Court of Appeal File No. CA44448

COURT OF APPEAL

BETWEEN:

UNITED MINE WORKERS OF AMERICA 1974 PENSION PLAN AND TRUST

Appellant

AND:

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 A 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

Respondent

BOOK OF AUTHORITIES OF THE RESPONDENT

United Mine Workers of America 1974 Pension Plan and Trust

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CASE LAW

TAB 1

2015 ONCA 553
Ontario Court of Appeal

Menzies Lawyers Professional Corp. v. Morton (Trustees of)

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A.C.W.S. (3d) 265, 28 C.B.R. (6th) 136, 337 O.A.C. 1

In the Matter of the Proposal of Edwin Harold Morton: Ottawa Bankruptcy

Menzies Lawyers Professional Corporation, Menziesbank Corp. and Douglas G. Menzies, personally, Applicants and Doyle Salewski, Trustees in Bankruptcy for Edwin Morton and the Attorney General of Canada, Respondents

P. Lauwers J.A. (In Chambers)

Heard: November 18, 2014
Judgment: July 27, 2015
Docket: CA M44416

Proceedings: allowing leave to appeal *Menzies Lawyers Professional Corp. v. Morton (Trustees of)* (2014), 60 C.P.C. (7th) 111, 17 C.B.R. (6th) 264, 50 R.F.L. (7th) 357, 2014 CarswellOnt 12872, 2014 ONSC 5438, Stanley J. Kershman J. (Ont. S.C.J.)

Counsel: Douglas G. Menzies for himself
Stephanie Lauriault for Attorney General of Canada

Subject: Civil Practice and Procedure; Family; Income Tax (Federal); Insolvency; Public; Tax — Miscellaneous; Torts

Headnote

Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — To Court of Appeal — Time for appeal

Legal services relating to divorce proceedings were rendered to bankrupt taxpayer by creditor DM from 2008 to 2010, and creditor ML Corp. from 2011 on — Canada Revenue Agency (CRA) filed and registered tax lien in amount of $227,042 in 2010 based on re-assessments and obtained jeopardy order in 2013 — Creditor MB Corp. made loan to bankrupt taxpayer to pay two execution creditors — Bankrupt taxpayer filed proposal under Bankruptcy and Insolvency Act in 2014 — Creditors and CRA filed proofs of claim — Application judge dismissed creditors' motions for solicitor's liens

and salvage lien in relation to services rendered or money lent to bankrupt taxpayers — Creditors brought application for extension of time to file notice of appeal — Application granted — Creditors were granted extension of time to bring appeal — As this was decision of Bankruptcy Court, creditors were to bring appeal within ten days, as appeal to Court of Appeal lies under s. 193 of Act, rather than under Rules of Civil Procedure — Creditors had bona fide intention to appeal before expiry of appeal period but misapprehended applicable rules, which explained delay — There would be no prejudice to responding parties in granting leave since funds were in court.

Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — To Court of Appeal — Availability — Leave by judge

Legal services relating to divorce proceedings were rendered to bankrupt taxpayer by creditor DM from 2008 to 2010, and creditor ML Corp. from 2011 on — Canada Revenue Agency (CRA) filed and registered tax lien in amount of $227,042 in 2010 based on re-assessments and obtained jeopardy order in 2013 — Creditor MB Corp. made loan to bankrupt taxpayer to pay two execution creditors — Bankrupt taxpayer filed proposal under Bankruptcy and Insolvency Act in 2014 — Creditors and CRA filed proofs of claim — Application judge dismissed creditors' motions for solicitor's liens and salvage lien in relation to services rendered or money lent to bankrupt taxpayers — Creditors brought application for leave to appeal — Application granted — Solicitor's lien and charging order were form of property for purpose of s. 193(c) of Act, so appeal was as of right since amounts exceeded $10,000 — It was more than arguable that s. 193(c) of Act was basis for court's appeal jurisdiction and leave was not required — If leave were required, it would have been granted — Proposed appeal met test for leave under s. 193(e) of Act.

Table of Authorities

Cases considered by *P. Lauwers J.A.*:

Baker, Re (1995), 31 C.B.R. (3d) 184, (sub nom. *Baker (Bankrupt), Re*) 83 O.A.C. 351, 22 O.R. (3d) 376, 1995 CarswellOnt 58 (Ont. C.A. [In Chambers]) — considered

Business Development Bank of Canada v. Pine Tree Resorts Inc. (2013), 2013 ONCA 282, 2013 CarswellOnt 5026, 100 C.B.R. (5th) 91, 115 O.R. (3d) 617, 307 O.A.C. 1 (Ont. C.A.) — referred to

Fiber Connections Inc. v. SVCM Capital Ltd. (2005), 2005 CarswellOnt 1834, 10 C.B.R. (5th) 201, 198 O.A.C. 27 (Ont. C.A. [In Chambers]) — considered

Moore, Re (2012), 2012 ONCA 569, 2012 CarswellOnt 10879, (sub nom. *Moore (Bankrupt), Re)* 295 O.A.C. 373, 95 C.B.R. (5th) 157, 354 D.L.R. (4th) 67 (Ont. C.A.) — followed

Ontario Wealth Management Corp. v. Sica Masonry and General Contracting Ltd. (2014), 2014 ONCA 500, 2014 CarswellOnt 8586, 17 C.B.R. (6th) 91, 323 O.A.C. 101, 37 C.L.R. (4th) 191 (Ont. C.A.) — distinguished

Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp. (1988), 19 C.P.C. (3d) 396, 1988 CarswellBC 615 (B.C. C.A.) — considered

R.J. Nicol Homes Ltd. (Trustee of) v. Nicol (1995), 30 C.B.R. (3d) 90, 77 O.A.C. 395, 1995 CarswellOnt 42 (Ont. C.A.) — considered

Thomas Gold Pettinghill LLP v. Ani-Wall Concrete Forming Inc. (2012), 2012 ONSC 2182, 2012 CarswellOnt 5802, 349 D.L.R. (4th) 431, 25 C.P.C. (7th) 110 (Ont. S.C.J.) — considered

Tots & Teens Sault Ste. Marie Ltd., Re (1975), 11 O.R. (2d) 103, 21 C.B.R. (N.S.) 1, 65 D.L.R. (3d) 53, 1975 CarswellOnt 105 (Ont. Bktcy.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

s. 69 — referred to

s. 69(1) — referred to

s. 193 — considered

s. 193(c) — considered

s. 193(e) — considered

Rules considered:

Bankruptcy and Insolvency General Rules, C.R.C. 1978, c. 368

R. 31(1) — referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
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APPLICATIONS by creditors for extension of time to file notice of appeal and for leave to appeal judgment reported at *Menzies Lawyers Professional Corp. v. Morton (Trustees of)* (2014), 2014 ONSC 5438, 2014 CarswellOnt 12872, 17 C.B.R. (6th) 264, 60 C.P.C. (7th) 111, 50 R.F.L. (7th) 357 (Ont. S.C.J.), dismissing creditors' motions for solicitor's liens and salvage lien in relation to services rendered or money lent to bankrupt taxpayers.

***P. Lauwers J.A. (In Chambers)*:**

1 The Menzies Lawyers Professional Corporation, and Douglas Menzies personally, acted for many years for the bankrupt, Edwin Morton, in lengthy and protracted matrimonial proceedings. They postponed their claim for fees on a number of occasions and sought, in the application at issue, to protect their accounts out of Mr. Morton's estate, having been completely surprised by his bankruptcy. They applied for the recognition of a solicitor's lien for about $133,000 in respect of their representation of Mr. Morton and a charging order.

2 Menziesbank assisted in the implementation of the matrimonial settlement. It claimed a salvage lien for $30,000, the amount it paid to clear two execution creditors' interests so that the sale of the matrimonial home could close.

3 The application judge refused to grant the solicitors a charging order and to grant Menziesbank a salvage lien.

4 This motion raises two issues. First, do the applicants require an extension of time to serve the notice of appeal? Second, is leave required for the appeal itself under s. 193 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("the *BIA*")?

A. Is An Extension of Time for Leave to Appeal under the Rules Required?

5 The applicants were under the mistaken impression that the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 ("the *Rules*") applied to this appeal, and so they had 30 days to appeal. In fact, since this was a decision of the Bankruptcy Court, the appeal to the Court of Appeal lies under s. 193 of the *BIA*. Therefore, under rule 31(1) of the *Bankruptcy and Insolvency General Rules*, C.R.C., c. 368, the appeal must be brought within 10 days "or within such further time as a judge of the Court of Appeal stipulates".

6 Since the appeal was late, I am obliged to consider the following factors in exercising discretion to extend the time for filing the notice of appeal:

a) whether the applicant had a *bona fide* intention to appeal before the expiration of the appeal period;

b) any explanation for the delay in filing;

c) any prejudice to the responding parties caused by the delay; and

d) the merits of the proposed appeal.

7 Based on the affidavit material and the hotly contested nature of the dispute between the parties, I am satisfied that the applicants had a *bona fide* intention to appeal before the expiry of the appeal period, but they misapprehended the applicable rules, which explains the delay. There would be no prejudice to the responding parties in granting leave to appeal since the funds are in court earning interest.

8 The remaining issue to be addressed before time can be extended turns on the merits of the appeal, which dovetail with the appellants' appeal rights under s. 193 of the *BIA*.

B. Is Leave to Appeal Required under S. 193 of the BIA?

9 Section 193 of the *BIA* governs appeal rights. The relevant grounds for this motion are found in paragraphs (c) and (e):

193. Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:

(c) if the property involved in the appeal exceeds in value ten thousand dollars;

(e) in any other case by leave of a judge of the Court of Appeal.

10 The applicants were at pains to characterize the appeal as one as of right under s. 193(c), and not one for which leave is required under s. 193(e). A decision on which of the paragraphs applies depends on a consideration of the facts.

(a) The Factual Context

11 The factual context is fairly set out in the factum of the AGC:

1. The Appellant, Douglas Menzies, represented Edwin Morton in complicated matrimonial proceedings that were eventually settled after one day of trial on terms which required the wife to pay to the husband amounts exceeding $250,000.00.

> 2. Mr. Morton was unable to pay as a result of the financial constraints of the multiple proceedings initiated by the wife, including criminal charges, and the retainer agreement between Menzies and Morton provided that interest would be charged on the outstanding balance at 10% with the amounts paid from the proceeds of the matrimonial home.
>
> 3. The house was eventually sold, but an Application for a Vesting Order was required to complete the sale because the Canada Revenue Agency (CRA) had filed a claim for lien as a result of the reassessment of Mr. Morton's taxes for 4 years. In addition, there were 2 execution creditors, the Royal Bank of Canada (RBC) and Canadian Imperial Bank of Commerce (CIBC), claiming amounts totaling $67,000.00.
>
> 4. The Appellant, Menziesbank, purchased the interests of the two execution creditors for fifty cents on the dollar. Rather than profit on this by talking an assignment of the full amount of the debt, it has claimed a salvage lien for the amount it actually paid out to discharge these claims, $30,000.00. [Footnotes omitted.]

(b) The Application Judge's Decision

12 After setting out the facts in detail, the motion judge found, at para. 62, that "the entire value of the monies owing from Ms. Rivard to Mr. Morton, pursuant to the Campbell Divorce Judgment, were preserved by Douglas Menzies ... [and] would not have come into existence 'but for' the efforts of Douglas Menzies." He added, at para. 63, "The Court finds that Douglas Menzies preserved Mr. Morton's interest in Ms. Rivard's one-half interest in the matrimonial home proceeds [1] ." Accordingly, the application judge found it equitable to lift the *BIA* stay of proceeding in relation to the claim for a solicitor's lien.

13 Despite these findings, the application judge declined to give effect to the lien by granting a charging order on equitable grounds. He noted, at para. 67, that "equity would be offended by the granting of a solicitor's lien/charging order." The application judge based this decision on his view, expressed at paras. 70-71, that the solicitor did not take advantage of his right to obtain a second mortgage under the divorce judgment that would have protected his interest. He concluded, at para. 74, "Given the conduct of the solicitors and the potential prejudice to competing creditors, equity weighs heavily against the granting of a charging order in this case."

14 The application judge also refused on equitable grounds to lift the automatic stay of proceedings under s. 69 of the *BIA* in relation to Menziesbank's salvage claim, noting, at para. 38, that "Menziesbank, is not likely to be materially prejudiced by the continued operation

of s. 69(1) of the *BIA* and it is not equitable on other grounds to make such a declaration." He did not specify the equities on which he was relying.

(c) The Legal Argument Concerning Appeal Rights under s.193 of the BIA

15 There are two legal issues to be decided with respect to the appeal rights under s. 193 of the *BIA*. The first is whether a solicitor's lien and a charging order is a form of property for the purpose of s. 193(c) of the *BIA*. The second is whether this proposed appeal meets the test for leave, assuming that it must proceed under s. 193(e). I address each in turn.

(1) Is a solicitor's lien and a charging order is a form of property for the purpose of s. 193(c) of the BIA

16 If a solicitor's lien and a charging order is a form of property for the purpose of s. 193(c) of the *BIA*, then the applicants' appeal should be as of right, since the amounts at issue exceed $10,000.

17 The decision of Henry J. in the bankruptcy case of *Tots & Teens Sault Ste. Marie Ltd., Re* (1975), 11 O.R. (2d) 103, [1975] O.J. No. 2549 (Ont. Bktcy.), is relevant. Justice Henry framed the issue, at para. 1, in terms that apply to this case: "The simple issue in this application is whether a solicitor's lien for his costs in respect of his successful defence of litigation for his client, who is now bankrupt, constitutes a charge upon the fund recovered by him in the litigation, so as to give him the status of a secured creditor in the bankruptcy."

18 Justice Henry's analysis is set out at para. 26:

> While fully accepting the principle here declared, I have reached the conclusion that the fund at the time it was created in the hands of the Sheriff was impressed with the inchoate right of the solicitor to apply to the Court and have a declaration that it is charged as security for his costs. This was an inherent right to invoke the equitable jurisdiction of the Court to exercise its discretion in his favour by way of declaring that the fund is charged as security for his claim. As I see it, the role of the Court is to declare, not to create, the security and even though the bankruptcy has occurred, it is in my opinion still open to the proper Court, in the exercise of its discretion, as I have said, to decide if the lien shall or shall not be recognized. If the Court makes such a declaration it has the effect, as I see it, of holding that the lien attached to the fund at the moment it was created. If it had been created prior to the bankruptcy, there would be no question that the fund would stand charged; the fund having been created after the bankruptcy may, in my opinion, in the same way be made the subject of a charge by way of security, unless of course the Court comes to the conclusion that it would offend the principles of equity, either by reason of the conduct of the solicitor or unfairness to the creditors, to refuse to exercise the discretion in the solicitor's favour. On the view that I take of the matter,

> the lien in law attached to the fund as an inchoate right, the crystallization of the lien requiring only the pronouncement of the Court to reveal it.

19 Justice Perell summarized the import of *Tots and Teens* in *Thomas Gold Pettinghill LLP v. Ani-Wall Concrete Forming Inc.*, 2012 ONSC 2182, [2012] O.J. No. 2109 (Ont. S.C.J.), at para. 101:

> [T]he three points to note from Justice Henry's decision in *Re Tots and Teens Sault Ste. Marie* about a charging lien made under the court's inherent jurisdiction are: first, *the charging lien creates the proprietary interest of a secured creditor*; second, subject to being declared, the charging lien is an inchoate interest that pre-dates the court's declaration; and third, the charging lien is intrinsically declaratory in nature. [Emphasis added.]

20 The respondent relies on *Ontario Wealth Management Corp. v. Sica Masonry and General Contracting Ltd.*, 2014 ONCA 500, [2014] O.J. No. 3051 (Ont. C.A.) (Strathy J.A. (In Chambers)), which addressed the scope of s. 193(c), at para. 41, and added, at para 42:

> The issue before the motion judge was simply a matter of which claim had priority. This is the daily fare of judges in bankruptcy proceedings. To provide an appeal as of right from such decisions would negate the court's gatekeeping function under s. 193(e) and would tie up bankruptcy proceedings in interlocutory appeals over routine issues.

21 In my view, the reasoning in *Ontario Wealth Management* does not apply on the facts of this case, which instead involves the assertion of a proprietary interest in the form of a solicitor's lien and its appropriate valuation.

22 The same logic applies to Menziesbank's claim. I find that, consistent with *Tots and Teens*, it is more than arguable that s. 193(c) is the basis for the court's appeal jurisdiction; the appellants would not have required the court's leave if the appeal had been brought in time.

23 In any event, I would have granted leave to appeal under s. 193(e) of the *BIA*.

(2) The proposed appeal meets the test for leave under s. 193(e) of the BIA

24 The test for leave to appeal under s. 193(e) of the *BIA* was set by this court in *Moore, Re*, 2012 ONCA 569, [2012] O.J. No. 4089 (Ont. C.A.), at para. 47:

> Generally speaking, the factors to be considered on an application for leave to appeal are:
>
> a) whether the point of appeal is of significance to the practice;
>
> b) whether the point raised is of significance to the action itself;

c) whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and

d) whether the appeal will unduly hinder the progress of the action.

This test is similar to Blair J.A.'s formulation in *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282, [2013] O.J. No. 1918 (Ont. C.A.), at para. 29.

25 I am satisfied that an appeal will not unduly hinder the progress of the bankruptcy/insolvency proceedings under para. (d).

26 The question is whether the appeal raises an issue or issues of general importance to the practice in bankruptcy/insolvency matters and to the action itself, and whether the appeal is *prima facie* meritorious.

27 In my view, there are two issues of law presented by the proposed appeal: Did the application judge make a palpable and overriding error in his apprehension and application of the relevant legal principles in deciding not to:

i. grant a charging order against the estate in favour of Douglas G. Menzies and Menzies Lawyers Professional Corporation, having found the existence of valid solicitors' lien?

ii. grant a salvage lien to Menziesbank under s. 69 of the *BIA*?

28 I find that these are issues of broader application and therefore of general importance to the practice in bankruptcy/insolvency matters. There is a need for this court to consider afresh the principles referred to by Henry J. in *Tots and Teams* and the discretionary factors that would lead a court to deny a charging order. It would also be helpful to the practice to identify the circumstances in which a salvage lien is properly obtained and the discretionary factors that would lead a court to deny a salvage lien.

29 I find that the proposed appeal is not in any sense frivolous, and that it is of significance both to the parties and in respect of the proceeding.

30 With respect to the merits, in *Pinetree Resorts*, Blair J.A. noted, at para. 23, that "Ontario decisions have traditionally leaned toward" the factors expressed by Goodman J.A. in *R.J. Nicol Homes Ltd. (Trustee of) v. Nicol*, [1995] O.J. No. 48 (Ont. C.A.), at para. 6. He thought that these factors ought to be considered in determining whether an appeal is *prima facie* meritorious, explaining at para. 31:

> A proposed appeal in which the judgment or order under attack (a) appears to be contrary to law, (b) amounts to an abuse of judicial power, or (c) involves an obvious error causing prejudice for which there is no remedy, will be a proposed appeal that is *prima facie* meritorious. I recognize that the *Power Consolidated* 'prima facie meritorious' criterion is different than the 'arguable point' notion referred to by Osborne J.A. in *Baker* and by Armstrong J.A. in *Fiber Connections*. In my view, however, the somewhat higher standard of a *prima facie* meritorious case on appeal is more in keeping with the incorporation of the *R.J. Nicol* factors into the test.

31 I do not, with respect, discern a meaningful difference between the interpretations to which Blair J.A. referred. In *Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp.* (1988), 19 C.P.C. (3d) 396, [1988] B.C.J. No. 1403 (B.C. C.A.), McLachlin J.A. held that the appeal was "*prima facie* meritorious", on the basis that: "the appeal is not without merit in the sense that an argument can be made" that the judge erred in the application of a legal test. In both *Baker, Re* (1995), 22 O.R. (3d) 376, [1995] O.J. No. 580 (Ont. C.A. [In Chambers]), at para. 24, and *Fiber Connections Inc. v. SVCM Capital Ltd.* (2005), 10 C.B.R. (5th) 201, [2005] O.J. No. 1845 (Ont. C.A. [In Chambers]), at para. 20, Osborne J.A. and Armstrong J.A., respectively, simply stated that the "*prima facie* meritorious" criterion is met where "there are arguable grounds of appeal". They were both uncomfortable with expressing a view that the appeal would succeed, despite the wording of the test.

32 Perhaps it would be better if the third step of the test - expressed most recently by a panel of this court in *407 ETR Concession Co* as "whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous" - were revised, in the words of Osborne and Armstrong JJ.A., to provide: "whether there are arguable grounds of appeal or, on the other hand, whether it is frivolous".

33 In my view, it would be helpful to the profession and the practice if there were more guidance given by this court on the interpretation of the phrase "*prima facie* meritorious".

34 I turn now to apply the criterion of "*prima facie* meritorious" to this appeal, without expressing a view as to whether the appeal will succeed, according to the approach taken by Osborne and Armstrong JJ.A. It seems to me arguable that the application judge did not set out a principled basis for refusing to grant a charging order in favour of the solicitors, having found a valid solicitor's lien. The solicitors were working with the bankrupt to assist him and decided not take a second mortgage securing their legal fees. It is not clear why this should prejudice them when, had they taken out the second mortgage, the amount of money represented thereby would not have fallen into the estate.

35 I take a similar view of his refusal to grant salvage lien to Menziesbank. The application judge simply asserted that he was applying the equities but he did not explain his thinking in any meaningful way.

36 It is therefore arguable that the application judge made that have prejudiced the appellants. For these reasons, I would find that the criterion of an appeal that is "*prima facie* meritorious" has been satisfied in this case. This finding is also sufficient to satisfy the remaining criterion of the merits of the proposed appeal for the purpose of determining whether to extend the time for leave to appeal under the rules.

C. Disposition

For the reasons set out above, I extend the time for the applicants to file the notice of appeal to October 30, 2014 to validate its filing *nunc pro tunc*, and grant their application for leave to appeal under s. 193(e) of the *BIA*. Since the applicants are seeking an indulgence, it is reasonable to make a costs award in favour of the respondent, which I fix at $1,500.

Applications granted.

Footnotes

1 The application judge declined, at paras. 64-65 to provide similar recognition to the work of Menzies Lawyers Professional Corporation, but it is not clear whether that materially affects the claims.

TAB 2

2006 BCSC 1102
British Columbia Supreme Court

Minera Aquiline Argentina SA v. IMA Exploration Inc.

2006 CarswellBC 1776, 2006 BCSC 1102, [2006] B.C.J. No. 1626, [2007] 1 W.W.R. 43,
150 A.C.W.S. (3d) 1124, 32 C.P.C. (6th) 31, 32 B.L.R. (4th) 165, 58 B.C.L.R. (4th) 217

Minera Aquiline Argentina SA (Plaintiff) and IMA Exploration Inc. and Inversiones Mineras Argentinas S.A. (Defendants)

M.M. Koenigsberg J.

Heard: October 11-12, 14, 17-21, 25-27, 2005; November 7-10, 16-18, 21-24, 28-30, 2005; December 1-2, 5-9, 2005
Judgment: July 14, 2006
Docket: Vancouver S041353

Counsel: G. Nathanson, Q.C., S.R. Schachter, Q.C., J. MacInnis for Plaintiff
M.P. Carroll, Q.C., D. Geoffrey Cowper, Q.C., Brent Meckling, J. Horswill for Defendants

Subject: Natural Resources; Estates and Trusts; Civil Practice and Procedure; Property; International

Headnote

Natural resources --- Mines and minerals — Remedies — Miscellaneous

Mining company, N, owned potential mining site — Defendant, IMA, was one of several potential purchasers of N's mining site and plaintiff was ultimate purchaser of site — Each potential purchaser signed confidentiality agreement before receiving access to data about mining site in order to be able to evaluate it — Plaintiff as ultimate purchaser, obtained ownership of data — IMA subsequently announced it had discovered another nearby new mining site — Plaintiff brought proceedings claiming breach of confidentiality agreement — Specifically, plaintiff claimed that IMA unlawfully used confidential geological information obtained during its due diligence with regard to data supplied by N, to discover new site — Defendants claimed information they used to find new site was not covered by confidentiality agreement since it was not specifically listed or referenced in agreement — Plaintiff claimed that information was covered by agreement by necessary implication because it was data made available during site visit and because it related to evaluating possible purchase of N's site — Plaintiff's action was allowed — Information in question was not expressly referenced in confidentiality agreement — However, construction of agreement was to be viewed through lens of business purpose which was to permit interested parties to have access to confidential information to allow them to evaluate possible purchase of site, while at same time protecting confidentiality of information — Wording of agreement and authorities cited supported plaintiff's contention that any information provided to IMA by N that could reasonably be viewed by N as "relating to" or "concerning" IMA's evaluation of site was confidential information within meaning of agreement — Nothing in agreement compelled more narrow interpretation and there was no ambiguity in agreement regarding meaning and scope of "confidential information" — Even if there was ambiguity, parties to agreement understood and so acted in relation to each other that all data observed or given during site visits by IMA was confidential information to be used solely for purpose of evaluating N's site — Therefore, use by IMA of data to find and stake new site was in breach of confidentiality agreement.

