the wiretap information in the case at bar.

[8] Bélanger J. then stated that, because of the exceptional nature of the interception of private communications, the disclosure of such information must be subject to proper controls. Relying on this Court's decision in *Glegg v. Smith & Nephew Inc.*, 2005 SCC 31, [2005] 1 S.C.R. 724, she indicated that the courts have the powers they need to control the disclosure process and the scope of the disclosure. In her view, the right of access to information obtained from wiretaps must be weighed so as to strike an appropriate balance between the rights of the parties and ensure the proper administration of justice.

[9] After listing the various factors to be considered in this weighing exercise, Bélanger J. concluded that the motion should be granted except for communications involving [TRANSLATION] "third parties having nothing whatsoever to do with the proceedings" (para. 98). Various factors weighed in favour of disclosing the evidence in this case, including the principles of expeditious conduct of proceedings and equality of the parties, the importance and reliability of the audio evidence in the search for truth, and the low risk of a violation of the rights to privacy and to a fair trial that were protected by the implied duty of confidentiality and by the terms of the order. However, the disclosure was to be limited to the lawyers and experts participating in the civil proceedings in order to avoid influencing the conduct of the criminal cases.

obtenue soit communiquée « dans le cadre de l'application ou du contrôle » de cette loi, ce qui est le cas en l'espèce. D'autre part, aux termes de l'al. 193(2)*a*) *C. cr.*, une personne peut divulguer une communication privée au cours ou aux fins d'une déposition faite lors de poursuites civiles. À cet égard, précise la juge Bélanger, la décision de notre Cour *Michaud c. Québec (Procureur général)*, [1996] 3 R.C.S. 3, ne limite pas l'application de cet article aux seules situations où le demandeur à l'instance civile est également la « cible » de l'écoute. Dans ce contexte, il n'existe donc aucun empêchement à ce que les fruits de l'écoute électronique soient communiqués en l'espèce.

[8] Ensuite, la juge Bélanger affirme qu'en raison du caractère exceptionnel de l'interception des conversations privées, la communication de celles-ci doit être bien encadrée. S'appuyant sur l'arrêt de notre Cour *Glegg c. Smith & Nephew Inc.*, 2005 CSC 31, [2005] 1 R.C.S. 724, elle indique que les tribunaux possèdent les pouvoirs nécessaires pour encadrer le processus de communication et l'étendue de celle-ci. Le droit d'accès aux fruits de l'écoute électronique doit selon elle être pondéré, de manière à respecter un juste équilibre entre les droits des parties et à assurer une saine administration de la justice.

[9] Après avoir énuméré les divers éléments à considérer dans cette pondération, la juge Bélanger conclut que, sous réserve des communications touchant des « tiers complètement étrangers au litige » (par. 98), il doit être fait droit à la demande. En l'espèce, les principes de conduite diligente des procédures et d'égalité des parties, l'importance et la fiabilité de la preuve audio dans la recherche de la vérité, de même que le faible risque d'atteinte à la vie privée et au droit à un procès juste et équitable qu'assurent le devoir implicite de confidentialité et les termes de l'ordonnance sont autant de considérations qui militent en faveur de la communication de la preuve. Toutefois, afin d'éviter d'influencer le déroulement des procédures criminelles, cette communication sera restreinte aux avocats et experts participant à l'instance civile.

[10] Belanger J. also briefly discussed, and rejected, the alternative argument that s. 193 *Cr. C.* was of no force or effect. She noted that the disclosure order was based not on that section, but on the *Competition Act* and the *Code of Civil Procedure*. The application of s. 193 *Cr. C.* therefore did not result in an infringement of s. 8 of the *Canadian Charter of Rights and Freedoms* or s. 2(*e*) of the *Canadian Bill of Rights*, R.S.C. 1985, App. III.

[11] Finally, regarding the appellant Imperial Oil, Bélanger J. found that the fact that it was not involved in the criminal proceedings did not change its status for the purposes of the motion. It was not a third party to the civil proceedings, so it had the same rights and obligations as its co-defendants. As a result, the intercepted communications had to be disclosed if they were relevant. In any event, Bélanger J. added, Imperial Oil could object to the production of the evidence, if need be, at the proper time.

[12] In the end, Bélanger J. ordered that the communications intercepted in the course of the Octane investigation that had already been disclosed to the accused in the criminal proceedings be disclosed to the lawyers and experts participating in the civil proceedings. These communications would have to be screened, however, to protect the privacy rights of third parties having nothing whatsoever to do with the proceedings.

B. *Decisions of the Court of Appeal (2012 QCCA 2265 (CanLII) and 2012 QCCA 2266 (CanLII))*

[13] In two separate judgments, Morin, Rochon and Vézina JJ.A. of the Court of Appeal declined to review the merits of the motion judge's decision, finding that art. 29 *C.C.P.*, which provides for appeals from interlocutory decisions, did not apply in this case. Moreover, they noted, the courts have consistently held that a judgment dismissing an objection to evidence may not in principle be appealed, and the impugned order, which was based

[10] La juge rejette aussi, en quelques lignes, l'argument subsidiaire d'inopérabilité de l'art. 193 *C. cr.* Elle rappelle que l'ordonnance de communication n'est pas basée sur ce texte, mais bien sur la *Loi sur la concurrence* et le *Code de procédure civile*. L'application de l'art. 193 *C. cr.* ne devient donc pas la source d'une violation de l'art. 8 de la *Charte canadienne des droits et libertés* et de l'al. 2*e*) de la *Déclaration canadienne des droits*, L.R.C. 1985, app. III.

[11] Finalement, à propos de l'appelante Pétrolière Impériale, la juge Bélanger conclut que l'absence de cette dernière dans les procédures pénales ne modifie pas son statut pour les besoins de la requête. Elle n'est pas un tiers au litige civil et, en ce sens, elle possède les mêmes droits et est tenue aux mêmes obligations que ses co-défendeurs. Pour cette raison, si les conversations interceptées sont pertinentes, elles doivent être communiquées. Quoi qu'il en soit, ajoute la juge, Pétrolière Impériale pourra, au besoin et au moment opportun, s'opposer à la production de la preuve.

[12] En définitive, la juge Bélanger ordonne que les conversations interceptées dans le cadre de l'enquête Octane et déjà communiquées aux accusés dans les procédures pénales soient également communiquées aux avocats et experts participant à l'instance civile. Ces conversations devront toutefois être filtrées pour protéger le droit à la vie privée des tiers complètement étrangers au litige.

B. *Arrêts de la Cour d'appel (2012 QCCA 2265 (CanLII) et 2012 QCCA 2266 (CanLII))*

[13] Dans deux arrêts distincts, les juges Morin, Rochon et Vézina de la Cour d'appel refusent de réexaminer le bien-fondé de la décision de première instance, concluant que l'art. 29 *C.p.c.*, qui permet l'appel de décisions interlocutoires, ne s'applique pas en l'espèce. De plus, souligne la cour, il est de jurisprudence constante qu'un jugement rejetant une objection à la preuve n'est en principe pas appelable, et l'ordonnance contestée, qui repose à la fois

on the *Code of Civil Procedure*, the *Criminal Code* and the *Competition Act*, had been made at a stage prior to the presentation of evidence. The Court of Appeal accordingly dismissed the motions for leave to appeal.

IV. Issues and Positions of the Parties

A. *Issues*

[14] The appeals before this Court raise two issues. First, the Court must rule on the validity of an order, made in the course of civil proceedings, for disclosure of a series of communications that had been intercepted for the purposes of a criminal investigation. More specifically, the Court must decide whether there is any reason why the communications intercepted by the state in the course of the Octane investigation should not be disclosed to the parties to the civil proceedings. Second, the Court must rule on the constitutionality of art. 402 *C.C.P.*, on which the motion judge's order was based. In this regard, the Chief Justice stated the following question on September 23, 2013:

> Does art. 402 of the *Code of Civil Procedure* . . . apply constitutionally having regard to the legislative authority of Parliament under s. 91(27) of the *Constitution Act, 1867*?

[15] In the alternative, the appellants ask the Court to decide whether the Court of Appeal erred in refusing to grant them leave to appeal Bélanger J.'s decision. Since this Court has jurisdiction to hear the appeal on the merits under its enabling legislation (*Supreme Court Act*, R.S.C. 1985, c. S-26, s. 40(1)), we are of the opinion that it is not necessary to answer this question (see H. S. Brown, *Supreme Court of Canada Practice 2014* (2013), at pp. 83-84).

B. *Positions of the Parties*

[16] The appellants generally argue that disclosure of the intercepted private communications would be inconsistent with the provisions of the *Criminal Code* and the *Competition Act* and that, as a result,

sur le *Code de procédure civile*, le *Code criminel* et la *Loi sur la concurrence*, à été rendue à une étape préalable à la présentation de la preuve. La Cour d'appel rejette en conséquence les requêtes pour permission d'appeler.

IV. Questions en litige et thèses des parties

A. *Les questions en litige*

[14] Les pourvois dont notre Cour est saisie soulèvent deux questions. Premièrement, la Cour doit se prononcer sur la validité d'une ordonnance requérant, dans le cadre d'une instance civile, la communication d'une série de conversations interceptées pour les besoins d'une enquête pénale. Plus exactement, la Cour doit décider s'il existe un empêchement à la communication, aux parties à l'instance civile, des conversations interceptées par l'État durant l'enquête Octane. Deuxièmement, la Cour doit statuer sur la constitutionnalité de l'art. 402 *C.p.c.*, sur lequel est fondée l'ordonnance rendue en première instance. À cet effet, la Juge en chef a formulé, le 23 septembre 2013, la question suivante :

> L'article 402 du *Code de procédure civile* [. . .] s'applique-t-il constitutionnellement au regard de l'autorité législative que confère au Parlement le par. 91(27) de la *Loi constitutionnelle de 1867*?

[15] Subsidiairement, les appelants demandent à la Cour de décider si la Cour d'appel a commis une erreur en refusant de les autoriser à faire appel de la décision de la juge Bélanger. Comme notre Cour a compétence à l'égard de l'appel sur le fond en vertu de sa loi constitutive (*Loi sur la Cour suprême*, L.R.C. 1985, ch. S-26, par. 40(1)), nous sommes d'avis qu'il n'est pas nécessaire de répondre à cette question (voir H. S. Brown, *Supreme Court of Canada Practice 2014* (2013), p. 83-84).

B. *Les thèses des parties*

[16] De façon générale, les appelants prétendent que la communication des conversations privées interceptées est incompatible avec les dispositions du *Code criminel* et de la *Loi sur la concurrence*. En

art. 402 *C.C.P.* cannot serve as a basis for their disclosure.

[17] The appellants Couche-Tard et al. state, first, that electronic surveillance is the most serious violation of the right to privacy and that such a violation is exacerbated if the recording is subsequently disclosed. According to them, s. 193 *Cr. C.* lays down a rule of strict confidentiality that is subject to a few exceptions, listed exhaustively in s. 193(2) and (3). In their view, the purpose of all these exceptions is to fight crime, which is the government objective that justified interception in the first place. Second, according to Couche-Tard et al., an interpretation consistent with the modern approach to statutory interpretation and with this Court's decision in *Michaud* leads necessarily to the conclusion that Part VI *Cr. C.* does not give private litigants a right of access to information from wiretaps. Finally, the words of s. 29 of the *Competition Act* confirm the confidential nature of wiretap information and do not permit its disclosure.

[18] As for the appellant Imperial Oil, it submits that the motion of the respondents Jacques *et al.* constitutes an unlawful application for authorization to intercept private communications that would enable them to put together evidence they could not have obtained otherwise. The class action based on art. 1457 *C.C.Q.* and s. 36 of the *Competition Act* is civil in nature. Its purpose is to obtain reparation for pecuniary damage, not to suppress crime as is the case with Part VI *Cr. C.* Moreover, Imperial Oil argues that s. 193(2)(*a*) applies only to parties that are lawfully in possession of intercepted private communications, which means that Part VI *Cr. C.* cannot have the purpose or effect of giving a party to civil proceedings a right of access to private communications intercepted by the state. Imperial Oil also argues that it is an "innocent person", because no criminal charges have been laid against it. It adds that the public interest in protecting the innocent may preclude access to evidence in the context of civil proceedings. Finally, it submits that ss. 36(2) and 29 of the *Competition Act* cannot serve as a

conséquence, l'art. 402 *C.p.c.* ne peut en autoriser la communication.

[17] Les appelants Couche-Tard et autres indiquent en premier lieu que l'écoute électronique constitue l'atteinte la plus grave au droit à la vie privée — atteinte qui est exacerbée lorsque l'enregistrement est par la suite divulgué. En effet, selon eux, l'art. 193 *C. cr.* énonce une règle stricte de confidentialité, assortie de quelques exceptions énumérées de manière exhaustive aux par. 193(2) et (3). Couche-Tard et autres sont d'avis que toutes ces exceptions visent l'objectif de la lutte contre la criminalité, soit l'objectif étatique qui a justifié l'interception à l'origine. En second lieu, soulignent Couche-Tard et autres, une interprétation conforme à la méthode moderne d'interprétation des lois et à l'arrêt *Michaud* de notre Cour force à conclure que la partie VI *C. cr.* n'établit aucun droit d'accès aux fruits de l'écoute électronique en faveur d'un justiciable privé. Finalement, le libellé de l'art. 29 de la *Loi sur la concurrence* confirme la nature confidentielle de l'écoute électronique et n'en permet pas la divulgation.

[18] Pour sa part, l'appelante Pétrolière Impériale soutient que la requête des intimés Jacques et autres constitue une demande illégale d'autorisation d'intercepter des communications privées, mesure qui leur permettrait de se constituer une preuve qu'ils n'auraient pu obtenir autrement. En effet, le recours collectif fondé sur l'art. 1457 *C.c.Q.* et l'art. 36 de la *Loi sur la concurrence* possède un caractère civil. Il vise à réparer un dommage pécuniaire, et non à réprimer le crime comme la partie VI *C. cr.* De plus, selon Pétrolière Impériale, l'al. 193(2)*a*) ne s'applique qu'aux parties qui sont légalement en possession des communications privées interceptées. En conséquence, la partie VI *C. cr.* ne peut avoir pour objet ou pour effet d'accorder à une partie à un litige civil un droit d'accès aux communications privées interceptées par l'État. Au surplus, Pétrolière Impériale plaide qu'elle est une « personne innocente », puisqu'aucune accusation criminelle n'a été portée contre elle. Elle ajoute que l'intérêt public relatif à la protection des personnes innocentes peut représenter un obstacle à

basis for compelling the Competition Bureau to disclose the wiretap information.

[19] Generally speaking, the respondents counter that no rule of federal law prohibits the disclosure of intercepted communications that are considered relevant under provincial law. In this regard, the Attorney General of Quebec ("AGQ") and the DPP, who are also respondents, essentially support the position taken by the respondents Jacques et al. However, the intervener Attorney General of Ontario ("AGO") stresses the importance of regulating and controlling the disclosure process and the scope of any disclosure.

[20] The respondents Jacques et al. note that Part VI *Cr. C.* protects privacy, but also provides that one's privacy can be invaded if the invasion serves the public interest in ensuring that justice is done. In their view, although communications may be intercepted only in pursuit of the purpose of fighting crime, intercepted communications may be disclosed in a wider range of circumstances that are already specified in the *Criminal Code*. Moreover, they argue that s. 193(2)(*a*) *Cr. C.* and s. 29 of the *Competition Act* are not the source of a right to disclosure of wiretap information. Rather, the right in the instant case is provided for in art. 402 *C.C.P.* As to the violation relied on by the appellants, the respondents Jacques et al. state that action has been taken to limit disclosure and to preclude premature or unnecessary disclosure. Finally, concerning Imperial Oil's argument that it is an innocent third party, they submit that the Superior Court did not err in refusing to grant it that status. As Bélanger J. stated, the third party concept must be interpreted in the context of the civil proceedings in which the disclosure of the documents is sought.

[21] The DPP submits that, if interpreted applying the modern approach to statutory construction,

l'accès à des éléments de preuve dans le contexte d'une instance civile. Enfin, elle prétend que le par. 36(2) et l'art. 29 de la *Loi sur la concurrence* ne permettent pas de contraindre le Bureau de la concurrence à communiquer les fruits de l'écoute électronique.

[19] Globalement, les intimés affirment au contraire qu'aucune règle de droit fédérale n'interdit la communication de conversations interceptées lorsque celles-ci sont jugées pertinentes en vertu du droit provincial. À cet égard, le procureur général du Québec (« PGQ ») et le DPP, également intimés, appuient pour l'essentiel la thèse des intimés Jacques et autres. L'intervenant le procureur général de l'Ontario (« PGO ») insiste toutefois sur l'importance d'encadrer et de contrôler le processus de communication et la portée de celle-ci.

[20] Les intimés Jacques et autres rappellent que la partie VI *C. cr.* protège la vie privée tout en permettant à ce qu'il y soit porté atteinte, et ce, dans l'intérêt du public à ce que justice soit rendue. À leur avis, bien qu'une communication ne puisse être interceptée que dans la poursuite de l'objectif de la lutte contre la criminalité, la divulgation de communications interceptées est permise dans un éventail plus large de circonstances déjà prévues au *Code criminel*. Par ailleurs, ils soutiennent que l'al. 193(2)*a*) *C. cr.* et l'art. 29 de la *Loi sur la concurrence* ne constituent pas la source d'un droit permettant d'obtenir la communication des fruits de l'écoute électronique. En l'espèce, c'est plutôt l'art. 402 *C.p.c.* qui crée un tel droit. En ce qui concerne l'atteinte invoquée par les appelants, les intimés Jacques et autres précisent que des mesures ont été mises en place pour limiter la communication et pour éviter qu'elle soit prématurée ou superflue. Finalement, à propos de l'argument de Pétrolière Impériale selon lequel elle serait un tiers innocent, ils plaident que la Cour supérieure n'a pas commis d'erreur en refusant de lui reconnaître ce statut. Comme l'a indiqué la juge Bélanger, la notion de tiers doit s'interpréter par rapport à l'instance civile au cours de laquelle la communication des documents est demandée.

[21] Pour sa part, le DPP affirme que, suivant la méthode moderne d'interprétation des lois, l'al.

s. 193(2)(*a*) *Cr. C.* allows for the disclosure of private communications to a litigant for the purpose of giving evidence in civil proceedings. He adds that s. 29 of the *Competition Act* does not preclude the disclosure of such communications either. Moreover, he considers it wrong to liken the disclosure of a private communication to a second interception under Part VI *Cr. C.*: interception and disclosure are distinct concepts. The DPP responds to the arguments of the appellant Imperial Oil by stating that, even if Imperial Oil could be considered an "innocent third party", which is not the case, that would not make the exemption provided for in s. 193(2)(*a*) inapplicable, but would merely be one factor to consider in deciding whether to order disclosure. The DPP further notes that s. 193(2)(*a*) does not differentiate between an intercepted private communication that involves an "innocent" person and one that does not. Nor does the relevance of a private communication depend on the status of any of those involved in the communication.

[22] The AGQ agrees with the DPP and the other respondents that a court hearing a civil case can authorize the disclosure of wiretap evidence. Article 402 *C.C.P.* allows this at the pretrial stage as long as the evidence is relevant and furthers the truth-seeking process. However, the AGQ points out that such a disclosure remains subject to the discretion of the court, which will determine the extent and conditions of the disclosure by considering the various interests at stake. Regarding s. 193(2)(*a*), the AGQ considers the interpretation proposed by the appellants to be unduly narrow. Although the interception of private communications must serve the purpose of fighting crime, the same is not true of the subsequent disclosure of information resulting from that interception. Furthermore, the AGQ submits that the motion judge's order struck an appropriate balance between the right to privacy and the parties' right to a fair trial. It also ensured proportionality between the purposes of the statutory provision and the protection of the values of the Canadian *Charter* and the *Charter of human rights and freedoms*, CQLR, c. C-12. Finally, the AGQ asserts that Bélanger J. was right to find that Imperial Oil

193(2)*a*) *C. cr.* autorise la communication de conversations privées à un justiciable aux fins de déposition dans des poursuites civiles. D'après le DPP, l'art. 29 de la *Loi sur la concurrence* n'empêche pas non plus une telle communication. Par ailleurs, il estime qu'il est incorrect d'assimiler la communication d'une conversation privée à une seconde interception fondée sur la partie VI *C. cr.* : l'interception et la communication sont des notions distinctes. En réponse aux arguments de l'appelante Pétrolière Impériale, le DPP ajoute que même si cette dernière pouvait être considérée comme un « tiers innocent », ce qui n'est pas le cas, cette situation ne constituerait pas un obstacle à l'application de l'exemption prévue à l'al. 193(2)*a*), mais uniquement un facteur à considérer pour décider si la communication doit être ordonnée. Le DPP souligne également que l'al. 193(2)*a*) ne fait pas de distinctions selon que les communications privées interceptées concernent une personne « innocente » ou non. De même, la notion de pertinence d'une communication privée ne dépend pas du statut de l'un ou de l'autre des interlocuteurs à la conversation.

[22] À l'instar du DPP et des autres intimés, le PGQ exprime l'avis qu'un tribunal siégeant en matière civile peut autoriser la communication d'éléments de preuve découlant d'activités d'écoute électronique. L'article 402 *C.p.c.* le permet à l'étape des procédures préalables à l'instruction, dans la mesure où l'élément de preuve est pertinent et s'inscrit dans le processus de la recherche de la vérité. Le PGQ rappelle toutefois que cette communication demeure assujettie au pouvoir discrétionnaire du tribunal, qui en détermine l'étendue et les modalités, en soupesant les divers intérêts en jeu. Quant à l'al. 193(2)*a*), l'interprétation que proposent les appelants est trop restrictive selon le PGQ. Bien que l'interception d'une communication privée doive être faite dans la poursuite de l'objectif de lutte contre la criminalité, il n'en est pas ainsi pour la communication ultérieure des fruits de cette interception. Par ailleurs, d'après le PGQ, l'ordonnance rendue par la juge de première instance respecte un juste équilibre entre le droit à la vie privée et le droit des parties à un procès équitable. De même, elle assure la proportionnalité entre les objets de la disposition législative et la protection des valeurs

is not an innocent third party and therefore does not have more rights than its co-defendants.

[23] The AGO proposes a conservative interpretation of s. 193(2)(*a*) *Cr. C.* that takes into account not only the purpose of Part VI, but also the need for consistency with other important imperatives, including the search for truth. Section 193(2)(*a*) provides for the possibility of disclosing, at the exploratory stage of civil proceedings, communications intercepted by the state. However, the disclosure must be limited to situations contemplated in applicable legislation and common law rules, interpreted in a manner consistent with Part VI. Where intercepted communications are in the possession of a party to the proceedings — such as the defendants in this case who have also been charged in the criminal proceedings — the request for disclosure should be made directly to that party and should take place within the framework established by the Ontario Court of Appeal in *P. (D.) v. Wagg* (2004), 71 O.R. (3d) 229, in 2004. Where the state is in sole possession of the intercepted communications, on the other hand, the burden of justifying the application for disclosure should be much heavier.

V. Analysis

A. *Disclosure of Evidence at the Exploratory Stage*

[24] Nearly 20 years ago, Cory J. observed that "[t]he ultimate aim of any trial, criminal or civil, must be to seek and to ascertain the truth" (*R. v. Nikolovski*, [1996] 3 S.C.R. 1197, at para. 13). Although the parallel objectives of proportionality and efficiency have become increasingly important in the civil procedure context, seeking the truth remains the cardinal principle in civil proceedings (see P. Tessier, "La vérité et la justice" (1988), 19 *R.G.D.* 29, at p. 32; C. Marseille, *La règle de la pertinence en droit de la preuve civile québécois* (2004), at p. 3). Informed by this objective, the rules of the

de la *Charte* canadienne et de la *Charte des droits et libertés de la personne*, RLRQ, ch. C-12. Enfin, le PGQ affirme que la juge Bélanger a eu raison de conclure que Pétrolière Impériale n'est pas un tiers innocent et que, pour cette raison, elle ne possède pas plus de droits que ses codéfendeurs.

[23] Pour sa part, le PGO propose une interprétation conservatrice de l'al. 193(2)*a*) *C. cr.* qui tient compte non seulement de l'objet de la partie VI, mais également du respect d'autres impératifs importants, telle la recherche de la vérité. L'alinéa 193(2)*a*) ouvre la possibilité que soient communiquées, au cours de la phase exploratoire d'une instance civile, des conversations interceptées par l'État. Toutefois, la communication doit être limitée aux situations envisagées par la loi ou les principes de common law applicables, interprétés en conformité avec la partie VI. Lorsqu'une partie au litige est en possession de communications interceptées — comme c'est le cas des défendeurs en l'espèce qui sont par ailleurs accusés au criminel —, la demande de communication devrait leur être adressée directement et être circonscrite au moyen du cadre établi dans l'arrêt *P. (D.) c. Wagg* (2004), 71 O.R. (3d) 229, par la Cour d'appel de l'Ontario en 2004. Par ailleurs, si l'État est seul à posséder des communications interceptées, le fardeau de justification de la demande de communication devrait être beaucoup plus exigeant.

V. Analyse

A. *La communication de la preuve durant la phase exploratoire*

[24] Il y a de cela près de 20 ans, le juge Cory rappelait que « [l]'objectif ultime d'un procès, criminel ou civil, doit être la recherche et la découverte de la vérité » (*R. c. Nikolovski*, [1996] 3 R.C.S. 1197, par. 13). Sous réserve du respect des objectifs parallèles de proportionnalité et d'efficacité, dont l'importance croît dans le cadre de la procédure civile, la recherche de la vérité demeure le principe cardinal de la conduite de l'instance civile (voir P. Tessier, « La vérité et la justice » (1988), 19 *R.G.D.* 29, p. 32; C. Marseille, *La règle de la pertinence en droit de la preuve civile québécois* (2004), p. 3).

law of evidence in civil matters allow judges "to find out the truth, and to do justice according to law" (*Frenette v. Metropolitan Life Insurance Co.*, [1992] 1 S.C.R. 647, at p. 666, quoting *Jones v. National Coal Board*, [1957] 2 Q.B. 55 (C.A.), at p. 63).

[25] Although the power of judges to intervene in the conduct of civil proceedings has become increasingly broad, judges generally do not play an active part in the search for truth (L. Ducharme and C.-M. Panaccio, *L'administration de la preuve* (4th ed. 2010), at p. 7; *Technologie Labtronix Inc. v. Technologie Micro Contrôle Inc.*, [1998] R.J.Q. 2312 (C.A.), at p. 2325). In an accusatory and adversarial system, the delicate task of bringing the truth to light falls first and foremost to the parties (see art. 2803 *C.C.Q.*; arts. 76 and 77 *C.C.P.*). In this context in which the objective of seeking the truth remains the priority, the Quebec legislature has established general rules of evidence to govern and facilitate this process, which remains under the control of the parties (see L. Ducharme, "Rapports canadiens — première partie: la vérité et la législation sur la procédure civile en droit québécois", in *Travaux de l'Association Henri Capitant des amis de la culture juridique française*, vol. 38, *La vérité et le droit — Journées canadiennes* (1987), 657).

[26] The pre-trial "exploratory" stage, which is a key time for this search in court for the truth, facilitates the disclosure of evidence that might enable the parties to establish the truth of the facts they allege (J.-C. Royer and S. Lavallée, *La preuve civile* (4th ed. 2008), at pp. 485 and 493; J.-L. Baudouin, *Secret professionnel et droit au secret dans le droit de la preuve: Étude de Droit Québécois comparé au Droit Français et à la Common-Law* (1965), at p. 173; see also *Blaikie v. Commission des valeurs mobilières du Québec*, [1990] R.D.J. 473, at pp. 476-77). This stage enables each of the parties [TRANSLATION] "to be better informed of the facts of the case and, more specifically, of the opposite party's evidence" (Ducharme and Panaccio, at p. 365). In the early 2000s, the committee established to reform Quebec civil procedure gave a more precise description of the "communication of exhibits" stage, stating that

Guidé par cet objectif, le régime juridique de la preuve civile permet au juge « de découvrir [cette] vérité et de rendre justice conformément à la loi » (*Frenette c. Métropolitaine (La), cie d'assurance-vie*, [1992] 1 R.C.S. 647, p. 666, citant *Jones c. National Coal Board*, [1957] 2 Q.B. 55 (C.A.), p. 63).

[25] Même si les pouvoirs d'intervention du juge dans la conduite de l'instance civile sont devenus de plus en plus importants, en règle générale, ce dernier ne participe pas activement à la recherche de la vérité (L. Ducharme et C.-M. Panaccio, *L'administration de la preuve* (4e éd. 2010), p. 7; *Technologie Labtronix Inc. c. Technologie Micro Contrôle Inc.*, [1998] R.J.Q. 2312 (C.A.), p. 2325). En effet, dans un système accusatoire et contradictoire, la délicate tâche de faire apparaître la vérité revient d'abord et avant tout aux parties (voir art. 2803 *C.c.Q.*; art. 76 et 77 *C.p.c.*). Dans ce contexte, où l'objectif de recherche de vérité continue de primer, le législateur québécois a instauré un régime général de preuve destiné à encadrer et à faciliter la mise en œuvre de ce processus dont les parties demeurent les maîtres (voir L. Ducharme, « Rapports canadiens — première partie : la vérité et la législation sur la procédure civile en droit québécois », dans *Travaux de l'Association Henri Capitant des amis de la culture juridique française*, t. 38, *La vérité et le droit — Journées canadiennes* (1987), 657).

[26] Période névralgique dans cette quête de la vérité au prétoire, la phase « exploratoire » précédant l'audition favorise la communication des éléments de preuve susceptibles de permettre aux parties d'établir la véracité des faits qu'elles allèguent (J.-C. Royer et S. Lavallée, *La preuve civile* (4e éd. 2008), p. 485 et 493; J.-L. Baudouin, *Secret professionnel et droit au secret dans le droit de la preuve : Étude de Droit Québécois comparé au Droit Français et à la Common-Law* (1965), p. 173; voir aussi *Blaikie c. Commission des valeurs mobilières du Québec*, [1990] R.D.J. 473, p. 476-477). Cette phase permet à chacune des parties « d'être mieux informé[e]s sur les faits en litige et, plus spécialement, sur les moyens de preuve dont dispose la partie adverse » (Ducharme et Panaccio, p. 365). Décrivant de manière plus précise encore l'étape de la communication des pièces, le comité chargé

it [TRANSLATION] "favours the transparency of proceedings and the accountability of parties and counsel. It also favours admissions, allows the issues to be defined quickly and facilitates transactions" (Civil Procedure Review Committee, D. Ferland (Chair), *Rapport du Comité de révision de la procédure civile: une nouvelle culture judiciaire* (2001), at p. 138; see also *Frenette*, at pp. 679-80; *Glegg*, at para. 22).

[27] The Quebec legislature, aware of the importance of the exploratory stage in the civil process, had already established a framework for it by enacting a series of rules of general application that empower judges to order the disclosure of documents relating to the issues between the parties. It is these rules, and not, as the appellants argue, the various federal statutes on which they rely, that the parties can use to request the disclosure of documents. In this sense, they form the basis for the "right of access" to information. The rules, which are now codified in c. III of Title V of the *Code of Civil Procedure*, include art. 402, the first paragraph of which reads as follows:

402. If, after defence filed, it appears from the record that a document relating to the issues between the parties is in the possession of a third party, he may, upon summons authorized by the court, be ordered to give communication of it to the parties, unless he shows cause why he should not do so.

[28] The courts have given this article a large and liberal interpretation (Royer and Lavallée, at pp. 487-89; *Autorité des marchés financiers v. Panju*, 2008 QCCA 832, [2008] R.J.Q. 1233; *Fédération des infirmières et infirmiers du Québec v. Hôpital Laval*, 2006 QCCA 1345, [2006] R.J.Q. 2384; *Westfalia Surge Canada Co. v. Ferme Hamelon (JFD) et Fils*, 2005 QCCA 514 (CanLII)). As a result, although judges have great discretion in exercising their power to oversee the application of art. 402, they will generally favour disclosure. In this regard, Proulx J.A. noted in a leading Court of Appeal decision that, [TRANSLATION] "at the stage of examination on discovery both before and after defence,

de réformer la procédure civile québécoise affirmait d'ailleurs, au début des années deux mille, que cette étape « favorise la transparence des débats et la responsabilisation des parties et des procureurs. Elle favorise également les admissions, permet de circonscrire rapidement les questions en litige et facilite les transactions » (Comité de révision de la procédure civile, D. Ferland (prés.), *Rapport du Comité de révision de la procédure civile : une nouvelle culture judiciaire* (2001), p. 138; voir aussi *Frenette*, p. 679-680; *Glegg*, par. 22).

[27] Conscient de l'importance de l'étape exploratoire dans le processus civil, le législateur québécois a eu tôt fait de l'encadrer en édictant une série de règles d'application générale, qui habilitent le juge à ordonner la communication de documents relatifs au litige. Contrairement aux prétentions des appelants, ce sont ces règles, et non pas les différentes lois fédérales qu'ils invoquent, qui permettent aux parties de requérir la communication des documents. En ce sens, elles constituent le fondement du « droit d'accès » à l'information. Parmi ces règles, aujourd'hui codifiées au ch. III du titre V du *Code de procédure civile*, mentionnons l'art. 402, dont le premier alinéa est rédigé ainsi :

402. Si, après production de la défense, il appert au dossier qu'un document se rapportant au litige est entre les mains d'un tiers, celui-ci sera tenu d'en donner communication aux parties, sur assignation autorisée par le tribunal, à moins de raisons le justifiant de s'y opposer.

[28] Les tribunaux ont donné une interprétation large et libérale à cet article (Royer et Lavallée, p. 487-489; *Autorité des marchés financiers c. Panju*, 2008 QCCA 832, [2008] R.J.Q. 1233; *Fédération des infirmières et infirmiers du Québec c. Hôpital Laval*, 2006 QCCA 1345, [2006] R.J.Q. 2384; *Westfalia Surge Canada Co. c. Ferme Hamelon (JFD) et Fils*, 2005 QCCA 514 (CanLII)). Ainsi, bien que le juge jouisse d'une grande discrétion dans l'exercice de son pouvoir de contrôle de l'application de l'art. 402, il favorisera généralement la communication. À ce propos, dans un arrêt de principe de la Cour d'appel, le juge Proulx soulignait que, « au stade de l'interrogatoire préalable,

the fullest possible disclosure of evidence should be favoured" (*Westinghouse Canada Inc. v. Arkwright Boston Manufacturers Mutual Insurance Co.*, [1993] R.J.Q. 2735 ("*Arkwright*"), at p. 2741; see also *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, 2001 SCC 51, [2001] 2 S.C.R. 743, at para. 60; *Frenette*, at p. 680; *Communauté urbaine de Montréal v. Chubb du Canada compagnie d'assurances*, [1998] R.J.Q. 759 ("*Chubb*"), at p. 764). With respect to the exploratory stage, these words still seem relevant.

[29] Although the right to disclosure granted to each of the parties to a civil proceeding must be understood broadly, it is nevertheless not unlimited. First, as we will see below, the scope of disclosure must sometimes be limited to avoid harming the interests of third parties. Second, it should be mentioned that under art. 402, para. 1 *C.C.P.*, the court may refuse to order a third party to disclose documents in his or her possession if that party "shows cause why he should not do so". In exercising its discretion, the court may consider, *inter alia*, the relevance of the documents to the issues between the parties, the extent to which the privacy of a party or of a third party to the proceedings is invaded and the importance of remaining sensitive to the duty to protect a person's privacy that flows from the *Charter of human rights and freedoms* (s. 5) and the *Civil Code of Québec* (arts. 35 and 36).

[30] Thus, disclosure can be objected to if the documents sought in the motion are not relevant to the issues between the parties (D. Ferland and B. Emery, *Précis de procédure civile du Québec* (4th ed. 2003), vol. 1, at p. 629). Although the courts seem to be more cautious when assessing the relevance of confidential documents, the concept of relevance is generally interpreted broadly at the exploratory stage of the proceedings (*Glegg*, at para. 23; *Kruger Inc. v. Kruger*, [1987] R.D.J. 11 (C.A.), at p. 17; *Industries GDS inc. v. Carbotech inc.*, 2005 QCCA 655 (CanLII); see also Royer and Lavallée, at pp. 490-91; S. Grammond, "La justice secrète: information confidentielle et procès civil"

tant avant qu'après défense, il y a lieu de favoriser la divulgation la plus complète de la preuve » (*Westinghouse Canada Inc. c. Arkwright Boston Manufacturers Mutual Insurance Co.*, [1993] R.J.Q. 2735 (« *Arkwright* »), p. 2741; voir aussi *Lac d'Amiante du Québec Ltée c. 2858-0702 Québec Inc.*, 2001 CSC 51, [2001] 2 R.C.S. 743, par. 60; *Frenette*, p. 680; *Communauté urbaine de Montréal c. Chubb du Canada compagnie d'assurances*, [1998] R.J.Q. 759 (« *Chubb* »), p. 764). Relativement au rôle de la phase exploratoire, ces propos nous semblent toujours pertinents.

[29] Cependant, s'il doit être entendu de manière large, le droit à la communication dont dispose chacune des parties à une instance civile n'est pas pour autant illimité. D'une part, comme nous le verrons plus loin, l'étendue de la communication doit parfois être restreinte pour éviter qu'il soit porté atteinte aux intérêts de tiers. D'autre part, il importe de préciser que, aux termes de l'art. 402, al. 1 *C.p.c.*, le tribunal peut refuser d'ordonner la communication de documents en possession d'un tiers s'il existe des « raisons le justifiant de s'y opposer ». Dans l'exercice de sa discrétion, le tribunal pourra considérer, entre autres, la pertinence des documents à l'égard du litige, le degré d'atteinte à la vie privée d'une partie ou d'un tiers au litige et l'importance de demeurer sensible au devoir de protéger la vie privée prévu par la *Charte des droits et libertés de la personne* (art. 5) et le *Code civil du Québec* (art. 35 et 36).

[30] Ainsi, il est possible de s'opposer à la communication si les documents faisant l'objet de la requête ne sont pas pertinents à l'égard du litige (D. Ferland et B. Emery, *Précis de procédure civile du Québec* (4e éd. 2003), vol. 1, p. 629). Quoique les tribunaux semblent plus prudents au moment d'évaluer la pertinence de documents de nature confidentielle, le concept de pertinence s'apprécie généralement de manière large au cours de la phase exploratoire de l'instance (*Glegg*, par. 23; *Kruger Inc. c. Kruger*, [1987] R.D.J. 11 (C.A.), p. 17; *Industries GDS inc. c. Carbotech inc.*, 2005 QCCA 655 (CanLII); voir aussi Royer et Lavallée, p. 490-491; S. Grammond, « La justice secrète : information

(1996), 56 *R. du B.* 437, at pp. 457-58). To be relevant, the requested document must relate to the issues between the parties, be useful and be likely to contribute to resolving the issues (*Glegg*, at para. 23; *Arkwright*, at p. 2741; *Chubb*, at p. 762; *Westfalia Surge Canada Co.*; *Autorité des marchés financiers*; *Fédération des infirmières et infirmiers du Québec*).