Estates and trusts — Trusts — Constructive trust — General principles

Mining company, N, owned potential mining site — Defendant, IMA, was one of several potential purchasers of N's mining site and plaintiff was ultimate purchaser of site — Each potential purchaser signed confidentiality agreement before receiving access to data about mining site in order to be able to evaluate it — Plaintiff as ultimate purchaser,

obtained ownership of data — IMA subsequently announced it had discovered another nearby new mining site — Plaintiff brought proceedings claiming breach of confidentiality agreement — Specifically, plaintiff claimed that IMA unlawfully used confidential geological information obtained during its due diligence with regard to data supplied by N, to discover its new site — Plaintiff's action was allowed on basis that confidentiality agreement had been breached by use of data, and issue arose as to appropriate remedy — Plaintiff sought constructive trust over new mining site claims — Defendants were to hold all claims at new mining site pursuant to constructive trust in favour of plaintiff — Canadian jurisprudence recognized availability of constructive trust for breach of contractual term of confidentiality — Remedial constructive trust is proprietary remedy in that it results in ownership of a thing, but unlike other in rem orders, it acts upon a person, rather than thing itself — Court had in personam jurisdiction over all parties to this litigation, as well as subject matter jurisdiction over all causes of action pleaded — Accordingly, even though constructive trust might be alien to jurisdiction (Argentina) where it was sought to be enforced, there was no need for enforcement in Argentina since remedy sought was enforceable in British Columbia — Also, there was in this case clear and cogent link between wrong, information and acquisition of property, since data led directly to discovery of new site, it was very unlikely that IMA would have found and staked site without use of data and use of data was wrongful use — Furthermore, damages were clearly inadequate — Accordingly, imposition of constructive trust was appropriate remedy in circumstances.

Natural resources — Mines and minerals — Remedies — Forfeiture of claims — Miscellaneous

Mining company, N, owned potential mining site — Defendant, IMA, was one of several potential purchasers of N's mining site and plaintiff was ultimate purchaser of site — Each potential purchaser signed confidentiality agreement before receiving access to data about mining site in order to be able to evaluate it — Plaintiff as ultimate purchaser, obtained ownership of data — IMA subsequently announced it had discovered another nearby new mining site — Plaintiff brought proceedings claiming breach of confidentiality agreement — Specifically, plaintiff claimed that IMA unlawfully used confidential geological information obtained during its due diligence with regard to data supplied by N, to discover its new site — Plaintiff's action was allowed on basis that confidentiality agreement had been breached by use of data, and issue arose as to appropriate remedy — Plaintiff sought constructive trust over new mining site claims — Defendants were to hold all claims at new mining site pursuant to constructive trust in favour of plaintiff — Canadian jurisprudence recognized availability of constructive trust for breach of contractual term of confidentiality — Remedial constructive trust is proprietary remedy in that it results in ownership of a thing, but unlike other in rem orders, it acts upon a person, rather than thing itself — Court had in personam jurisdiction over all parties to this litigation, as well as subject matter jurisdiction over all causes of action pleaded — Accordingly, even though constructive trust might be alien to jurisdiction (Argentina) where it was sought to be enforced, there was no need for enforcement in Argentina since remedy sought was enforceable in British Columbia — Also, there was in this case clear and cogent link between wrong, information and acquisition of property, since data led directly to discovery of new site, it was very unlikely that IMA would have found and staked site without use of data and use of data was wrongful use — Furthermore, damages were clearly inadequate — Accordingly, imposition of constructive trust was appropriate remedy in circumstances.

Natural resources — Mines and minerals — Remedies — Damages — Assessment and quantum

Mining company, N, owned potential mining site — Defendant, IMA, was one of several potential purchasers of N's mining site and plaintiff was ultimate purchaser of site — Each potential purchaser signed confidentiality agreement before receiving access to data about mining site in order to be able to evaluate it — Plaintiff as ultimate purchaser, obtained ownership of data — IMA subsequently announced it had discovered another nearby new mining site — Plaintiff brought proceedings claiming breach of confidentiality agreement — Specifically, plaintiff claimed that IMA unlawfully used confidential geological information obtained during its due diligence with regard to data supplied by N, to discover its new site — Plaintiff's action was allowed on basis that confidentiality agreement had been breached by use of data and issue arose as to extent of plaintiff's loss of opportunity — Defendants claimed that only real loss plaintiff suffered was market value of data and if there was any further loss, it was loss of opportunity to stake claims at new site themselves — Defendants also argued that valuation of loss had to be

undertaken by assessing probability that plaintiff would have staked same claims, and probability was to be assessed from perspective of what was known at date confidence was breached — True measure of plaintiff's lost opportunity was value of all of claims in area of new site — Purpose of compensatory damages is to put plaintiff in position it would have been in, but for defendants' breach — Plaintiff's loss flowing from breach is not determined by reference only to facts known on date of breach, but is determined with full value of hindsight — New site was staked as direct result of use by IMA of N's data — Other properties indirectly owned by IMA were staked because they had similar characteristics to new site and IMA hoped to find similar style of new site's mineralization on those properties — There was no evidence that any of properties in area of new site would have been staked had IMA not staked new site discovered through use of N's data — Accordingly, all claims staked by IMA in area of new site would have been staked by plaintiff following similar process had plaintiff been first to stake new site.

Natural resources --- Mines and minerals — Remedies — Damages — Miscellaneous

Mining company, N, owned potential mining site — Defendant, IMA, was one of several potential purchasers of N's mining site and plaintiff was ultimate purchaser of site — Each potential purchaser signed confidentiality agreement before receiving access to data about mining site in order to be able to evaluate it — Plaintiff as ultimate purchaser, obtained ownership of data — IMA subsequently announced it had discovered another nearby new mining site — Plaintiff brought proceedings claiming breach of confidentiality agreement — Specifically, plaintiff claimed that IMA and other corporate defendant, which was IMA's wholly owned subsidiary, unlawfully used confidential geological information obtained during its due diligence with regard to data supplied by N, to discover its new site — Defendants claimed information they used to find new site was not covered by confidentiality agreement since it was not specifically listed or referenced in agreement — Plaintiff claimed that information was covered by agreement by necessary implication because it was data made available during site visit and because it related to evaluating possible purchase of N's site — Plaintiff's action was allowed on basis that confidentiality agreement had been breached by use of data and issue arose as to whether damages were appropriate remedy for breach — Damages were inadequate remedy since claims at new site were only in very early stages of development — Also, any amount of damages award could cause injustice to one of parties through over or under compensating that party.

Remedies --- Injunctions — Availability of injunctions — Mandatory injunctions — Enforcement of contractual terms — Miscellaneous

Mining company, N, owned potential mining site — Defendant, IMA, was one of several potential purchasers of N's mining site and plaintiff was ultimate purchaser of site — Each potential purchaser signed confidentiality agreement before receiving access to data about mining site in order to be able to evaluate it — Plaintiff as ultimate purchaser, obtained ownership of data — IMA subsequently announced it had discovered another nearby new mining site — Plaintiff brought proceedings claiming breach of confidentiality agreement — Specifically, plaintiff claimed that IMA unlawfully used confidential geological information obtained during its due diligence with regard to data supplied by N, to discover its new site — Plaintiff's action was allowed on basis that confidentiality agreement had been breached by use of data and constructive trust in favour of plaintiff was imposed over all claims in area of new site — Issue arose as to whether mandatory injunction should be awarded to transfer title to claims to plaintiff — Defendants contended that because plaintiff did not previously own mineral claims, and because it was not absolutely certain that but for breach of confidence, plaintiff would have staked claims, transfer of title by way of mandatory injunction would result in overcompensation to plaintiff — Mandatory injunction was imposed — Plaintiff was entitled to whole of claims it would have staked had defendants not wrongfully intervened — Equity does not require that parties share claims, so constructive trust was not required to protect plaintiff's interests while title remained solely in defendants' name — Therefore, court could order mandatory injunction, pursuant to its equitable jurisdiction, to require defendants to transfer claims to plaintiff forthwith — However, plaintiff would be unjustly overcompensated if it was not required to reimburse defendants for development that they have funded on new site since claims were staked — Accordingly, defendants were to submit accounting of development expenses for reimbursement by plaintiff.

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Article 3 — considered

ACTION by ultimate purchaser of mining property against potential purchaser for breach of confidentiality agreement.

***M.M. Koenigsberg J.*:**

Introduction

1 On February 3, 2003, IMA Exploration Inc. ("IMA") announced it had found a "Bonanza Grade Silver — Copper — Lead Discovery in Patagonia, Argentina." The area of the discovery and the staked claims covering it were named the "Navidad Project."

2 Although the announcement and subsequent publicity surrounding the discovery did not mention its dominant provenance, the discovery was made as a result of reviewing data obtained by IMA from Newmont Mining Corporation ("Newmont") during a due diligence site visit.

3 IMA was a potential purchaser of a mining property called "Calcatreu" owned by Newmont along with several other mining companies including the ultimate purchaser, the plaintiff in these proceedings, Minera Aquiline Argentina SA ("Aquiline"). Each potential purchaser, including the defendant, IMA, signed a Confidentiality Agreement before receiving access to data and the Calcatreu mining site for the purpose of evaluating it. The plaintiff obtained ownership of the data used by IMA to make the discovery as a result of being the successful purchaser of Calcatreu.

4 In 1989, the Supreme Court of Canada ordered Lac Minerals, as a result of it having obtained a mining property through the unlawful use of Corona Resources' confidential information, to hold in trust for Corona what had become a billion dollar mine. In this case, the plaintiff also alleges the unlawful use of its confidential information by the defendants and seeks the same order in respect of the Navidad Project.

5 The plaintiff alleges that the defendant IMA, and its wholly owned subsidiary Inversiones Mineras Argentinas S.A. ("Inversiones") the other corporate defendant, unlawfully used confidential geological information obtained from Newmont's owner during IMA's due diligence site visit in respect of Calcatreu, to discover and stake the Navidad Project.

Background and the Players

Development of Calcatreu and the Confidential Data

6 The events which give rise to this claim begin in the late 1990s. At that time, Normandy Mining Corporation ("Normandy"), a large multi-national gold mining company with its head office in Australia, was the indirect owner of Minera, the entity holding title to the Calcatreu mining claims. Minera carried on mining exploration work in Argentina with funds loaned to it by Normandy.

7 In or about 1997, La Source Development S.A. ("La Source"), an Argentine company that had been incorporated by a former joint venture partner of Normandy, staked three mineral claims in the Rio Negro province of Argentina believed to be prospective for gold. Thereafter, Minera staked additional claims adjacent to the claims that had been staked by La Source. The claims staked by La Source and Minera became known as Calcatreu.

8 By 1999, La Source's role was as a bare title holder of three mineral claims. The related mining project was wholly controlled and managed by Minera.

9 Calcatreu is located in southern Rio Negro Province and northern Chubut Province, near Minera's office in the small town of Jacobacci, located in the southern part of Rio Negro.

10 It is helpful to have an understanding of some mineral exploration tools that guide geologists in conducting exploration to assist in understanding the matters at issue. It is very rare for a geologist to discover a major mineral deposit.

11 At the earliest stage of exploration, large areas can be reviewed with a variety of techniques, such as satellite imagery, large-scale geological mapping, or geophysical surveys. This work may permit a geologist to formulate a regional geological model in respect of the mineral of interest. A regional model will identify the type of geological structures which may be associated with that particular mineral.

12 In the case of the Patagonia area of Argentina (which covers three states in southern Argentina — Rio Negro, Chubut, and Santa Cruz), the regional model for gold is described as "epithermal". This model describes the process by which gold deposits that had been identified in the Patagonia area were created. This model does not fit the Navidad Project because that project contains a unique silver-lead deposit.

13 A regional model can be related to certain features on specially prepared satellite images that can then lead a company to a more specific location within a large regional area. A more specific location can lead, depending upon what is found, to a refinement of the regional model, such that the relationship between local and regional models is interactive and ongoing.

14 Stream sediment sampling is an exploration tool which is typically used at the earlier stages of exploration once a large area has been identified through prior techniques such as geological modelling. Stream sediment sampling requires geologists go into the field to take samples within the identified area. Satellite images can be used to locate stream basins in drainage areas within the area to be explored. In this way, large areas can be explored in the field in a cost effective manner. For example, one would not spend money drilling in an area that had not already been defined by other exploration tools.

15 Between 1998 and 2001, Minera did exploration work in Rio Negro and northern Chubut, within and around Calcatreu. This work, including the stream sediment sampling, resulted in databases of technical information, which were available in the Jacobacci office.

16 The stream sediment sampling conducted by Minera within and around Calcatreu consisted of approximately 500 samples and was referred to as "BLEG B data". The BLEG B samples were primarily located in the Rio Negro Province.

17 BLEG refers to a Normandy stream sediment sampling methodology; it is an acronym for "bulk leach extractable gold", which is a process for extracting all of the gold and other elements associated with gold such as silver from a small sample of material.

18 Prior to 2001, as a result of other exploration work within Calcatreu, Minera had identified a gold resource referred to as "Vein 49". Minera had also identified some exploration potential within the boundaries of Calcatreu, but outside of Vein 49.

19 By 2001, Vein 49 was thought to consist of 500,000 ounces of gold resource, which was not large enough for Normandy to justify developing a mining project. Normandy's threshold for development of a mine was five million ounces of gold resource. Normandy loaned funds to Minera to enable it to engage in further regional geochemical exploration work within, adjacent to, and south of Calcatreu for the purpose of locating additional resources to supplement or enhance Calcatreu such that it would be economic to mine there. This new exploration was known as "Project Generation".

20 At the beginning of 2001, Minera commenced work on Project Generation and continued until a decision was made to sell Calcatreu in 2002. The Project Generation work consisted of stream sediment sampling in Chubut, adjacent to and primarily south of Calcatreu. Locations of stream sediment sampling sites were identified with the assistance of satellite imagery.

21 As part of Project Generation, various geologists were sent to the field over many months to collect stream sediment samples from various locations identified by specific coordinates. The stream sediment samples were sent by Minera to Normandy's laboratory in Perth, Australia, where the samples were analysed. The results were then sent to Minera, to Normandy, and to a joint venture partner of Normandy, as well as to the geologists who had done the work. The data resulting from Project Generation consisted of approximately 1000 samples and is referred to as the "BLEG A data" (and in the Statement of Claim as the "Regional Exploration Data").

22 Geochemical sampling requires a statistical analysis because it is intended to provide a comparison between sample results. An individual sample result on its own is not meaningful. Statistically, most of the results represent typical low-concentration background results showing the usual, and therefore unremarkable, presence of mineralized material that is generally present in a particular area. These background readings are not indicative of a mineralized deposit. However, some samples may give significantly higher readings as compared to a statistically determined background. These higher

readings are referred to as "anomalies" or "anomalous" results. Anomalous results are often duplicated by retesting the remains of the sample material from the tested sample that was anomalous.

23 Statistically, the larger the database of stream sediment samples, the more meaningful the analysis of the background and the identification of any anomalies. To consider only a portion of a database could, therefore, be quite misleading. Given the statistical nature of the analysis, anomalies are often identified in percentiles; for example, as anything above the 98th percentile or by concentrations of minerals that are tied to percentiles.

24 An anomalous reading or a cluster of anomalies may well indicate the presence of a mineralized deposit. When a significant anomaly or cluster of anomalies is identified, a geologist can then go to the location of the relevant samples to find the source of the anomaly because it is presumed that the mineralized material washed into the drainage system from a particular location or source.

25 By 2002, Minera had all of the BLEG B and the BLEG A data in digital form available in the Jacobacci office. This data had been generated by Minera over approximately four years. None of the BLEG B or BLEG A data was in the public domain. It is agreed that it was only disclosed to IMA during the course of IMA's due diligence evaluation of the possible purchase of Calcatreu.

26 The BLEG A data was put into an Excel format, which can be depicted on a satellite image map or other map so that locations and results are plotted using colour-coding or sizing to show the difference between sample results; for example, larger symbols depict the anomalies.

27 The BLEG A data was depicted on a satellite image map, which was on the wall in the Jacobacci office. It depicted data sampling points in an area approximately 40 km to the south of Calcatreu.

28 In or about the spring of 2002, Newmont, the world's largest gold mining company with a head office in Denver, Colorado, acquired Normandy. Newmont held meetings in March 2002, in Chile to formulate, among other things, its Latin American priorities after the acquisition. At these meetings, Minera's president and others described the Calcatreu resource and Project Generation to the attendees. Nick Green, President of Newmont, was present, along with company geologists, Aquilera and Worland. Carlos Cuburu (a geologist and the only remaining employee of Minera) attended as did Bruce Harvey, the Director of Latin American exploration for Newmont.

29 Mr. Worland made a PowerPoint presentation at the meeting which included a reference to Newmont's "exploration methodology" in respect to Bleg A and the fact that the express purpose of the exploration was to "add to Calcatreu Resource." The corresponding map in the PowerPoint presentation places a box around the Project Generation area and identifies Calcatreu within that region. In respect of this slide, Mr. Cuburu testified at trial:

> Q Do you recall any discussion about adding to the Calcatreu resource in the meeting?
>
> A The presentation given by Rohan Worland, in fact, did aim at incorporating new geological resources to be added to the Calcatreu project.

30 Some time after the Santiago meeting, Newmont made it known that it did not want to continue operating in Argentina. Calcatreu did not meet Newmont's size requirements, and Newmont believed there were higher priorities for exploration elsewhere.

31 By the time Mr. Worland's final report on Project Generation was received by Harvey and others, the decision had already been made by Newmont to cease work in Argentina.

32 Mr. Worland's report was prepared on July 30, 2002. It was Worland and Achilles Aquilera who collected the samples in the area that later became known as the Navidad Project. In his report, Worland commented on the gold anomalies in the BLEG A data and also commented on silver anomalies in the "Sacanana" area which was the name he gave to the area that is now known as the Navidad Project. Worland gave the gold anomalies higher priority than

the silver anomalies and described the silver anomalies in the Sacanana area as "medium" targets for follow-up but not for immediate staking.

33 Harvey testified that he expected that the Project Generation information, that is, the BLEG A data, would be information available to people looking at Calcatreu in order to evaluate the project.

The Sale Process of Calcatreu

34 The person in charge of the sale process for Calcatreu was Esteban Crespo, an employee of Newmont who resided in Quito, Ecuador, and was Newmont's manager of Latin American lands. He asked Nick Green, the president of Minera, to prepare an information brochure to be provided to prospective purchasers after they signed a Confidentiality Agreement. With minimal assistance from Cuburu, Green prepared such an information brochure in July 2002 ("the Brochure").

35 The Brochure was accompanied by a CD which contained a digital version of the maps and figures referred to in the Brochure. Neither the Brochure nor the CD associated with it (the "Bid Package") contained any raw technical data.

36 The Brochure contained, in part, the following information in its introduction:

> The Information Brochure is designed to give the reader an overview of the exploration carried out over the Calcatreu Project between its discovery in 1997 and July 2002...
>
> In parallel with the prospect work, Normandy also collected 429 BLEG stream sediment samples. The work highlighted a number of anomalies, which have yet to receive detailed follow-up ...

37 The BLEG samples referred to in the Brochure were a large portion of the BLEG B data, which was the data located within Calcatreu.

38 The regional context of Calcatreu was referenced in the Brochure. In section 9, the Brochure referred to "Regional Mines, Project and Prospects". The authors referred to an operating mine and to various land packages assembled by others. Reference was also made to the former Angela mine, located approximately 50 km east of Calcatreu, which had operated between 1978 and 1992.

39 In section 10.7, the authors referred to regional geochemistry:

> From 1998 Normandy initiated a regional BLEG (Bulk Leach Extractable Gold) stream sediment survey over the Calcatreu Project area....Some 429 samples were collected, which were analysed at a Normandy Exploration Laboratory, located in Perth, Australia.
>
> A statistical analysis based upon an examination of log normal cumulative probability plots of Au, Ag and Cu, led to the recognition of the following anomalous thresholds; ...
>
> The gold results of the survey are presented in Figure 45.
>
> A number of anomalies were identified that were not associated with the known areas of mineralization ....
>
> Outside of the anomalous samples associated with the known areas of mineralization and the contaminated samples from creeks draining the Angela Mine Road, there are a number of anomalous creeks that have not been adequately explained.

40 As noted, the BLEG B samples represented data depicted in Figure 45 in the Brochure were found primarily within the present boundaries of Calcatreu; however some of those samples were taken outside those boundaries in areas that had previously been staked by Minera but later relinquished and in other areas outside of the boundaries of Calcatreu.

41 In cross-examination, Cuburu testified as to his views on the contents of the brochure and whether it made it possible to sell Calcatreu. He testified: "It was sufficient, perhaps, for the needs of some companies and insufficient for others."

42 Various potential purchasers executed the Confidentiality Agreement and received the bid package. Some of them chose to visit the Jacobacci office and the Calcatreu site. Some of these potential bidders requested various types of additional digital raw data, which was then provided to them. The evidence was undisputed that it is typical in the due diligence process for potential bidders to ask for additional information to permit them to analyse the data and come to their own conclusions in respect of it prior to making a bid. IMA, alone among other potential bidders, requested that Mr. Cuburu provide copies of the BLEG A data, as well as, like other bidders, various other digital data.

IMA's Interest in Calcatreu and Access to the BLEG Data

43 IMA is a junior mining company based in Vancouver, B.C. and engaged in the business of acquiring and exploring of mineral properties. It is active primarily in Argentina and Peru and has been focused in Argentina since 1993. IMA has a strong presence in Argentina, where it holds interests in a number of exploration properties. In particular, IMA controls a portfolio of five groups of properties which cover over 217,000 hectares. These properties are located primarily in the Patagonia region of Argentina.

44 IMA's interest in Calcatreu was solicited by Bruce Harvey of Newmont. In response to the solicitation, IMA readily agreed to review project data under a Confidentiality Agreement, which it signed on September 6, 2002.

45 IMA sent three of its representatives, including Paul Lhotka, a British Columbia geologist then residing in Argentina who was in charge of the due diligence team, to conduct due diligence in respect of the Calcatreu sale. For that purpose, these representatives made arrangements to visit the project office in Jacobacci and to tour the Calcatreu site from September 20 to 22, 2002. The person they dealt with in respect of due diligence was Carlos Cuburu.

46 Prior to the first site visit, Patterson contacted Crespo and had a brief discussion. Crespo advised that maps and geochemical data were being sent to Vancouver. Patterson was advised on September 12, 2002 that there would be a complete data set on site and that IMA would have access to it on a site visit.

47 By September 16, 2002, Patterson advised Lhotka that IMA had received the maps which were attached to the Brochure but had not received any geochemistry.

48 On September 17, 2002, Lhotka responded to Patterson, in part as follows:

> When you say no geochem. Do you mean no surface sample data of any kind or just no multi-element stuff. It would be critical to get all surface sample data as that combined with geophysics is the key to areas not drilled or tested by single holes...
>
> .....
>
> My gut feeling is that you should be emailing me anything that looks useful. After today it will be a serious pain in the ass and may be very expensive to get until I return to Mendoza. Have you got a list of what you received? That would be great as then I know in a pinch at least one of us has it. If for instance head office sent one set of maps to Jacobacci then there will be no way Carlos [Cuburu] will part with them. As to digital data Latinos tend to be tight with data and just cause head office is giving it out does not mean that he will be keen to.