[31] This relevance requirement ensures that the parties do not conduct "fishing expeditions". It also ensures that the conduct of the proceedings is not delayed, complicated or even jeopardized by the introduction of evidence that does not assist in establishing the rights being claimed (see Royer and Lavallée, at p. 487; Marseille, at pp. 1 and 21). In this sense, the relevance rule is a procedural balancing rule that ensures the efficiency of the judicial process while facilitating the search for truth.

[32] In the instant case, Bélanger J. found that the evidence requested by the respondents was relevant. There is nothing in the record to cast doubt on that finding. It is clear that the recordings in question, whether transcribed or not, are indeed "document[s]" within the meaning of art. 402 *C.C.P.* (Ducharme and Panaccio, at pp. 428 and 455; see also *Corporation de financement commercial Transamérica Canada v. Beaudoin*, [1995] R.D.J. 633 (C.A.)). Moreover, and particularly to the extent that the plaintiffs in the action in the instant case are trying to show that there was collusion among the defendants, there is every reason to believe that the recordings sought in the motion will be useful for the conduct of the proceedings.

[33] Under art. 402 *C.C.P.*, an objection to disclosure can also be based on an immunity from disclosure that is either provided for in legislation or established by the courts (see Ducharme and Panaccio, at pp. 426-27; *Union Canadienne, compagnie d'assurance v. St-Pierre*, 2012 QCCA 433, [2012] R.J.Q. 340, at para. 21; *Goulet v. Lussier*, [1989] R.J.Q. 2085 (C.A.); see also *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157; *R. v. Corbett*, [1988] 1 S.C.R.

confidentielle et procès civil » (1996), 56 *R. du B.* 437, p. 457-458). Pour être pertinent, le document demandé doit se rapporter au litige, être utile et être susceptible de faire avancer le débat (*Glegg*, par. 23; *Arkwright*, p. 2741; *Chubb*, p. 762; *Westfalia Surge Canada Co.*; *Autorité des marchés financiers*; *Fédération des infirmières et infirmiers du Québec*).

[31] Cette obligation de pertinence empêche les parties de se livrer à une « recherche à l'aveuglette ». Elle permet d'éviter que le bon déroulement de l'instance soit ralenti, compliqué ou même compromis par l'introduction d'éléments inutiles pour établir l'existence des droits invoqués (voir Royer et Lavallée, p. 487; Marseille, p. 1 et 21). En ce sens, la règle de la pertinence représente une règle d'équilibre procédural qui tend à assurer l'efficacité du processus judiciaire, tout en facilitant la quête de la vérité.

[32] En l'espèce, la juge Bélanger a conclu que les éléments de preuve sollicités par les intimés sont pertinents. Rien dans le dossier ne permet de remettre en cause cette conclusion. D'une part, qu'ils aient été transcrits ou non, il est clair que les enregistrements en question constituent bel et bien des « document[s] » au sens de l'art. 402 *C.p.c.* (Ducharme et Panaccio, p. 428 et 455; voir aussi *Corporation de financement commercial Transamérica Canada c. Beaudoin*, [1995] R.D.J. 633 (C.A.)). D'autre part, particulièrement dans la mesure où les demandeurs dans le recours entrepris en l'espèce cherchent à démontrer qu'il y a eu collusion entre les défendeurs, il y a tout lieu de croire que les enregistrements visés par la requête seront utiles pour la conduite de l'instance.

[33] Pour l'application de l'art. 402 *C.p.c.*, l'opposition à la communication peut également reposer sur une immunité de divulgation de source légale ou prétorienne (voir Ducharme et Panaccio, p. 426-427; *Union Canadienne, compagnie d'assurance c. St-Pierre*, 2012 QCCA 433, [2012] R.J.Q. 340, par. 21; *Goulet c. Lussier*, [1989] R.J.Q. 2085 (C.A.); voir aussi *M. (A.) c. Ryan*, [1997] 1 R.C.S. 157; *R. c. Corbett*, [1988] 1 R.C.S. 670; *R. c. Seaboyer*, [1991]

670; *R. v. Seaboyer*, [1991] 2 S.C.R. 577). The appellants argue that such exceptions exist under the *Competition Act* and the *Criminal Code*. For the reasons that follow, we are not persuaded by this argument.

B. *The Provisions and Principles Relied On by the Appellants Are Not Valid Grounds for Objecting to Disclosure of the Recordings*

[34] The appellants submit that disclosure is precluded by ss. 29 and 36 of the *Competition Act*, and by s. 193 *Cr. C.* The appellant Imperial Oil adds that its "innocent third party" status prohibits any disclosure of recordings about it. We will now consider these various grounds for objecting to disclosure of the requested information.

(1) *Competition Act*

[35] The appellants argue that s. 29 of the *Competition Act* confirms that the recordings of intercepted private communications are confidential, and that this section cannot be applied to require the Competition Bureau to disclose the results of its electronic surveillance. They add that s. 36 creates no right to disclosure. Finally, according to the appellant Imperial Oil, although s. 36(2) provides that evidence given in criminal proceedings that resulted in conviction can be evidence in an action under s. 36, Bélanger J.'s order should have drawn a distinction between the defendants in the civil action that had been convicted in the criminal proceedings and those that had not been.

[36] These arguments must fail. As we explained above, disclosure of the intercepted private communications was ordered not under s. 36 of the *Competition Act* but under art. 402 *C.C.P.* As for s. 29, it provides for confidentiality of the Competition Bureau's record of investigation, and in particular

2 R.C.S. 577). Les appelants plaident que la *Loi sur la concurrence* et le *Code criminel* créent de telles exceptions. Pour les raisons qui suivent, cet argument ne nous convainc pas.

B. *Les textes et principes invoqués par les appelants ne constituent pas une source valide d'opposition à la communication des enregistrements*

[34] Pour s'opposer à la communication, les appelants invoquent les art. 29 et 36 de la *Loi sur la concurrence*, ainsi que l'art. 193 *C. Cr.* L'appelante Pétrolière Impériale ajoute pour sa part que son statut de « tiers innocent » interdit toute communication des enregistrements la concernant. Nous examinerons maintenant ces différentes sources d'opposition à la communication des renseignements demandés.

(1) La *Loi sur la concurrence*

[35] Les appelants prétendent que l'art. 29 de la *Loi sur la concurrence* confirme la nature confidentielle des enregistrements de communications privées interceptées et que cette disposition ne peut être invoquée pour exiger du Bureau de la concurrence la communication du produit de ses activités d'écoute électronique. Par ailleurs, ils ajoutent que l'art. 36 n'établit aucun droit à la communication. Enfin, l'appelante Pétrolière Impériale souligne que le par. 36(2) précise que la preuve fournie lors de procédures pénales ayant mené à une déclaration de culpabilité peut constituer une preuve dans le cadre d'un recours fondé sur l'art. 36, mais avance que l'ordonnance de la juge Bélanger aurait dû faire une distinction entre les défendeurs au recours civil qui ont été reconnus coupables au pénal et ceux qui ne l'ont pas été.

[36] Ces moyens doivent être rejetés. Comme nous l'avons expliqué précédemment, ce n'est pas en vertu de l'art. 36 de la *Loi sur la concurrence* que la communication des conversations privées interceptées a été ordonnée, mais bien sur le fondement de l'art. 402 *C.p.c.* L'article 29, quant à lui, énonce

of the types of information referred to in s. 29(1)(*a*) to (*e*):

29. (1) No person who performs or has performed duties or functions in the administration or enforcement of this Act shall communicate or allow to be communicated to any other person except to a Canadian law enforcement agency or for the purposes of the administration or enforcement of this Act

(*a*) the identity of any person from whom information was obtained pursuant to this Act;

(*b*) any information obtained pursuant to section 11, 15, 16 or 114;

(*c*) whether notice has been given or information supplied in respect of a particular proposed transaction under section 114;

(*d*) any information obtained from a person requesting a certificate under section 102; or

(*e*) any information provided voluntarily pursuant to this Act.

[37] Private communications intercepted under Part VI *Cr. C.* are not among the types of information referred to in s. 29(1)(*a*) to (*e*), so s. 29 does not prohibit their disclosure. In our opinion, the same is true of s. 193 *Cr. C.*

(2) *Criminal Code* — Section 193(2)(*a*)

[38] Section 193 *Cr. C.* is found in Part VI, which is entitled "Invasion of Privacy". This Court has already discussed Part VI in *Lyons v. The Queen*, [1984] 2 S.C.R. 633, *R. v. Duarte*, [1990] 1 S.C.R. 30, *Michaud*, *R. v. Tse*, 2012 SCC 16, [2012] 1 S.C.R. 531, at para. 24, and, more recently, *R. v. TELUS Communications Co.*, 2013 SCC 16, [2013] 2 S.C.R. 3 (particularly at paras. 22-31 and 73).

[39] Part VI, which is a result of legislative amendments made to the *Criminal Code* in 1974 to fill a legal vacuum in privacy protection (*Tse*, at para. 24),

la confidentialité du dossier d'enquête constitué par le Bureau de la concurrence, particulièrement des catégories de renseignements mentionnées aux al. (1)*a*) à *e*) :

29. (1) Il est interdit à quiconque exerce ou a exercé des fonctions dans le cadre de l'application ou du contrôle d'application de la présente loi de communiquer ou de permettre que soient communiqués à une autre personne, sauf à un organisme canadien chargé du contrôle d'application de la loi ou dans le cadre de l'application ou du contrôle d'application de la présente loi :

a) l'identité d'une personne de qui des renseignements ont été obtenus en application de la présente loi;

b) l'un quelconque des renseignements obtenus en application de l'article 11, 15, 16 ou 114;

c) quoi que ce soit concernant la question de savoir si un avis a été donné ou si des renseignements ont été fournis conformément à l'article 114 à l'égard d'une transaction proposée;

d) tout renseignement obtenu d'une personne qui demande un certificat conformément à l'article 102;

e) des renseignements fournis volontairement dans le cadre de la présente loi.

[37] Les conversations privées interceptées en vertu de la partie VI *C. cr.* ne font pas partie des éléments mentionnés aux al. 29(1)*a*) à *e*). L'article 29 n'en interdit donc pas la communication. Il en va de même, à notre avis, de l'art. 193 *C. cr.*

(2) Le *Code criminel* — l'al. 193(2)*a*)

[38] L'article 193 *C. cr.* se trouve à la partie VI intitulée « Atteintes à la vie privée ». Notre Cour s'est déjà penchée sur cette partie du *Code criminel* dans les arrêts *Lyons c. La Reine*, [1984] 2 R.C.S. 633, *R. c. Duarte*, [1990] 1 R.C.S. 30, *Michaud*, *R. c. Tse*, 2012 CSC 16, [2012] 1 R.C.S. 531, par. 24, et plus récemment dans l'arrêt *R. c. Société TELUS Communications*, 2013 CSC 16, [2013] 2 R.C.S. 3, (particulièrement aux par. 22-31 et 73).

[39] Résultat de modifications législatives apportées au *Code criminel* en 1974 pour combler un vide juridique en matière de protection de la vie privée

"provides a scheme to protect private communications" (*TELUS*, at para. 3). Its purpose is "to offer broad protection for private communications from unauthorized interference by the state" (*ibid.*, at para. 35). Beyond this protection, the function of Part VI is to strike a balance between the protection of privacy and the suppression of crime: it "is directed both to protecting, and to invading, the privacy of the individual" (*Lyons*, at p. 652; *R. v. Welsh* (1977), 15 O.R. (2d) 1 (C.A.), at pp. 7-8). Understood in this way, Part VI is therefore intended to strike "a reasonable balance between the right of individuals to be left alone and the right of the state to intrude on privacy in the furtherance of its responsibilities for law enforcement" (*Duarte*, at p. 45).

[40] The objective here is not to upset the balance made possible by Part VI by placing strict controls on the interception of private communications. Rather, it is to decide whether communications *already intercepted* by the state can be disclosed to individuals who are parties in civil trials in order to serve other legitimate purposes, such as truth-finding, procedural fairness and ensuring the efficiency of the judicial process.

(a) *Section 193: An Offence, Not a Disclosure Mechanism*

[41] Section 184(1) *Cr. C.*, which is found in Part VI, provides that every one who wilfully intercepts a private communication by means of any electro-magnetic, acoustic, mechanical or other device commits an offence. And s. 193(1) *Cr. C.* lays down the principle that it is unlawful to disclose or use an intercepted private communication without the consent of the originator or the intended recipient of the communication:

193. (1) Where a private communication has been intercepted by means of an electro-magnetic, acoustic, mechanical or other device without the consent, express or implied, of the originator thereof or of the person intended by the originator thereof to receive it, every one who, without the express consent of the originator thereof or of the person intended by the originator thereof to receive it, wilfully

(*Tse*, par. 24), « [l]a partie VI du *Code* établit un régime de protection des communications privées » (*TELUS*, par. 3). Son objet « consiste à accorder une protection étendue aux communications privées contre les ingérences non autorisées de l'État » (*ibid.*, par. 35). Au-delà de cette protection, la partie VI a pour fonction d'établir un équilibre entre la protection de la vie privée et la répression du crime : elle « vise à la fois à protéger la vie privée des personnes et à permettre d'y porter atteinte » (*Lyons*, p. 652; *R. c. Welsh* (1977), 15 O.R. (2d) 1 (C.A.), p. 7-8). Considérée ainsi, la partie VI vise donc à établir « un équilibre raisonnable entre le droit des particuliers d'être laissés tranquilles et le droit de l'État de porter atteinte à la vie privée pour s'acquitter de ses responsabilités en matière d'application des lois » (*Duarte*, p. 45).

[40] Il n'est pas question ici de perturber l'équilibre que permet d'établir la partie VI en encadrant de manière stricte l'interception de communications privées. Il s'agit plutôt de décider si des conversations *déjà interceptées* par l'État peuvent être communiquées à des particuliers parties à des procès civils, et ce, pour réaliser d'autres objectifs légitimes, comme la découverte de la vérité, l'équité procédurale et l'efficacité du processus judiciaire.

a) *Article 193 : une infraction, et non un mécanisme de divulgation*

[41] Aux termes du par. 184(1) *C. cr.*, qui figure à la partie VI, commet une infraction quiconque intercepte volontairement une communication privée, au moyen d'un dispositif électromagnétique, acoustique, mécanique ou autre. De surcroît, le par. 193(1) *C. cr.* établit le principe selon lequel il est illégal de divulguer ou d'utiliser une communication privée interceptée sans le consentement de son auteur ou du destinataire :

193. (1) Lorsqu'une communication privée a été interceptée au moyen d'un dispositif électromagnétique, acoustique, mécanique ou autre sans le consentement, exprès ou tacite, de son auteur ou de la personne à laquelle son auteur la destinait, quiconque, selon le cas :

(*a*) uses or discloses the private communication or any part thereof or the substance, meaning or purport thereof or of any part thereof, or

(*b*) discloses the existence thereof,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

The common purpose of these provisions is to protect the privacy of Canadians. As this Court stated in *Duarte*, it is hard to imagine a state activity that is more dangerous to privacy than electronic surveillance (p. 43).

[42] At first glance, s. 193(1) *Cr. C.* therefore seems to preclude the disclosure of documents resulting from electronic surveillance. However, since the right to privacy is not absolute, the general prohibition provided for in s. 193(1) is tempered by a series of exemptions set out in s. 193(2) and (3). In particular, s. 193(2)(*a*) deals with the giving of evidence in civil and criminal proceedings:

(2) [Exemptions] Subsection (1) does not apply to a person who discloses a private communication or any part thereof or the substance, meaning or purport thereof or of any part thereof or who discloses the existence of a private communication

(*a*) in the course of or for the purpose of giving evidence in any civil or criminal proceedings or in any other proceedings in which the person may be required to give evidence on oath;

[43] By excluding certain well-defined situations from the scope of the prohibition provided for in s. 193(1), these exemptions give a person the right to disclose recordings that otherwise could not be disclosed. But even though s. 193(2) and s. 193(3) allow for such a disclosure, they do not create an actual disclosure mechanism, let alone a right of access. The procedure for seeking *access* to the recordings must therefore derive from another source. Since this case involves civil proceedings brought under s. 36 of the *Competition Act* and art. 1457

a) utilise ou divulgue volontairement tout ou partie de cette communication privée, ou la substance, le sens ou l'objet de tout ou partie de celle-ci;

b) en divulgue volontairement l'existence,

sans le consentement exprès de son auteur ou de la personne à laquelle son auteur la destinait, est coupable d'un acte criminel et passible d'un emprisonnement maximal de deux ans.

Ces dispositions ont pour objectif commun de protéger la vie privée des Canadiens. Comme l'a indiqué notre Cour dans *Duarte*, il est difficile de concevoir une activité de l'État qui soit plus dangereuse pour la vie privée que l'écoute électronique (p. 43).

[42] De prime abord, le par. 193(1) *C. cr.* semble donc faire obstacle à la communication de documents résultant de l'écoute électronique. Le droit à la protection de la vie privée n'étant toutefois pas absolu, une série d'exemptions, codifiées aux par. 193(2) et (3), tempèrent l'interdiction générale édictée au par. 193(1). L'alinéa 2*a*) vise notamment les dépositions au cours de poursuites civiles et pénales :

(2) [Exemptions] Le paragraphe (1) ne s'applique pas à une personne qui divulgue soit tout ou partie d'une communication privée, ou la substance, le sens ou l'objet de tout ou partie de celle-ci, soit l'existence d'une communication privée :

a) au cours ou aux fins d'une déposition lors de poursuites civiles ou pénales ou de toutes autres procédures dans lesquelles elle peut être requise de déposer sous serment;

[43] En soustrayant certaines situations bien définies de la portée de l'interdiction créée par le par. 193(1), ces exemptions autorisent une personne à communiquer des enregistrements qui, autrement, ne pourraient l'être. S'ils permettent une telle communication, les par. 193(2) et (3) ne créent toutefois ni un mécanisme de divulgation en soi ni, surtout, un droit d'accès. La procédure permettant *d'accéder* aux enregistrements provient donc nécessairement d'une autre source. Comme nous sommes en présence d'une poursuite civile intentée

C.C.Q., that procedure is the one provided for in art. 402 *C.C.P.*

[44] For this reason, *Michaud*, on which the appellants base their argument, can be distinguished from the case at bar. In that case, the Sûreté du Québec had placed Mr. Michaud under electronic surveillance because it suspected that he had disclosed to the media certain confidential documents concerning the constitutional negotiations leading up to the Charlottetown Accord. In the end, however, no criminal charges had been laid against him. Hoping to pursue an action in damages for an unlawful search, Mr. Michaud applied under s. 187(1)(*a*)(ii) (now s. 187(1.3)) *Cr. C.* for disclosure of the sealed packet containing the documents that had been filed in support of the application for judicial authorization. He also applied for disclosure of the recordings themselves. Section 187(1)(*a*)(ii) gave *accused persons* automatic access to the sealed packet in criminal proceedings, and the Court had to decide whether a target of electronic surveillance against whom criminal charges had not been laid was entitled to that same automatic access.

[45] A majority of the Court held that a non-accused target could not claim automatic access to the sealed packet, but would have to make a preliminary showing that indicated that the initial authorization had been obtained in an unlawful manner. The Court added that, "outside a criminal proceeding, the *Code* does not provide a former surveillance target with any avenue for disclosure of the recording materials" (para. 62). The appellants rely heavily on this passage. However, unlike in the instant case, Mr. Michaud had not yet instituted a civil action when he filed his motion under s. 187(1)(*a*)(ii) *Cr. C.* Because his request was therefore based solely on the *Criminal Code*, which grants a right of access to wiretap information only in a criminal proceeding, there was no mechanism available to a court to order the requested disclosure. Far from absolutely ruling out the possibility of disclosure, however, the Court continued its analysis, stating that the recordings could be disclosed in an action

en vertu de l'art. 36 de la *Loi sur la concurrence* et de l'art. 1457 *C.c.Q.*, c'est l'art. 402 *C.p.c.* qui établit cette procédure.