49 The sale of Calcatreu was taking place at a time of increased interest in the Chubut Province by explorationists, and IMA was one of several exploration companies actively searching there for targets and potential resources. It had employed a number of geologists to provide it with advice in relation to Argentina and it had directed much of its resources to looking for potential resources in Argentina and in the Chubut Province specifically. It was continuing to do so when it reviewed Calcatreu and it had under consideration some areas that fell within the area covered by the regional

BLEG A data. At that time, all of IMA's claims in the Province of Chubut were located in western Chubut, although it had conducted some field work in central Chubut and had identified areas for further consideration in eastern Chubut. The southern portion of Calcatreu is located in north-central Chubut, as is what is now called Navidad. Navidad is south and east of Calcatreu.

50 In his examination for discovery, which was adopted at trial, Lhotka gave evidence concerning the purpose of the visit to the Jacobacci office and his instructions to the two geologists who accompanied him on that first visit in September 2002:

> 1678 Q All right. You were doing that at the request of IMA?
>
> A Yes, sir.
>
> 1679 Q For the purpose of?
>
> A the Calcatreu project.
>
> 1680 Q You didn't have any other reason to go and see Mr. Cuburu, did you?
>
> A No, I didn't know him previously and had no other reason.
>
> . . . . .
>
> 1780 Q So apart from the general discussion about dividing the work up so it could be done efficiently, do you recall any more specific discussion before you got to the Jacobacci office?
>
> A Yes, I would have generally advised both of the geologists there was a confidentiality agreement.
>
> 1781 Q You say you would have. Do you specifically recall that?
>
> A I'm quite sure that I did.
>
> 1782 Q Why are you quite sure of that?
>
> A It's good practice and I try to do things right.
>
> 1783 Q Why is it good practice?
>
> A Because they are going to be viewing confidential information and they have to be aware of that.
>
> 1784 Q Did you tell them that anything they see during the course of their visit to the office and the site was confidential and they should treat it as confidential?
>
> A That would be the normal situation.
>
> 1785 Q All right. That's what you recall telling them; isn't it?
>
> A Yes, that would be what you would expect going to do a site exam, yes. That's what you would expect.
>
> 1786 Q That's what you recall telling them?
>
> A Yes, sir.
>
> 1787 Q That's how you intended to govern your own conduct; isn't it?
>
> A Yes, sir.

51 During the first site visit, Lhotka visited the property and attended at the Minera office in Jacobacci. Cuburu and Lhotka met in Cuburu's office, and Lhotka observed the satellite map on the wall that showed the early progress of Project Generation (the BLEG A data). The map showed the location of all of the points sampled, but only partial results for gold. Some of the sample points were within Calcatreu, but most were in north-central Chubut, outside of the Calcatreu boundaries. The map also showed sample locations in the area that was later staked by IMA as the Navidad Project, but no results in respect of those locations for either gold or silver.

52 This satellite map caught Lhotka's interest and was briefly discussed by Cuburu and Lhotka while they were in the office. Mr. Cuburu's uncontradicted evidence was that the only discussion of the BLEG A data on the first site visit took place in front of the map and consisted of speaking "about regional geological characteristics about the structures that control the possible mineralizations but always in general terms, not in terms of results."

53 Cuburu explained the nature of Project Generation in general terms to Lhotka. They also discussed a property, in the region around Calcatreu, owned by David Jorge. Gold sample results from the David Jorge property were also depicted on the satellite map. Lhotka had visited the David Jorge property in February 2002. Thereafter, the parties discussed the work within Calcatreu. Lhotka asked Cuburu if he could have the BLEG A data, which was the data associated with the satellite map on the wall. He was told that Cuburu would have to check with Crespo for permission to provide the BLEG A raw data.

54 The undisputed evidence at trial was that Cuburu asked if he could provide the BLEG A data to Lhotka in a telephone call with Crespo after the first site visit by IMA. In a follow-up call, Crespo, after discussing it with Bruce Harvey, told him to give IMA free access to all data, which Cuburu understood to include the BLEG A data. Crespo's evidence was that he did not recall Project Generation or BLEG A at the time and does not, therefore, recall giving express authorization to release the BLEG A data. He does recall giving Cuburu authorization to give raw data to all potential bidders. He assumed all data would be requested and provided only in the context of the evaluation of Calcatreu for the purpose of making a bid.

55 As a result of its review of the information obtained at the first site and office visit, IMA was concerned about the economic viability of Calcatreu but decided that Lhotka should make a second site visit accompanied by Keith Patterson, IMA's manager of exploration. In anticipation of that visit, Lhotka emailed Cuburu on October 16, 2002, seeking certain other digital data. Some of this data was provided to him on October 17, 2002.

56 Patterson and Lhotka arrived at Jacobacci on October 31, 2002. They toured the Calcatreu site and met with Cuburu; in particular in his office on the morning of November 2, 2002. During a meeting lasting several hours that morning, they discussed drill intercept data concerning Vein 49, and Lhotka asked for, and Cuburu provided, various technical data in digital form, which Lhotka then downloaded to his laptop. The last set of digital data that Lhotka requested was the BLEG A data, which Cuburu provided in the same manner.

57 At the time the BLEG A data was given to Lhotka, there was no discussion of confidentiality by either party.

Staking Navidad

58 Some four weeks after obtaining the BLEG A data and about four weeks after it declined to bid on Calcatreu, Lhotka reviewed the BLEG A data. The review immediately revealed a cluster of exceptional silver-lead anomalies, the same anomalies identified by Mr. Worland and labelled as "medium targets" for Normandy/Newmont. Lhotka reported his review to IMA's head office and IMA staked a mineral claim in Chubut on December 6, 2002, prior to visiting the property covered by the cluster of silver anomalies in the BLEG A data. This is the claim which was later publicly described by IMA as the Navidad Project.

59 In 2003, IMA staked further claims solely as a consequence of having staked the Navidad Project. These additional claims, together with the Navidad Project, are referred to collectively in the Statement of Claim as the "Navidad Claims".

To put these other claims in context, most of the exploration work by IMA to date has been on the Navidad Project, or the first claim staked by IMA on December 6, 2002.

The Confidentiality Agreement

60 The first issue to be determined is whether the regional BLEG A data was covered by the Confidentiality Agreement.

61 It is not disputed that the regional geological information encompassed in the BLEG A data was not expressly referenced in the Confidentiality Agreement nor in the Information Brochure.

62 It is the plaintiff's position that the BLEG A data is covered by the Confidentiality Agreement by necessary implication because it is data made available during the site visit *and* because it relates to evaluating a possible transaction concerning Calcatreu.

63 The relevant sections of the Confidentiality Agreement are set out below:

> THIS AGREEMENT is made as of September 6, 2002 by and between Newmont Mining Corporation, a Delaware corporation, on behalf of LaSource Development, a French corporation and Minera Normandy Argentina S.A. an Argentinean corporation, whose address is 1700 Lincoln Street, Denver, Colorado, U.S.A. 80203 (collectively "Newmont") and IMA Exploration Inc., a Canadian corporation, whose address is 709-837 W. Hastings St. Vancouver, Canada ("Reviewer") (Newmont and Reviewer are collectively called the "Participants").
>
> Reviewer is interested in reviewing certain confidential information in relation to exploration and mining rights at Newmont's Calcatreu Project in the Rio Negro and Chubut Provinces, Argentina, which are further described on the attached Exhibit "A", for the purpose of evaluating a possible transaction concerning such project (the "Project").
>
> In connection with Reviewer's review of the Project, Newmont may provide to Reviewer certain financial, operating, technical, geological and other information (the "Confidential Information") concerning the Project. Confidential Information in this Agreement will include all communications, whether written, electronically stored or delivered, or oral, of any kind, between the Participants relating to the Project, any observations made by Reviewer during site visits or tours, and any and all information, reports, analyses, studies, compilations, forecasts or other materials prepared by Reviewer relating to the Project which contains or otherwise reflects such information.
>
> In consideration of Newmont providing Confidential Information to Reviewer, the Participants agree as follows:
>
> 1. **Use of Confidential Information**. The Participants agree that Confidential Information provided by Newmont to Reviewer will be used by Reviewer or Reviewer's Representatives only for the purpose of the Project and that the Confidential Information will otherwise be kept confidential by Reviewer and their Representatives. For purposes of this Agreement, "Representatives" means Reviewer and its directors, officers, employees, consultants, agents, accountants, legal counsel, bankers and those of its direct and indirect wholly-owned subsidiaries and parent companies.
>
> > (a) any of such Confidential Information may be disclosed to Reviewer's Representatives who need to know such information for the purpose of the Project (it being agreed that each such Representative will be informed by Reviewer of the confidential nature of such information and the terms of this Agreement and will agree to be bound by the terms of this Agreement and further, that Reviewer will be responsible for any breach of this Agreement by its Representatives); and
>
> . . .
>
> 4. **Portions of Confidential Information Not Applicable To This Agreement**. This Agreement will terminate or become inoperative with respect to any portion of the Confidential Information if:

> . . .
>
> (c) Reviewer can establish that such information was developed by it independently of any disclosure by Newmont or was available to Reviewer on a non-confidential basis prior to its disclosure by Newmont; or
>
> . . .
>
> 5. **Termination**. Except as provided herein, this Agreement and all obligations hereunder will terminate and be of no further force or effect on the date that is the **second anniversary** of the date hereof (the "Termination Date"). Within 30 days of written request by Newmont, made at any time before or after the Termination Date, Reviewer will return all Confidential Information received by it from Newmont and all copies or reproductions thereof, and will destroy all information, reports, analyses, studies, forecasts, compilations and other documents prepared by or on behalf of Reviewer that contain or otherwise reflect Confidential Information.
>
> . . .
>
> 8. **Acquisition Restrictions**. During the term of this Agreement, neither Reviewer or any of its subsidiaries or any of its subsidiaries or affiliates will acquire, directly or indirectly, any mining claims, permits, concessions or other property situated within **two (2) kilometers** from and parallel to all exterior boundaries of the Project.
>
> . . .
>
> 16. **Entire Agreement**. This Agreement contains the sole and entire agreement between Newmont and Reviewer relating to the Project, and its other subject matter; it supersedes any prior and contemporaneous agreements, commitments, representations, and discussions, whether oral or written, express or implied, relating to the Project, all of which are hereby terminated in their entirety as of the date of this Agreement and all confidential information under which is hereby deemed to be Confidential Information under this Agreement. No promise or inducement not expressly provided for herein has been made, given or relied upon by the parties ad consideration for this Agreement. This Agreement and its *express* limitations on the use of Confidential Information are in lieu of any other *express or implied* limitations that may exist at law or in mining industry practice. This Agreement shall not be construed to create between the parties any fiduciary relationship or any other special relationship of trust or confidence not expressly provided for herein.
>
> . . .
>
> 18. **Headings**. The headings set out in this Agreement are inserted for convenience and will not affect the construction or meaning hereof.

The Meaning of the Agreement

64 Before turning to a discussion of the terms of the Confidentiality Agreement, it is important to recognize that all Newmont's private business information was, by its nature, confidential. This included geological, technical, operating, and financial information. In the ordinary course, this information would not be available to IMA or anyone else. There is no dispute about this.

65 Cuburu understood all of a company's technical data is confidential. This view was shared by other geologists who testified. Lhotka testified that he always kept information that he generated for his clients confidential. Patterson also understood that geologists were required to keep information they generated for the companies they worked for confidential.

66 The construction of the Confidentiality Agreement should be viewed through the lens of its business purpose, which was to permit interested parties to have access to confidential information of the vendor to allow them to evaluate a possible acquisition of Calcatreu while, at the same time, protecting the confidentiality of the vendor's proprietary information.

67 Prospective purchasers had unrestricted access to the site personnel (Cuburu) and to the site itself. They were free to ask whatever questions they thought necessary for their evaluation, and to request documents to assist in that evaluation. The plaintiff's position is that any information provided to IMA, in response to any request by that company that could reasonably be viewed by the vendor as relating to IMA's evaluation of Calcatreu, was confidential information within the meaning of the Agreement.

68 The defendants submit that to interpret the Confidentiality Agreement as applying to data not specifically listed or referenced would undermine the mining exploration business. The defendants noted that any potential bidder wants to know the type and scope of information provided pursuant to a Confidentiality Agreement so that there will be no unintended interference with its own exploration efforts. As the defendant pointed out, IMA had a pre-existing interest in the general region of Calcatreu and in part of the area covered by some of the BLEG A data. I accept that this position of the defendant provides a relevant consideration in interpreting the Agreement. However, IMA did not have an active sampling program nor any claims anywhere near Calcatreu or what became Navidad.

69 The plaintiff's position is that the "Project" covered by the Agreement is not solely defined by reference to the description of the mining claims in Exhibit "A". Rather, the Project is defined by reference, not only to the Calcatreu Project itself, but to the possible transaction that a Reviewer might enter into concerning such a project, as set out in the first paragraph of the Confidentiality Agreement. This interpretation is supported by Clause 1(a) of the Agreement which provides in part:

> Use of Confidential Information. The Participants agree that Confidential Information provided by Newmont to Reviewer will be used by Reviewer or Reviewer's Representatives only for the purpose of the Project and that the Confidential Information will otherwise be kept confidential by Reviewer and their representatives ...

70 The Confidential Information can therefore only be used for the purpose of the Project. The phrasing in this section is relied upon by the plaintiff to mean that the "Project" means the review of information by the Reviewer for the purpose of evaluating a possible transaction.

71 That interpretation is also supported by the latter portion of the second clause of the Agreement, which includes the definition of "Confidential Information":

> In connection with Reviewer's review of the Project, Newmont may provide to Reviewer certain financial, operating, technical, geological and other information (the "Confidential Information") concerning the Project. Confidential Information in this Agreement will include all communications, whether written, electronically stored or delivered, or oral, of any kind, between the Participants relating to the Project, any observations made by Reviewer during site visits or tours, and any and all information, reports, analyses, studies, compilations, forecasts or other materials prepared by Reviewer relating to the Project which contains or otherwise reflects such information.

72 It is important to note the placement of the defined term, "Confidential Information", which follows a reference to the fact that Newmont may provide to the Reviewer certain information "[i]n connection with Reviewer's review of the Project". It is therefore submitted by the plaintiffs that "Confidential Information" is that information provided to IMA in connection with IMA's review of the project — that is, it was information provided to IMA in the course of, and in the context of, such review.

73 The plaintiff submits that this construction of the Agreement is consistent with the business purpose of the transaction. Newmont was willing to provide information to IMA in connection with its review of the project —

information which is proprietary and not available to the public — on the basis that IMA agreed that it would only use the information for review purposes, and would maintain its confidentiality, subject to the exceptions noted in clause 4 of the Agreement.

74 The broad construction contended for by the plaintiff is consistent with the use of such terms as "concerning the Project" and "relating to the Project". These terms are extremely broad in scope and should be construed, says the plaintiff, in the context of this Agreement, as applying to any information that was provided in the context of IMA's evaluation of a possible transaction concerning Calcatreu.

75 The plaintiff relies on, and I accept as apposite, the following authorities: *Nowegijick v. R.*, [1983] 1 S.C.R. 29, 144 D.L.R. (3d) 193 (S.C.C.), Dickson J. (as he then was) said, in an oft-quoted passage:

> The words "in respect of" are, in my opinion, words of the widest possible scope. They import such meanings as "in relation to", "with reference to" and "in connection with". The phrase "in respect of" is probably the widest of any expression intended to convey some connection between two related subject matters.

76 In *Slattery (Trustee of) v. Slattery*, [1993] 3 S.C.R. 430, 106 D.L.R. (4th) 212 (S.C.C.), Iacobucci J. said this:

> The connecting phrases used by Parliament in s. 241(3) [of the *Income Tax Act*] are very broad. The confidentiality provisions are stated not to apply *in respect of* proceedings *relating* to the administration or enforcement of the Income Tax Act.
>
> The phrase "in respect of" was considered by this court in *Nowegijick v. Canada* (1983), 144 D.L.R. (3d) 193 at p. 200, [1983] 1 S.C.R. 29, [1983] C.T.C. 20:
>
> > The words "in respect of" are, in my opinion, words of the widest possible scope. They import such meanings as "in relation to", "with reference to" or "in connection with". The phrase "in respect of" is probably the widest of any expression intended to convey some connection between two related subject — matters.
>
> **In my view, these comments are equally applicable to the phrase "relating to".** *The Pocket Oxford Dictionary*, 7th ed. (1984) defines the word "relation" as follows:
>
> > ... what one person or thing has to do with another, way in which one stands or is related to another, kind of connection or correspondence or contrast or feeling that prevails between persons or things...
>
> So, both the connecting phrases of s. 241(3) suggest that a wide rather than narrow view should be taken when considering whether a proposed disclosure is in respect of proceedings relating to the administration or enforcement of the *Income Tax Act*. [emphasis added]

77 These authorities support the plaintiff's interpretation of the Agreement and are inconsistent with the narrow construction contended for by the defendants.

78 The defence submits that the scope of the information intended to be covered by the Confidentiality Agreement is that "relating to the "Project" as narrowly construed." The defendant says the Project is defined by reference to Exhibit A which is a listing of the Calcatreu claims. The defendant says that the BLEG A data is *not* "related to" or "concerning" the Project for five reasons:

> (1) it was not referenced in the Information Brochure;
>
> (2) it was not provided to any other bidders;
>
> (3) it does not cover the geographic area of Calcatreu (as defined by Exhibit A);
>
> (4) it covers an extensive area outside the "area of interest" specified in the Agreement; and,

(5) Lhotka did not review the data as part of his due diligence.

79 The defendant also points out that the actual data represented by the BLEG A data points was not kept at the Jacobacci office, and suggests that that is another reason why the BLEG A data was not contemplated as being relevant to the purchase of Calcatreu.

80 Although each of the points 1-4 made by the defendants suggests that the BLEG A data was not relevant to an evaluation of the purchase of Calcatreu, several experts called by each side agreed that regional exploration data like the BLEG A data could be relevant or desirable when evaluating a known resource.

81 Central, in my view, to finding that the BLEG A or any regional exploration data may be relevant to evaluating the purchase of this mining property is the fact that Normandy undertook the geochemical survey, which in its first phase, resulted in developing the BLEG A data, for the express purpose of potentially adding to the Calcatreu gold property.

82 The defendants submitted that given that the BLEG A was not specifically referenced by Newmont in the Bid Package, nor in the Confidentiality Agreement, it was understood by both Cuburu and Lhotka that the reason Lhotka wanted to see the data was to further his interest in his general regional exploration, not for his evaluation of Calcatreu.

83 Lhotka says the defendants did not expect to see the BLEG A in the Jacobacci office. In this regard, the defendants rely in part on evidence from the experts as to what the industry custom or common practice with respect to what will be found in a "data room" such as the Jacobacci office. The evidence that there is, in fact, an industry custom was far from compelling. However, there was some nonspecific evidence from several of the experts that each might not expect to see "unrelated" data in the "data room" (begging the question as to whether the BLEG A data could be considered "unrelated data"). The best such evidence in this case was the evidence of David Watkins, the defendants' expert who stated on cross-examination as follows:

> Q And some of the proprietary data that vendors make available to bidders for an exploration asset are regional — is regional data, regional exploration data?
>
> A I would not expect a seller to show regional exploration data that was proprietary without — **without protecting it as would be done under a conventional confidentiality agreement** with an area of interest.
>
> **Q Yes. Well, I'm not going to get into what a contract means, but can we go this far: you wouldn't expect a vendor who is going to be selling an exploration asset to make regional data available without there being some kind of protection for confidentiality?**
>
> **A I agree with that statement, yes.**

[emphasis added]

84 The full answer to the defendant's submission, however, is the evidence of Mr. Lhotka and Mr. Patterson coupled with that of Mr. Cuburu, Mr. Crespo, and Mr. Harvey. I find that each thought that the request for the BLEG A data — in the circumstances — was in furtherance of IMA's due diligence evaluation of Calcatreu.

85 Evidence of Mr. Lhotka's state of mind at the time that he received the BLEG A data on his computer and before he contemplated opening the data can be found in his own evidence at his examination for discovery prior to trial:

> Q All right, so when he gave you the diskette did you assume he was giving you information for the purpose of your evaluation?
>
> A Yes Sir.

86 At trial, when this discovery evidence was put to Mr. Lhotka, he testified that he did give that answer, and when asked if it was true, he stated "Yes Sir, I am not sure. I am not sure what I thought at the time." In my view, Mr. Lhotka's evidence on discovery is more consistent with all of the evidence, including all of his, and is more reliable, having been taken at a time when Mr. Lhotka apparently had a clearer memory of his thoughts and assumptions at the relevant time.

87 Mr. Cuburu's evidence with regard to his intention was that he understood that the BLEG A data was to be given as part of the evaluation. There is no question that he considered that it had some kind of different status from the raw data included in the information brochure. On the other hand, he clearly felt he had to ask permission before providing it and when he was given permission, there is no indication that he thought that permission was anything other than a decision of management to include the BLEG A data to make the deal more attractive to IMA.

88 When pressed, both testified that any permission to provide access to data to a bidder on Calcatreu and specifically to IMA given the business discussions between the two companies, was given in the context of "free access" to assist in the evaluation of the property.

89 In addition, there was no evidence given by the witnesses from Newmont, none of whom had any real interest in this litigation, that anyone intended for IMA to have access to any data while carrying out IMA's due diligence other than to evaluate the purchase of Calcatreu.

90 With regard to reason five put forward by the defence, I find that the fact that Mr. Lhotka did not review the data as part of his due diligence cannot be evidence that it was not germane to that due diligence. Rather, the overwhelming evidence was that before Mr. Patterson and Mr. Lhotka left the Jacobacci site, they each had tentatively decided they were not going to recommend the purchase. It was as they drove away that they came to that conclusion. In no way can Mr. Lhotka's failure to examine the data before so deciding be compelling evidence of its lack of relevance. In effect, I conclude, he had decided he would not recommend the purchase despite having received the BLEG A data to review as part of that decision-making process.

91 In Mr. Lhotka's own email to Patterson on November 20, 2002, after he received the data and after he knew IMA was not going to bid on Calcatreu before he opened the data, he queried whether the Confidentiality Agreement precluded him from looking at the data. He said:

> IMA recently also acquired the BLEG database of Calcatreu which includes regional sampling in Chubut in this area. The confidentiality agreement IMA signed with Newmont would allow IMA to acquire land more than 2 kilometres distant from lands included the CA [Confidentiality Agreement], but it is unclear to me if such confidential data could be used to acquire lands outside the 2 km boundary.

The Area of Interest Clause

92 Further, says the defendant, clause 8 of the Agreement represents an "Area of Interest Clause," which defines or limits the restriction on the use of confidential information under the Agreement if BLEG A is such confidential information.

93 Clause 8 of the Agreement provides as follows:

> **Acquisition Restrictions.** During the term of this Agreement, neither Reviewer or any of its subsidiaries or affiliates will acquire, directly or indirectly, any mining claims, permits, concessions or other property situated within two (2) kilometers from and parallel to all exterior boundaries of the Project.

94 I note, however, that Clause 8 makes no reference to Confidential Information. It appears to be an independent covenant by which a Reviewer covenants not to, directly or indirectly, acquire any mining claims, etc. within two kilometres of the Project, even if the Reviewer discovered those claims through independently developed exploration.

95 The plaintiff relies on an article entitled *Confidentiality and Dispositions in the Oil and Gas Industry*, by Hardwicke-Brown, (1997) 2 Alta. L. Rev. 356, in which the author analyses issues in negotiating and drafting confidentiality agreements. At p. 387, under the heading "Area of Exclusion Covenant", the author states:

> Perhaps the most contentious aspect of a confidentiality agreement is a requirement that the confidant enter into an area of exclusion covenant. This is an attempted duplication of the remedy granted by the courts to Corona in the *Lac Minerals* case. **The difference is that the area of exclusion covenant is effective, notwithstanding that there may not have been any improper use of confidential information by the confidant in the acquisition of the interest that is subject to the covenant.** [emphasis added]

96 Thus, says the plaintiff, any suggestion that this acquisition restriction defines an "area of interest" is without merit. In particular, there is nothing in Clause 8 that limits in any way the covenant in Clause 1 restricting the use of the Confidential Information. I agree with this interpretation of Clause 8.