[44] Pour cette raison, l'arrêt *Michaud* — sur lequel les appelants appuient leur thèse — se distingue du présent appel. Dans cette affaire, la Sûreté du Québec avait mis M^e^ Michaud sur table d'écoute, parce qu'elle le soupçonnait d'avoir divulgué aux médias des documents confidentiels relatifs aux négociations constitutionnelles de l'Accord de Charlottetown. Toutefois, aucune accusation criminelle n'avait en définitive été portée contre M^e^ Michaud. Souhaitant intenter une action en dommages-intérêts pour perquisition illégale, ce dernier avait demandé, en vertu du sous-al. 187(1)*a*)(ii) (maintenant le par. 187(1.3)) *C. cr.*, la communication du paquet scellé contenant les documents appuyant la demande d'autorisation judiciaire. Il avait également demandé la communication des enregistrements eux-mêmes. Comme le sous-al. 187(1)*a*)(ii) donnait aux *accusés* un accès automatique au paquet scellé en cas de procédures criminelles, la Cour devait décider si une cible d'écoute électronique ne faisant pas l'objet d'accusations criminelles bénéficiait de ce même accès automatique.

[45] À la majorité, notre Cour a décidé que les cibles non accusées ne pouvaient réclamer l'accès automatique au paquet scellé. Elles devaient plutôt présenter une preuve préliminaire indiquant que l'autorisation initiale avait été obtenue illégalement. La Cour a ajouté que, « en dehors d'une procédure criminelle, le *Code* ne prévoit pour la personne qui a été la cible d'une surveillance aucun moyen d'obtenir la divulgation des enregistrements » (par. 62). Les appelants s'appuient fortement sur ce passage. Or, à la différence de la présente situation, M^e^ Michaud n'avait toujours pas entrepris de recours civil lorsqu'il a déposé sa requête en vertu du sous-al. 187(1)*a*)(ii) *C. cr.* Puisque sa demande reposait donc uniquement sur le *Code criminel*, lequel n'accorde pas de droit d'accès aux fruits de l'écoute électronique en dehors d'une procédure criminelle, aucun mécanisme ne permettait au tribunal d'ordonner la communication demandée. Toutefois, loin de fermer entièrement la porte à une

for damages based on the *Charter* if they were *relevant* to determining the extent of the damage suffered by the target (*Michaud*, at paras. 63-65). In light of the context of that decision, it is of limited relevance to the case at bar.

[46] As we explained above, art. 402 *C.C.P.* allows *prima facie* for access to wiretap information. Given the general prohibition laid down in s. 193(1), however, the question becomes whether one of the exemptions provided for in s. 193(2) applies in the instant case. More specifically, the respondents submit that s. 193(2)(*a*) allows for the disclosure of recordings of intercepted private communications without the consent of the originator of the communications or the person intended by the originator to receive them. They are right. The exemption set out in s. 193(2)(*a*) empowers a person who is in possession of such recordings to disclose them. However, the disclosure is made in the manner and to the extent provided for in the court order authorizing the disclosure.

(b) *The Exemption Provided for in Section 193(2)(a) Applies in This Case*

[47] The modern approach to statutory interpretation requires that the words of an Act be interpreted "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87, reproduced in R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 1). As we will see below, the ordinary sense of the words of s. 193(2)(*a*), the context of that provision and its object lead to the conclusion that the exemption applies in this case.

possible divulgation, la Cour a poursuivi son analyse et indiqué que les enregistrements pourraient être communiqués dans une action en dommages-intérêts fondée sur la *Charte*, dans la mesure où ils seraient *pertinents* pour démontrer l'étendue du préjudice subi (*Michaud*, par. 63-65). Vu le contexte de cet arrêt, il revêt une pertinence limitée pour l'affaire qui nous occupe.

[46] Comme nous l'avons expliqué plus haut, l'art. 402 *C.p.c.* permet *a priori* l'accès aux fruits de l'écoute électronique. Face à l'interdiction générale édictée par le par. 193(1) *C. cr.*, cependant, la question consiste à se demander si l'une des exemptions prévues au par. 193(2) s'applique en l'espèce. Plus particulièrement, les intimés prétendent que l'al. 193(2)*a*) permet la communication d'enregistrements de conversations privées interceptées sans le consentement de leur auteur ou de la personne à laquelle leur auteur les destinait. Leur prétention est bien fondée. L'exemption énoncée à l'al. 193(2)*a*) habilite la personne qui a en sa possession de tels enregistrements à les communiquer. Toutefois, la communication s'effectue de la manière et dans la mesure prévues par l'ordonnance judiciaire qui l'autorise en vertu de l'art. 402 *C.p.c.*

b) *L'exemption prévue à l'al. 193(2)a) s'applique à l'espèce*

[47] Suivant la méthode moderne d'interprétation des lois, les termes d'une loi doivent être interprétés [TRADUCTION] « dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'économie de la loi, l'objet de la loi et l'intention du législateur » (E. A. Driedger, *Construction of Statutes* (2e éd. 1983), p. 87, repris dans R. Sullivan, *Sullivan on the Construction of Statutes* (5e éd. 2008), p. 1). Comme nous le verrons ci-dessous, le sens ordinaire du texte de l'al. 193(2)*a*), le contexte dans lequel il se trouve et son objet imposent la conclusion selon laquelle l'exemption s'applique en l'espèce.

(i) Sense of the Words "For the Purpose of Giving Evidence in Any Civil . . . Proceedings"

[48] Section 193(2)(*a*) provides that a disclosure is not an offence under s. 193(1) if it is made "in the course of or for the purpose of giving evidence in any civil or criminal proceedings or in any other proceedings in which the person [who makes the disclosure] may be required to give evidence on oath". "Civil proceedings", whether in a traditional form or not, always include an exploratory stage. The word "purpose" means "something to be attained; a thing intended" (*The Canadian Oxford Dictionary* (2nd ed. 2004), at p. 1256), or "[a]n objective, goal, or end" (*Black's Law Dictionary* (9th ed. 2009), at p. 1356). The word "*fin*" used in the French version is to the same effect. In this context, if Parliament had intended that the exemption would apply only at the time evidence is given, as the appellants argue, then it would not have included the words "or for the purpose". Since it did include those words, we must assume that they are not redundant, must avoid depriving them of meaningful effect, or "effectivity", and must recognize that they reflect an intention to give the exemption a generous scope that encompasses the exploratory stage of civil proceedings (on the rule of effectivity, see P.-A. Côté, in collaboration with S. Beaulac and M. Devinat, *The Interpretation of Legislation in Canada* (4th ed. 2011), at p. 295; *Subilomar Properties (Dundas) Ltd. v. Cloverdale Shopping Centre Ltd.*, [1973] S.C.R. 596, at p. 603; *Air Canada v. Ontario (Liquor Control Board)*, [1997] 2 S.C.R. 581, at para. 53).

[49] In the alternative, the appellants argue that the words "for the purpose of giving evidence" refer only to incidental disclosure, that is, disclosure that takes place during the proceedings in order, for example, to have a witness identify recorded voices. This interpretation overlooks the fact that the incidental disclosure referred to by the appellants is, as we will see below, already covered by s. 193(3). Construing s. 193(2)(*a*) in this manner would therefore deprive s. 193(3) of meaningful

(i) Les termes « aux fins d'une déposition lors de poursuites civiles »

[48] L'alinéa 193(2)*a*) dispose que l'infraction établie au par. 193(1) ne s'applique pas lorsque la divulgation est faite « au cours ou aux fins d'une déposition lors de poursuites civiles ou pénales ou de toutes autres procédures dans lesquelles [la personne qui divulgue] peut être requise de déposer sous serment ». Une « poursuite civile », qu'elle prenne ou non une forme traditionnelle, comporte toujours une phase exploratoire. De plus, le mot « fins » se rapporte à une « [c]hose qu'on veut réaliser, à laquelle on tend volontairement » (*Le Petit Robert* (nouv. éd. 2012), p. 1047), ou encore au « [b]ut poursuivi » (H. Reid, avec la collaboration de S. Reid, *Dictionnaire de droit québécois et canadien* (4e éd. 2010), p. 270). La version anglaise, « *purpose* » est au même effet. Dans ce contexte, si le législateur avait eu l'intention de limiter l'application de l'exemption au seul moment de la déposition, comme le prétendent les appelants, il n'aurait pas inclus les mots « ou aux fins ». Étant donné qu'il l'a fait, il faut présumer que ces termes ne sont pas redondants, éviter de les priver d'effet utile et reconnaître qu'ils indiquent l'intention de conférer à cette exemption une portée généreuse, qui englobe la phase exploratoire d'une instance civile (sur le principe de l'effet utile, voir P.-A. Côté, avec la collaboration de S. Beaulac et M. Devinat, *Interprétation des lois* (4e éd. 2009), par. 1047-1048; *Subilomar Properties (Dundas) Ltd. c. Cloverdale Shopping Centre Ltd.*, [1973] R.C.S. 596, p. 603; *Air Canada c. Ontario (Régie des alcools)*, [1997] 2 R.C.S. 581, par. 53).

[49] Subsidiairement, les appelants arguent que les mots « aux fins d'une déposition » ne visent que les divulgations incidentes, c'est-à-dire celles qui surviennent en cours d'audience, dans le but, par exemple, de permettre à un témoin d'identifier les différentes voix enregistrées. Cette interprétation néglige le fait que la situation de divulgation incidente dont font mention les appelants est, comme nous le verrons plus loin, déjà visée par le par. 193(3). Interpréter ainsi l'al. (2)*a*) priverait

effect, contrary to principles of interpretation that have long been recognized by this Court (see Côté, at p. 295).

[50] This analysis of the language of s. 193(2)(*a*) *Cr. C.* satisfies us that wiretap information may be disclosed at the exploratory stage of any civil proceeding. As we have seen, the purpose of this stage is essentially to prepare for the hearing of the case. The documents requested at this stage may very well be requested for the purpose of testifying at the hearing. In the instant case, for example, it is easy to imagine counsel for the respondents wanting to examine a representative of the state, a third party in possession of recordings of intercepted communications, in order to meet the conditions for admission of such physical evidence.

[51] We accordingly conclude that s. 193(2)(*a*) *Cr. C.* applies in this case. Nothing in its words justifies limiting its application to the time when evidence is being given. An analysis of the provision's object and context admits of no other conclusion.

(ii) Object and Context

[52] In keeping with the general purpose of Part VI, the specific objective of s. 193 is to prevent the unauthorized disclosure of private communications. Despite its importance, this objective is not absolute. It must sometimes yield to other purposes to which Parliament has chosen to give priority (see *Lyons*, at p. 652). The exemption provided for in s. 193(2)(*a*) is the best example of this. According to the AGQ, the object of s. 193(2)(*a*) is [TRANSLATION] "to ensure that courts of competent jurisdiction will have access to all information relevant to the proceedings before them, in a manner consistent with established rules of procedure" (R.F. AGQ, at para. 108). In our opinion, this view is consistent with the context of this provision.

donc d'effet utile le troisième paragraphe de l'art. 193, contrairement aux principes d'interprétation reconnus depuis longtemps par notre Cour (voir Côté, par. 1047-1050).

[50] L'analyse du texte de l'al. 193(2)*a*) *C. cr.* nous convainc que la communication des fruits de l'écoute électronique peut être effectuée durant la phase exploratoire de tout recours civil. Cette étape, nous l'avons vu, sert essentiellement à la préparation de l'audition de la cause. Or, les documents qui y sont alors demandés peuvent très bien l'être aux fins de témoigner à l'audience. À titre d'exemple, dans le cas qui nous occupe, on conçoit facilement que les procureurs des intimés souhaiteront interroger un représentant de l'État, tiers en possession des enregistrements des communications interceptées, afin de satisfaire aux conditions d'admissibilité d'une telle preuve matérielle.

[51] Par conséquent, nous concluons que l'al. 193(2)*a*) *C. cr.* s'applique en l'espèce. Rien dans le texte de cette disposition ne justifie de restreindre l'application de celle-ci au seul moment de la déposition. L'analyse de l'objet et du contexte de cette disposition n'admet aucune autre conclusion.

(ii) Objet et contexte

[52] Conformément à l'objectif général de la partie VI, l'objectif particulier de l'art. 193 consiste à prévenir la divulgation non autorisée de communications privées. Malgré son importance, cet objectif n'a pas un caractère absolu. Il doit parfois céder devant d'autres objectifs auxquels le législateur a choisi de donner priorité (voir *Lyons*, p. 652). L'exemption prévue à l'al. 193(2)*a*) représente le meilleur exemple d'une telle situation. Selon le PGQ, cet alinéa a pour objet « d'assurer aux tribunaux compétents qu'ils auront accès à toute information pertinente aux procédures dont ils sont saisis, dans le respect des règles de procédure établies » (m.i. PGQ, par. 108). Cette perspective nous semble fidèle au contexte dans lequel s'inscrit cette disposition.

a. *Other Exemptions Set Out in Section 193(2)*

[53] Where context is concerned, an analysis of all the exemptions set out in s. 193(2) is relevant insofar as it helps determine the overall objective of the provision in a coherent manner. The appellants argue that all these exemptions have to do with fighting crime and that s. 193(2)(*a*) should therefore be interpreted in light of that objective. With respect, we disagree.

[54] It is true that most of the exemptions set out in s. 193(2) relate to the fight against crime. This is the case for para. (2)(*b*) (disclosure in the course of or for the purpose of any criminal investigation), para. (2)(*c*) (disclosure in giving notice or furnishing further particulars under s. 189 or 190 *Cr. C.* in order to have intercepted communications admitted into evidence in criminal proceedings), and para. (2)(*e*) (disclosure to a peace officer or prosecutor in Canada or to a person or authority with responsibility in a foreign state for the investigation or prosecution of offences). Paragraph (2)(*f*) (disclosure to the Canadian Security Intelligence Service so it can perform its duties and functions under s. 12 of the *Canadian Security Intelligence Service Act*, R.S.C. 1985, c. C-23) may also, generally speaking, be directed at fighting crime. However, not all the exemptions provided for in s. 193(2) have this as their purpose. For example, s. 193(2)(*d*) "exempts from criminal liability disclosures in the course of the operation of a communications or computer system, provided that the disclosure is necessarily incidental to the purposes which provide such operators with an exemption from the interception offence [provided for in s. 184(2)(*c*), (*d*) or (*e*)]" (*TELUS*, at para. 147, *per* Cromwell J., dissenting on another point). On its face, this paragraph does not have crime fighting as its objective.

[55] Moreover, we consider it particularly important to point out that, unlike with paras. (*b*), (*c*),

a. *Les autres exemptions énoncées au par. 193(2)*

[53] Relativement au contexte, l'analyse de l'ensemble des exemptions figurant au par. 193(2) est pertinente, dans la mesure où elle permet de définir de manière cohérente l'objectif global de la disposition. Les appelants prétendent que toutes ces exemptions se rattachent à la lutte contre le crime et que, en conséquence, l'al. 193(2)*a*) doit être interprété en fonction de cet objectif. Avec égards, nous ne sommes pas de cet avis.

[54] Il est vrai que la plupart des exemptions prévues au par. 193(2) visent à faciliter la lutte contre le crime. C'est le cas des dispositions suivantes : al. (2)*b*) (divulgation au cours ou aux fins d'une enquête en matière pénale); al. (2)*c*) (divulgation lors de la remise d'un préavis ou de détails complémentaires requis en application des art. 189 et 190 *C. cr.* pour faire admettre des communications interceptées en preuve dans le cadre de procédures criminelles); al. (2)*e*) (divulgation à un agent de la paix ou à un poursuivant au Canada, ou à une personne ou un organisme étranger chargé de la recherche ou de la poursuite des infractions). L'alinéa (2)*f*) (divulgation au Service canadien du renseignement de sécurité pour qu'il exerce les fonctions que lui confie l'art. 12 de la *Loi sur le Service canadien du renseignement de sécurité*, L.R.C. 1985, ch. C-23) peut aussi, de façon générale, viser la lutte contre la criminalité. Cependant, les exemptions énoncées au par. 193(2) ne sont pas toutes conçues de cette manière. Ainsi, l'al. 193(2)*d*) « écarte la responsabilité criminelle à l'égard de la divulgation intervenant dans le cadre de l'exploitation d'un système de communications ou d'un service de gestion ou de protection d'un ordinateur, si [cette] divulgation est nécessairement accessoire aux fins pour lesquelles les exploitants peuvent être exonérés de l'infraction d'interception [aux al. 184(2)*c*), *d*) ou *e*)] » (*TELUS*, par. 147, le juge Cromwell, dissident sur un autre point). À la lecture même de cet alinéa, on constate qu'il n'a pas pour objectif de lutter contre la criminalité.

[55] Par ailleurs, il nous semble particulièrement important de souligner qu'à l'inverse des al. *b*), *c*),

(*e*) and (*f*), a plain reading of which suffices to identify their objective, a more thorough analysis is required to identify the purpose of para. (*a*). Although the objective of fighting crime is apparent where recordings are requested "in the course of or for the purpose of giving evidence in any . . . criminal proceedings", it seems difficult to arrive at the same interpretation if they are requested "in any civil . . . proceedings or in any other proceedings". The fight against crime (in the strict sense of the term) primarily involves criminal investigations and proceedings. But if that had been the only function of para. (*a*), Parliament would have limited the codification to that possibility (as it did in the case of paras. (*b*) and (*e*)). Furthermore, Parliament adopted a much broader drafting style in it than in the other paragraphs. We therefore find it difficult to conclude that para. (*a*) has facilitating the fight against crime as its sole purpose.

e) et *f*), dont une simple lecture permet de dégager l'objectif, la détermination du but visé par l'al. *a*) requiert une analyse plus poussée. Bien qu'il soit évident que, dans le scénario où les enregistrements sont demandés « au cours ou aux fins d'une déposition lors de poursuites [. . .] pénales », l'objectif est de lutter contre la criminalité, il paraît difficile de tirer la même interprétation du scénario où ils le sont « lors de poursuites civiles [. . .] ou de toutes autres procédures ». En effet, la lutte contre la criminalité (au sens strict du terme) prend d'abord et avant tout la forme d'enquêtes et de poursuites pénales. Or, si telle avait été la seule et unique fonction de cet al. *a*), le Parlement n'y aurait codifié que ce scénario (comme aux al. *b*) et *e*)). De plus, le législateur a adopté un style de rédaction beaucoup plus large que celui utilisé aux autres alinéas. Il nous semble en conséquence difficile de conclure que l'al. *a*) n'est destiné qu'à faciliter la lutte contre la criminalité.

[56] In *TELUS*, this Court discussed the interpretation of the exemptions set out in s. 193. Comparing them to the exemptions relating to interception provided for in s. 184 *Cr. C.*, Cromwell J. (dissenting on another point) wrote the following:

> The exemptions in s. 193 are far more permissive than those in s. 184, especially with respect to criminal investigations. Under s. 184, police can only intercept communications if they are authorized to do so (s. 184(2)(*b*)) or in certain exceptional circumstances (s. 184.4). By contrast, s. 193 includes broad exemptions that permit disclosure of intercepted communications in a range of circumstances including in the course of civil or criminal proceedings (s. 193(2)(*a*)), and "in the course of or for the purpose of any criminal investigation" (s. 193(2)(*b*)). [Emphasis added; para. 146.]

[56] Dans l'arrêt *TELUS*, notre Cour s'est penchée sur l'interprétation des exemptions prévues à l'art. 193. Comparant ces exemptions à celles relatives à l'interception que l'on trouve à l'art. 184 *C. cr.*, le juge Cromwell (dissident sur un autre point), a écrit ceci :

> L'article 193 prévoit des exemptions beaucoup plus permissives que celles prévues à l'art. 184, en particulier en ce qui a trait aux enquêtes en matière pénale. Aux termes de l'art. 184, la police ne peut intercepter des communications que si elle est autorisée à le faire (al. 184(2)*b*)) ou dans certaines circonstances exceptionnelles (art. 184.4). L'article 193, par contre, comprend de larges exemptions, qui permettent la divulgation de communications interceptées dans diverses circonstances, notamment lors de poursuites civiles ou pénales (al. 193(2)*a*)) et « au cours ou aux fins d'une enquête en matière pénale » (al. 193(2)*b*)). [Nous soulignons; par. 146.]

[57] Thus, the language of s. 193(2)(*a*) requires that its objectives be defined broadly. It is clear that this provision does not apply solely to proceedings related to the fight against crime.

[57] Ainsi, la rédaction de l'al. 193(2)*a*) impose une définition large de ses objectifs. Il est clair que cette disposition ne s'applique pas seulement aux procédures de lutte contre la criminalité.

b. *Section 193(3)*

[58] The appellants Couche-Tard et al. also argue that the interpretation given to s. 193(2)(*a*) *Cr. C.* by the courts below cannot be reconciled with s. 193(3), which reads as follows:

(3) Subsection (1) does not apply to a person who discloses a private communication or any part thereof or the substance, meaning or purport thereof or of any part thereof or who discloses the existence of a private communication where that which is disclosed by him was, prior to the disclosure, lawfully disclosed in the course of or for the purpose of giving evidence in proceedings referred to in paragraph (2)(*a*).

[59] In the appellants' opinion, this subsection cannot be reconciled with the rest of the section unless the disclosure to which it refers occurs at the production of evidence stage. Since the evidence becomes public at that time as a result of the open court principle, there would, they submit, no longer be any reason to prohibit anyone from disclosing the content of evidence that is already known. On the contrary, they argue, it would [TRANSLATION] "make no sense for Parliament to allow private litigants to publicly disclose wiretap information that has been disclosed to them solely in the context of the civil discovery process" (A.F. Couche-Tard et al., at para. 66).

[60] This interpretation is wrong. First, it overlooks the possibility that Parliament in fact wished to avoid interfering with the open court principle by allowing, for that purpose, the disclosure of "the substance, meaning or purport" of a private communication that was, "prior to the disclosure, lawfully disclosed in the course of . . . giving evidence". When interpreted in this way, the exemption would, for example, allow a journalist to disclose the substance of communications heard at a trial. Second, the appellants' interpretation is unduly restrictive. It leaves out a series of specific possibilities. For example, an expert who is authorized during "civil proceedings" to listen to recordings of private communications disclosed "for the purpose of giving evidence" might have to "disclose" the content of the communications

b. *Le paragraphe 193(3)*

[58] Les appelants Couche-Tard et autres plaident également que l'interprétation donnée à l'al. 193(2)*a*) *C. cr.* par les juridictions inférieures ne peut être réconciliée avec le texte du par. 193(3), lequel dispose :

(3) Le paragraphe (1) ne s'applique pas aux personnes qui rapportent une communication privée, en tout ou en partie, ou qui en divulguent la substance, le sens ou l'objet, ou encore, qui en révèlent l'existence lorsque ce qu'elles révèlent avait déjà été légalement divulgué auparavant au cours d'un témoignage ou dans le but de témoigner dans les procédures visées à l'alinéa (2)*a*).

[59] De l'avis des appelants, ce paragraphe ne peut être concilié avec le reste de l'article que si la divulgation mentionnée survient à l'étape de la production de la preuve. Comme la preuve devient alors publique par l'effet du principe de la publicité des débats, il n'existerait plus, selon eux, de raison d'interdire à quiconque de rapporter le contenu d'une preuve déjà connue. Au contraire, prétendent-ils, il serait « illogique pour le Parlement de permettre à un justiciable privé de rapporter publiquement le contenu de l'écoute électronique qui ne lui a été divulguée que dans le cadre d'une procédure civile de communication préalable » (m.a. Couche-Tard et autres, par. 66).

[60] Cette interprétation est mal fondée. D'une part, elle passe sous silence la possibilité que le Parlement ait pu, justement, souhaiter ne pas entraver la publicité des débats en permettant, à cette fin, que soient rapportés « la substance, le sens ou l'objet » d'une communication privée « légalement divulgué[e] auparavant au cours d'un témoignage ». Interprétée ainsi, cette exemption permettrait par exemple à un journaliste de rapporter la substance de la communication entendue au procès. D'autre part, l'interprétation des appelants s'avère trop restrictive. Elle omet une série de scénarios précis. À titre d'exemple, un expert qui serait autorisé, dans le cadre d'une « poursuite civile », à écouter des enregistrements de conversations privées communiquées « aux fins d'une déposition » pourrait devoir

when giving evidence in court. Moreover, in the case at bar, counsel for the respondents will probably want to use the content of the recordings to cross-examine the appellants when they testify in court. In testifying, the appellants will be protected by the exemption set out in s. 193(3), since they will be disclosing that which "was, prior to the disclosure, lawfully disclosed . . . for the purpose of giving evidence", as provided for in s. 193(2)(*a*).

c. *History*

[61] The appellants also argue, on the basis of the previous versions of s. 193(2)(*a*), that this provision has never had the function of allowing litigants to obtain disclosure of wiretap information for the purpose of a civil proceeding. We see no merit in this argument either.

[62] Section 178.2(2)(*a*) — the predecessor of s. 193(2)(*a*) — which was proclaimed in force in 1974, read as follows:

178.2 . . .

(2) Subsection (1) does not apply to a person who discloses a private communication or any part thereof or the substance, meaning or purport thereof or of any part thereof or who discloses the existence of a private communication

(*a*) in the course of or for the purpose of giving evidence in any civil or criminal proceedings or in any other proceedings in which he may be required to give evidence on oath where the private communication is admissible as evidence under section 178.16 or would be admissible under that section if it applied in respect of the proceedings;

[63] Section 178.16 — to which s. 178.2(2)(*a*) referred — was enacted before the Canadian *Charter* came into force. This section established a rule that a communication intercepted by the state was, in principle, inadmissible as evidence against its originator or against the person intended to receive it unless it had been obtained lawfully or unless the persons in question consented to its being admitted:

en « rapporter » le contenu lors de son témoignage en cour. Par ailleurs, dans le cas qui nous occupe, les procureurs des intimés voudront probablement utiliser le contenu des enregistrements afin de contre-interroger les appelants lors de leurs témoignages en cour. Ces témoins seront alors protégés par l'exemption énoncée au par. (3), car ils révéleront ce qui a « déjà été légalement divulgué auparavant [. . .] dans le but de témoigner », comme le prévoit l'al. (2)*a*).

c. *Historique*

[61] Sur la base des versions précédentes de l'al. 193(2)*a*), les appelants prétendent également que celui-ci n'a jamais eu pour fonction de permettre à un justiciable d'obtenir communication de fruits de mesures d'écoute électronique aux fins d'exercer un recours civil. Cet argument nous semble lui aussi mal fondé.

[62] Proclamé en vigueur en 1974, l'ancêtre de l'al. 193(2)*a*), l'al. 178.2(2)*a*), était libellé ainsi :

178.2 . . .

(2) Le paragraphe (1) ne s'applique pas à une personne qui divulgue soit tout ou partie d'une communication privée ou la substance, le sens ou l'objet de tout ou partie de celle-ci, soit l'existence d'une communication privée

a) au cours ou aux fins d'une déposition lors de poursuites civiles ou pénales ou de toutes autres procédures dans lesquelles elle peut être requise de déposer sous serment lorsque la communication privée est admissible en preuve en vertu de l'article 178.16 ou le serait en vertu de cet article s'il s'appliquait aux poursuites ou procédures;

[63] L'article 178.16 — auquel fait référence l'al. 178.2(2)*a*) — a été adopté avant l'entrée en vigueur de la *Charte* canadienne. Il établissait un régime selon lequel les communications interceptées par l'État étaient en principe inadmissibles en preuve contre leurs auteurs ou contre les personnes à qui les communications étaient destinées, sauf si elles avaient été obtenues légalement, ou si les personnes en question y consentaient :

178.16 (1) A private communication that has been intercepted and evidence obtained directly or indirectly as a result of information acquired by interception of a private communication are both inadmissible as evidence against the originator thereof or the person intended by the originator thereof to receive it unless

(*a*) the interception was lawfully made; or

(*b*) the originator of the private communication or the person intended by the originator thereof to receive it has expressly consented to the admission thereof.

[64] The appellants, considering s. 178.2(2)(*a*) jointly with s. 178.16, submit that these provisions always governed the *production* of evidence, not its *disclosure*. According to this argument, since s. 178.16 required the state to prove that an interception was lawful at the admissibility stage, it should be concluded that Parliament's intention was never that the exemption be used by litigants in private actions. It would have made no sense, in the appellants' view, to impose a burden on the state to show that an interception of communications was lawful each time a litigant sought the disclosure of information resulting from such interceptions in a private action.

[65] In our view, this interpretation is unduly narrow. First, concerning the possible burden imposed on the state, the appellants are overlooking the fact that, by allowing for the admission in evidence of an intercepted communication if one of the persons involved in the communication "expressly consented" to its being admitted (s. 178.16(1)(*b*)), Parliament had provided for a solution that relieved the state of any such burden. Second, although it is true that s. 178.16 had the function of determining whether evidence was admissible and could therefore be produced, it is wrong to argue that s. 178.2(2)(*a*) played the same role. The purpose of s. 178.2(2)(*a*) was [TRANSLATION] "to grant immunity for disclosures made in the course of or for the purpose of any civil or criminal proceedings or any other proceedings" (D. A. Bellemare, *L'écoute électronique au Canada* (1981), at p. 153). Thus, the only difference between the former scheme and the current scheme is that disclosure could not be authorized without first either determining that the recording was lawful or obtaining the consent of one of the persons

178.16 (1) Une communication privée qui a été interceptée et une preuve obtenue directement ou indirectement grâce à des renseignements recueillis par l'interception d'une communication privée sont toutes deux inadmissibles en preuve contre son auteur ou la personne à laquelle son auteur la destinait à moins

a) que l'interception n'ait été faite légalement; ou

b) que l'auteur de la communication privée ou la personne à laquelle son auteur la destinait n'ait expressément consenti à ce qu'elle soit admise en preuve.

[64] Analysant conjointement l'al. 178.2(2)*a*) et l'art. 178.16, les appelants avancent que ces dispositions ont toujours régi la *production* des éléments en preuve, et non leur *communication*. Suivant cet argument, du fait qu'à l'étape de l'admissibilité, l'art. 178.16 assujettissait l'État à l'obligation de prouver la légalité de l'interception, il faut conclure que le législateur n'a jamais souhaité que l'exemption profite aux justiciables dans des recours privés. En effet, soulignent-ils, il aurait été illogique d'imposer à l'État le fardeau de démontrer la légalité de l'interception de communications chaque fois qu'un justiciable souhaitait obtenir la communication des fruits de ces interceptions dans une action privée.

[65] Cette interprétation nous paraît trop restrictive. D'une part, en ce qui concerne le fardeau potentiel imposé à l'État, les appelants omettent de considérer qu'en permettant l'admission en preuve d'une communication interceptée si une des personnes parties à la communication y a « expressément consenti » (al. 178.16(1)*b*)), le législateur avait ainsi prévu une solution qui le dégageait de ce fardeau éventuel. D'autre part, s'il est vrai que l'art. 178.16 avait pour fonction de régir l'admissibilité de la preuve, et donc sa production, il est inexact de prétendre que tel était également le rôle de l'al. 178.2(2)*a*). En effet, cette disposition visait « à accorder une immunité aux divulgations effectuées au cours ou aux fins d'une poursuite civile ou pénale ou au cours ou aux fins de toute autre procédure » (D. A. Bellemare, *L'écoute électronique au Canada* (1981), p. 153). Dans ce contexte, la seule différence entre ce régime et le régime actuel se trouve dans l'assujettissement de l'autorisation de divulgation à un examen préalable de la légalité de l'enregistrement ou, le cas échéant, à l'obtention du

involved in the communication. It was therefore s. 178.16 that governed the production of evidence, not s. 178.2(2).

[66] However, many subsections of s. 178.16 (which by then had become s. 189) were repealed in 1993 following the enactment of the Canadian *Charter*. As a result of that repeal, the admissibility in evidence of recordings of private communications would be governed by s. 24(2) of the *Charter* and the various applicable provincial statutes (see R. W. Hubbard, P. M. Brauti and S. K. Fenton, *Wiretapping and Other Electronic Surveillance: Law and Procedure* (loose-leaf), vol. 1, at pp. 1-20 and 1-21; *An Act to amend the Criminal Code, the Crown Liability and Proceedings Act and the Radiocommunication Act*, S.C. 1993, c. 40, s. 10(1)). These legislative amendments thus removed from the *Criminal Code* the bulk of the process for determining whether the production of wiretap information in evidence is lawful.

d. *Case Law*

[67] The case law and the academic literature support a broad interpretation of s. 193(2)(*a*) *Cr. C.* We will now discuss a few of the decisions on this subject.

[68] One of these decisions is *Tide Shore Logging Ltd. v. Commonwealth Insurance Co.* (1979), 13 B.C.L.R. 316, which concerned an application for discovery of recordings under Rule 26(11) of the rules of procedure of the British Columbia Supreme Court (B.C. Reg. 310/76). The Royal Canadian Mounted Police ("RCMP") had intercepted private communications of the principal shareholder of Tide Shore Logging in the course of a criminal investigation into a fire that was at the centre of civil proceedings between that company and its insurer. The insurer refused to compensate Tide Shore Logging, as it considered that the fire had been set deliberately. Counsel for the Attorney General of British Columbia, on behalf of the RCMP, did not object to disclosure of the recordings provided that the disclosure did not entail the commission of a crime. The court considered the offence now provided for in

consentement d'une des personnes impliquées dans la conversation. C'est donc l'art. 178.16 qui avait pour fonction de régir la production des éléments en preuve, non pas le par. 178.2(2).

[66] Cela dit, en 1993, après l'adoption de la *Charte* canadienne, de larges pans de l'art. 178.16 (alors devenu l'art. 189) ont été abrogés. Par suite de cette abrogation, l'admissibilité en preuve des enregistrements de communications privées est désormais régie par le par. 24(2) de la *Charte* et les différentes lois provinciales applicables (voir R. W. Hubbard, P. M. Brauti et S. K. Fenton, *Wiretapping and Other Electronic Surveillance : Law and Procedure* (feuilles mobiles), vol. 1, p. 1-20 et 1-21; *Loi modifiant le Code criminel, la Loi sur la responsabilité civile de l'État et le contentieux administratif et la Loi sur la radiocommunication*, L.C. 1993, ch. 40, par. 10(1)). Ces modifications législatives ont donc supprimé du *Code criminel* l'essentiel du processus de contrôle de la légalité de la production en preuve des fruits de l'écoute électronique.

d. *Jurisprudence*

[67] La jurisprudence et la doctrine appuient une interprétation large de l'al. 193(2)*a*) *C. cr.* Nous allons maintenant examiner quelques décisions rendues à ce sujet.

[68] À titre d'exemple, l'affaire *Tide Shore Logging Ltd. c. Commonwealth Insurance Co.* (1979), 13 B.C.L.R. 316, portait sur une demande de communication préalable d'enregistrements présentée en vertu du par. 26(11) des règles de procédure de la Cour suprême de la Colombie-Britannique (B.C. Reg. 310/76). La Gendarmerie royale du Canada (« GRC ») avait intercepté des communications privées de l'actionnaire principal de Tide Shore Logging à l'occasion d'une enquête criminelle sur l'incendie qui était au cœur du litige civil entre Tide Shore Logging et son assureur. Ce dernier refusait d'indemniser Tide Shore Logging, car il considérait que l'incendie avait été causé délibérément. Les avocats du procureur général de la Colombie-Britannique, au nom de la GRC, n'avaient pas d'objection à ce que les enregistrements soient communiqués, à la condition que leur communication

s. 193(1) and the exemption now set out in s. 193(2)(*a*). Although satisfied that such pre-trial disclosure did not fall within the words "in the course of giving evidence", the court considered that it did fall within the phrase "for the purpose of giving evidence". The court ordered the disclosure of the recordings, concluding that Parliament had clearly contemplated the use of intercepted communications in civil proceedings under provincial jurisdiction, and not only in civil proceedings over which Parliament itself had jurisdiction.

[69] To the same effect, in a civil proceeding involving the state (*Ault v. Canada (Attorney General)* (2007), 88 O.R. (3d) 541), the Ontario Superior Court of Justice dismissed a motion to exclude recordings obtained by means of a wiretap warrant that the federal government wished to produce in evidence (paras. 31-32). The court also stated that the plaintiffs and the targets of the warrant — who objected to the evidence in part because it was being produced late — could have requested its disclosure on discovery under the Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (para. 11). The court held that s. 193(2)(*a*) provided for the introduction in evidence, in civil proceedings, of wiretap information obtained previously in the course of a criminal investigation (para. 31).

[70] More recently, in *Canada (Procureur général) v. Charbonneau*, 2012 QCCS 1701 (CanLII), the Quebec Superior Court considered a motion by the RCMP to quash a subpoena ordering it to disclose, among other things, private communications it had intercepted in the course of an investigation. The court found that there was no privilege or restriction that would preclude the RCMP from disclosing evidence from its investigation, including the intercepted communications, to the Commission of Inquiry on the Awarding and Management of Public Contracts in the Construction Industry. In response to the RCMP's argument that none of the exemptions

n'entraîne pas la perpétration d'une infraction criminelle. La cour s'est penchée sur l'infraction figurant aujourd'hui au par. 193(1), ainsi que sur l'exemption maintenant prévue à l'al. 193(2)*a*). Convaincue qu'une telle communication préalable n'était pas visée par l'expression « au cours d'une déposition », la cour estimait toutefois que la communication était visée par les termes « aux fins d'une déposition ». Elle a ordonné la communication des enregistrements, concluant que le Parlement avait clairement envisagé l'utilisation des communications interceptées dans des procédures civiles relevant des provinces, et non seulement dans des procédures civiles sur lesquelles le Parlement a compétence.

[69] Au même effet, dans une procédure civile impliquant l'État (*Ault c. Canada (Attorney General)* (2007), 88 O.R. (3d) 541), la Cour supérieure de justice de l'Ontario a refusé une requête visant à faire exclure les enregistrements obtenus au moyen d'un mandat d'écoute électronique que le gouvernement fédéral souhaitait produire en preuve (par. 31-32). La cour a également précisé que les demandeurs et les personnes ciblées par le mandat — qui s'opposaient à cette preuve en partie parce qu'elle était produite tardivement — auraient pu en demander la communication durant l'enquête préalable en vertu des *Règles de procédure civile* de l'Ontario, R.R.O. 1990, Règl. 194 (par. 11). Selon la cour, l'al. 193(2)*a*) autorisait la production en preuve, dans une procédure civile, des fruits d'activités d'écoute électronique recueillis antérieurement dans le cadre d'une enquête criminelle (par. 31).

[70] Plus récemment, dans *Canada (Procureur général) c. Charbonneau*, 2012 QCCS 1701 (CanLII), la Cour supérieure du Québec a examiné une requête de la GRC visant à faire annuler un subpoena lui enjoignant de communiquer, entre autres choses, des communications privées qu'elle avait interceptées au cours d'une enquête. Le tribunal a conclu qu'aucun privilège ni aucune restriction n'empêchaient la GRC de communiquer à la Commission d'enquête sur l'octroi et la gestion des contrats publics dans l'industrie de la construction divers éléments d'enquête, y compris les communications interceptées. En réponse à l'argument

set out in s. 193 *Cr. C.* applied in that case, the Superior Court reached the following conclusion:

[TRANSLATION] The Court is well aware of the Supreme Court's ruling in *Michaud*, to the effect that the regime set out at section 193 of the *Criminal Code* was enacted in an effort to "balance society's interest in the detection of crime, particularly organized crime, with an individual's right to personal privacy." Nevertheless, the Court must conclude that, in the present case, section 193 allows the RCMP to provide the information requested to the Commission.