97 The contract in this case has to be interpreted objectively to ascertain the intentions of the parties from the language of their Agreement. It is submitted that the Agreement on its face supplies the objective evidence of the purpose and object of the parties. The narrow construction of the Agreement contended for by the defendants — that the restriction on the use of confidential information is limited to the area of the staking restriction — would have the effect of preventing purchasers from obtaining information that would inform their evaluation of a possible acquisition. No reasonable vendor would provide information outside the restricted area, even if that information would assist potential buyers in evaluating whether other potential resources might be available, if that information would not of necessity be treated as confidential.

98 It is important to bear in mind that the purpose of the Confidentiality Agreement is to protect proprietary information and to maintain its confidentiality in respect of all bidders who may be interested in considering the evaluation of Calcatreu, whether or not they ever make a bid or are successful in acquiring it. This is not a Purchase Agreement that will define the assets to be sold and the terms and conditions of such sale.

99 The most compelling submission of the defendants, in my view, is that if the BLEG A data is covered by the Confidentiality Agreement without being specifically referenced anywhere in the Bid Package or the Confidentiality Agreement, any bidder could inadvertently run afoul of the Confidentiality Agreement in carrying out their own explorations. For instance, if IMA had not asked to see the data, and did not have notice that Normandy had it, but later made the Navidad discovery, it still could not stake it without risking an allegation of breach of the Agreement.

100 However, Clause 4(c) of the Confidentiality Agreement appears to provide protection to the potential purchaser to prevent that eventuality. Clause 4(c) provides an exemption clause from the prohibition on the use of information defined as confidential in the Agreement. It states:

> 4. **Portions of Confidential Information Not Applicable To This Agreement**. This Agreement will terminate or become inoperative with respect to any portion of the Confidential Information if:
>
> . . .
>
> (c) Reviewer can establish that such information was developed by it independently of any disclosure by Newmont or was available to Reviewer on a non-confidential basis prior to its disclosure by Newmont; or
>
> . . .

101 I find, thus, that so long as IMA did not use the confidential data of Newmont, it was free to pursue its interests in the region using its own data or public information. That is, using information not received from Newmont for the purposes of evaluating Calcatreu, IMA was free to stake anywhere outside the two kilometre boundary established by Clause 8.

102 Mr. Patterson testified that as a reviewer under a Confidentiality Agreement, he would be concerned to know the type of information that is going to be produced pursuant to the Confidentiality Agreement so as not to have any unintended interference with his own exploration efforts. Mr. Patterson testified that had he been warned that the scope of the information that might be provided went far beyond the boundaries of the "area of interest" he would have had to consider very carefully whether that represented a potential interference with IMA's own exploration efforts. In my view, while generally this appears to be a reasonable consideration and consistent with the evidence of some of the experts, it has little relevance on the facts here.

103 Mr. Lhotka was the IMA representative most familiar with IMA's on-the-ground exploration in the Chubut Province. He was on a due diligence visit to Calcatreu and understood that "everything" he saw or observed was covered by the Confidentiality Agreement. He advised the two junior geologists who accompanied him of that fact. While visiting Calcatreu, he noticed the data points on the map in the Jacobacci office and discussed them generally with Mr. Cuburu. He was not offered the data — he asked for it. After receiving it, he still believed it was not only confidential but that the use of it by IMA may be covered by the Confidentiality Agreement. In other words, if IMA intended to imminently explore and stake in the area covered by the BLEG A data, Mr. Lhotka surely would not have asked to see the data during his site visit.

104 The defendants also rely on the actions of Newmont in asserting that the BLEG A data was not covered by the Confidentiality Agreement. It is pointed out that Newmont not only did not include the BLEG A data in the Information Brochure, or specifically reference it in the Confidentiality Agreement, but also assigned no value to it. As late as March of 2002 the very anomalies so obvious to Mr. Lhotka as "exciting" were presented at a Newmont meeting and noted only as "medium targets" to be followed up at a later time. Further, Mr. Crespo had no memory of the BLEG A data, although he attended the meeting, and Newmont assigned no specific value to the data when it included it in the share sale to the plaintiff. Thus, says the defendant, Newmont did not consider the data valuable, and that is why it was prepared to give IMA "free access" to it. The defendants argued that Newmont waived any restriction on its use by IMA because Newmont wished to maintain good relations with IMA and intended to perhaps do a deal with IMA involving properties of IMA's in Peru, which was one of the countries Newmont was moving into as it left Argentina.

105 Both of the principals of Newmont gave evidence on these points. Their evidence was consistent that by the time of the first site visit by IMA, Newmont had no interest in doing a deal with IMA in relation to its Peru properties. Further, by the time of the first site visit, each of the requests by IMA for special consideration (such as exclusivity) as a bidder on Calcatreu had been refused by Newmont.

106 IMA and Newmont had had some business connections in the past, and it was expected by Newmont that they would continue to have a good business relationship in the future without giving IMA any special consideration on the bidding or deal making on Calcatreu. Finally, both Mr. Crespo and Mr. Harvey testified that when they were asked if IMA could have the BLEG A data on its second site visit, they considered that IMA should be given free access to all data it required in performing its due diligence before bidding on Calcatreu. Each, for different reasons, believed the data, regardless of exactly which data was being asked for and given, was to be given only within the context of the Calcatreu evaluation and for no other reason. It is significant that Newmont is not only not a party to this litigation but also appears to have no interest in its outcome. I accept without hesitation the truthfulness of the evidence of both Mr. Crespo and Mr. Harvey on this point.

107 There was no evidence, at any time, given by any witness, that a confidential data set would be "given" without consideration from one company to another without any immediate business reason. There was no issue that the cost of the development of the BLEG A data was high — in the many hundreds of thousands of dollars. It is simply not plausible on the evidence in this case to find that the BLEG A data was simply given away.

108 The defence also argued with some force that the reason Mr. Lhotka noticed and asked for the BLEG A data was that Mr. Lhotka was a "data pig," as Mr. Cowper put it — this is not a pejorative description in the industry and

is apparently a commonly shared characteristic of exploration geologists. I do not accept that this characteristic negates my findings made on the basis of his own words, that Mr. Lhotka sought the data in pursuance of his evaluation of Calcatreu. However, it may explain, in part, the ease with which he brushed aside his doubts and reinterpreted events from his site visit to allow himself to open and use data that he knew or strongly suspected was not available for use for staking by IMA.

109 Thus, I find that the BLEG A data in the full context of the Confidentiality Agreement was covered by the words "relating to" and "concerning" the Project. I so find for the following reasons: First, the words "relating to" and "concerning the project" are words of broad interpretation generally, and nothing in the Agreement compels a more narrow meaning. Second, Clause 8 has no direct reference to the use of confidential information. Third, the term "confidential information" is defined broadly in the second and third paragraphs of the Agreement. I find that there is no ambiguity in the contract with regard to the meaning and scope of "Confidential Information".

110 I find that if there was an ambiguity, despite the potential operation of the *contra proferentum* rule, the parties to the contract understood and so acted in relation to each other that all data observed or given during the site visits by IMA was confidential information to be used solely for the purpose of evaluating Calcatreu.

111 Thus, the use by IMA of the BLEG A data to find and stake Navidad was in breach of the Confidentiality Agreement.

Confidentiality at Common Law

112 Based on my findings that the Confidentiality Agreement applies to the BLEG A data and that IMA's use of it to stake Navidad constitutes a breach of contract, it is unnecessary for me to consider the plaintiff's alternative claim to relief pursuant to extra-contractual obligations arising at common law. However, as much evidence and many days of trial were dedicated to that issue, I provide the following analysis and findings on the common law breach of confidentiality claim.

113 It must first be acknowledged that Clause 16 of the Confidentiality Agreement constitutes an entire agreement with respect to data defined as "Confidential Information" under the agreement. Clause 16 specifically excludes a relationship of confidence, other than as provided for in the agreement. However, to the extent that the Confidentiality Agreement does not apply, the exclusion clause within it cannot operate to exclude a common law duty of confidentiality in respect of data received outside the agreement.

114 Thus, the plaintiff submits that the defendant IMA owed the plaintiff a duty of confidence at common law that it breached in causing its subsidiary, Inversiones, to stake the Navidad Area Claims in reliance on data provided to it during due diligence relating to Calcatreu.

115 The evidence is neither straightforward nor overwhelmingly clear on this issue. If it were, it is unlikely that this case would have occupied in excess of six weeks of court time. Although the parties' understanding of the meaning of the confidentiality of the data at the time it was asked for by Lhotka and provided by Cuburu is likely one of the determining factors in the resolution of this action, at the time the data was given it appears to have had minimal importance to the parties, and their memories are not fully reliable guides as to what exactly took place and why. It may therefore be helpful at this point to summarize the essential facts and my finding about them, in relation to the common law claim.

116 There is no issue that IMA signed the Confidentiality Agreement that covered the Calcatreu project before being allowed access to any data belonging to Newmont, it was understood that the business purpose of the Agreement was to permit interested parties to have access to Newmont's confidential information to allow them to evaluate a possible acquisition of Calcatreu while at the same time protecting the confidentiality of Newmont's proprietary information.

117 It was only after signing the Confidentiality Agreement that the data package (within which the BLEG A data was not included) was distributed to interested buyers who, if they wished to proceed to the next step, could then arrange for

a site visit. At that point, in going to the site having signed the Confidentiality Agreement, the buyer would be permitted a detailed review with unconstrained access to all data.

118 At the time of trial, it was not contested that the BLEG A data was obtained during IMA's site visit. IMA's representative, Paul Lhotka, testified that his sole purpose for being at the site and at the plaintiff's field office in Jacobacci was to evaluate Calcatreu for its potential acquisition by IMA. Part of Mr. Lhotka's experience as a geologist carrying out due diligence visits included knowledge of general obligations of confidentiality. Further, at the time of trial, the nature of the BLEG A data was conceded to be proprietary data and inherently confidential.

119 Thus the factual issue for the common law claim revolves around whether the receipt of the BLEG A data during the site visit, which data is not specifically covered by the Confidentiality Agreement, but which is conceded to be confidential in nature, would disentitle the defendant from using the data in order to further its own exploration efforts.

120 When asked about communications between IMA and Newmont regarding the provision of information for the purposes of evaluating Calcatreu, IMA's Mr. Patterson, to whom Mr. Lhotka was reporting about his evaluation and his site visits, testified as follows:

> Q And you expected him [Lhotka] to attend at the site and to ask whatever information he required in order to do the evaluation.
>
> A That's correct.
>
> Q And you hoped that the vendor, that was obviously interested in selling the property, would be cooperative and helpful in that regard; is that correct?
>
> A I assumed they would be.

121 Other testimony to the same effect is as follows:

> Q You expected Newmont to provide information which you thought would assist in the evaluation of the Calcatreu project.
>
> A I did.
>
> Q And you assumed that to the extent they didn't give you all you wanted, you would ask for it and they would probably give you that too?
>
> A I assumed that would be the case.

122 In addition, Mr. Patterson's evidence of his relations with Mr. Crespo, Newmont's person in charge of the Calcatreu sale, is to similar effect:

> Q All right. Did Mr. Crespo say to you words to the effect: look, whatever information you need to evaluate the property we'll make available?
>
> A I'm not sure in exactly those words. I'm not sure if he directly assured me that we would get everything we need, but he certainly didn't raise any flags that certain areas might be off limits.

123 Finally, Mr. Patterson's expectations of Mr. Lhotka's freedom to ask for information and to supplement the bid package were captured in the following questions and answers read in as part of the plaintiff's case:

> Q So I take it you left it to Mr. Lhotka to request information that he wanted for the evaluation?

> A I left it to Mr. Lhotka to do the evaluation and if in order to do that he — if in the course of doing that he found that there had been work done that wasn't documented in the bid package, of course he's going to ask for that information. You know, that's quite normal.

124 Mr. Lhotka's own expectations and understanding regarding the confidentiality of information received at a site visit is clear from the instructions he admits to having provided to the junior geologists accompanying him; that is, that all they observed and received must be treated as confidential.

125 The uncontradicted evidence of the circumstances surrounding the transfer of BLEG A data from Cuburu (on behalf of Newmont) to Lhotka (on behalf of IMA) is important, in my view, in considering the intention of the parties, as well as in weighing each witness's evidence.

126 Both Cuburu and Lhotka appeared to me to be sincere, honest witnesses doing their best to answer questions about what each had thought and done at the time of the transfer. Each, however, is retrieving and reconstructing memory through the lens of contested litigation. It is important to acknowledge that at the time of the transfer, the actual transfer of the data and the circumstances surrounding it were not thought to be of great importance to either party. Certainly, neither had any sense that the BLEG A data was significant in the way it turned out to be.

127 It is in this context that I comment that the recollection of each of the main players, that is Mr. Cuburu, Mr. Lhotka, Mr. Patterson, and even Mr. Crespo who gave permission for the data to be transferred, must be viewed as some part recollection and a significant part reconstruction. I know of no sinister motive for the giving of evidence by reconstruction. It is both commonplace and necessary for anyone asked to give evidence of past events to do so in part by reconstructing what is likely to have happened.

128 The review of data at the field office took place in Mr. Cuburu's office. Mr. Lhotka acknowledged in testimony that he considered Mr. Cuburu's office a "data room" and acknowledged that in going into Mr. Cuburu's private office, he expected that he would be seeing confidential information pertaining to Calcatreu. Although he also testified that he did not expect to see the BLEG A data points, this statement is obviously reconstructed in hindsight.

129 Lhotka further acknowledged that a data room often is not an actual physical room or location and that it can often be very informal. A data room can be a report or a compilation of information; it varies depending on the circumstances. Mr. Lhotka stated that his understanding of the data room is that "it contains data or information or reports relevant to the asset or property being sold."

130 Mr. Lhotka testified that on the first site visit he noted the map on the wall; it was actually on the door of the office with a large number of data points in the Province of Chubut. IMA had "some interests" considerably further away from Calcatreu but still in the Province of Chubut. I find that Mr. Lhotka asked on that first visit if the information depicted on the map was available. He was told that Newmont would have to give permission.

131 At the time, Mr. Lhotka did not suggest that because the data points he was interested in were well outside the boundaries of Calcatreu, he was surprised that they were shown on a map available to him in the site office where he was doing his due diligence. In fact, he in no way, either at that time or at any other time, indicated that such information would not be relevant to his review of Calcatreu.

132 In contrast, on the same first visit, Mr. Lhotka recalled that during the office part of the visit — in the "data room" with the map — Mr. Cuburu showed him some rock samples from outside the "project." Mr. Lhotka testified that he told Mr. Cuburu that he shouldn't be showing those rock samples because they weren't relevant to the Calcatreu review.

133 There was some controversy at trial over whether that exact conversation took place. Mr. Cuburu testified that he did not recall the conversation about the rock samples, although he did recall that he had rock samples (as opposed to a "file" with rock sample data) from well outside Calcatreu in his office on display. He doubted that Mr. Lhotka

cautioned him about showing rock samples from outside Calcatreu because the samples would not be of importance in giving confidential information; they were just samples of different mineralization and rocks from several places that could act as comparators with rock samples from within Calcatreu.

134 There was likewise some confusion during the trial about whether Mr. Lhotka, in recalling that he was freely shown data outside the "project" during his site visit, was in fact recalling seeing and discussing those displayed rock samples, not rock sample data unconnected to Calcatreu. Resolution of that issue is not possible on the state of the evidence. However, what is relevant to the issue at hand is what sign-posts were evident to each of Mr. Cuburu and Mr. Lhotka about the confidentiality of all the information made available to IMA. In that regard, based on Mr. Lhotka's evidence that he told Mr. Cuburu that he should not show him files or rock samples from far outside Calcatreu, I infer that Mr. Lhotka had in his mind, whether he expressed the thought or not, that he was being shown confidential data freely that was unconnected to his evaluation of Calcatreu and that he felt compelled to indicate that to Mr. Cuburu.

135 It is significant therefore that when asking for the raw data relating to data points on the map (the BLEG A data), Mr. Lhotka did not feel compelled to question why such information would be shown in the data room. Nor did he indicate that his request for the data that corresponded to the points on the map was of no relevance to his evaluation of Calcatreu.

136 In my view, this supports the plaintiffs' contention that Mr. Lhotka did not think it was irrelevant to the evaluation of Calcatreu, or at the very least, he considered that the BLEG A map data points were covered by an obligation of confidentiality as part of his evaluation.

137 This same state of mind is again reflected in his November 20, 2002, email to Mr. Patterson set out in full earlier in these reasons at para. 91 in which he queried whether it was appropriate for him to open the BLEG A data on his computer. The email makes no reference to any doubt as to what Cuburu intended as to confidentiality or to any confusion on Lhotka's part in that regard. The email is the best evidence of what Lhotka understood. He described the regional or BLEG A data as being "of Calcatreu" and as "confidential data".

138 Based on all of this evidence, I have no hesitation in finding that Mr. Lhotka understood that everything he observed and any data he obtained must be treated as confidential — essentially because a confidentiality agreement had been signed and because he was aware of the common law issues surrounding the use of confidential information as explained in the *Lac Minerals Ltd.* [*International Corona Resources Ltd. v. Lac Minerals Ltd.*, 1989 CarswellOnt 126 (S.C.C.)] case. He testified as follows:

> Q Now, prior to visiting the Calcatreu Claim, did you have occasion in your work with IMA to be concerned about the ***Lac Minerals*** case and its implications for any work you were doing for IMA?
>
> A Yes sir, I did mention it in one memo for IMA.

139 When Mr. Patterson and Mr. Lhotka left the site in November of 2002 with the BLEG A data and the other data they obtained that day, they had essentially already decided that as a result of their evaluation they would not be recommending that IMA make a bid on Calcatreu. Subsequently they did not make a bid. It was close to one month later when Mr. Lhotka was reviewing other projects, and in particular, the exploration of possible claims somewhat to the north and west of the area covered by the BLEG A data points, that he thought about looking at the BLEG A data he had obtained from Newmont. He sent off the email of November 20, 2002, to IMA's management querying whether it was appropriate for IMA to use the BLEG A data given its confidential nature. He received no response whatsoever.

140 Curiosity appears to have overcome him, and he opened the data and immediately noticed the anomalies, which led him to immediately seek permission to stake the area covered by those anomalies. When queried at trial as to what changed between the time that he sent the email indicating that he considered the data was confidential and therefore potentially unusable for exploration by IMA and the time he determined to open the data, he acknowledged that nothing

had changed except that he "resolved" his doubt by deciding that the circumstances in which he received the data would allow him to open it.

141 When Crespo or Harvey, on behalf of Newmont, instructed Cuburu to give Lhotka free access to data, neither considered whether the raw data being requested was inside or outside the boundaries of Calcatreu as defined in the Confidentiality Agreement. Both assumed that the raw data being sought was to assist IMA in evaluating Calcatreu and formulating a bid. In particular, Mr. Crespo did not realize that data separate from the data contained or referenced in the Information Brochure existed or that the BLEG A data was in any way not directly connected to the Calcatreu sales process. Thus, the most probable inference to be drawn from Newmont giving Cuburu permission to provide "free access" to the BLEG A data was to encourage IMA to purchase Calcatreu.

142 In summary, the overwhelming weight of the evidence from both Mr. Patterson and Mr. Lhotka was that obtaining the BLEG A data was for the purpose of evaluating Calcatreu. This is the only reasonable interpretation of their words and actions at the time they asked for and received the data. They knew it was confidential information. They knew they were being given it because they had signed a Confidentiality Agreement and were very interested in a potential purchase. Both Mr. Patterson and Mr. Lhotka acknowledged in their evidence that each understood Newmont was providing the data in furtherance of encouraging IMA's purchase of Calcatreu. Although some answers provided at trial skated away from this acknowledgment, it is the evidence I accept as the most probable true reflection of what each thought when they asked for and obtained the BLEG A data.

143 The evidence from Newmont's representatives bears no other interpretation. They, too, understood that the BLEG A data was provided to IMA to encourage them to bid on Calcatreu.

144 Thus, in my view, Mr. Lhotka was mistaken when he concluded that "such confidential information could be used by IMA to acquire lands". I conclude that he did not act dishonestly when he opened the data since before he opened the data he could not know what he would find. Rather, I speculate that his geologist's curiosity overcame his more cautious and better informed nature and, hearing nothing from head office, he took a chance.

145 I cannot conclude that IMA's head office management were quite so honestly mistaken. In repeated public pronouncements right up to just before this trial, they denied that the BLEG A data was the sole basis for IMA's Navidad "discovery."

146 Although that was finally admitted at trial, IMA's early protestations that the Navidad "discovery" was made from its own data sources and field geology were plainly untrue. At best this represented wishful thinking and at worst deliberate dishonesty.

147 IMA's conduct after making the discovery is, however, irrelevant to my finding that IMA, through Mr. Lhotka and Mr. Patterson, knew or should have known that the BLEG A data was not theirs to use to stake Navidad.

148 The applicable test for breach of confidence adopted by the Supreme Court of Canada in *Lac Minerals Ltd.* contains three elements:

(a) that the information conveyed was confidential;

(b) that it was communicated in confidence; and,

(c) that it was misused by the party to whom it was communicated.

Based on the above review of the evidence, it is clear that this test has been met.

149 The defendants properly conceded at trial that the BLEG A data was by nature confidential information. A commonly cited consideration of what constitutes confidential information is the following passage from Lord Greene in *Saltman Engineering Co. v. Campbell Engineering Co.* (1948), 65 R.P.C. 203 (Eng. C.A.) at 215:

> I think that I shall not be stating the principle wrongly if I say this with regard to the use of confidential information. The information, to be confidential must, I apprehend, *apart from contract*, have the necessary quality of confidence about it, namely, it must not be something which is public property and public knowledge. On the other hand, it is perfectly possible to have a confidential document, be it a formula, a plan, a sketch or something of that kind, which is the result of work done by the maker upon materials which may be available for the use of anybody; but what makes it confidential is the fact that the maker of the document has used his brain and thus produced a result which can only be produced by somebody who goes through the same process. [emphasis added]

150 In *Expert Travel Financial Security (E.T.F.S.) Inc. v. BMS Harris & Dixon Insurance Brokers Ltd.* (2005), 36 B.C.L.R. (4th) 254, 2005 BCCA 5 (B.C. C.A.), Southin J.A. (concurring in a result) considered the facts of *Lac Minerals Ltd.* and stated at paras. 45-48:

> On the facts of that case, one can pose this question: would Corona have communicated their geographical findings and so forth to Lac if it had known Lac would itself go out and acquire the Williams' property to Corona's exclusion? The answer is patently "no".
>
> When the answer to such a question is "no", the information can fairly be called "confidential".
>
> . . .
>
> The question of what constitutes "confidential information" within the *Lac* formulation, could also be put this way: if an honourable man in Lac's position, upon being asked before receiving the information, "if we cannot make a deal, will you use without our consent what we tell you to enrich yourself?" would answer, "Of course not, the information is confidential," the information fairly falls under the rubric "confidential".

151 With respect to the second condition of confidentiality, whether the information was communicated in confidence, the words of Megarry J. (as he then was) in *Coco v. A.N. Clark (Engineers) Ltd.* (1968), [1969] R.P.C. 41, [1968] F.S.R. 415 (Eng. Ch. Div.) are relevant:

> It seems to me that if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being given to him in confidence, then this should suffice to impose upon him the equitable obligation of confidence. In particular, where information of commercial or industrial value is given on a business-like basis and with some avowed common object in mind, such as a joint venture or the manufacture of articles by one party for the other, I would regard the recipient as carrying a heavy burden if he seeks to repel a contention that he was bound by an obligation of confidence...

152 I have found that there is evidence that Newmont placed relatively little value on the Project Generation data in general and the BLEG A data in particular. However, "relatively" is the key word. There was no evidence to support the proposition that it was of no value to them as contended by the defendants. The only specific evidence of its "relative" value was that of Mr. Crespo who acknowledged that he should have obtained consideration for the Project Generation data when Calcatreu was sold — it was a mistake not to. That it was of value as proprietary information costing hundreds of thousands of dollars to develop is sufficient to find that its "relative" value does not distinguish this case from the scenario Megarry J. described in *Coco*.

153 Once the first two elements of breach of confidence have been established, and it has been shown that the defendants have used confidential information, the burden shifts to the defendants to demonstrate that their use was a permitted use. In *Lac Minerals Ltd.*, La Forest J. stated at para. 139:

> In establishing a breach of a duty of confidence, the relevant question to be asked is, "what is the confidee entitled to do with the information?" and not, "to what use he is prohibited from putting it?" Any use other than a permitted

> use is prohibited and amounts to a breach of duty. When information is provided in confidence, the obligation is on the confidee to show that the use to which he put the information is not a prohibited use.

154 Given my findings as to what each of the parties knew and understood at the time the data was transferred from Newmont to IMA, the answer in this case is that IMA was entitled to use the BLEG A data for the sole purpose of evaluating the purchase of Calcatreu.

155 The defendants have failed to discharge their burden of showing that their use of the data to stake Navidad was a permitted use. In fact, Lhotka adopted the following evidence from his examination for discovery, which further belies any suggestion that he resolved his doubt or even considered himself qualified to resolve the issue as to whether the data could be lawfully used to stake new claims:

> 2242 Q Right. Did you have any discussion at the time of this particular telephone call on November 28th, 2002, about whether IMA was entitled to use this data to stake that cateo?
>
> A I think we felt that at that point after finding the anomaly, as exploration geologists we didn't really have much choice that we were going to stake it...
>
> 2243 Q Right. In other words, forget the legalities, you've got something — well, I shouldn't put it in that way.
>
> A I hope not.
>
> 2244 Q As an exploration geologist you'd come across something fantastic and you wanted to tie it up right away; correct?
>
> A I think a prudent exploration geologist would stake that anomaly, and I had previously pointed out in earlier emails it was unclear of November the 20th [a reference to the email of that date], that had not been clarified and under the circumstances I felt the prudent thing to do as an exploration geologist was to stake it. **And somebody should look at that issue or whether it was an issue but it wasn't me; I'm not qualified to do that.**

[emphasis added]

156 On November 22, 2002, Lhotka advised Patterson that he was preparing a field program for Daniel Bussandri using images and "BLEG". Lhotka advised Bussandri that he could use the BLEG A data to search for the source of the silver anomalies notwithstanding that there had been no resolution of the issue. Lhotka adopted the following evidence from his discovery:

> Q All right. Do you tell him in that note that the BLEG data can be used?
>
> A Yes, I do.
>
> Q Why were you telling him that?
>
> A I'd previously written a memo, I believe, dated November 20th where I raised it as a possible issue for IMA. But I can't raise it as a possible issue for Bussandri, Daniel Bussandri a field geologist. He is either going to use it or he is not and I hadn't an answer and so I told him to use it.

157 In the result, I find that IMA used the BLEG A data to "discover" and stake the Navidad project and that use was in breach of its common law duty of confidence to Newmont and through Newmont to the plaintiff.

The Conflict of Laws Issue

158 As is readily apparent in the above analysis, I have applied the law of this province to determine the issue of whether IMA's use of the BLEG A data constituted a breach of confidence at common law. I have found that British

Columbia law is applicable after careful consideration of the defendant's pleadings in para. 31 of its Amended Statement of Defence, which states as follows:

> In the alternative, if the silver/lead BLEG data is not governed by the Confidentiality Agreement, but is nonetheless confidential in nature, which is denied, IMA's use of the data and any remedies arising are governed by the laws of Argentina, which do not permit or allow for a constructive trust remedy over the Navidad property, any assets related thereto, or the shares of IMA in IMA Holdings Corp.

159 The analysis that follows deals with the applicability of Argentine law to IMA's use of confidential data and any remedies arising. The issues raised here engage an ever-evolving area of conflict of laws. As will become apparent by the end of these reasons the determination of the questions raised depends on the characterization of the matter to which the rules apply.

How should the claim be characterized?

160 The defendant submits that Argentine law must apply to the breach of confidence claim because the claim involves the title to a foreign immovable, and there is a long-standing rule of private international law that a court does not have jurisdiction to act directly on immovables outside its borders.

161 The usual rule in conflict of law situations is that the forum court characterizes the claim according to its own laws. However, whether property is considered moveable or immovable is an exception to that general rule and depends on how the property is characterized in the *lex situs*, the law of the place where the property is located: Castel & Walker, *Canadian Conflict of Laws.* 6th ed. Looseleaf: Rel. 3, March, 2006 (Markham: LexisNexis Canada Inc, 2005) at §22.1.

162 Witnesses expert in the law of Argentina were called: Two on behalf of the defendant, Mssrs. Bianchi and Naon, and one by the plaintiff, Mr. Lucero, relating to mining law and confidential information. All were highly qualified to provide expert evidence of the law of Argentina. Expert witnesses from both parties agreed that mining claims are considered immovables in Argentina and that the Argentine court has exclusive jurisdiction over the title to such claims.

163 The rule against assuming jurisdiction over a foreign immovable is based partly on the principle that courts should strive to avoid making an order that risks coming into conflict or calling into question the authority of a foreign sovereign nation, especially with respect to sovereign territory. It is also based partly on the recognition that foreign courts will insist on exclusive jurisdiction over land situate within their country's borders, so may refuse to recognize or enforce an order respecting the title to foreign land. Generally, where the court cannot grant an effective judgment or an enforceable remedy, it should decline jurisdiction over the dispute: *Catania v. Giannattasio* (1999), 174 D.L.R. (4th) 170, 118 O.A.C. 330 (Ont. C.A.) at para. 11.

164 The plaintiff disputes that the claim in this case is a claim of title over foreign land. The plaintiff submits that when characterizing the issues to determine the applicable choice of law, the courts must consider the true nature of the claim, not the nature of the remedy sought: Castel & Walker, §32.1. According to the plaintiff, the rule discussed above does not apply to this case because the claim is not properly characterized as an *in rem* claim affecting title to foreign land. Instead, the plaintiff describes it as an *in personam* claim in equity for the wrongful appropriation of the mining claims through a breach of confidence. As such, the plaintiff says, the claim fits into a limited but long-recognized exception to the rule prohibiting the court from dealing with a claim affecting title to foreign land: *Duke v. Andler*, [1932] S.C.R. 734 (S.C.C.) at 739, [1932] 4 D.L.R. 529 (S.C.C.).

165 To understand the distinction drawn by the plaintiff, I find assistance in the words of John Stevens in *Restitution or Property? Priority and Title to Shares in Conflicts of Laws* (1996), 59 Modern Law Review 741 at 744-745, an article cited by the plaintiffs with respect to the appropriate choice of law for remedies, but one which is equally useful in determining the nature of the claim the plaintiff has advanced. Mr. Stevens wrote that, "[t]he real distinction ... is between claims

which are founded on an autonomous principle of unjust enrichment and claims which are founded upon proprietary entitlement."

166 A claim founded on proprietary entitlement, as described by Mr. Stevens, is a claim that the defendant holds property subject to a pre-existing right or interest in that property belonging to the plaintiff. In essence, it is a claim that the plaintiff has a right in the property that it wishes the court to recognize. The principle of territoriality prohibits this court from passing judgment on such a claim based on the general rule that the Argentine courts have exclusive jurisdiction to determine the validity of title to immovables located in that country.

167 However, that is not the claim the plaintiff has advanced. It has advanced a claim "founded on an autonomous principle of unjust enrichment." The plaintiff does not say that the title to the mineral claims in the Navidad region truly belongs to it, nor does it ask this court to declare the defendants' title invalid. The plaintiff merely argues that the defendant should be ordered to give up its title because that title was obtained wrongfully through a breach of confidence.

168 The case is therefore distinguishable from *Catania v. Giannattasio* and other cases cited by the defendant in which Canadian courts have found that they lacked the jurisdiction necessary to adjudicate on the title to foreign land.

169 The problem of confusing a claim attacking the validity of a foreign title and a claim for unjust enrichment caused by a breach of duty can be seen in our Court of Appeal's judgment in *Mountain-West Resources Ltd. v. Fitzgerald* (2002), 6 B.C.L.R. (4th) 97 (B.C. C.A.). The Chambers judge had declined jurisdiction over the claim relating to mineral rights in Nevada by applying the rule against jurisdiction over foreign immovables as a blanket rule for cases involving foreign land. The appellant argued, as the plaintiff does in this case, that the claim did not raise issues of title to the mineral claims, but rather raised questions of equity arising from the defendant's alleged breach of fiduciary duty and the duties owed under the *Company Act*. Thus, the appellant argued that the court below was not asked to make a decision *in rem*, but only a decision *in personam* against the defendant. The Court of Appeal held that the Chambers judge had failed to appreciate the distinction, and as a result, returned the case to the court below so that the claims could be dealt with appropriately. See also *War Eagle Mining Co. v. Robo Management Co.* (1995), 13 B.C.L.R. (3d) 362, [1996] 2 W.W.R. 504 (B.C. S.C. [In Chambers]).

170 The Ontario Court of Appeal provided a helpful description of the *in personam* exception in *Catania v. Giannattasio*. Although on the facts of that case, the exception was found to be inapplicable, the Court of Appeal stated at para. 12:

> Admittedly, as Smith J. points out in *Duke v. Andler*, a long line of authorities has held that Canadian courts have jurisdiction to enforce rights affecting land in foreign countries if these rights are based on contract, trust or equity and the defendant resides in Canada. In exercising this jurisdiction, Canadian courts are enforcing a personal obligation between the parties. In other words, they are exercising an *in personam* jurisdiction. This *in personam* jurisdiction is an exception to the general rule that Canadian courts have no jurisdiction to decide title to foreign land. The exception recognizes that some claims may have both a proprietary aspect and a contractual aspect [and I would add, an equitable aspect]. Canadian courts, however, will exercise this exceptional *in personam* jurisdiction only if four criteria are met. These four criteria ... are discussed by McLeod [McLeod, ***The Conflict of Laws***, (Calgary: Carswell, 1983) at 321-325]:
>
> > In order to ensure that only effective *in personam* jurisdiction is exercised pursuant to the exception, the courts have insisted on four prerequisites:
> >
> > (1) The court must have *in personam* jurisdiction over the defendant. The plaintiff must accordingly be able to serve the defendant with originating process, or the defendant must submit to the jurisdiction of the court.
> >
> > (2) There must be some personal obligation running between the parties. The jurisdiction cannot be exercised against strangers to the obligation unless they have become personally affected by it...
> >
> > (3) The jurisdiction cannot be exercised if the local court cannot supervise the execution of the judgment.

> (4) Finally, the court will not exercise jurisdiction if the order would be of no effect in the *situs*. Thus, jurisdiction will be declined if the *lex situs* prohibits effective enforcement of the decree. This requirement seems reasonable in the abstract since the *lex situs* has ultimate control over the immovable. The mere fact, however, that the *lex situs* would not recognize the personal obligation upon which jurisdiction is based will not be a bar to the granting of the order.

171 Professor McLeod's analysis of the *in personam* exception has been adopted by this court in *Forsythe v. Forsythe* (1991), 33 R.F.L. (3d) 359, [1991] B.C.J. No. 2101 (B.C. S.C.).

172 The plaintiff contends that its claim in this action meets the four prerequisites set out by Professor McLeod. In particular, the plaintiff argues forcefully that an equitable order against the defendants does not require the supervision of the Argentine courts because it can be supervised and enforced in this court through contempt proceedings should that become necessary.

173 The defendants dispute all but the first prerequisite, but do not seriously dispute the second as it relates to the defendant IMA. On that point, they argue only that Inversiones, as co-defendant, owes no obligation of any kind to the plaintiff because it did not receive the BLEG A data and did not use it. However, I accept the plaintiff's submission on this point and find that because Inversiones is wholly owned and controlled by IMA and, indeed, is run out of IMA's Vancouver office, the obligation arising from IMA's receipt of confidential data extends to Inversiones and prevents Inversiones from any unauthorized use of the data. In such circumstances, it cannot be said that there is no personal obligation running between Inversiones and the plaintiff sufficient to meet the second prerequisite.

174 The defendants rely primarily on their submission that the plaintiff cannot meet the third and fourth prerequisites because the remedies sought in this action cannot be supervised by this court, and the order would be ineffective because the Argentine courts would refuse to enforce it. They argue that any order that compels the defendants to transfer their interest in the mineral claims to the plaintiff would necessarily require the involvement of the Argentine courts and land registration system to make the transfer effective. In that respect, they rely on Mr. Naon's expert testimony that such a remedy is incompatible with the scheme and spirit of Argentine law.

175 Mr. Naon's evidence will be discussed in more detail below. For the present, it is sufficient to note that neither Mr. Naon nor Mr. Bianchi, the other expert witness for the defence, suggested that a transfer of mineral claims such as that contemplated by the plaintiff would be considered illegal in Argentina. Regardless of the underlying reasons for the transfer, which may or may not be acceptable to the Argentine courts, the transfer itself would be recognized as legitimate as long as the mechanics and form dictated by Argentine law were followed.

176 In my view, that is all that is required by the fourth condition for the *in personam* exception. As Professor McLeod explained at p. 325:

> In the context of the exception this [fourth] prerequisite may be more illusionary than real. The fact that the *situs* has ultimate control over the immovable really has very little to do with the enforcement of the court order, since the remedies for enforcement operate not against the property but against the person. Some substance may be given to the principle where it would be illegal in the *situs* for the defendant to comply with the rule. Such points, however, are better dealt with in the context of the enforcement of contracts...

177 The issue of enforcement as it relates to this fourth requirement is very clearly explained in the *obiter* comments of the English court in *R. Griggs Group Ltd. v. Evans (No. 2)* [(2004), [2005] Ch. 153 (Eng. Ch. Div.)], [2004] All E.R. 155 (Ch.) at para. 68. The court wrote:

> A court of equity would decline to act if it were proved that the local law forbade the owner to sell his own property. ... It would not order the defendant to defy the laws of the foreign state; an exercise not only pointless, but disrespectful

> to the authority of the sovereign of that state. But usually the local sovereign does permit privately owned land to be alienated.

178 I am persuaded that an order, the effect of which is to require the defendant to transfer its interest in the mineral claims to the plaintiff, is capable of supervision by this court because such an order operates on the person of the defendants over which legal persons this court has jurisdiction.

179 I am equally satisfied on the evidence that the law of Argentina does not prohibit the transfer of mineral claims between mining companies. The evidence does not indicate that transfer documents duly executed according to local form by the defendants would be found to be illegal or would be otherwise refused by the registrar of titles in Argentina. Thus, Argentine law will not prevent the defendants from complying with an order requiring them to execute such transfer documents should that order be found by this court to be the appropriate remedy to satisfy the equities between the parties.

180 Whether or not the Argentine courts would come to the same conclusion on the equities or would agree with this court's reasons for making the order is immaterial to the abilities of this court to effectively supervise and enforce its judgment. As Professor McLeod's fourth criterion specifies, "the mere fact that the *lex situs* would not recognize the personal obligation upon which jurisdiction is based will not be a bar to the granting of the order."

181 Consequently, the plaintiff's claim meets the prerequisites for the *in personam* exception to the rule prohibiting this court from dealing with claims affecting foreign land. The claim in this case is more appropriately characterized as an equitable claim for unjust enrichment arising from a breach of confidence. As such, any effect this action may have on the title to land in Argentina is purely incidental.

What choice of law applies to an in personam claim for breach of confidence?

182 The above analysis does not determine that British Columbia law ought to apply to the issues in this action. It means only that the claim is not primarily a claim over a foreign immovable dictating that the law of Argentina should apply. It remains to properly characterize the claim and apply the appropriate choice of law rule.

183 The parties agree that a claim for breach of confidence is a restitutionary claim for unjust enrichment resulting from a breach of duty: *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142, 59 B.C.L.R. (3d) 1 (S.C.C.), *International Corona Resources Ltd. v. Lac Minerals Ltd.*, [1989] 2 S.C.R. 574, 61 D.L.R. (4th) 14 (S.C.C.).

184 There is also no dispute that the choice of law rule for unjust enrichment claims is the "proper law of the obligation." The parties disagree, however, on how to determine what that proper law is in the circumstances of this case.

185 Both parties rely on the choice of law rule set out by Dicey and Morris, *On the Conflict of Laws*. 12th ed. (London: Stephens, 1993) at p. 1471, though they differ on how the rule should be interpreted. Dicey and Morris state that the proper law of the obligation is to be determined according to the following subrules:

> (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.

186 The plaintiff argues that these subrules were intended to apply in descending order, such that subrule (a) would apply if the case involved a relevant contract irrespective of whether the issue also involved a transaction concerning an immovable.

187 According to the plaintiff, subrule (a) applies to the present case because the phrase "arising in connection with" ought to be construed broadly to include non-contractual claims that nevertheless relate to a relevant contract or pre-existing contractual relationship: *Sarabia v. "Oceanic Mindoro" (The)* (1996), 26 B.C.L.R. (3d) 143, [1997] 2 W.W.R. 116 (B.C. C.A.). They rely in this respect on the broader statement of subrule (a) found in Castel & Walker at §32.1, which mentions an obligation arising in connection with "a pre-existing contractual relationship either actual or intended."

188 Although the plaintiff accepts, for the purpose of this alternative common law claim only, that the BLEG A data may not have been strictly covered by the Confidentiality Agreement, the plaintiff argues that the obligation of confidence with respect to the data nevertheless arose "in connection with" that agreement or at least in connection with the pre-existing contractual relationship between these parties. Absent that contractual relationship, there would have been no delivery of the BLEG A data to the defendants and no opportunity for the breach of confidence alleged here. The plaintiff submits that in such circumstances, the court ought to conclude that the parties addressed their minds to the choice of law that would govern their relationship, and subrule (a) must apply.

189 The parties agree that the law this court should apply to the contract is B.C. law because although the contract was governed by Colorado law, neither party pleaded or proved that law. The court must therefore act as if Colorado law is the same as the law of B.C.: *"Mercury Bell" (The) v. Amosin*, [1986] 3 F.C. 454, 27 D.L.R. (4th) 641 (Fed. C.A.).

190 The plaintiff's submission, as I understand it, is based on logical inference and the principle of freedom of contract. In effect, the plaintiff asks the court to infer from the fact that the parties expressly chose the law of Colorado to govern the Confidentiality Agreement that the parties intended Colorado law to govern all aspects of their business relationship or at least all aspects of that relationship relating to the exchange of confidential information. Following that inference, the plaintiff says, the court ought to respect and give priority to the apparent choice of the parties, finding that the law of the Confidentiality Agreement is the proper law of the obligation notwithstanding that the parties did not expressly indicate that choice for the BLEG A data by executing a specific contract with respect to it.

191 The defendants challenge the plaintiff's hierarchical interpretation of Dicey and Morris's choice of law rules. They interpret the passage as citing independent rules designed to apply in different circumstances. They emphasize that subrule (b) recognizes the longstanding rule of non-interference with foreign immovables, which is based on the need to ensure that any order affecting foreign land would not be unenforceable because of a conflict with local laws.

192 Moreover, the defendants dispute that the obligation alleged by the plaintiff in the common law breach of confidence claim can be considered to have arisen "in connection with a contract" because the plaintiff has advanced this claim as an alternative to its claim based on the Confidentiality Agreement. The court is only concerned with a common law claim if the contract between the parties is found to be inapplicable to the issues in this litigation. Thus, according to the defendants, the obligation the plaintiff asserts necessarily and expressly arises outside of contract, making subrule (a) irrelevant to this action.

193 While I agree with the plaintiff's submission that the phrase "in connection with" ought to be more broadly interpreted than the phrase "arising under" (an alternative phrase that might readily have been used if that was what had been intended), this does not resolve the matter. The same phrase is repeated in the second subrule relied upon by the defendants concerning an obligation that arises "in connection with" a transaction concerning an immovable. The same broad interpretation applied to (a) must surely be applied to (b).

194 The crux of the issue on the facts of this case is whether the choice of law rules set out by Dicey and Morris were intended to be hierarchical. The plaintiff says this hierarchy accords with common sense, logic, and proper respect for the principle of freedom of contract, but was unable to cite any authority that recognizes such a hierarchy. I take the defendant's position to be that the principles of sovereignty and territoriality underlying subrule (b) are at least equally if not more deserving of the court's respect as freedom of contract and any inference that may be drawn about the parties' intended choice.

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 §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."

196 Thus, the principle underlying the subrules set out by Dicey and Morris appears to be the strength of the connection between the obligation and the competing legal systems. Additional support for this statement of principle can be found in *Christopher v. Zimmerman* (2000), 80 B.C.L.R. (3d) 229, 2000 BCCA 532 (B.C. C.A.), where our Court of Appeal found that the appropriate choice of law was the law of the place where the enrichment occurred because that was the law that had "the closest and most real connection" with the obligation in question. Similarly, in *Unifund Assurance Co. of Canada v. Insurance Corp. of British Columbia*, [2003] 2 S.C.R. 63, 2003 SCC 40 (S.C.C.), at para. 58, and *Castillo v. Castillo*, [2005] 3 S.C.R. 870, 2005 SCC 83 (S.C.C.), at para. 44, the Supreme Court of Canada emphasized the relative strength of the connection when it held that the connection required for choice of law issues must be more robust and requires a higher threshold than the "real and substantial" connection applied to questions of jurisdiction.

197 A choice of law rule based on a strong, meaningful connection between the law and the obligation it will govern is consistent with the philosophy underlying private international law. As Hessel E. Yntema expressed in the article, "The Objectives of Private International Law" (1957), 35 Can. Bar Rev. 721, at p. 741, cited with approval in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, 52 B.C.L.R. (2d) 160 (S.C.C.) at para. 32:

> In a highly integrated world economy, politically organized in a diversity of more or less autonomous legal systems, the function of conflict rules is to select, interpret and apply in each case the particular local law that will best promote suitable conditions of interstate and international commerce, or, in other words, to mediate in the questions arising from such commerce in the application of the local laws.

198 Where claims involve multiple legal systems, the promotion of suitable conditions for pursuing those claims and the principles of order and fairness can best be achieved by applying the law of the place with the closest and most real connection to the obligation in question.

199 Castel & Walker in the quotation cited above suggests that Dicey and Morris's third subrule, "the law of the country where the enrichment occurs", can be used essentially as a tie-breaker should the application of the first two rules "fail to yield a compelling result". That interpretation is not wholly consistent with the language in subrule (c), which specifies that the place of enrichment ought to be considered "in any other circumstances"; that is, circumstances *other* than those in which a contractual relationship or an immovable is involved. However, because Dicey and Morris do not propose a choice of law for a situation in which both (a) and (b) apply, it may be possible to stretch the language as far as Castel & Walker suggest.

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.

201 In many cases, perhaps most, it may be that the court will find after examining all the connecting factors that the law of the place where the enrichment occurred is in fact the law with the closest and most real connection to the obligation. However, in my view, that is a conclusion that the court should reach only after full examination and analysis.

202 The plaintiffs submit that "even if the court were to consider the place of enrichment, IMA certainly treats the enrichment as its own." Because IMA is incorporated in British Columbia, a court applying the law of the place of the enrichment should apply the law of B.C.

203 The defendants point out that all of the circumstances giving rise to the obligation asserted by the plaintiffs occurred in Argentina. The BLEG A data was created in Argentina, was delivered to the defendants in Argentina, and was used to stake mineral claims in Argentina.

204 In the circumstances, I find that the enrichment occurred in Argentina. That is also where both parties carried on business at the time the obligation arose, and where the data was intended to be used, even if the only permitted use or transaction in question was, as I have found, the evaluation and sale of Calcatreu.

205 One cannot ignore, however, the fact that neither of the parties involved in the exchange of the BLEG A data were Argentine companies, and none of the principals involved in the circumstances leading up to the breach of confidence were Argentinean. The principle actors in this drama were all Canadians or Americans who lacked even a superficial understanding of Argentine law with respect to the control and distribution of confidential information. It is therefore very unlikely that these companies and individuals would have chosen or expected Argentine law to govern their actions and their relationship.

206 Conversely, each of the principal actors on both sides was aware of the Canadian or Colorado law on this issue. Those were the systems of law under which both parties routinely conducted their affairs. It is particularly significant, in my view, that Mr. Lhotka admitted to being familiar with the *Lac Minerals Ltd.* case and its implications at the time he requested, received, and used the BLEG A data. Thus, the legal system that informed and guided the perceptions and actions of the key players at the time the breach of confidence occurred was Canadian and American law.

207 In the circumstances, despite the fact that some important choice of law factors point to Argentine law, I find that B.C. law, as it is described in *Lac Minerals Ltd.*, has the closest and most real connection to the obligation between these parties, and must apply to determine liability of the common law claim.