. . .

The RCMP alleges that the Commission's work does not constitute an inquiry in a civil or criminal proceeding, seemingly wanting to limit the exemption to court proceedings. It fails to mention, however, that the exemption set out at section 193(2)(*a*) of the *Criminal Code* also applies to any other proceedings in which a person may be required to give evidence under oath. A commission of inquiry constitutes another proceeding for the purposes of this exception. [Emphasis deleted; paras. 34 and 36.]

[71] In short, the courts have applied the exemption provided for in s. 193(2)(*a*) in contexts other than that of giving evidence at a trial, and in cases in which the state is not directly a party. Section 193(2)(*a*) has also been applied in the context of disciplinary hearings (for example, *Law Society of Upper Canada v. Canada (Attorney General)* (2008), 89 O.R. (3d) 209 (S.C.J.); *Re Board of Commissioners of Police for City of Thunder Bay and Sundell* (1984), 15 C.C.C. (3d) 574 (Ont. Div. Ct.)) and in youth protection cases (for example, *Children's Aid Society of Thunder Bay (District) v. D. (S.)*, 2011 ONCJ 100, 2 R.F.L. (7th) 202).

[72] The commentators agree that the exemption provided for in s. 193(2)(*a*) permits the disclosure in civil proceedings of private communications intercepted in the course of criminal investigations. For example, Hubbard, Brauti and Fenton state the following:

de la GRC selon lequel aucune des exemptions énumérées à l'art. 193 *C. cr.* ne s'appliquait dans cette affaire, la Cour supérieure a tiré la conclusion suivante :

Le Tribunal n'ignore pas l'énoncé de la Cour suprême, dans l'arrêt *Michaud*, voulant que le régime édicté à l'article 193 *C.c.r.* vise « l'équilibre entre l'intérêt de la société à la détection du crime, notamment le crime organisé, et le droit de l'individu au respect de sa vie privée ». Néanmoins, il faut conclure que l'article 193 permet, en l'instance, la communication à la Commission par la GRC des renseignements demandés.

. . .

La GRC avance que les travaux de la Commission ne constituent pas une enquête en matière civile ou pénale, semblant vouloir limiter l'exemption aux procédures judiciaires. Toutefois, elle passe sous silence que l'exception édictée à l'article 193(2)*a*) *C.c.r.* concerne également toute autre procédure dans laquelle une personne peut être requise de déposer sous serment. Or, une commission d'enquête constitue une autre procédure aux fins de cette exception. [Soulignement omis; par. 34 et 36.]

[71] En somme, la jurisprudence a appliqué l'exemption énoncée à l'al. 193(2)*a*) dans des contextes autres qu'au cours de dépositions dans un procès, et dans des cas où l'État n'est pas directement partie prenante. De plus, on constate que l'al. 193(2)*a*) a été appliqué à l'occasion d'audiences disciplinaires (par exemple, *Law Society of Upper Canada c. Canada (Attorney General)* (2008), 89 O.R. (3d) 209 (C.S.J.); *Re Board of Commissioners of Police for City of Thunder Bay and Sundell* (1984), 15 C.C.C. (3d) 574 (C. div. Ont.)), et en matière de protection de la jeunesse (par exemple, *Children's Aid Society of Thunder Bay (District) c. D. (S.)*, 2011 ONCJ 100, 2 R.F.L. (7th) 202).

[72] La doctrine considère elle aussi que l'exemption prévue à l'al. 193(2)*a*) permet la divulgation, dans le cadre de procédures civiles, de communications privées interceptées dans le cadre d'enquêtes criminelles. Par exemple, les auteurs Hubbard, Brauti et Fenton écrivent ce qui suit :

While wiretaps can only be authorized for criminal investigations, any evidence obtained pursuant to an authorization can be used in civil proceedings. There is nothing express in Part VI of the *Code* authorizing the use of wiretap evidence in civil proceedings because the *Code* focuses on criminal offences and procedure. However, s. 193, which creates an offence for disclosure of information intercepted by electronic devices, specifically exempts disclosing wiretap evidence "in the course of or for the purpose of giving evidence in any *civil* or criminal proceedings". [Emphasis added; p. 6-40.6a.]

[73] To the same effect, Bellemare, after reviewing the case law on this question, concludes that

[TRANSLATION] disclosure can lawfully be made in the course of or for the purpose of any civil proceedings under provincial jurisdiction, just as in the course of or for the purpose of any proceedings under Parliament's jurisdiction, as long as it meets the requirements of s. 178.20(2)(a) of the Criminal Code. [p. 156]

(iii) Conclusion

[74] We conclude from our analysis of the language, context and purpose and of the case law that s. 193(2)(*a*), which sets out an exception to the criminal offence provided for in s. 193(1), applies in the instant case. Bélanger J.'s decision was therefore correct in this regard.

(3) "Innocent Third Party" Status

[75] In addition to supporting the position taken by its co-defendants, one of the appellants, Imperial Oil, argues that it has special status as an "innocent third party", because it was not charged in the parallel criminal proceedings or "targeted" by the wiretap operation. It submits that this status precluded the motion judge from ordering the disclosure of recordings that involved it in any way. This argument is without merit.

[TRADUCTION] Bien que des mesures d'écoute électronique ne puissent être autorisées que pour les besoins d'enquêtes criminelles, toute preuve recueillie conformément à une telle autorisation peut être utilisée dans une instance civile. La raison pour laquelle la partie VI du *Code* ne renferme aucune disposition autorisant expressément l'utilisation dans des procédures civiles de preuve obtenue par écoute électronique est que le *Code* s'attache d'abord et avant tout à la procédure et aux infractions criminelles. Toutefois, l'art. 193 — qui crée l'infraction consistant à divulguer des renseignements interceptés au moyen de dispositifs électroniques — écarte cette infraction lorsque la preuve recueillie par écoute électronique est divulguée « au cours ou aux fins d'une déposition lors de poursuites *civiles* ou pénales ». [Nous soulignons; p. 6-40.6a.]

[73] Dans le même sens, après avoir passé en revue la jurisprudence sur la question, Bellemare conclut ainsi :

. . . la divulgation faite au cours ou aux fins d'une poursuite ou d'une procédure de nature civile relevant d'une province pourra au même titre que celle faite au cours ou aux fins d'une procédure relevant de la juridiction du Parlement, être faite légalement dans la mesure où cette divulgation rencontre les conditions d'application de l'article 178.20(2)(a) du Code criminel. [p. 156]

(iii) Conclusion

[74] L'analyse du texte, du contexte, de l'objectif et de la jurisprudence nous amène à conclure que l'al. 193(2)*a*) — qui constitue une exception à l'infraction criminelle créée par le par. 193(1) — s'applique en l'espèce. La décision de la juge Bélanger était donc, à cet égard, bien fondée.

(3) Le statut de « tiers innocent »

[75] En plus d'appuyer la thèse de ses codéfendeurs, une des appelantes, Pétrolière Impériale, soutient que l'absence d'accusation contre elle dans les procédures pénales parallèles et le fait qu'elle n'était pas « ciblée » par l'opération d'écoute électronique lui confèrent le statut particulier de « tiers innocent ». Ce statut empêcherait la juge de première instance d'ordonner la communication des enregistrements la concernant, de près ou de loin. Cette prétention s'avère sans fondement.

[76] In our opinion, it must be borne in mind that, although Imperial Oil is a third party in the parallel criminal proceedings, it has become a party to the civil proceedings. It therefore has the same rights and is subject to the same procedural rules as all the parties. As we mentioned above, the court must encourage the fullest possible disclosure of evidence at the exploratory stage unless a specific exception applies. It is only if there are reasons why he or she should not do so that the judge may refuse to order the disclosure.

[77] From this perspective, Imperial Oil asserts that the public interest in protecting the privacy of innocent persons is sufficiently important to constitute a cause why it should not disclose the evidence contained in the recordings even though that evidence has been found to be relevant. In support of this assertion, it cites, *inter alia*, *Michaud*, *Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175, and *R. v. Durette*, [1994] 1 S.C.R. 469. According to the appellant, those cases show that the protection of the innocent must take precedence over the search for truth. It adds that the disclosure of recordings involving an innocent third party must therefore be denied.

[78] We agree with the appellant that the impact of disclosure on the rights of innocent persons requires that care be taken in considering motions for disclosure. However, this rule of caution cannot constitute a cause why evidence should not be disclosed in all circumstances.

[79] First, although we will not discuss the cases relied on by Imperial Oil, we must point out that, in the circumstances of the case at bar, the harm allegedly faced by Imperial Oil differs from the harm faced by the persons concerned in the cases it cites. In most of those cases, the contents of the communications could have been made public, but that is not a factor here. Bélanger J.'s order limits

[76] Il nous apparaît nécessaire de rappeler que, bien qu'elle reste un tiers par rapport aux procédures pénales parallèles, Pétrolière Impériale est devenue une partie à l'instance civile. À ce titre, elle bénéficie des mêmes droits et est soumise aux mêmes règles procédurales que l'ensemble des parties en cause. Or, comme nous l'avons exposé plus haut, durant la phase exploratoire d'une instance, à défaut d'une exception précise, le tribunal doit favoriser la communication la plus complète de la preuve. Ce n'est qu'en présence de raisons le justifiant de s'y opposer que le juge pourra refuser d'ordonner la communication.

[77] Dans cette optique, Pétrolière Impériale affirme que l'intérêt du public dans la protection de la vie privée des personnes innocentes revêt une importance telle qu'il justifie l'opposition à la communication, et ce, même si la preuve contenue dans les enregistrements a été jugée pertinente. Pour appuyer cette affirmation, elle cite entre autres les décisions *Michaud*, *Procureur général de la Nouvelle-Écosse c. MacIntyre*, [1982] 1 R.C.S. 175, et *R. c. Durette*, [1994] 1 R.C.S. 469. De prétendre l'appelante, il ressort de ces arrêts qu'entre le principe de recherche de la vérité et celui de la protection des personnes innocentes, c'est le dernier qui doit prévaloir. En conséquence, ajoute-t-elle, la communication des enregistrements concernant le tiers innocent doit être refusée.

[78] Nous sommes d'accord avec l'appelante pour dire que l'impact de la communication sur les droits des personnes innocentes exige un examen attentif d'une requête en communication. Cependant, cette règle de prudence ne saurait justifier pour autant l'opposition à la communication en toutes circonstances.

[79] D'une part, sans revenir sur la jurisprudence invoquée par Pétrolière Impériale, il importe de souligner que, dans les circonstances du présent pourvoi, le préjudice dont celle-ci serait menacée diffère des préjudices auxquels étaient exposées les personnes concernées dans les jugements qu'elle cite. En effet, dans la majorité de ces affaires, le contenu des conversations était susceptible d'être rendu public.

disclosure to the professionals participating in the proceedings. Second, it should not be forgotten that the protection of the innocent, and more specifically of their right to privacy, is not absolute. The scope of this protection depends on the specific circumstances of each case and must always be assessed in light of the various interests at stake (*MacIntyre*, at pp. 186-87; *Vickery v. Nova Scotia Supreme Court (Prothonotary)*, [1991] 1 S.C.R. 671; *Durette*, at p. 495; *Phillips v. Vancouver Sun*, 2004 BCCA 14, 27 B.C.L.R. (4th) 27). In the instant case, since, as we will see, the potential harm has been considerably reduced by the measures taken by the judge to control the disclosure process and the scope of the disclosure, the search for truth must prevail.

(4) Conclusion

[80] When all is said and done, therefore, there is no factual or legal impediment to disclosure of the documents requested by the respondents under art. 402 *C.C.P.* In our opinion, this suffices to dispose of the constitutional arguments. There is no basis for concluding that this provision of the *Code of Civil Procedure* is inconsistent with the provisions and principles relied on by the appellants. Moreover, it seems to us that such a conflict is implausible, if not impossible, given the scheme of art. 402, para. 1 *C.C.P.* itself. By giving judges the power to refuse to order disclosure where a barrier to disclosure is provided for in legislation or has been established by the courts, this paragraph already provides that, where necessary, the principle of disclosure it codifies will yield to any applicable federal provision that prohibits disclosure.

[81] The fact that there is no impediment to disclosure does not dispose of the case, however. The interests at stake in a case such as this require us to consider the controls imposed on the disclosure process and the scope of the disclosure.

En l'espèce, ce facteur n'est pas présent. En effet, l'ordonnance de la juge Bélanger limite la communication aux seuls professionnels participant à l'instance. D'autre part, il ne faut pas oublier que la protection des personnes innocentes — plus particulièrement la protection de leur droit à la vie privée — n'est pas absolue. L'étendue de cette protection reste tributaire des circonstances particulières de chaque affaire, et doit toujours être mesurée en fonction des divers intérêts en jeu (*MacIntyre*, p. 186-187; *Vickery c. Cour suprême de la Nouvelle-Écosse (Protonotaire)*, [1991] 1 R.C.S. 671; *Durette*, p. 495; *Phillips c. Vancouver Sun*, 2004 BCCA 14, 27 B.C.L.R. (4th) 27). En l'occurrence, dans la mesure où, comme nous le verrons, le préjudice potentiel se trouve considérablement réduit par les mesures prises par la juge pour encadrer la procédure de communication et l'étendue de celle-ci, le principe de la recherche de la vérité doit prévaloir.

(4) Conclusion

[80] En définitive, il n'existe donc pas d'obstacle factuel ou légal à la communication des documents que sollicitent les intimés en vertu de l'art. 402 *C.p.c.* À notre avis, cette constatation suffit pour décider des arguments de nature constitutionnelle. Rien ne permet de conclure que cette disposition du *Code de procédure civile* est incompatible avec les textes et les principes soulevés par les appelants. D'ailleurs, il nous semble que l'économie même de l'art. 402, al. 1 *C.p.c.* rend peu plausible, sinon impossible, un tel conflit. En effet, en octroyant au juge le pouvoir de refuser d'accorder la communication s'il existe une barrière légale ou prétorienne à une telle communication, cet alinéa prévoit déjà que, au besoin, le principe de communication qu'il codifie cèderait devant un texte fédéral prohibitif applicable.

[81] Toutefois, l'absence d'obstacle à la communication ne règle pas tout. Les intérêts en cause dans une affaire comme celle qui nous occupe commandent un examen du cadre régissant le processus de communication et l'étendue de celle-ci.

C. *Controls on Disclosure*

[82] The courts have always had a right to oversee and control the evidentiary process. They therefore have all the powers necessary for the exercise of such control (arts. 2, 20 and 46 *C.C.P.*; *Lac d'Amiante*, at paras. 36-37). These include the power to control the process of disclosing evidence and to set conditions for and limits on disclosure (art. 395 *C.C.P.*; *Glegg*, at paras. 29-30). Judges have great discretion in exercising this power at the exploratory stage (*Frenette*, at p. 685; Ferland and Emery, at p. 627; Ducharme and Panaccio, at p. 437). The appropriateness and the extent of such control therefore vary with the interests to be protected and the circumstances of each case.

[83] A judge laying down conditions for the disclosure of private documents must consider and weigh the various interests involved. On the one hand, the judge must limit the potential for invasion of privacy and, on the other, he or she must avoid unduly limiting access to relevant documents so as to ensure that the proceedings remain fair, the search for truth is not obstructed and the proceedings are not unjustifiably delayed (see *Frenette*, at pp. 685-86). Where, as in the case at bar, the documents requested by a party result from a criminal investigation, the judge must also consider — in addition to the factors just mentioned — the impact of disclosure of the documents in question on the efficient conduct of the criminal proceedings and, if applicable, on the right of the accused to a fair trial. In light of the interest of society at large in these two principles, particular attention should be paid to them. In this regard, we wish to point out that these principles are sufficiently important that they could, although this is not a case in which they would, warrant the Crown's intervening in a situation involving the disclosure of documents *in the possession of one of the parties* to a civil proceeding. They could be relied on by the Crown itself to object to the disclosure to other parties of documents it has already disclosed to an accused who is also a party to a civil proceeding, or to ask that specific conditions be imposed for disclosure. The courts, which have control over the entire proceeding, should then

C. *L'encadrement de la communication*

[82] Les tribunaux ont, de tout temps, exercé un droit de regard et de contrôle sur le processus d'administration de la preuve. À cette fin, ils détiennent tous les pouvoirs nécessaires à l'exercice de ce contrôle (art. 2, 20 et 46 *C.p.c.*; *Lac d'Amiante*, par. 36-37). Ces pouvoirs incluent celui de contrôler le processus de communication de la preuve, d'en établir les modalités et d'en fixer les limites (art. 395 *C.p.c.*; *Glegg*, par. 29-30). Le juge qui exerce ce pouvoir durant la phase exploratoire de l'instance jouit d'une grande discrétion (*Frenette*, p. 685; Ferland et Emery, p. 627; Ducharme et Panaccio, p. 437). L'opportunité et l'intensité d'un tel contrôle varient donc en fonction des intérêts à protéger et des circonstances propres à chaque affaire.

[83] Le juge qui établit les modalités de la communication de documents à caractère privé doit considérer et soupeser les différents intérêts en présence. Il doit, d'une part, limiter les risques d'atteinte à la vie privée et, d'autre part, éviter de restreindre indûment l'accès aux documents pertinents, pour que les procédures demeurent équitables, que la recherche de la vérité ne soit pas entravée et que le déroulement de l'instance ne soit pas retardé de manière injustifiée (voir *Frenette*, p. 685-686). Dans les cas où, comme en l'espèce, les documents demandés par une partie sont le produit d'une enquête pénale, le juge devra considérer — en plus des facteurs que nous venons de mentionner — l'impact de la communication de ces documents sur le bon déroulement des procédures pénales et, s'il y a lieu, sur le droit des accusés concernés à un procès juste et équitable. L'intérêt de la société en général dans le respect de ces deux principes justifie qu'on leur accorde une attention particulière. À ce sujet, bien que nous ne soyons pas en présence d'un cas de la sorte, nous tenons à souligner que l'importance de ces principes est telle qu'ils pourraient justifier l'intervention de la Couronne dans une situation de communication de documents *en la possession d'une des parties* au litige civil. Sur la base de ces principes, la Couronne elle-même pourrait s'opposer à ce que des documents qu'elle a déjà communiqués à un accusé, qui participe également à l'instance civile, soient communiqués à d'autres parties, ou encore

weigh the various interests at stake to decide whether to grant the disclosure being sought and, if so, what the extent of the disclosure should be.

[84] At the exploratory stage of a proceeding, the right to privacy, the efficient conduct of criminal proceedings and the right to make full answer and defence are, to some degree, protected by the duty of confidentiality imposed on the parties, their counsel and their experts (see *Lac d'Amiante*; *Autorité des marchés financiers*, at para. 57; *Marché Lionel Coudry inc. v. Métro inc.*, 2004 CanLII 73143 (Que. C.A.), at para. 7; *Southam Inc. v. Landry*, 2003 CanLII 71970 (Que. C.A.), at para. 6). Despite its importance, however, this preventive measure will not always be enough. If necessary, judges have the powers they need to impose other conditions (*Glegg*, at para. 30). For example, a judge can limit the number of persons authorized to consult the requested documents and specify in what capacity and for how long they may do so. The judge can also establish the circumstances of this access by, for example, ordering that disclosure be made in a specific manner and, if necessary, at a specific time and place. And where appropriate, the judge can order that the information in a requested document be "screened" (Ducharme and Panaccio, at pp. 437-38).