Breach of Confidence under Argentine law

208 If I am wrong in applying B.C. law, I find that liability would nevertheless rest with the defendants were Argentine law to be applied. As has become clear through lengthy expert testimony, Argentine law on a breach of confidence claim is only subtly different from our own law on that issue, and the differences are not substantial enough to relieve the defendants of liability for their misuse of the BLEG A data.

209 First and foremost, the defining characteristics of confidentiality appear to be the same under both systems of law. At the very least, the criteria required for confidentiality are so similar that there is no question that the BLEG A data would be considered confidential information in Argentina as it is in B.C.

210 Experts for both parties agreed that confidential information is defined under Argentine law in *Act 24,766*, Articles 1 and 3, which state in translation:

> **Art. 1** Physical or juridical persons shall be able, in respect of information lawfully under their control, to restrain its disclosure to others, or its acquisition or use by third parties without their consent in a manner contrary to honest commercial practices, provided that such information meets the following conditions:
>
> (a) It is secret in the sense that it is not, as a body or in its configuration, or in the precise assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with such kind of information; and
>
> (b) It has commercial value because it is secret; and
>
> (c) It has been subject to reasonable measures to keep it secret, under the circumstances, taken by the person lawfully in control of it.
>
> It shall be deemed contrary to honest commercial practices: breach of contract; breach of confidence; inducement to infringement; and the acquisition of undisclosed information by third parties who knew, or were grossly negligent in failing to know, that such practices were involved in the acquisition.
>
> **Art. 3** Any person who, because of his work, employment, post, position, exercise of profession, or business relationship, has access to an information complying with the conditions listed in Article 1, and about whose confidentiality the person has been warned, shall refrain from using or disclosing it without good cause, or without the consent of the person controlling such information, or of a user authorized by the latter.

211 The reference in Article 3 to "information complying with the conditions listed in Article 1" makes it clear that those conditions are the criteria required for information to be found confidential. Although the defendants argued that the reference to a warning in Article 3 creates a fourth criterion, the language of that section is more consistent with only three defining characteristics. The presence of a warning affects whether the use of confidential information is lawful, not whether the information is confidential in the first place. This interpretation is supported by the report of Mr. Bianchi, who referred to "four elements for the prohibition of unauthorized use or disclosure of undisclosed information", not four elements for establishing confidentiality.

212 The three requirements for confidentiality under Argentine law are therefore that the information is secret, that secrecy affects its value, and that reasonable measures have been taken to keep it secret.

213 The correspondence with the test for confidentiality under B.C. law is clear: As explained earlier, the Supreme Court of Canada in *Lac Minerals Ltd.* has said that information is confidential if it has "the necessary quality of confidence" about it, and if it is "communicated in circumstances importing an obligation of confidence". Two of the relevant factors in determining whether information has the "necessary quality of confidence" are the value of the information and the extent of measures taken by its owner to guard its secrecy: *Ebco Industries Ltd. v. Kaltech*

Manufacturing Ltd., [1999] B.C.J. No. 2350 (B.C. S.C. [In Chambers]) at para. 36, citing *Pharand Ski Corp. v. Alberta* (1991), 37 C.P.R. (3d) 288 (Alta. Q.B.) and *Deta Nominees Pty. Ltd. v. Viscount Plastic Products Pty. Ltd.*, [1979] V.R. 167 (Victoria S.C.) at p. 193.

214 That the value of the information is relevant to the confidentiality enquiry can be seen from the comments cited earlier of Megarry J. in *Coco v. A.N. Clark (Engineers) Ltd.*, which were also cited with approval by the Supreme Court of Canada in *Lac Minerals Ltd.* and *Cadbury Schweppes Inc.*:

> where information of commercial or industrial value is given on a business-like basis and with some avowed common object in mind, ... I would regard the recipient as carrying a heavy burden if he seeks to repel a contention that he was bound by an obligation of confidence.

215 At trial, the parties did not seriously dispute the fact that the BLEG A data meets the requirements of secrecy and value. The defendants focused instead on whether reasonable measures were taken to protect the confidentiality of the information such that the communication to IMA could give rise to an obligation of confidence. The defence submissions on this point are twofold: first, the information pointing to the BLEG A data was posted on the door inside Mr. Cuburu's office for anyone to see; and second, the data was freely given to Mr. Lhotka without any express conditions as to how it ought to be handled by him.

216 Under both legal systems, what constitutes "reasonable measures" depends on the circumstances surrounding the disclosure of the information and on the common understandings and practices within the particular industry. As Mr. Bianchi noted in his report, under Argentine law, "the adequacy and sufficiency of such measures seems to be dependent on current usages ("*usos y costumbres*") of the corresponding field of business." The law is the same in B.C. As Madam Justice Huddart explained in the original trial judgment in *Cadbury Schweppes Inc.*, again citing *Coco's* case and *Lac Minerals Ltd.*:

> In Coco's case, Megarry J. said, "it seems to me that if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information, would have realized that upon reasonable grounds the information was being given to him in confidence, then this should suffice to impose upon him the equitable obligation of confidence." This subjective objectivity, approved in *Lac Minerals*, per La Forest and Sopinka, suggests that the standard may vary from case to case. This means that regard must be had to the practice of the particular industry in which the parties are participants and to any agreements between the confider and the confidee.

217 In the circumstances of this case, I have found that reasonable measures were taken to safeguard the confidentiality of the BLEG A data because only those who had agreed, expressly or implicitly, to maintain confidentiality were given access to the information. Mr. Lhotka requested the data as part of his evaluation of the Calcatreu project. He fully understood that he would be expected to follow the industry practice and keep everything he saw or received during his site visits confidential. He gave that very instruction to his more junior colleagues who accompanied him.

218 Whether or not Mr. Lhotka had additional reasons, unrelated to Calcatreu, for requesting the data, such reasons were not communicated to Mr. Cuburu or anyone at Minera when the data was requested and delivered. It was not unreasonable for Mr. Cuburu to assume that Mr. Lhotka wished to see the data as part of the due diligence related to the Calcatreu, even though the data related to a geographic area far outside the two-kilometer "stake free" zone specified in the Confidentiality Agreement and was not specifically referenced in that Agreement. Whether opportunities existed to expand Calcatreu was a reasonable consideration in the evaluation of Calcatreu's worth to IMA. Mr. Cuburu testified that the possibility of such an expansion was the reason that the BLEG A data was produced since the express goal of Project Generation was to find new resources that could be added to Calcatreu.

219 My findings that support both a breach of the Confidentiality Agreement and unlawful use of confidential information at common law underscore that all parties understood the data was confidential. It is therefore clear that the BLEG A data ought to be considered confidential information under both Argentine and B.C. law. Its disclosure to

IMA through Mr. Lhotka gave rise to an obligation of confidence. The question remains whether Argentine law would consider that IMA breached that confidence by staking the Navidad Claims.

220 As set out in para. 152 above, under B.C. law, the receipt of confidential information in circumstances of confidence establishes a duty not to use that information for any purpose other than a permitted use. Any use other than a permitted use is prohibited and amounts to a breach of the duty of confidence.

221 Similarly, Articles 1 and 3 of *Law 24,766* indicate that prior consent or authorization from the person lawfully in control of the information also dictates what constitutes lawful use of confidential information under Argentine law. The essential question is the same: what is the recipient entitled to do with the information?

222 Here, the defendants were given the BLEG A data as part of their evaluation of the Calcatreu project. They were entitled to use that information for the purposes of determining whether they wished to bid and at what price. Accordingly, any other use of the data amounts to a breach of confidence under Argentine and B.C. law.

223 The defendants argue, however, that because they lawfully acquired the BLEG A data through their business relationship with the plaintiffs, Article 3 required the plaintiff to *expressly* warn them that the information was confidential and subject to restrictions on the use that could be made of it. Without such a warning, the defendants argue, Article 3 imposes no duty to refrain from using the data in any manner the defendants choose. Thus, if there is no other significant difference between the relevant law regarding the use of confidential information in B.C. and Argentina, the necessity that a warning of confidentiality be express is the defining difference.

224 The plaintiff advances a different interpretation of Article 3. Mr. Lucero explained that Article 3 protects a narrow category of persons who, because of their close working relationship with the person lawfully in control of the confidential information, are exposed to a great deal of confidential and non-confidential information belonging to the other party. Because it may not always be clear which information is to be treated as confidential, such persons deserve and can expect a warning that particular information falls into the confidential category before they can be held liable for wrongful use. In essence, the warning in Article 3 is meant to protect those who are at greater risk of making an honest mistake about whether certain information is, in fact, confidential.

225 On this interpretation of Article 3, no warning is required where there is no risk of honest mistake. Another way to look at it is that if there are sufficient signposts of confidentiality in relation to the provision of information, then no "honest" mistake can be made. Therefore, a warning may be implied where the circumstances are such that a reasonable person in the shoes of the recipient would understand from the surrounding context and the practice of the industry that the information they received should be treated as confidential. According to the plaintiff, Argentine law imposes liability where information known to be confidential is wrongfully disclosed or misused, but excuses any misuse or wrongful disclosure that arises from an honest mistake.

226 The plaintiff argues, moreover, that the issue of warning does not legitimately arise because it is Article 1, not Article 3, that governs the circumstances of this case. According to the plaintiff, Article 1 gives the lawful owner of the information the right to restrain its disclosure, acquisition, or use in a manner contrary to honest commercial practices. Breach of confidence is specifically listed in that article as being contrary to honest commercial practices. Both Mr. Lucero, for the plaintiff, and Mr. Bianchi, for the defence, agreed that a breach of the principle of good faith also falls into this category. Citing Fernando J. López de Zavalía, *Teoría de los Contratos* [Contract Law], Vol. 1, General Part, Editorial Zavalía, Buenos Aires (1991), p. 191, Mr. Lucero explained:

> The most elementary rule of good faith requires that he who knows a secret which has been trusted to him during the course and by virtue of contractual negotiations, shall keep it, and any breach of such duty gives rise to tort liability, which is therefore independent from the fact that the contract may not be eventually executed, and also independent from the fact that negotiations are suddenly or arbitrarily interrupted, since the liability will arise in any case.

227 According to Mr. Lucero, use of confidential information for purposes other than the negotiations represents a failure to keep it secret and therefore constitutes bad faith or conduct "contrary to honest commercial practices." Both Mr. Lucero and Mr. Bianchi agreed that Article 1 does not require a warning because persons who use information contrary to honest commercial practices do not deserve a warning.

228 The defendants submit that Article 1 does not apply in this case because Article 1 only grants the right to restrain the use of information that has been acquired through dishonest means. The plaintiff insists that the Article grants the lawful controller of the information the right to restrain dishonest conduct, whether that conduct relates to disclosure, acquisition, or use.

229 It is well settled that a court faced with conflicting opinions about foreign law is bound to make its own decision about what that law requires: *Sarabia v. "Oceanic Mindoro" (The)*, at para. 11. The general rule with respect to foreign statutes is that the court must consider the evidence of the experts and not the text itself unless the experts cannot agree on the statute's meaning. Faced with contradictory interpretations, the court has no choice but to weigh the expert opinion along with its own examination of the text: *Rouyer Guillet & Cie v. Rouyer Guillet & Co.*, [1949] 1 All E.R. 244 (Eng. C.A.) at 244; *Allen v. Hay* (1922), 64 S.C.R. 76 (S.C.C.).

230 After careful evaluation and being cognizant of the difficulties inherent in interpreting what is only a translation of *Law 24,766*, I prefer the plaintiff's interpretation of the text and the interaction between Articles 1 and 3 for the following reasons.

231 Nothing in the language and structure of Article 1 suggests that the phrase "in a manner contrary to honest commercial practices" relates only to the acquisition of the information and not also to its use. Therefore, Article 1 applies where, as here, the defendants acquired the confidential information legitimately, but then used it in a manner that breaches the duties of confidence and good faith that Argentine law implies in all pre-contractual negotiations.

232 The defendants clearly understood that the BLEG A data was treated throughout the industry as proprietary, confidential information. There is no doubt that both Mr. Cuburu and Mr. Lhotka knew that all information requested and received in a data room or during a site visit was to be considered confidential information. Under these circumstances, it is unreasonable and unrealistic to expect the plaintiff to expressly say, "this data is confidential." If the parties were in a business relationship as that term is used in Article 3, the warning that Article requires must be capable of being implied by the circumstances. To say otherwise is to divorce the requirements of law from the reality and practicalities of such business relationships.

233 However, the key here is that there is no question of honest mistake. The defendants did not receive so much confidential and non-confidential information from the plaintiff that they were unable to determine which was which. The defendants knew that the BLEG A data was inherently confidential and had been received under circumstances that restricted its use. To absolve the defendants from liability for deliberate misuse of confidential data merely because certain words were not spoken would be contrary to justice, whether in Argentina or in B.C.

Remedies

Applicable Law

234 The greatest and most important distinction between the law of Argentina and the law in B.C. as it relates to the facts of this case is the law concerning the remedies available for a breach of confidence.

235 The parties agree that should damages be awarded, the governing law must be the law of B.C. That is because the defendants did not specifically plead that Argentine law should apply to the issue of damages, and neither party led evidence establishing the circumstances under which damages are assessed in Argentina. Where the relevant foreign law has not been proved, the court must apply its own law.

236 However, the defendants contend that the law of Argentina ought to govern the availability of a remedial constructive trust or other equitable remedy that the court might impose.

237 The plaintiff argues that, regardless of which law applies to issues of liability, B.C. law must govern the remedies because it is a general rule of private international law that remedies are procedural in nature, and the law of the forum applies to all matters of procedure. The plaintiff sees no reason to depart from this longstanding principle of law in the circumstances of this case.

238 Relying on Castel & Walker at §6.2, the defendants argue that Canadian courts should restrict the scope of questions deemed procedural, "so as not to frustrate the fundamental purposes of conflict of laws." The authors propose that a more appropriate test to determine which law should be applied to remedies is whether the foreign law is too inconvenient for the forum court to apply.

239 The test proposed by Castel & Walker and by the defendants in this case does not appear to have been adopted by Canadian courts. Nevertheless, the defendants say that restitutionary remedies are particularly suited to such a test because they are so closely related to the right claimed in the action. The defendants submit that in claims based on unjust enrichment, the proper law of the obligation governs both the claim and the remedy as an exception to the older principle cited by the plaintiffs.

240 In that regard, the defendants again rely on the comments of Castel & Walker at §32.1. While acknowledging that the nature of the plaintiff's remedy is generally a question for the *lex fori*, the authors suggest that, "the law of restitution is a remedial form of substantive law which includes whatever remedies are provided by that law to reverse the unjust enrichment." Where the right and remedy claimed are "indissolubly connected" such that granting or denying the particular remedy affects the recognition of the right itself, even questions of remedy must be considered substantive. It is clear from the author's comments at §28.7 that they consider the constructive trust to be such an "indissolubly connected" remedy:

> It is suggested that while claims for unjust enrichment tend to give rise to the remedial device of a constructive trust, they should be treated as matters of substance to which an applicable foreign law should be applied provided it can conveniently be applied. In recent years, Canadian courts have restricted the scope of procedure. The domestic characterization of the issue as remedial should not prevent the application of the applicable law, which is that with which the obligation to restore the benefit unjustly obtained has the closest and most real connection. That law will determine whether the remedy of constructive trust is available.

241 That opinion may also be found in Dicey and Morris at §29-026, where, although the authors acknowledge that there is no authority on the point, they express the opinion that, "[i]f constructive trusts are regarded, as seems best, within the subject of restitution, Rule 200 will apply to indicate the proper law of the obligation represented by the constructive trust."

242 The plaintiff urges the court to disregard these text authorities, which they characterize as academic opinion rather than statement of law. This is apparent, the plaintiff says, from Castel & Walker's use of the introductory phrase "it is suggested that" and Dicey and Morris's conditional construction and use of the phrase "as seems best". Despite giving a contrary opinion, Castel & Walker at §28.7 recognize that at least for domestic law purposes, "the courts have held that the constructive trust is a general equitable restitutionary remedy for unjust enrichment: it is not a substantive right but a remedy that serves as a means of compelling a person to surrender an unjust enrichment."

243 The plaintiff submits that the court ought not to introduce confusing inconsistency in the law by treating the constructive trust differently in conflict of laws cases. In the plaintiff's submission, it would be a backwards step to deem the constructive trust to be substantive rather than procedural law because the law of constructive trust in Canada has developed beyond the point where it can be said that unjust enrichment claims "tend to give rise to" a constructive trust as Castel & Walker assume. Canadian courts no longer consider the constructive trust to be a substantive claim equivalent

to unjust enrichment. It is now viewed primarily, if not solely, as a remedial device, and as such, it is now available not only for claims of unjust enrichment but for other causes of action as well: *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217, 146 D.L.R. (4th) 214 (S.C.C.) at para. 17.

244 That a constructive trust should be characterized as a remedy and not a substantive claim was recognized by McLachlin J. (as she then was) in *Peter v. Beblow*, [1993] 1 S.C.R. 980, 77 B.C.L.R. (2d) 1 (S.C.C.), where she criticized past case law for occasionally conflating "the remedial notion of constructive trust" with unjust enrichment itself, "as though where one is found the other must follow." McLachlin J. clearly felt that such a fusion of right and remedy was in error, and she wrote that, "'[u]njust enrichment' in equity permitted a number of remedies, depending on the circumstances," and later, "[a] finding that a plaintiff is entitled to a remedy for unjust enrichment does not imply that there is a constructive trust."

245 La Forest J. expressed a similar opinion that the constructive trust ought to be regarded as a remedy in *Lac Minerals Ltd.* at para. 194:

> It is not the case that a constructive trust should be reserved for situations where a right of property is recognized. That would limit the constructive trust to its institutional function, and deny to it the status of a remedy, its more important role. [emphasis added.]

246 Both La Forest J. and Sopinka J. agreed that a constructive trust could be ordered as a remedy for breach of confidence, but that it was not necessarily, or even very often, the appropriate remedy for that claim. "The court can exercise considerable flexibility in fashioning a remedy for breach of confidence because the action does not rest solely on any one of the traditional jurisdictional bases for action — contract, equity or property — but is *sui generis* and relies on all three."

247 That opinion was shared by Binnie J. in *Cadbury Schweppes Inc.* at para. 48, where he stated: "equity, with its emphasis on flexibility, keeps its options open. It would be contrary to the authorities in this Court ... to allow the choice of remedy to be driven by a label ("property") rather than a case-by-case balancing of the equities."

248 In light of the modern view of the constructive trust as expressed in recent Supreme Court of Canada jurisprudence, I am not persuaded that a constructive trust remedy is "indissolubly connected" to the unjust enrichment arising from the breach of confidence such that both must be seen as two sides of one substantive coin. I find support for this view in the distinction already drawn between the plaintiff's claim for a constructive trust as a remedy for unjust enrichment arising from a breach of confidence and a claim for the declaration of a constructive trust in order to recognize an alleged pre-existing property right. A constructive trust imposed in the latter type of claim may well be so connected to the right at issue that it cannot be treated distinctly as a remedy. In the plaintiff's case, however, the breach of confidence may give rise to a number of remedies, only one of which is a constructive trust.

249 Moreover, there is no reason in this case to consider the other potential equitable remedies sought by the plaintiff to be substantive in nature. The defendants were not able to cite any authority other than Castel & Walker to support the proposition that the longstanding rule that the *lex fori* applies to remedies has been displaced by a rule based on the convenience or inconvenience of applying foreign law. Absent compelling authority, I am not persuaded to adopt a new test.

250 Finally, the defendants submit that Argentine law must govern the remedies because it is a principle of law that the court will not award a remedy that is alien to the legal system the laws of which govern liability in the action. In effect, this submission repeats and combines the defendants' arguments that the proper law of the obligation must govern both the claim and the remedy and the argument that the court will not make an order that would be ineffective in the foreign jurisdiction.

251 *Vien, Re* (1988), 64 O.R. (2d) 230, 49 D.L.R. (4th) 558 (Ont. C.A.) (*sub. nom. Leclerc v. St.-Louis*), is cited in support; however, that was a case in which the Ontario Court dismissed the claim because it found the proper law of a

marriage contract was the law of Quebec, and under that law at the time, there could be no unjust enrichment between spouses. While the court noted that the concept of a constructive trust did not exist in the civil law of Quebec, the decision turned on the absence of liability. Moreover, perhaps because it was released in 1988, this decision appears to fall into the error described by Madam Justice McLachlin in *Peter v. Beblow*, that is, it conflates the concepts of unjust enrichment and constructive trust. Consequently, the judgment cannot be understood to suggest that the lack of a constructive trust remedy in the law of Quebec would have prevented such a remedy from being awarded had liability been established.

252 The parties introduced contradictory evidence from the three experts on Argentine law as to whether the courts in Argentina would recognize and enforce an order of this court granting a constructive trust or otherwise requiring the defendants to transfer their interest in the Navidad claims and related assets to the plaintiffs. Not surprisingly, the plaintiff's expert gave his opinion that such orders would be accepted in Argentina, and the defendants' experts testified that the courts would refuse to recognize or enforce such orders because Argentine law does not include a concept similar to the remedial constructive trust or even recognize beneficial ownership of property except with respect to very limited fiduciary duties assigned to a trustee expressly in a will or contract. The defence experts also testified that remedies equivalent to disgorgement of gains without a corresponding loss are frowned on by the Argentine courts and may be awarded only in rare and strictly defined circumstances such as a case of insider trading.

253 This case does not require the court to resolve the contradiction in the expert testimony on this issue. Because I have found that the plaintiff advances only an *in personam* claim, any remedies that might be awarded would operate personally against the defendants within this jurisdiction. The parties would have no need to attempt to have the judgment recognized or enforced in Argentina. Any enforcement that might be necessary should the defendants fail to carry out their obligations under an order of this court can be dealt with in this court. Whether or not the Argentine court would enforce remedies determined to be appropriate under Canadian law is not an issue that needs to be determined in this case.

254 As explained earlier in these reasons with regard to the *in personam* exception to the general rule against interfering with foreign immovables, there is no evidence to suggest that a duly executed transfer of title to the claims in favour of the plaintiffs would be ineffective or illegal in Argentina. Consequently, the defendants' concern that this court ought not to grant an ineffective remedy does not arise.

255 After considering all of the submissions and evidence, I see no reason to avoid the accepted general rule that determining the nature of the available and appropriate remedies is a matter for the *lex fori*. In any event, even if the defendants are correct in their submission that the proper law of the obligation ought to govern both the claim and the remedy — of which I remain unconvinced — I have found that the proper law of the obligation in this case is, in fact, B.C. law.

Remedies under Argentine Law

256 In light of my determination that the law of British Columbia should apply to determine the nature of the appropriate remedy in this case, it is unnecessary to determine what remedies are available for breach of confidence under Argentine law. However, as once again considerable time was spent in evidence and argument on this issue, I provide the following discussion.

257 The plaintiff admits that the concept of constructive trust is severely limited in Argentina. All three experts agree that a trust can only arise when it is expressly created by a will or a contract. The courts in Argentina cannot order a constructive trust as a remedy for unjust enrichment or breach of confidence as we do here.

258 However, the plaintiff submits that Argentine law does include a restitutionary remedy that is the "juridical equivalent" of a constructive trust and would permit an Argentine court to order the transfer of title to the mineral claims and associated data. That remedy is *restitutio in natura* or "compensation in kind". It is found in s. 1083 of the Argentine *Civil Code*, which states in rough translation:

> **1083** The compensation of damages shall consist of returning goods to its previous situation, except where such solution is not feasible, in which case the compensation shall be monetary. The damaged party may also opt to be indemnified by means of monetary compensation.

259 All of the experts agreed that one of the goals of this section is to fulfill a general principle of Argentine law that a plaintiff must be "made whole" by providing full compensation for the damage suffered. There is no dispute that the section allows the courts to order defendants to perform some positive act or duty. Mr. Lucero testified for the plaintiff that because of this power, compensation in kind is considered by the Argentine courts to be the best form of compensation available. That statement was not expressly disputed by the defendants.

260 The experts also agree that compensation in kind under s. 1083 supports an order returning the parties to the situation as it existed before the wrongful conduct occurred. However, Mr. Lucero adds that the section allows the court to make an order returning the plaintiff to the position it *would have been* in prior to the wrongful conduct, citing as authority Fischer, Hans A. *Los Danos civiles y su reparacion*, trad. De W. Roces, Madrid, 1928, p. 141. He testified that the scope of the section must be interpreted in this way in order to achieve the goal of full compensation.

261 It was Mr. Lucero's opinion that the power granted under s. 1083 to achieve this goal includes the power to make almost any order that would reverse the wrong in question. He gave the following examples, among others, drawn from Argentine authorities cited in his report:

- If a defendant breaks a pane of glass, he may be ordered to replace it;
- If a defendant illegally printed a book, he may be ordered to destroy all copies;
- If the machinery of a manufacturer makes annoying noises, he should provide for a silencer; and
- If a defendant made libellous or slanderous comments, he may be ordered to publish corrections in the press.

262 He concluded from these examples that the duty to compensate "in kind" involves more than simply returning a specific good to its previous owner. Thus, in Mr. Lucero's opinion, if the court should find that Aquiline would have staked the Navidad Claims first had the defendants not wrongfully intervened, it would be open to the Argentine court under s. 1083 to order the transfer of the mineral claims to the plaintiff and the disgorgement of any profits earned in the period between the wrongful staking of the claim and its return to the plaintiff.

263 Mr. Lucero's broad interpretation of s. 1083 was contradicted by the defence experts, Mr. Naon and Mr. Bianchi, whose reports indicate that "compensation in kind" could only be awarded when the plaintiff can establish prior ownership of a specific good.

264 According Mr. Naon, the section is limited to an order of return to precisely the same situation that existed before the wrong occurred. Therefore, if the plaintiff did not own the asset before the wrong, it could not obtain ownership through an order for "compensation in kind". That section, Mr. Naon says, does not authorize the court to substitute a different kind of asset for the asset that was lost or damaged through the wrongful act. In Mr. Naon's opinion, this narrower interpretation of the compensation available under s. 1083 does not violate the principle of full compensation, because the section specifies that in the event that it is no longer possible to return the asset that was lost through wrongful conduct, monetary compensation will be payable.

265 Mr. Naon also testified that s. 1083 applies only to tangible assets or "things" capable of orders for specific performance. The section does not provide a remedy for the return of intangible assets such as information. Consequently, it was Mr. Naon's opinion that s. 1083 did not apply in this case because the subject matter of the wrongful conduct was the BLEG A data and, as mere information, that data could not be meaningfully returned to the plaintiff.

266 In general terms, Mr. Bianchi agreed with Mr. Naon's interpretation of s. 1083. However, Mr. Bianchi admitted under cross-examination that s. 1083 can put the plaintiff in the position it "would have been in" absent wrongful conduct. He was given a hypothetical illustration of the issue, involving a company that could prove that it would have purchased and developed a particular piece of property if an employee had not wrongfully gone out and purchased it first. Mr. Bianchi agreed that an Argentine court might award damages equal to the amount of lost profits to "put the company in the position it would have been in if it had bought the property and earned the profit." He was then asked whether he would agree that if, instead of damages, the court ordered the transfer of the property to the company as compensation in kind, such an order would have the same effect of putting the company in the position it would have been in had the wrongful conduct not occurred. Mr. Bianchi agreed that such an order was possible under s. 1083.

267 This evidence, obtained under cross-examination, is contrary to Mr. Bianchi's description of the scope of s. 1083 in his written report, where he explains that the courts could not use that section to order the transfer of assets to the plaintiff that it never owned before. However, I do not believe that Mr. Bianchi was confused by the question or the hypothetical illustration as suggested by the defendants. Immediately following his testimony outlined above, Mr. Bianchi explained that s. 1083 grants the Argentine court extremely broad jurisdiction as to the type of remedy it could order. He said:

> Sir, there is no — if I may add something in this respect. There is no legal limitation, no restriction for a court on the remedy the court may grant, provided that this remedy has been asked for by the plaintiff and provided that the general principles are respected. The public policy in this respect would be that no compensation should be granted above the extent of the damage, otherwise we would have an enrichment without cause for the plaintiff. With this proviso, a court would be free to award any remedy.

268 Under re-examination, Mr. Bianchi qualified this answer, explaining that the Argentine court would have to be 100 percent certain that the particular remedy was warranted and would not result in overcompensation to the plaintiff. Mr. Bianchi cited no authority in support of his opinion that the standard of proof was 100 percent certainty. His evidence on this point was disputed by Mr. Lucero, who testified that the court would apply the *sana critica* or "reasonable judgment" standard typical of all civil claims, which I understand to be analogous to the Canadian standard of the balance of probabilities.

269 In my view, the weight of the evidence in this case suggests that compensation in kind would be available to support an order requiring the defendants to transfer the Navidad Claims to the plaintiff.

270 Just prior to the breach of confidence, the defendant had the BLEG A data, but only the plaintiff had the right to use that data to stake new claims. The evidence of the internal discussions among Aquiline's principals regarding the area covered by the BLEG A data satisfies me that the plaintiff would have staked claims in the Navidad region no later than the end of May 2003 had that been possible. The plaintiff was only prevented from doing so because it discovered that the region was already staked by IMA. It is unlikely, in fact very unlikely, that without the BLEG A data, IMA would have stumbled upon the silver anomalies or the outcroppings observed by Mr. Bussandri. He found them because he was sent specifically to the place where the BLEG A significant anomalies taken from stream sampling points were located.

271 After rejecting Calcatreu as a possible next area of exploration, IMA intended to look in several other areas in Chubut, but none close enough to Navidad that it is likely it would have found the outcroppings independently. Interestingly, IMA's representatives were quoted in *The Northern Miner*, a widely read mining industry newspaper, as saying the following about their discovery of Navidad:

> Geologically, the Navidad discovery is hosted in an Upper Jurassic series of mixed calcareous sediments and intermediate volcanics mapped by government geologists as the Canadon Asfalto Formation. This formation has never been the focus of metallic mineral exploration. Says Lhotka: "You wouldn't go out looking for a Navidad, because there is nothing like it in the Patagonia".
>
> . . .

> There was no one hammer mark on anything. says Lhotka. You could walk past this from 50 metres away, but you could not walk on it and not find it. It's impossible. You can see copper oxide on the top of the hill, and the rocks are so heavy you can't pick them up.

272 This evidence only emphasizes the significance of the BLEG A data. Without it, one would probably not explore in the area for gold, which was the primary object of IMA. On the other hand, if one did explore in the area without the benefit of the BLEG A data and therefore without a reason to walk up the hill to look for the location of the mineralization strongly indicated by anomalies found in the drainage basin, one could easily miss it. Patterson agreed that the mineralization was hosted by Jurassic rocks described as the "Canadon Asfalto". His evidence was that this was a type of Jurassic rock that had not been the focus of IMA's exploration.

273 Accordingly, an order requiring the transfer of all of the Navidad Claims; that is, all those claims staked as a result of the use of the BLEG A data, to the plaintiff would return the situation to that which would very likely have existed had the defendants not misused the BLEG A data and would therefore be an order that could be made under s. 1083. Such an order would not violate any principle of Argentine law. It is, in essence, merely an equitable remedy designed to eliminate an unjust enrichment. Both Mr. Lucero and Mr. Bianchi testified that the concept of providing an equitable remedy to remove an *enriquecimiento sin causa*, an "enrichment without cause," is not foreign to Argentine law. While Mr. Bianchi testified that a claim for a remedy of this nature is subsidiary to any remedy available in tort, both he and Mr. Lucero agreed that such a remedy is available if the plaintiff can establish that the defendant was enriched at the expense of the plaintiff's impoverishment and that there is no justification or consideration for the enrichment.

Remedies under B.C. Law

(i) The availability of a constructive trust

274 The plaintiff seeks foremost the remedy of a constructive trust over the Navidad Claims coupled with a mandatory injunction ordering the defendants to transfer their existing rights to the Navidad Claims to the plaintiff.

275 The defendants say that a constructive trust is inappropriate in this case for several reasons.

276 First, the defendants say a constructive trust ought not to be awarded where such a remedy is alien to the jurisdiction where it is sought to be enforced. On the basis of the findings and analysis already set out in these reasons, this submission has no force. I have found that a similar equitable remedy is not unknown to Argentina, and in any event, there is no need for enforcement in Argentina because the remedy sought in this case is enforceable in B.C. This court has *in personam* jurisdiction over all parties to this litigation, as well as subject matter jurisdiction over all causes of action pleaded.

277 The distinction between *in personam* and *in rem* remedies in the area of conflict of laws is set out in Castel & Walker at §11.2:

> When an action seeks to affect the rights or interests of all persons in the world in a thing, the court exercises its power directly over the thing even though it might not have personal jurisdiction over the interested persons. The court's jurisdiction is said to be *in rem* and it is based on power over the thing....Where a plaintiff seeks a money judgment against a defendant, *or an order directing the defendant to do* or to refrain from doing *something*, the court exercises jurisdiction *in personam* and the action is *in personam*.

278 A remedial constructive trust is a "proprietary remedy" in that it results in ownership of a thing, but unlike other *in rem* orders, it acts upon a person, rather than on the thing itself. It is not the exercise of *in rem* jurisdiction because the court's jurisdiction is based on its equitable power over the person and not its power "directly over the thing." This distinction is evident in the authorities. The cases cited by the defendants clearly involve the exercise of *in rem* jurisdiction and therefore are not persuasive.

279 The defendants provide three additional reasons as to why a constructive trust is not appropriate under Canadian law on the facts of this case. None of these reasons are compelling on the facts as I have found them.

280 The defendants say first that such an equitable remedy is reserved for "vicious and deliberate" conduct. There is no support in the authorities for such a reservation. *Lac Minerals Ltd.*, relied upon in part by the defendants, does not stand for such a proposition. The comment in *Lac Minerals Ltd.* concerning the exceptional nature of the remedy was made in the context of La Forest J's view that damages would be adequate redress in most cases.

281 The plaintiff has urged the court to find that the conduct of the defendants was dishonest. There is no question that senior management of IMA — after Mr. Lhotka made what I find to be essentially an honest mistake in deciding he could open the BLEG A data — was far from honestly mistaken about the use that could be made of the data. Mr. Patterson should have known that Mr. Lhotka's query about the use of confidential information required a response. He made no response. Once the "discovery" was made using the BLEG A data, I find that IMA's corporate management engaged in providing misinformation regarding how the discovery was made. This misinformation, if not deliberate lies, was at least wilful blindness to the truth. Nevertheless, there is no basis for any finding that the conduct of IMA was vicious and no need to make such a finding before imposing a constructive trust.

282 Next, the defendants say that before a constructive trust should be employed as a remedy, there must be a link between the wrong, the information, and the acquisition of the property. I agree that such a link must be found. However, given my finding that the use of the BLEG A data led directly to the "discovery" of Navidad and that without its use, it is very unlikely in the circumstances that IMA would have found and staked Navidad within many months if not years, or at all, and that the use of BLEG A was a wrongful use, the link is clear and cogent. In my view, this case has stronger necessary links than either of the classic constructive trust cases, *Peter v. Beblow* and *Lac Minerals Ltd.*

283 Lastly, the defendants say that a constructive trust should only be awarded when damages are inadequate. Again, I agree. In this case, as I set out briefly below, damages are clearly inadequate. In these respects, this case bears a close resemblance to *Lac Minerals Ltd.*

(ii) Lost Opportunity

284 The defendants suggest that the only real loss the plaintiff suffered was the market value of the BLEG A data. If there is a further loss, the defendants say, it was the loss of the opportunity to stake the Navidad Claims themselves, and the valuation of that loss must be undertaken by assessing the probability that the plaintiff would have staked the same claims. That probability must be assessed, according to the defendants, from the perspective of what was known at the date the confidence was breached.

285 This proposition is incorrect. The purpose of compensatory damages, whether assessed in equity or at common law, is to put the plaintiff in the position it would have been in "but for" the defendants' breach. The "but for" test always requires the court to consider, on the balance of probabilities, what would have happened if the defendant had lived up to its legal obligations. The plaintiff's loss flowing from the breach is not determined by reference only to the facts known on the date of the breach; it is determined with the full benefit of hindsight. This very point was made by Binnie J. in *Cadbury Schweppes Inc.*, at para. 64, where he adopted the causation test in *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 35 C.R. 534, 85 D.L.R. (4th) 129 (S.C.C.), for breach of confidence purposes:

> **Measure of the "Lost Opportunity"**
>
> The applicable concept of restoration was set out in the reasons of McLachlin J. in *Canson Enterprises* as follows, at p. 556:
>
> > In summary, compensation is an equitable monetary remedy which is available when the equitable remedies of restitution and account are not appropriate. By analogy with restitution, it attempts to restore to the plaintiff

> what has been lost as a result of the breach; i.e., the plaintiff's lost opportunity. The plaintiff's actual loss as a consequence of the breach is to be assessed with the full benefit of hindsight. Foreseeability is not a concern in assessing compensation, but it is essential that the losses made good are only those which, on a common sense view of causation, were caused by the breach.

286 By reason of the defendants' breach, the plaintiff lost the opportunity of staking the Navidad Claims. The court, in determining whether, in fact, the plaintiff would have staked Navidad, must consider the evidence of subsequent events. For example, the court cannot treat the purchase of Calcatreu by Aquiline as a contingency, because hindsight demonstrates that it in fact occurred.

287 A review of the evidence detailing the process IMA went through when staking Navidad and all the related claims is instructive as to what Aquiline would likely have done had they been free, as they ought to have been, to stake the original Navidad Claim as the sole lawful users of the BLEG A data.

288 The decision to stake was made on November 29, 2002, after Patterson told Grosso about the anomalies. The staking was intended to cover the Jurassic rock areas in which the anomalies were located, and all of the anomalies are found within the area that was staked.

289 Bussandri went to the location of the anomalies in the BLEG A data and very quickly located the source of the anomalies by walking up the hill from where the anomalies were located. Patterson adopted this evidence from his examination for discovery:

> Q. All right. Now, Mr. Bussandri went and did some reconnaissance work in early December, as we know.
>
> . . .
>
> Q. 2002?
>
> A Correct.
>
> Q All right. And the first place he went was an area he described as El Alamo to find the source of the silver anomalies?
>
> A Correct.
>
> Q And you were advised that he found them very quickly?
>
> A He did.
>
> Q And that was brought to your attention in December 2002?
>
> A It was.
>
> Q By Mr. Lhotka?
>
> A Correct.
>
> Q All right. Were you also advised that he was looking in other areas in the same month in that northwest and southeast corridor from David Jorge's property?
>
> A Correct. During that same visit he visited a number of other areas.
>
> Q Right. Did you ever send him back to those areas after December of 2002?
>
> A No, we didn't.

Q Okay. Did he recommend that you go back to those areas?

A To be honest, I don't recall.

290 The process of discovering the Navidad project area was referred to in contemporaneous memoranda prepared by Lhotka on December 17, 2002, and December 26, 2002. On December 17, 2002, Lhotka advised Patterson as follows:

> This morning I spoke with Daniel Bussandri about the recce work in the Gastre area he started on December 10th. Obviously, all of this information is very preliminary, but it appears significant and therefore I wanted to bring it to your attention and the Technical Committee.
>
> Daniel first called me on Dec the 11th to report that he had located the source of the strong 8-km long Ag-Pb-Zn anomaly that we discovered in the data supplied by Normandy/Newmont on Calcatreu.

291 On December 26, 2002, Lhotka advised Patterson as follows:

> Daniel and I exchanged emails about one comment in his report about uncertainty of old BLEG sites. He felt that some were not good sites with very poorly developed drainage and he questioned whether they really sampled there or might there have been a coordinate error. I am not concerned for errors as we used the data to make the discovery so why should we doubt it now? Our sampling should shortly at least partly confirm the old data.
>
> . . .
>
> The huge strength and size of anomaly gives me a lot of faith. If it was potty and small would we have found it so fast when the exposure is not supposed to be great?

292 In December 26, 2002, the connection of the Navidad Project mineralization to the Canadon Asfalto Formation was noted by Lhotka. In an email to Patterson of December 26, 2002, he stated in part:

> Checked the continuation of Gan Gan geology to the NW onto the old (1976) Gastre 1:200,000 sheet. The host Canadon Asfalto Fm is not mapped as occurring along strike. There are volcanics of the Lonco Trapial Fm (Jurassic) however they are largely staked by Patagonia Gold.
>
> There is a bit of Asfalto mapped about 20 km both SE and NW of David Jorge's property, but they are small areas 1*2 km and 2*6 km approx and do not look that important.
>
> . . .
>
> If that formation is the key the only other obvious direction to go is south as indicated before. Haven't made more extensive searches.

293 On January 31, 2003, Patterson emailed Berretta concerning additional claims staked in relation to the Navidad project.

> The five new claims in north-central chubut have been selected to cover stratigraphy and documented reports of mineralization (old minas) similar to that which hosts the Navidad discovery. The purpose of this staking is to quickly tie up as much prospective ground as possible as it is likely that news of the Navidad discovery will spark considerable competitor interest in the region, focussed on the same stratigraphy as that which hosts Navidad ...

294 In connection with the staking of the other Inversiones claims after December 6, 2002, Patterson adopted this evidence from his examination for discovery:

> Question 83:

Q I'm showing you a copy of the management proxy circular, dated May 14th, 2004, with respect to the reorganization of IMA. You recall when that took place?

. . .

A I do.

Q And you understood that as a result of reorganization, the Navidad properties were going to be in the IMA corporate chain and that another company, Golden Arrow, was going to have all of IMA's other properties?

A I understood that, yes.

Q All right. And the sixth page — numbered page of this document shows the corporate chain after the arrangement, with IMA Exploration Inc. at the top of the chain and the Navidad area properties at the bottom of the chain on the left-hand column.

. . .

Q Do you see that?

A I see that.

Q All right. And on page 25 there's reference to the Navidad project.

. . .

A I do.

Q And reference to the title of the Navidad project and the date the first cateo was staked, December 6th, 2002?

A I see that.

Q And we'll come to that sequence — I'll go over it with you, Mr. Patterson, but you recall it was on December 6th, 2002, that the cateo which has the Navidad project was first staked by IMA?

A I do.

Q And you were directly involved with that circumstance?

A I was.

Q And so the history of the project is then discussed, and then there are some other properties that are 100 percent owned by IMA that are referred to on page 36 and then over to page 38.

A Yeah, I see those.

Q And they are described as Navidad area properties, other than the December 6th, 2002 cateo?

A Yes.

Q And you understood that these other properties were going to be included in the IMA chain along with the Navidad project?

A They would remain in IMA.

Question 104:

Q Right. So by virtue of having found Navidad and a particular set of host rocks, you could then look at other areas which had similar characteristics?

A Sure. We were staking ground looking for that same — that same rock formation.

Q Right. And then subsequent to that it looks like the plan would be to do preliminary prospecting by way of, for example, stream sediment sampling in those new cateos that were staked following the Navidad project discovery.

A That would be a very normal first phase of exploration, yes.

Q All right. In order to put together properties which — which together would be of interest to IMA with the Navidad project?

A Yes.

Question 140:

Q All right. And do you know when these properties, the Navidad area properties, were put together with the Navidad project and put in IMA as part of the reorganization?

A They were always in IMA.

Q All right.

A There was no putting them in. They just simply weren't taken out?

Q They weren't taken out and put together with the properties in western Chubut?

A Correct.

Q Because it was natural to keep them together?

A Sure. They're a grouping both geologically and by geological target, and it makes sense that they should go with Navidad.

Q Right. They all relate to one another.

A Correct.

Q And some of them are, I guess, relatively close in kilometres to the Navidad project?

A Some of them are contiguous with the Navidad project; others are outlying. They're all within maybe a hundred kilometres or so.

Question 169:

Q The claims that are referred to as the Navidad project and the Navidad area properties are held in the name of this Argentine subsidiary, Inversiones Mineras Argentinas SA?

A I believe so.

295 The arrangement was a reorganization of IMA. IMA retained the Navidad Project and the properties related to it, which were registered in the name of Inversiones or its nominee. Golden Arrow was incorporated by IMA to be the owner of all of the other IMA properties, such as the properties in Western Chubut and Peru. This arrangement was approved by Order of this Court in June 2004.

296 In sum, the Navidad project was staked on December 6, 2002, as a direct result of the use by IMA of the BLEG A data. The other properties, indirectly owned by IMA through the chain of subsidiaries leading to Inversiones, were staked because they had similar characteristics to the Navidad Project and IMA hoped to find a similar style of Navidad mineralization on those properties. There was no evidence from IMA's witnesses, not surprisingly, that any of the Navidad area properties would have been staked had IMA not staked the original Navidad Claim.

297 In the result, I find that all claims staked in the Navidad area connected to the Navidad Project would have been staked by Aquiline following a similar process had the plaintiff been first to stake the original Navidad Claim. Thus, the true measure of the plaintiff's lost opportunity is the value of all of the Navidad Area Claims.

(iii) Inadequacy of Damages

298 In *Lac Minerals Ltd.*, at para. 197, the Supreme Court of Canada held that a constructive trust remedy should be granted in circumstances where there is "...reason to grant to the plaintiff the additional rights that flow from recognition of a right of property."

299 The choice of remedy in *Lac Minerals Ltd.* was driven in large measure by difficulties inherent in the valuation of a mineral asset (albeit one in that case which was far more advanced than the Navidad Area Claims). La Forest J. summarized the point at para 192:

> The trial judge assessed damages in this case at $700,000,000 in the event that the order that Lac deliver up the property was not upheld on appeal. In doing so he had to assess the damages in the face of evidence that the Williams property would be valued by the market at up to 1.95 billion dollars. Before us there is a cross-appeal that damages be reassessed at $1.5 billion. The trial judge found that no one could predict future gold prices, exchange rates or inflation with any certainty, or even on the balance of probabilities. Likewise he noted that the property had not been fully explored and that further reserves may be found. The Court of Appeal made the following comment, at p. 59, with which I am in entire agreement:
>
> > ... there is no question but that gold properties of significance are unique and rare. There are almost insurmountable difficulties in assessing the value of such a property in the open market. The actual damage which has been sustained by Corona is virtually impossible to determine with any degree of accuracy. The profitability of the mine, and accordingly its value, will depend on the ore reserves of the mine, the future price of gold from time to time, which in turn depends on the rate of exchange between the U.S. dollar and Canadian dollar, inflationary trends, together with myriad other matters, all of which are virtually impossible to predict.
>
> To award only a monetary remedy in such circumstances when an alternative remedy is both available and appropriate would in my view be unfair and unjust.

300 The same difficulty was relied upon in *Visagie v. TVX Gold Inc.* (1998), 78 O.T.C. 1, 42 B.L.R. (2d) 53 (Ont. Gen. Div.); aff'd (2000), 49 O.R. (3d) 198, 187 D.L.R. (4th) 193 (Ont. C.A.), a case where Feldman J. awarded a constructive trust over the defendant's joint venture interest in a mine located in Greece obtained through the use of the plaintiff's confidential information. Feldman J. rejected damages as the appropriate remedy stating the following:

> A further issue is whether there is any other reason why it would be more appropriate in this case to make a compensatory award of damages reflecting the full value of the property, rather than a restitutionary award. In my

> view this is the type of case, like Lac, involving a gold mine where the value is a moving target and therefore the damage is 'virtually impossible to determine with any degree of certainty.'

301 Those words are equally applicable, if not more so, in this case where the Navidad Claims are only in the very early stages of development. Any amount of damages that this court might award would amount to speculation as to the value of the claims and would quite conceivably cause an injustice to one of the parties through over — or under-compensation.

302 Moreover, it is particularly important to remember that in this case, the remedy is awarded for a breach of contract. Notwithstanding that I have dealt with all alternative claims in these reasons, I have found that the BLEG A data was in fact covered by the Confidentiality Agreement and IMA's use of it was a breach of that Agreement. The Confidentiality Agreement contemplates the plaintiff's right to equitable remedies for breach of the agreement. Clause 9 provides:

> **Specific Enforcement Entitlement**. Reviewer acknowledges that Newmont may not have an adequate remedy at law in money damages if any of the covenants in this Agreement are not performed in accordance with their terms and Reviewer therefore agrees that Newmont is entitled to specific enforcement of the terms hereof (whether by injunction or other equitable remedy) in addition to any other remedy to which it may be entitled.