[85] In every case, the judge must, bearing in mind the proportionality principle that is inherent in art. 402 *C.C.P.* and is also spelled out in art. 4.2 *C.C.P.*, consider the financial and administrative impact of the conditions being imposed and how they will affect the general conduct of the proceedings. The judge must also consider the scope of the disclosure being ordered, although the number of documents sought in a motion is not in itself a ground for dismissing the motion (*Daishowa inc. v. Commission de la santé et de la sécurité du travail*, [1993] R.J.Q. 175 (Sup. Ct.), aff'd [1993] AZ-50072356; *S.M. v. S.G.*, [1986] R.D.J. 617 (C.A.)).

demander que la communication soit assujettie à certaines modalités particulières. Les tribunaux qui détiennent un pouvoir de contrôle sur l'ensemble de l'instance devraient alors soupeser les différents intérêts en jeu pour décider si la communication demandée doit avoir lieu et, si oui, quelle doit être l'étendue de celle-ci.

[84] Cependant, au cours de la phase exploratoire de l'instance, le droit au respect de la vie privée, le bon déroulement des procédures pénales et le droit à une défense pleine et entière sont, dans une certaine mesure, protégés par le devoir de confidentialité qui s'impose aux parties, à leurs avocats et à leurs experts (voir *Lac d'Amiante*; *Autorité des marchés financiers*, par. 57; *Marché Lionel Coudry inc. c. Métro inc.*, 2004 CanLII 73143 (C.A. Qué.), par. 7; *Southam Inc. c. Landry*, 2003 CanLII 71970 (C.A. Qué.), par. 6). Malgré son importance, cette mesure de protection préventive ne suffira pas toujours. Si besoin est, le juge dispose des pouvoirs nécessaires pour fixer d'autres modalités (*Glegg*, par. 30). À titre d'exemple, il peut limiter le nombre de personnes autorisées à consulter les différents documents demandés, et préciser à quel titre et pour combien de temps elles peuvent le faire. Il lui est également possible d'établir les conditions dans lesquelles cet accès doit se dérouler, par exemple en ordonnant que la communication s'effectue d'une manière précise et, au besoin, à un moment et à un endroit déterminés. De même, si le type de document demandé s'y prête, il peut ordonner le « filtrage » de l'information (Ducharme et Panaccio, p. 437-438).

[85] Dans tous les cas, tout en respectant le principe de proportionnalité qui fait intrinsèquement partie de l'art. 402 *C.p.c.*, en plus d'être consacré à l'art. 4.2 *C.p.c.*, le juge doit considérer l'impact financier et administratif des modalités qu'il impose, de même que leur influence sur le déroulement général de l'instance. Cette remarque vaut également pour l'étendue de la communication ordonnée, bien que la quantité de documents visés par la requête ne constitue pas, à elle seule, un motif d'irrecevabilité (*Daishowa inc. c. Commission de la santé et de la sécurité du travail*, [1993] R.J.Q. 175 (C.S.), conf. par [1993] AZ-50072356; *S.M. c. S.G.*, [1986]

Likewise, where a judge orders the person in possession of the documents to sort the information before disclosing it, the judge must also take the financial and administrative burden thus imposed on that third party into account. Combined with the relevance test, this factor will enable the judge to limit the scope of disclosure to that which is strictly necessary. A court hearing an application for disclosure can also consider the related costs and order that the applicant pay a reasonable amount in compensation to the person who is thus required to disclose documents in his or her possession.

[86] Where the requested documents result from a criminal investigation, the judge can refuse to order disclosure if he or she is satisfied that even the strictest disclosure conditions would not be sufficient to ensure, *inter alia*, the efficient conduct of criminal proceedings, the protection of third-party rights or the right to a fair trial. In such exceptional situations, the judge will therefore have the power to deny an application for disclosure under art. 402 *C.C.P.* if, from a societal perspective, the prejudicial effect of the disclosure outweighs its potential benefits. In this context, a judge may not refuse to order disclosure solely because it is argued that fundamental rights were violated in obtaining the requested evidence. In such a case, it is not the disclosure but the admissibility of the evidence that can be contested under art. 2858 *C.C.Q.*, which provides that a court "shall, even of its own motion, reject any evidence obtained under such circumstances that fundamental rights and freedoms are violated and whose use would tend to bring the administration of justice into disrepute".

[87] In the instant case, Bélanger J.'s order is perfectly consistent with these principles. Its scope is limited so as to protect the right to privacy of all those whose communications were intercepted. The limits also ensure that disclosure of the information will not hinder the efficient conduct of the criminal proceedings or violate the right of the defendants still facing criminal charges to a fair trial. Finally,

R.D.J. 617 (C.A.)). Pareillement, dans la mesure où le juge ordonne que la personne en possession des documents trie l'information avant de la communiquer, il doit également tenir compte du fardeau financier et administratif ainsi imposé à ce tiers. Conjugué au critère de la pertinence, ce facteur lui permettra de limiter au strict nécessaire l'étendue de la communication. La cour saisie de la demande de communication pourra aussi examiner la question des coûts qui lui sont afférents et imposer à la partie requérante l'obligation de payer une indemnité raisonnable à la personne qui se voit ainsi contrainte de communiquer des documents en sa possession.

[86] Lorsque les documents demandés sont les fruits d'une enquête pénale, le juge peut refuser d'en ordonner la communication s'il est convaincu que même des modalités très strictes de communication ne seraient pas suffisantes pour assurer notamment le bon déroulement des procédures pénales, la protection des droits des tiers ou, encore, le droit à un procès juste et équitable. Dans ces situations exceptionnelles, le juge aura donc le pouvoir de refuser une demande de communication en vertu de l'art. 402 *C.p.c.* si, pour la société, l'effet préjudiciable de cette communication est plus grand que ses avantages potentiels. Dans ce contexte, le seul fait qu'on plaide qu'il y a eu violation des droits fondamentaux dans l'obtention de la preuve demandée ne permet pas au juge de refuser d'en ordonner la communication. Dans un tel cas, ce n'est pas la communication mais bien l'admissibilité de la preuve qui pourra être contestée en vertu de l'art. 2858 *C.c.Q.*, lequel précise qu'un tribunal « doit, même d'office, rejeter tout élément de preuve obtenu dans des conditions qui portent atteinte aux droits et libertés fondamentaux et dont l'utilisation est susceptible de déconsidérer l'administration de la justice ».

[87] En l'espèce, l'ordonnance de la juge Bélanger respecte complètement ces principes. Sa portée est limitée de manière à protéger le droit à la vie privée de l'ensemble des personnes dont les conversations ont été interceptées. Ces limites assurent également que la communication ne constitue pas une entrave au bon déroulement des procédures pénales et une atteinte au droit qu'ont les défendeurs

there is no indication that the order imposes an undue financial and administrative burden on the third party in question in this case.

VI. Conclusion

[88] For all these reasons, we are of the opinion that both appeals must be dismissed with costs.

The following are the reasons delivered by

[89] The Chief Justice — I have read the reasons of my colleagues LeBel and Wagner JJ., and am in agreement with the conclusion that they reach in these appeals. However, assuming that my colleagues' reasons can be read as characterizing s. 193(2)(*a*) of the *Criminal Code*, R.S.C. 1985, c. C-46, as empowering Canadian authorities to disclose intercepted private communications for use in civil proceedings (an assumption that I do not share), I must respectfully disagree.

[90] In my view, the power to obtain disclosure of the intercepted private communications in the circumstances of this case arises solely from art. 402 of the *Code of Civil Procedure*, CQLR, c. C-25, not s. 193(2)(*a*). Section 193(2)(*a*) provides an exemption from the application of s. 193(1), the offence provision. Where the state is otherwise empowered or required to disclose intercepted private communications in civil proceedings — as in the case where a court orders disclosure pursuant to art. 402 — s. 193(2)(*a*) protects the authorities from criminal sanction.

[91] I am otherwise in agreement with the reasons provided by LeBel and Wagner JJ. I would therefore dismiss the appeals.

The following are the reasons delivered by

[92] Abella J. (dissenting) — "[O]ne can scarcely imagine a state activity more dangerous to individual privacy than electronic surveillance".

toujours accusés au pénal de subir un procès juste et équitable. Finalement, rien n'indique que l'ordonnance crée un fardeau financier et administratif excessif pour le tiers visé en l'espèce.

VI. Conclusion

[88] Pour l'ensemble de ces motifs, nous sommes d'avis que les deux pourvois doivent être rejetés, avec dépens.

Version française des motifs rendus par

[89] La Juge en chef — J'ai pris connaissance des motifs de mes collègues les juges LeBel et Wagner et je souscris à leur conclusion dans les présents pourvois. Toutefois, dans la mesure où l'on déduirait de leurs motifs que l'al. 193(2)*a*) du *Code criminel*, L.R.C. 1985, ch. C-46, habilite les autorités canadiennes à remettre, aux fins d'utilisation dans une instance civile, des communications privées interceptées (conclusion que je ne partage pas), je dois avec égards exprimer mon désaccord.

[90] Je suis d'avis que, dans les circonstances de l'espèce, le pouvoir d'obtenir les communications privées interceptées découle uniquement de l'art. 402 du *Code de procédure civile*, RLRQ, ch. C-25, et non de l'al. 193(2)*a*) du *Code criminel*. L'exemption prévue par cet alinéa écarte l'application du par. 193(1), la disposition qui crée l'infraction. Lorsque l'État a par ailleurs le pouvoir ou l'obligation de divulguer dans une instance civile des communications privées interceptées — par exemple si un tribunal lui ordonne de le faire en vertu de l'art. 402 — l'al. 193(2)*a*) protège les autorités contre toute sanction criminelle.

[91] Je souscris pour le reste aux motifs des juges LeBel et Wagner. Par conséquent, je rejetterais les pourvois.

Version française des motifs rendus par

[92] La juge Abella (dissidente) — « [O]n peut difficilement concevoir une activité de l'État qui soit plus dangereuse pour la vie privée des

Those words were written by La Forest J. in *Duarte* in 1990.[1] In reflecting on the threat to privacy from this extraordinary investigative technique, he said:

> The very efficacy of electronic surveillance is such that it has the potential, if left unregulated, to annihilate any expectation that our communications will remain private. A society which exposed us, at the whim of the state, to the risk of having a permanent electronic recording made of our words every time we opened our mouths might be superbly equipped to fight crime, but would be one in which privacy no longer had any meaning. [p. 44]

[93] And in *R. v. Mills*, [1999] 3 S.C.R. 668, this Court held that "[p]rivacy interests in modern society include the reasonable expectation that private information will remain confidential to the persons to whom and restricted to the purposes for which it was divulged" (para. 108). See also *R. v. Commisso*, [1983] 2 S.C.R. 121, at pp. 134-35, *per* Dickson J., dissenting).

[94] Our legal system has taken those admonitions to heart. Electronic surveillance can only be authorized in the limited circumstances set out in Part VI of the *Criminal Code*[2] for the investigation of serious crimes, or under the *Canadian Security Intelligence Service Act*[3] for the investigation of threats to national security.

[95] Notably, it is not legally permissible in Canada to authorize electronic surveillance for the purpose of gathering evidence in civil proceedings.

[96] The question in these appeals is whether intercepted private communications authorized as part of a criminal investigation can nevertheless be

1 *R. v. Duarte*, [1990] 1 S.C.R. 30, at p. 43.
2 R.S.C. 1985, c. C-46, s. 183, para. (*a*) of the definition of "offence".
3 R.S.C. 1985, c. C-23, s. 21.

particuliers que la surveillance électronique ». Ainsi s'exprimait le juge La Forest, en 1990, dans l'arrêt *Duarte*[1]. Dans le cours de ses réflexions au sujet de la menace que fait planer sur la vie privée des gens cette extraordinaire technique d'enquête, il a écrit ce qui suit :

> La surveillance électronique est à ce point efficace qu'elle rend possible, en l'absence de réglementation, l'anéantissement de tout espoir que nos communications restent privées. Une société nous exposant, au gré de l'État, au risque qu'un enregistrement électronique permanent soit fait de nos propos chaque fois que nous ouvrons la bouche, disposerait peut-être d'excellents moyens de combattre le crime, mais serait une société où la notion de vie privée serait vide de sens. [p. 44]

[93] Puis, dans l'arrêt *R. c. Mills*, [1999] 3 R.C.S. 668, notre Cour a conclu que « [d]ans une société moderne, le droit à la protection de la vie privée comporte l'attente raisonnable que les renseignements privés ne resteront connus que des personnes à qui ils ont été divulgués et qu'ils ne seront utilisés que dans le but pour lequel ils ont été divulgués » (par. 108). Voir également *R. c. Commisso*, [1983] 2 R.C.S. 121, p. 134-135, le juge Dickson, dissident).

[94] Notre système de justice a pris à cœur ces mises en garde. En effet, la surveillance électronique ne peut être autorisée que dans les circonstances limitées énoncées à la partie VI du *Code criminel*[2], dans le cadre d'enquêtes relatives à des crimes graves, ou encore en vertu de la *Loi sur le Service canadien du renseignement de sécurité*[3], en matière d'enquêtes sur des menaces envers la sécurité du Canada.

[95] Il convient de souligner qu'en droit canadien aucune activité de surveillance électronique ne peut être autorisée à l'occasion d'une instance civile en vue de recueillir des éléments de preuve.

[96] La question qui se pose dans les présents pourvois consiste à décider si des communications privées interceptées en vertu d'une autorisation accordée

1 *R. c. Duarte*, [1990] 1 R.C.S. 30, p. 43.
2 L.R.C. 1985, ch. C-46, art. 183, al. *a*) de la définition d'« infraction ».
3 L.R.C. 1985, ch. C-23, art. 21.

disclosed in the discovery process of a civil case. In my respectful view, such communications can only be disclosed in a civil case where they have already been made public in a criminal trial, or where the targets of the interception have either consented to the disclosure or otherwise waived their privacy interests. None of those exceptions makes an appearance in the scenario before us.

[97] The trial judge ordered the disclosure of intercepted private communications to the plaintiffs' lawyers and experts based on its relevance. She did so before any ruling had been made in the related criminal proceedings about the legality of the electronic surveillance or the admissibility of the intercepted communications. The order was made pursuant to art. 402 of the *Code of Civil Procedure*,[4] which states:

402. If, after [a] defence [is] filed, it appears from the record that a document relating to the issues between the parties is in the possession of a third party, he may, upon summons authorized by the court, be ordered to give communication of it to the parties, unless he shows cause why he should not do so.

[98] This provision gives significant discretion to a trial judge, but it does not give him or her *carte blanche* to order disclosure of communications protected by an almost impermeable legal coating like a privileged communication. In my view, evidence gathered through electronic surveillance is entitled to the same protection and, as a result, is not amenable to a balancing contest.

[99] Cases dealing with solicitor-client privilege offer helpful guidance. In *Goodis v. Ontario (Ministry of Correctional Services)*, [2006] 2 S.C.R. 32, for example, the relevance of the communications did

4 CQLR, c. C-25.

dans le cadre d'une enquête criminelle peuvent néanmoins être divulguées à l'étape de la communication préalable dans une instance civile. Avec égards pour l'opinion contraire, je suis d'avis que de telles communications ne peuvent être divulguées dans une instance civile que lorsqu'elles ont déjà été rendues publiques dans un procès criminel, ou lorsque les personnes visées par l'interception ont consenti à la divulgation ou ont autrement renoncé à leurs droits en matière de respect de la vie privée. Nous ne sommes en présence d'aucune de ces exceptions dans l'affaire dont nous sommes saisis.

[97] La juge de première instance a ordonné que soient divulguées aux avocats et aux experts des demandeurs, sur la base de leur pertinence, des communications privées qui ont été interceptées. Elle l'a fait avant que quelque décision que ce soit ait été prononcée dans les procédures criminelles connexes concernant la validité de la surveillance électronique ou l'admissibilité des communications interceptées. L'ordonnance a été rendue en vertu de l'art. 402 du *Code de procédure civile*[4], qui énonce ce qui suit :

402. Si, après production de la défense, il appert au dossier qu'un document se rapportant au litige est entre les mains d'un tiers, celui-ci sera tenu d'en donner communication aux parties, sur assignation autorisée par le tribunal, à moins de raisons le justifiant de s'y opposer.

[98] Cette disposition confère un vaste pouvoir discrétionnaire au juge de première instance, mais ne lui donne toutefois pas carte blanche pour ordonner la divulgation de communications jouissant d'une protection légale pratiquement impénétrable, comme c'est le cas pour les communications privilégiées. À mon avis, les éléments de preuve recueillis au moyen de mesures de surveillance électronique ont droit à la même protection et, par conséquent, ne se prêtent pas à une mise en balance des intérêts opposés.

[99] Les décisions relatives au secret professionnel de l'avocat peuvent apporter des indications utiles. Par exemple, dans l'arrêt *Goodis c. Ontario (Ministère des Services correctionnels)*, [2006] 2

4 RLRQ, ch. C-25.

not justify the disclosure of potentially privileged documents to opposing counsel. In other words, when communications are protected by privilege, they are not subject to a balancing exercise weighing their relevance against their immunity. They are protected *regardless* of relevance.

[100] Such an approach to intercepted communications seems to me to have the added endorsement of the statutory fact that both the general right to privacy and the specific right not to have confidential information disclosed are expressly protected in Quebec's *Charter of human rights and freedoms*.[5] The discretion in art. 402 of the *Code of Civil Procedure* should therefore not be so interpreted as to extinguish the scrupulous protection for the non-disclosure of intercepted communications found in other parts of the law.

[101] This brings us to the heightened protection for intercepted communications in Part VI of the *Criminal Code*. Section 193(1), found in Part VI, makes it an offence to disclose intercepted communications. The only exceptions are set out in ss. 193(2) and 193(3). Section 193(2)(*a*) is the relevant provision for our purposes:

193. . . .

(2) Subsection (1) does not apply to a person who discloses a private communication or any part thereof or the substance, meaning or purport thereof or of any part thereof or who discloses the existence of a private communication

(*a*) in the course of or for the purpose of giving evidence in any civil or criminal proceedings or in any other proceedings in which the person may be required to give evidence on oath;

5 CQLR, c. C-12, ss. 5 and 9.

R.C.S. 32, la pertinence des communications ne justifiait pas la divulgation, à l'avocate de la partie adverse, de documents possiblement privilégiés. En d'autres mots, lorsque des communications sont protégées par un privilège, elles ne peuvent être soumises à une opération de mise en balance où le tribunal soupèse leur pertinence et leur immunité de divulgation. Elles sont protégées *indépendamment* de leur pertinence.

[100] Il me semble que cette façon de considérer les communications interceptées trouve un appui supplémentaire dans le fait législatif suivant : tant le droit général au respect de la vie privée que le droit particulier au respect du secret professionnel sont expressément protégés dans la *Charte des droits et libertés de la personne*[5] du Québec. Il ne faudrait donc pas interpréter le pouvoir discrétionnaire conféré à l'art. 402 du *Code de procédure civile* d'une manière qui supprimerait la protection scrupuleuse contre la divulgation des communications interceptées prévue par d'autres règles de droit.

[101] Cela nous amène à la protection plus grande que prévoit la partie VI du *Code criminel* à l'égard des communications interceptées. Aux termes du par. 193(1), qui figure dans la partie VI, divulguer des communications interceptées constitue une infraction. Les seules exceptions sont énoncées aux par. 193(2) et (3). L'alinéa 193(2)*a*) est la disposition pertinente pour les besoins du présent pourvoi :

193. . . .

(2) Le paragraphe (1) ne s'applique pas à une personne qui divulgue soit tout ou partie d'une communication privée, ou la substance, le sens ou l'objet de tout ou partie de celle-ci, soit l'existence d'une communication privée :

a) au cours ou aux fins d'une déposition lors de poursuites civiles ou pénales ou de toutes autres procédures dans lesquelles elle peut être requise de déposer sous serment;

5 RLRQ, ch. C-12, art. 5 et 9.

[102] Part VI recognizes the uniquely intrusive character of electronic surveillance by permitting state interception of private communications *only* if express safeguards are followed. Those safeguards include restrictions in the types of criminal offences for which authorization can be granted;[6] the requirement that there be no other reasonable alternative method of investigating the crime in question;[7] and the requirement that targets of an interception be notified of the interception within a defined period of time, enabling them to challenge the legality of the interception.[8] Until a determination has been made as to the legality of a challenged interception, the communication is not admissible in a criminal proceeding.

[103] This means that s. 193(2)(*a*) should not be interpreted in a way that overrides the privacy protections in Part VI. Section 193(2)(*a*) does not create a right to access intercepted communications. At the very least, it should not be available to preempt a judicial determination about the validity of an interception. Until those interceptions have been found, or are conceded to be lawful and admitted into evidence in a criminal proceeding, they retain their private character for all purposes and are not available to the public. If, on the other hand, they are found to be lawful and admissible and are in fact made public in those proceedings, they are rendered public for all purposes, including civil proceedings.

[104] Using s. 193(2)(*a*) to permit litigants in a civil case to get disclosure of communications intercepted in the course of a criminal investigation before a challenged interception is found to be lawful, allows those litigants to benefit indirectly from an extraordinary investigative technique they are otherwise not legally entitled to. It seems to me to be ironic to say that communications sedulously

6 s. 183, para. (*a*) of the definition of "offence".
7 s. 186(1)(*b*); *R. v. Araujo*, [2000] 2 S.C.R. 992.
8 s. 196.

[102] La partie VI reconnaît le caractère exceptionnellement attentatoire de la surveillance électronique, en ce qu'elle permet l'interception de communications privées par l'État *uniquement* si certaines garanties expresses sont respectées. Parmi ces garanties, mentionnons les suivantes : des restrictions quant aux types d'infractions criminelles à l'égard desquelles une autorisation peut être accordée[6]; la condition exigeant qu'il n'existe aucune autre méthode raisonnable permettant d'enquêter sur le crime en question[7]; l'obligation d'aviser dans un délai déterminé les personnes qui ont fait l'objet de l'interception[8], mesure qui leur permet d'attaquer la légalité de l'interception. Tant qu'il n'a pas été statué sur la légalité d'une interception contestée, les communications interceptées ne sont pas admissibles dans une instance pénale.

[103] Cela signifie que l'al. 193(2)*a*) ne devrait pas être interprété d'une manière qui écarte les mesures de protection de la vie privée que prévoit la partie VI. L'alinéa 193(2)*a*) ne crée pas un droit d'accès aux communications interceptées. À tout le moins, il ne devrait pas pouvoir être invoqué pour prévenir une décision judiciaire relative à la validité d'interceptions. Tant que la validité de ces interceptions n'a pas été constatée ou concédée et que les communications interceptées n'ont pas été admises en preuve dans une instance criminelle, elles conservent à toutes fins utiles leur caractère privé et le public ne peut y avoir accès. Si, par contre, les communications interceptées sont jugées légales et admissibles et sont rendues publiques dans l'instance en question, elles deviennent alors publiques à toutes fins utiles, y compris dans le cadre de procédures civiles.

[104] Le fait de se fonder sur l'al. 193(2)*a*) afin de permettre à des plaideurs dans une instance civile d'obtenir la divulgation de communications interceptées dans une enquête criminelle — avant qu'une interception contestée ait été jugée légale — permet à ces mêmes plaideurs de bénéficier indirectement d'une technique d'enquête extraordinaire à laquelle ils n'ont autrement pas droit en vertu de la loi. Il

6 art. 183, al. *a*) de la définition d'« infraction ».
7 al. 186(1)*b*); *R. c. Araujo*, [2000] 2 R.C.S. 992.
8 art. 196.

protected from disclosure in the criminal justice system can somehow shed those protections by crossing over to the civil justice side of the street.

[105] It is noteworthy too that in other jurisdictions, intercepted private communications can never be disclosed as part of civil litigation between private parties: *National Broadcasting Co. v. United States Department of Justice*, 735 F.2d 51 (2nd Cir. 1984); *In re Motion to Unseal Electronic Surveillance Evidence*, 990 F.2d 1015 (8th Cir. 1993); C. S. Fishman and A. T. McKenna, *Wiretapping & Eavesdropping: Surveillance in the Internet Age* (3rd ed. (loose-leaf)), vol. 4, at § 41:69; *Regulation of Investigatory Powers Act 2000* (U.K.), 2000, c. 23, ss. 17 and 18.

[106] The trial judge in this case ordered the disclosure of confidential intercepted private communications in a civil proceeding about the price of gasoline, undoubtedly an important issue, but hardly of sufficient public urgency to warrant the premature disclosure of private communications before their legality — and the public's entitlement to their contents — has been judicially determined in the criminal proceedings.

[107] I would allow the appeals.

Appeals dismissed with costs, ABELLA J. *dissenting.*

Solicitors for the appellant Imperial Oil: Gowling Lafleur Henderson, Montréal and Ottawa.

Solicitors for the appellants Couche-Tard Inc. et al.: Davies Ward Phillips & Vineberg, Montréal; Louis Belleau, Montréal; Chenette, Boutique de litige, Montréal; Osler Hoskin & Harcourt, Montréal; McMillan, Montréal; Langlois Kronström Desjardins, Montréal; Miller Thomson, Toronto; Miller Thomson Pouliot, Montréal.

me paraît paradoxal d'affirmer que des communications assidûment protégées contre la divulgation dans le système de justice criminelle puissent d'une certaine manière perdre ces protections simplement en traversant la rue et en entrant dans le système de justice civile.

[105] Il convient également de souligner que, dans d'autres pays, des communications privées interceptées ne peuvent jamais être divulguées dans un litige civil entre des parties privées : *National Broadcasting Co. c. United States Department of Justice*, 735 F.2d 51 (2nd Cir. 1984); *In re Motion to Unseal Electronic Surveillance Evidence*, 990 F.2d 1015 (8th Cir. 1993); C. S. Fishman et A. T. McKenna, *Wiretapping & Eavesdropping : Surveillance in the Internet Age* (3e éd. (feuilles mobiles)), vol. 4, § 41:69; *Regulation of Investigatory Powers Act 2000* (R.-U.), 2000, ch. 23, art. 17 et 18.

[106] En l'espèce, la juge de première instance a ordonné, dans le cadre d'une instance civile portant sur le prix de l'essence, la divulgation de communications privées confidentielles interceptées. Le prix de l'essence constitue indubitablement une question importante, mais cette question est loin d'être suffisamment urgente pour le public pour justifier la divulgation prématurée de communications privées avant que la légalité de leur interception — et le droit du public d'en prendre connaissance — ait été judiciairement décidée dans le procès criminel.

[107] J'accueillerais les pourvois.

Pourvois rejetés avec dépens, la juge ABELLA *est dissidente.*

Procureurs de l'appelante Pétrolière Impériale : Gowling Lafleur Henderson, Montréal et Ottawa.

Procureurs des appelants Couche-Tard inc. et autres : Davies Ward Phillips & Vineberg, Montréal; Louis Belleau, Montréal; Chenette, Boutique de litige, Montréal; Osler Hoskin & Harcourt, Montréal; McMillan, Montréal; Langlois Kronström Desjardins, Montréal; Miller Thomson, Toronto; Miller Thomson Pouliot, Montréal.

Solicitors for the appellant Ultramar Ltd.: Stikeman Elliott, Montréal.

Solicitors for the respondents Simon Jacques et al.: Bernier Beaudry, Québec; Paquette Gadler, Montréal.

Solicitors for the respondent the Attorney General of Quebec: Attorney General of Quebec, Québec; Chamberland Gagnon, Québec.

Solicitor for the respondent the Director of Public Prosecutions of Canada: Public Prosecution Service of Canada, Ottawa.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Procureurs de l'appelante Ultramar ltée : Stikeman Elliott, Montréal.

Procureurs des intimés Simon Jacques et autres : Bernier Beaudry, Québec; Paquette Gadler, Montréal.

Procureurs de l'intimé le procureur général du Québec : Procureur général du Québec, Québec; Chamberland Gagnon, Québec.

Procureur de l'intimé le directeur des poursuites pénales du Canada : Service des poursuites pénales du Canada, Ottawa.

Procureur de l'intervenant le procureur général de l'Ontario : Procureur général de l'Ontario, Toronto.

TAB 31

Citation: Jam's International v. Westbank Holdings et al.
2001 BCCA 121

Date: 20010212
Docket: CA026188
Registry: Vancouver

COURT OF APPEAL FOR BRITISH COLUMBIA

ORAL REASONS FOR JUDGMENT

Before:
The Honourable Chief Justice McEachern
The Honourable Mr. Justice Lambert
The Honourable Mr. Justice Donald

February 12, 2001

Vancouver, B.C.

BETWEEN:

**JAM'S INTERNATIONAL VENTURES LTD.,
JAM'S INTERNATIONAL HOLDINGS LTD.,
JOSEPH E. MCHUGH and ARLENE MCHUGH**

PLAINTIFFS
(APPELLANTS)

AND:

**WESTBANK HOLDINGS LTD.,
WESTBANK PROJECTS CORPORATION,
WESTGATE SHOPPING CENTRE LTD. and
BRENT SAWCHYN**

DEFENDANTS
(RESPONDENTS)

AND:

**NEIL E. KORNFELD,
MAUREEN MCCANN, and
KORNFELD MACKOFF SILBER
(also known as Kornfeld Mackoff & Company)**

Third parties
(respondents)

R.W. Taylor and
C.D. Veinotte

Appearing for the Appellant

H.C.R. Clark, Q.C.

Appearing for the Respondents,
Westbank Holdings Ltd., Westbank Projects
Corporation and Brent Sawchyn

A.G. Sandilands Appearing for Respondent, Westgate Shopping Centre Ltd.

[1] LAMBERT, J.A.: This is an appeal from a judgment on a summary trial under rule 18A. The judgment dismissed the action against the defendants Westbank and Brent Sawchyn, an employee of Westbank, who were the applicants.

[2] No application was made on behalf of the defendant Westgate and so the action has continued against that defendant, as have the third party proceedings brought by Westgate against Kornfeld Mackoff & Company.

[3] Before discussing the circumstances of this particular case I purpose to mention two of the principles which have guided this court in appeals from rule 18A decisions. I do so at the beginning of this judgment in the hope that my references to these principles will be more noticeable than they have been when mentioned at the end of judgments.

[4] The first principle applies to those cases where the summary trial relates to only one issue in the appeal and is not a trial of the whole proceeding. The principle was stated in ***District of North Vancouver v. Fawcett*** (1998) 162 D.L.R. (4th) 402 where, in a unanimous judgment, the Court said this, at p.413:

> With respect, it seems to me that if the answer to an issue sought to be tried under rule 18A will only resolve the whole proceeding if one answer is given, but not if a different answer is given, then the applicant should be required to demonstrate, and the judge should be expected to decide, that the administration of justice, as it affects not just the parties to the motion, but also the orderly use of court time, will be enhanced by dealing with the issue as a separate issue. It cannot be enough simply that the parties have agreed to a summary trial of one or more issues, but not all of the issues, raised in the proceeding, without any consideration for the effective use of court time, or the efficient resolution of the proceeding.

[5] The second principle applies to those cases where the Court is asked to make assumptions of fact or mixed fact and law in a course of an 18A proceeding. Those assumptions can produce a hypothetical issue and often result in a situation where careful attention should be given to the first principle I mentioned because the resulting issue may not be a real issue in the case and it may save no time or expense to have it decided. There are a number of cases which discuss the difficulties of dealing with an 18A application on the basis of assumptions. I will mention only two: ***Steyns v. Manitoba Public Insurance Corp.*** (1995) 7 B.C.L.R. (3d) 106 and ***Bell Pole Co. v. Commonwealth Insurance Co.*** (1997) 66 B.C.L.R. (3d) 79.

[6] In the ***Bell Pole*** case Mr. Justice Esson, for the Court, said this:

> [15] This is not an appropriate case in which to make a definitive statement on the matter. I will say that to proceed with a summary trial on assumed facts is likely to result in the kind of confusion which arose here, and that such a procedure seems inconsistent with the principle that a summary trial is a trial.

[7] I would like to add this; the problem is particularly acute in those cases where the court has been asked to decide the 18A application on assumed facts which are not conceded by the applicant to be true. In most cases if the application is dismissed the applicant on assumed facts seeks to retain the right to prove the true facts which may or may not be the same as the assumed facts. As in the ***Bell Pole*** case I would not make a definitive ruling on this issue until the issue itself is argued and not simply raised by this Court.

[8] I think it would be a rare case where the Court was asked to assume facts which were not also conceded to be true for all purposes of the litigation by all parties to the litigation and where it would be wise for the court to give a judgment on those assumed facts. Of course, when all parties are prepared to concede that the facts put forward on the application are true and should be treated as such by all parties to the litigation, for all purposes of the litigation and not simply for the 18A proceeding, and all parties agree that that is so, then no problem is likely to arise. But those facts are not assumed facts they are admitted facts.

[9] I turn now to this appeal.

[10] A shopping centre in Maple Ridge was developed by Westbank Projects, which I will call the developer. The developer leased out a substantial portion before it was taken over by Westgate Shopping Centre Ltd., which I will call the landlord. Brent Sawchyn was employed by the developer to lease the space.

[11] In the spring of 1996 Joseph McHugh, a former commercial lawyer from Chicago, approached Sawchyn to negotiate terms of a lease for a family style restaurant. In December 1996 Sawchyn accepted McHugh's offer to lease and an agreement was made between the developer and one of McHugh's companies. As part of the negotiations McHugh vigorously sought protection from competition by similar restaurants. The clause that was ultimately agreed to reads:

> The [developer]... hereby covenants and agrees to not lease premises with the Shopping Center to a sit down restaurant whose principal business is serving breakfast item such as omelets, waffles, pancakes, (excluding McDonald's) and/or family style restaurants such as but not limited to ABC, Denny's, I-HOP, Ricky's, Pantry, Mitzel's and de Deutch

> Pannekock House being 2,000 square feet or larger....The tenant acknowledges that Swiss Chalet, Starbucks and the Great Canadian Bagel Ltd. are tenants whom the [developer] has entered into agreements with.

[12] McHugh claimed that during negotiations, Sawchyn made an oral promise that he would not lease to "substantially similar restaurants" that would be "competitive" but only to those that would "compliment" McHugh's family style restaurant. McHugh said he relied upon this oral representation.

[13] At the time the exclusive use clause was negotiated, McHugh was aware that another tenant was Swiss Chalet. McHugh thought that Swiss Chalet was a chicken and ribs specialty restaurant. Swiss Chalet was, in fact, owned by Cara, which also owned the Bread Garden restaurant chain. In April 1997, the developer concluded an offer to lease with Cara for a combined Bread Garden-Swiss Chalet operation.

[14] In December 1997 Sawchyn informed McHugh that the developer intended to enter into a lease with a Cheesecake Restaurant. McHugh objected because, firstly, he considered Cheesecake to be a family style restaurant and secondly Cheesecake had 14 breakfast items on their menu. In response Sawchyn wrote McHugh, stating that the Cheesecake was neither a breakfast type nor a family style restaurant. McHugh disagreed and hired counsel to advance his position.

[15] Following negotiations, the landlord ultimately agreed to supply McHugh with a letter from Cheesecake stating that the restaurant would be run the same as other Cheesecake restaurants. McHugh took this assurance to mean Cheesecake would not open before 11:00 am. The landlord also agreed to absorb certain costs.

[16] In March 1998 McHugh signed a release in favour of the landlord and the developer from any claims arising from the granting of a lease to Cheesecake.

[17] A lease between the developer and McHugh had not been executed and the agreement was not assigned to the landlord. In March 1998, the day after signing the release, McHugh and the landlord executed a lease of the restaurant space. It contained essentially the same exclusive use clause as the agreement between McHugh and the developer.

[18] On April 27, 1998 McHugh opened Jam's Restaurant and Bakery, after spending or committing to nearly $1 million. The restaurant has not done well and, we were informed during the course of the appeal, has gone out of business.

[19] At the time of the summary trial, McHugh claimed that there were three restaurants that competed with his: Cheesecake Café Restaurant & Bakery, Bread Garden-Swiss Chalet, and Fox's Reach Pub & Grill. The trial judge in paragraphs one and two of his reasons said this:

> [1] The developer makes application for the summary trial and dismissal of the action against it. Mr. McHugh opposes on the ground that the issues cannot be properly resolved in that way.
>
> [2] The representations are said to have been both oral and written. Those alleged to have been made orally are denied. If any determination can be made summarily with respect to them, it can only be whether, if made, they are actionable. With the issues confined accordingly, I address the representations, first the oral and then the written, before considering the allegation of inducing breach of contract.
>
> [My emphasis]

[20] In relation to the oral representations McHugh claimed that he relied upon Sawchyn's oral representation regarding competitive restaurants when he signed the lease with the landlord, some two years later. The trial judge found that McHugh was an experienced commercial lawyer who must have known that he could not rely on pre-contractual statements when the subject of the statements was specifically addressed in the executed agreement.

[21] Further, the trial judge noted that Sawchyn could only make representations with respect to the developer and not with respect to the eventual landlord.

[22] Lastly, the trial judge applied the elements of an action for negligent misrepresentation as stated by this Court in ***Kripps v. Touche Ross & Co.*** (1997), 33 B.C.L.R. (3d) 254 at paragraph 35. The trial judge held the fourth element that of "reasonable reliance" had not been established and could not be inferred.

[23] With respect to the written representation McHugh claimed that he relied upon Sawchyn's written representation that a Cheesecake restaurant was neither a family style restaurant nor a breakfast style restaurant. The trial judge could not see how McHugh could possibly rely on a statement "that he contested to the point of threatening litigation."

[24] McHugh argued that the wording of the release was ambiguous, pertaining only to breakfast style restaurants and, therefore, his right to claim if Cheesecake opened a family style restaurant was preserved. The trial judge found the release to be "clear beyond question."

[25] With respect to inducing a breach of contract McHugh claimed that the developer induced the landlord to breach his lease when the lease of Cara's space for the Bread Garden- Swiss Chalet restaurant was perfected. The trial judge stated that the agreement to lease was in place with Cara before the agreement with McHugh. The trial judge could not say that when Cara executed the lease, "the landlord was wrongly induced to lease premises for a restaurant such that a tort was committed by the developer."

[26] The trial judge heard this application on the basis of assumed facts. He was induced to do so when the issue was put before him as it was. The assumed facts were that the oral representation was made, and that it was false. However the parties argued in this Court about the circumstances in which an oral pre-contractual statement can survive into a written contract. The trial judge decided that this representation could not survive the clause in the written contract. Both the legal and factual questions, as presented by counsel, require a fuller evidentiary basis than was achieved on the rule 18A proceeding.

[27] The trial judge also decided that a reasonable person in Mr. McHugh's position could not reasonably rely on the oral representation. With respect, it seems to me that the trial judge treated the reliance question as if it were a pure question of law. In the absence of evidence of the full factual matrix, which might have grounded the reasonableness of the reliance we are left with a more complicated question than the question as it was dealt with by the trial judge, but without the evidence required to resolve it. I add also that evidence of the factual matrix surrounding the Cheesecake release could throw light on the patent ambiguity inherent in the document itself.

[28] For those reasons I would allow the appeal and dismiss the developer's application to have the action dismissed as against it.

[29] I add that the fact that only a part of a proceeding was before the court, on the 18A application, leaves me in this case with a measure of apprehension that facts found on the full trial may be shown to be different from the facts underlying the chambers judge's dismissal of the action against the developer under rule 18A.

[30] As I have said I would allow the appeal.

[31] **MCEACHERN, C.J.B.C.:** I agree.

[32] **DONALD, J.A.:** I agree.

[33] **MCEACHAERN, C.J.B.C.:** Thank you counsel, the appeal is allowed for the reasons given by Mr. Justice Lambert.

"The Honourable Mr. Justice Lambert"