303 The plaintiff's right to a constructive trust remedy does not require that the parties have specifically contracted for that remedy. The Supreme Court of Canada has recognized the availability of a constructive trust for breach of a contractual term of confidentiality. In *Pre-Cam Exploration & Development Ltd. v. McTavish*, [1966] S.C.R. 551, 57 D.L.R. (2d) 557 (S.C.C.), the defendant was held to have breached an implied term of an employment agreement that he would not use confidential information obtained during the course of his employment for his own advantage. Following his resignation, the defendant used data obtained by him during exploration work to stake certain mining claims that the court held would have been staked by his employer in the ordinary course of events. Judsons J. stated:

> Without the information acquired during the course of his employment, McTavish would not have staked the adjoining claim. This was highly confidential information and the purpose for which it was being sought was obvious — the acquisition of other connected claims which would be of advantage to the existing claims. Neither Pre-Cam nor McTavish, its servant, could acquire these connected claims against the interest of Murtack. Contrary to the majority opinion in the Court of Appeal, **I think that it was a term of his employment, which McTavish, on the facts of this case, understood that he could not use this information for his own advantage.** The use of the term "fraud" by the learned Chief Justice at trial was fully warranted. The severance of his employment on December 27 was an empty formality which could not improve his position. I do not mean by this that a simple minded person with his own ideas of common honesty could do this sort of thing without having to answer. **The constructive trust is imposed in a case of this kind because of the mere use of confidential information for private advantage against the interest of the person who made the acquisition of the information possible.** [emphasis added]

304 In *Lac Minerals Ltd.*, La Forest J. made clear at para. 193 that it could not be said that the parties in *Pre-Cam Exploration* "stood in a 'special relationship' to one another, but a constructive trust was nevertheless awarded."

305 The plaintiff's loss for breach of contract must be compensated by ensuring it is put in the position it would have been in "but for" the breach. Its loss for breach of confidence may be assessed on a "but for" analysis, or on a restitutionary analysis. However, in circumstances where the plaintiff's loss is equal to the defendant's gain, nothing turns on the distinction. This is the same situation as in *Lac Minerals Ltd.* at para. 188 where La Forest J. stated that "...if [damages] could in fact be adequately assessed, compensation and restitution in this case would be equivalent measures...."

306 What ultimately underscored the court's analysis of the appropriate remedy in *Lac Minerals Ltd.* was the finding of fact in the court below that, but for Lac Mineral's breach of confidence, Corona would have acquired the mining rights. La Forest J. stated at paras. 183-184:

> The issue then is this. If it is established that one party, (here Lac), has been enriched by the acquisition of an asset, the Williams property, that would have, but for the actions of that party been acquired by the plaintiff, (here Corona),

> and if the acquisition of that asset amounts to a breach of duty to the plaintiff, here either a breach of fiduciary obligation or a breach of a duty of confidence, what remedy is available to the party deprived of the benefit? In my view the constructive trust is one available remedy, and in this case it is the only appropriate remedy.
>
> 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. When one talks of restitution, one normally talks of giving back to someone something that has been taken from them (a restitutionary proprietary award), or its equivalent value (a personal restitutionary award). As the Court of Appeal noted in this case, Corona never in fact owned the Williams property, and so it cannot be "given back" to them. However, there 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 [page 670] 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.

307 This court has found that IMA's intervention in staking a cateo around the area containing the BLEG anomalies prevented the plaintiff from staking that ground in the spring or summer of 2003 when the plaintiff was likely to have done so, consistent with its staking of ground around lesser anomalies found in the BLEG data. La Forest J.'s conclusion at para. 191 of that decision speaks to the appropriateness of a constructive trust in this case:

> ...The constructive trust does not lie at the heart of the law of restitution. It is but one remedy, and will only be imposed in appropriate circumstances. Where it could be more appropriate than in the present case, however, it is difficult to imagine.

(iv) Mandatory Injunction

308 Even if I were not satisfied that a constructive trust was the appropriate remedy in this case, I would find that a mandatory injunction requiring the defendants to transfer the Navidad Area Claims to the plaintiff would, standing alone, be appropriate as a remedy for the defendant's breach of confidence and breach of contract.

309 Although in *Lac Minerals Ltd.*, the court appears to equate the transfer of property with the imposition of a constructive trust, the two remedies may not always be mutually interdependent. As cited above, both La Forest J. and Sopinka J. recognized that, "[t]he court can exercise considerable flexibility in fashioning a remedy for breach of confidence."

310 A constructive trust is necessary where the facts of a case require the court to vest all or a portion of a particular piece of property in the plaintiff in order to recognize the plaintiff's pre-existing proprietary right arising from having significantly contributed to the value of that property. However, where the facts of the case do not require such recognition, a mandatory injunction may stand alone to remedy wrongdoing. As Professor Waters explains in *The Law of Trusts*. 3rd ed. (Toronto: Thomson Carswell, 2005) pp. 485-486:

> ... there has always been a general equitable jurisdiction to grant an injunction whenever it is appropriate. This can arise out of conduct which amounts to legal wrongdoing, but also less serious conduct. ... There is no reason to doubt that a court could grant such an injunction to reverse an unjust enrichment.

311 On the facts of this case, the plaintiff certainly contributed to the acquisition of the Navidad Claims by the defendants. Despite IMA's public announcements about the quality of the rock lying about the area, the BLEG A data was clearly "the springboard which led to the acquisition" because it put IMA "in a preferred position vis-à-vis others with respect to knowledge of the desirability of acquiring the property": *Lac Minerals Ltd.*, at paras. 61-62. However, I do not think it necessary for the plaintiffs to establish a pre-existing proprietary right to the Navidad Claims in order

to support an order for their transfer. The transfer is not required to recognize the plaintiff's contribution to the asset, but rather because it is the only equitable way to compensate the plaintiff for the legal wrong it suffered; namely, the defendants' breach of confidence.

312 The defendants argued that because the plaintiff did not previously own the mineral claims, and because it is not absolutely certain that but for the breach of confidence, the plaintiff would have staked the claims, a transfer of title by way of a mandatory injunction would result in overcompensation to the plaintiff.

313 As Binnie J. pointed out in *Cadbury Schweppes Inc.*, in some cases, such as *Lac Minerals Ltd.*, the key to the remedy will be "the course of events that would *likely* have occurred 'but for' the breach" [emphasis added]. In this case, the plaintiff is entitled to the whole of the claims it would have staked had the defendant not wrongfully intervened. Equity does not require that the parties share the Navidad Claims, so a constructive trust is not required to protect the plaintiff's interests while the title remains solely in the defendants' name. Therefore, the court may order a mandatory injunction, pursuant to the court's equitable jurisdiction, to require the defendants to transfer the claims to the plaintiff forthwith.

314 The situation is, in essence, very similar to that in *Lac Minerals Ltd.*, where the court found that Lac acted to Corona's detriment when it used the confidential information to acquire the Williams property that Corona would have otherwise acquired. Because of the circumstances in which confidential information was exchanged, the court found that Lac became "uniquely disabled" from pursuing property in the area for a period of time. The court determined that precluding Lac from acquiring the property was not an unacceptable result because Lac had had options open to it: it could have negotiated a relationship with Corona based on the disclosure of confidential information, or it could have pursued property in the area for itself on the basis of publicly available information. Lac could not have the best of both worlds.

315 The same options were available to IMA in the present case. IMA could have negotiated with the plaintiff (or its predecessor) to buy the BLEG A data outright or come to some other arrangement to enable it to use the data for its own purposes. Alternatively, IMA could have pursued property in the area covered by the data through publicly available information. What it could not do — especially after Mr. Lhotka raised the concern in his email of whether use of the data for the acquisition of claims was lawful — was ignore that concern, ignore the circumstances in which it received the data, and plunge ahead, using the data to stake the claims without prior authorization for such use.

316 IMA was not forced to review the BLEG A data. It was not part of the original disclosure package for the Calcatreu project. Mr. Lhotka was familiar with IMA's exploration plans for the area, and he was familiar with the Supreme Court's decision in *Lac Minerals Ltd.* Had Mr. Lhotka had any concern about disabling IMA from pursuing claims in the region, he could have chosen not to pursue the BLEG A data. Instead, he chose to request it and review it. Under those circumstances, it is not unjust to find that IMA was "uniquely disabled" from staking claims in the area covered by that data.

317 In such circumstances, "the policy objectives in both equity and tort would support the restoration of the plaintiff to the position it would have occupied 'but for' the breach": see *Cadbury Schweppes Inc.*, at para. 51. That requires an order that IMA execute a transfer of the claims in favour of plaintiff.

318 However, the plaintiff would be unjustly overcompensated if it was not required to reimburse the defendants for the development that they have funded on the site since the claims were staked. Accordingly, an order is also required that the defendants will submit an accounting of the development expenses for reimbursement by the plaintiff. Any dispute arising from those expenses will be reviewable by this court.

Assessing Damages

319 The parties have asked that this court assess damages. I am reluctant to do so for the reasons explained above relating to the inadequacy of damages in a case such as this and the extreme difficulty of arriving at an assessment that could be described in any way as fair.

320 Assessing damages in a case of breach of confidence as in any other tort engages the principle that the object of damages is to compensate for loss or injury.

321 The damages in this case must be assessed based on my finding that but for IMA having staked the Navidad Project in December and further related staking in the ensuing few months, Aquiline would have likely staked it at the latest in May 2003 and would have followed a similar process to stake the related claims. The actual staking by IMA in December of 2002 was solely because of the use of Newmont's confidential BLEG A data. Almost no other public information was used and certainly none that would have led Daniel Bussandri to "discover" Navidad. Without that initial "discovery," IMA would not likely have staked the related Navidad Claims.

322 There is no compelling evidence to support a finding that what the plaintiff lost by the misuse of its confidential information was the chance to stake only the first Navidad Claim — that is to make the "discovery" that IMA did.

323 Thus, the plaintiff's loss is the value all of the related claims less the cost of exploration and development of those claims to date. That cost would have to have been incurred by the plaintiff if it had staked the claims first.

324 Coming to a reasonable and fair assessment of the value of those claims is difficult indeed. The only evidence of the value of the claims at this point, when they are still in a relatively early stage of exploration, is that of the plaintiff's expert, Ms. Hodos. Her expertise in providing an opinion of value in such circumstances as these was not contested. In fact, the defence called no evidence to contradict her opinion. Her valuation of the Navidad Project, which she qualified as being nearly an educated crystal ball gaze is, give or take, US$85 million.

325 Ms. Hodos testified about the challenges presented to an appraiser faced with evaluating Navidad at this stage of its development. She said that there was a fog of data that was difficult to penetrate.

326 Ms. Hodos stated that the limits of the deposit are not yet defined, thus there is not yet a full understanding of the nature of the deposit, and in her opinion it would take at least a year to resolve this uncertainty.

327 Although the property will definitely emerge from a category 2 deposit, as she defined it, one does not know in what form. There is no mining plan as yet. What portions of the mine will be lead and what parts will be silver is not yet known. She described the level of metallurgical analysis as primitive. A great deal of work is yet to be done. Although there are some preliminary ideas, the analysis is by no means exhaustive and not terribly reliable. This makes it very uncertain and difficult to settle on a value for the property. Moreover, the political risk of operating in Argentina is a difficult one to evaluate.

328 Ms. Hodos applied a 24% discount rate to her assessment of the income approach to valuation. She described this rate as high, with rates of 5-15% being more currently fashionable in the evaluation of mineral properties. Clearly, the use of such a high discount rate, reflecting the uncertainty flowing from metallurgy, resource size, and the underground mining ban, impacts the assessment of value.

329 The impact of uncertainty about the size of the resource and the impact of the Chubut ban on underground mining is exemplified by the estimate of value prepared for IMA by Mr. Chapman. Mr. Chapman valued the project between US$472 million and US$612 million. He applied a 5% discount rate, and assumed an open-pit mine, allowing a low stripping ratio, a high recovery rate, and a silver price of $6 per ounce. Ms. Hodos said this of his assumptions:

> Q ...Can you comment on the likelihood or not that his valuation, that is, the Chapman valuation, would ultimately be accurate or no?
>
> A. I can't predict with any accuracy. My personal opinion is that Chapman, I think, is pretty optimistic. **It's possible his forecasts could be achieved**, but I think he's pretty optimistic. [emphasis added]

330 The impact of Ms. Hodos' discount rate, reflecting uncertainty with a stage 2 project, is also reflected in her sensitivity analyses. She includes two "cases" where she varies her assumptions, and then applies different discount rates to demonstrate the impact on value. On Case I, she assumes the current resource estimate of Snowden and a $5.50 per ounce silver price. At a 24% rate, the value is US$71,177,703. At 15%, the value is US$124 million. In Case II, she references Pierre Lassonde's theory that 50% of all mines eventually double their reserves, and assumes a 50% chance that Navidad falls into this elite class, thereby increasing Navidad's tonnage by 50%. She applies the 2004 average silver price ($6.67 per ounce) and arrives at a net present value of US$191 million (at a 24% discount rate). When she lowers the discount rate to 15%, the value increases to US$285 million. On this latter scenario, Ms. Hodos deposed that "buyer resistance" would limit the upper price to US$200 million.

331 With respect to the comparable approach, Ms. Hodos commented on the importance of San Cristobal as the only project of comparable size to Navidad. For the purposes of comparison, San Cristobal's adjusted value is US$183 million. Ms. Hodos deposed that if it were not for "Navidad's issues"; that is, the challenging metallurgy, the underground mining ban, and the early stage of development, San Cristobal would be a very good comparable.

332 Ms. Hodos described this project as very large and stated that the market could be "thirsty" for it if it were available. It is potentially "world class," the significance of which has an impact on more than value. She deposed:

> Well, that phrase is commonly applied to very large and spectacular occurrences of metal, of first minerals. "World class" means that no matter where you find it in the world, it's worth developing, and that **there's tremendous amount of prestige, I guess, too, attributable to the company that owns one of these things.** Examples of world-class deposits, Yanacocha in Peru, a gold quarry mine. The Macassa mine in the Abitibi for 50 years I think turned out — oh, I can't remember the number of million ounces of gold, **but the Northern Miner, interestingly, published this historic newspaper for their 100th anniversary or whatever it was in which they highlighted the news items of the day going back to the beginning of their publication, and they had fabulous deposits that they put in that listing, including the nickel deposits in Sudbury and so forth, and one of the last entries is Navidad**. So the Northern Miner essentially placed it in that elite category. Now, that's not to say — we don't even know if Navidad is economic at this point in time, but it is big and you can afford to spend a lot of money evaluating it. [emphasis added]

333 The difficulties that Ms. Hodos had in attempting to evaluate Navidad are underscored by the affidavit of David Terry, a Vice President of Exploration for IMA. In para. 8 of his affidavit, he stated that it is inherent in the nature of a property such as Navidad that significant additional information will become known as work on the project continues. He described significant developments that occurred subsequent to the date of Ms. Hodos' valuation, including a new resource estimate that was published by IMA. Furthermore, he deposed as follows:

> In my professional opinion, publication of the Hodos Report, notwithstanding its very appropriate cautionary language, has a very real risk of being misleading respecting the issues concerning the Navidad resource. I emphasis [*sic*] that this continual inflow of new data and the eventual outcome of a detailed pre-feasibility analysis may substantially enhance or reduce the value of the asset depending on whether the positive or negative contingencies, either identified in the Hodos Report or otherwise, are realized in the subsequent data.

334 Ms. Hodos' opinion gave the market value of Navidad as conservatively US$85 million. However, in cross-examination, Grosso testified as follows, highlighting the frailty of any such opinion:

> Q Yes, All right. Now, just a question about the value of Navidad. This resource is in the very early stages of being identified, that is, fully identified; is that correct?
>
> A Rephrase that again, sir.
>
> Q I'll try it again. You haven't fully explored by various means the full extent of the resource there, have you?

A No, not by all means.

Q No. But based on the technical work that's been done by the IMA staff, you understand this resource is going to be — you believe it's going to be significantly increased, do you not?

A We hope so.

Q Yes. And if IMA had received a cash offer of $100 million US for this property, you'd turn it down flat, wouldn't you?

A That decision is not made by me, but I believe that that would be correct.

Q Yes. That is, you would recommend to your board to say forget it; correct?

A Most likely.

335 Thus, a reasonable inference is that IMA's position is that US$85 million undervalues the asset. However, there is as yet no firm basis to go to the top of the range of values suggested by Ms. Hodos.

336 For the reasons set out above in the discussion as to why a constructive trust is a more appropriate remedy than damages in this case, the value of US$85 million is the best that can be done. In the circumstances, I would, if awarding damages as the most appropriate remedy in this case, accede to the plaintiff's request that the amount of US$85 million is subject to an update of the valuation of Ms. Hodos.

337 In this case, clearly, damages are not a reasonable alternative remedy.

Conclusion

338 For the reasons set out above this court makes the following declarations and orders:

1) A declaration that Inversiones holds the Navidad Claims pursuant to a constructive trust in favour of Minera Aquiline.

2) This court grants a mandatory injunction requiring:

a) that Inversiones transfer the Navidad Claims and any assets related thereto to Minera Aquiline or its nominee within 60 days of this order;

b) that IMA take any and all steps required to cause Inversiones to comply with the terms of this order;

c) that the transfer of the Navidad Claims and any assets related thereto is subject to the payment to Inversiones of all reasonable amounts expended by Inversiones for the acquisition and development of the Navidad Claims to date.

d) Any accounting necessary to determine the reasonableness of the expenditures referred to in (c) above shall be by reference to the Registrar of this court.

3) The parties may speak to an order for costs.

339 Judgment for the plaintiff.

Action allowed.

End of Document

TAB 3

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *North American Tungsten Corporation v. Global Tungsten and Powders Corp.*, 2015 BCCA 426

Date: 20150930

Docket: CA42990 and CA42991

Between:

North American Tungsten Corporation Ltd.

Respondent
(Petitioner)

And

Global Tungsten and Powders Corp.

Appellant

And

Alvarez & Marsal Canada Inc., Callidus Capital Corporation, Wolfram Bergbau und Hütten AG, and Government of the Northwest Territories

Respondent

Before: The Honourable Madam Justice Neilson
The Honourable Mr. Justice Groberman
The Honourable Madam Justice Fenlon

Application to vary: An order of the Court of Appeal for British Columbia, dated August 12, 2015 (*North American Tungsten Corporation Ltd. v. Global Tungsten and Powders Corp.*, Docket nos. CA42990 and CA42991)

Oral Reasons for Judgment

Counsel for the Appellant:	R.D.W. Dalziel K.E. Siddall
Counsel for North American Tungsten:	J.R. Sandrelli J.D. Schultz
Counsel for Alvarez & Marsal Canada Inc.:	V.L. Tickle
Counsel for Callidus Capital Corporation:	W.E.J. Skelly

Counsel for Wolfram Bergbau und Hütten:	A.L. Crimeni
Counsel for the Northwest Territories:	M. Buttery
Place and Date of Hearing:	Vancouver, British Columbia September 23, 2015
Place and Date of Judgment:	Vancouver, British Columbia September 30, 2015

Summary:

The Supreme Court judge administering CCAA proceedings granted an order staying the applicant's right to set off amounts owing to it against debts for current deliveries of product by the company under CCAA protection. The applicant applied for leave to appeal, contending that s. 21 of the CCAA prohibits a court from staying a right to set-off. The chambers judge denied leave, and the applicant applied to have the order reviewed. Held: Application refused. The chambers judge erred in suggesting that higher standards are to be applied to leave applications in CCAA matters than in other proceedings. The remainder of the judge's analysis, however, did not exhibit any error. The proposed appeal is not meritorious, and the interests of justice militate against granting leave. Applying the correct standard for granting leave to the judge's analysis of the issues, the denial of leave should stand.

[1] **GROBERMAN J.A.**: This is an application to vary an order of a judge in chambers denying leave to appeal in *Companies' Creditors Arrangement Act* ("*CCAA*"), R.S.C. 1985, c. C-36, proceedings. The issue that the appellant proposes to argue on appeal is whether a judge acting under the *CCAA* has jurisdiction to stay rights of set-off for a specified period of time.

Background to the Proposed Appeal

[2] The essential factual background is straightforward. Global Tungsten & Powders Corp. ("GTP") has a contract with North American Tungsten Corporation Ltd. ("NATC") under which NATC supplies tungsten to it on an ongoing basis.

[3] In addition to the tungsten supply contract, GTP and NATC entered into a loan agreement whereby GTP lent money to NATC. Approximately $4.4 million is owing on the loan. The Supreme Court Chambers judge found that, as a result of a past default, the entirety of the loan debt is now due to GTP.

[4] On June 9, 2015, *CCAA* proceedings were commenced in respect of NATC. On July 9, 2015 an Amended and Restated Initial Order (commonly referred to as an "ARIO") was made in the *CCAA* proceedings.

[5] Up until July 22, 2015, GTP paid NATC for tungsten concentrate deliveries in the ordinary manner. On July 22, however, GTP gave NATC notice that it would be setting off NATC's loan debt against the amounts owing for tungsten concentrate.

[6] On July 27, 2015, the parties appeared before the judge administering the *CCAA* restructuring. He made a declaration that GTP was not entitled, under the provisions of the ARIO, to rely on a setoff to refuse to make payment for the tungsten concentrate deliveries.

[7] On July 30, 2015, after hearing more complete argument, the judge declared that GTP has a valid right of setoff, but stayed the exercise of that right.

[8] By mid-August, 2015, the amount of the setoff was in excess of US$1.2 million.

[9] The legal issue that GTP wishes to argue on appeal concerns the jurisdiction of a judge to stay rights of setoff. The relevant legislative provisions are ss. 11 and 21 of the *CCAA*:

> 11. Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances. [Emphasis added.]
>
> 21. The law of set-off or compensation applies to all claims made against a debtor company and to all actions instituted by it for the recovery of debts due to the company in the same manner and to the same extent as if the company were plaintiff or defendant, as the case may be.

[10] GTP wishes to argue that s. 21 is a "restriction set out in" the *CCAA*, and that a judge does not have discretion, under s. 11, to affect rights of setoff.

The Judgment Denying Leave to Appeal

[11] The chambers judge began his analysis by setting out a framework determining whether to grant leave:

> [9] The test for whether leave to appeal should be granted focuses primarily on the following considerations:
>
> 1. Whether the appeal is prima facie meritorious or whether it is frivolous;
> 2. Whether the point on appeal is of significance to the practice;
> 3. Whether the point raised is of significance to the parties;

4. Whether the appeal will unduly hinder the progress of the action: *Edgewater Casino Inc. (Re)*, 2009 BCCA 40 at para. 17;
5. An overriding consideration is whether [it] is in the interests of justice to grant leave: *Wallman v. Gill*, 2013 BCCA 110 at para. 12;
6. The discretion to grant leave to appeal in *CCAA* cases is to be exercised sparingly: *Edgewater*, at paras. 13, 18;
7. The *CCAA* judge is seized of proceedings below and is well-positioned to balance the interests of the competing stakeholders, and, accordingly, the decision below is entitled to deference. *New Skeena Forest Products Inc., Re*, 2005 BCCA 192 at para. 20.

[12] With respect to the merits of the case, the judge analysed ss. 11 and 21 of the *CCAA*. He observed that s. 21 does not explicitly refer to stays, nor does it identify itself as a restriction on the ambit of s. 11. He also considered the context of s. 21, noting that it is contained in a part of the statute dealing with claims, and not in a part dealing with jurisdiction.

[13] The judge then contrasted s. 21 with other provisions of the *CCAA*:

> [16] That s. 21 does not restrict the jurisdiction of the court is made clear when it is contrasted with other provisions of the *CCAA* which specifically prevent the court from staying certain rights and proceedings (see ss. 11.04, 11.06, 11.08, and 11.1). Set-off is clearly a remedy which is specifically stayed by the ARIO, but also generally stayed in insolvency proceedings: see e.g. *Quintette Coal* (1990), 51 B.C.L.R. (2d) 105 at 111-14, 2 C.B.R. (3d) 303. Clearly, if an attempt at compromise or arrangement is to have any prospect of success, there must be a means of holding creditors at bay.

[14] He concluded that s. 21 did not represent a restriction on the discretionary powers granted by s. 11 of the *CCAA*:

> [17] ... [G]iven the very broad interpretation given to s. 11, were Parliament intending to specifically limit the right to stay a set-off, it would have done so explicitly, as it did with restrictions contained elsewhere in the *CCAA*.

[15] Turning to other considerations on a leave application, the judge acknowledged that the issue that the appellant seeks to raise on appeal is of significance both to the practice and to the parties:

> [18] ... Any interpretation issue, however weak, of the statutory provisions governing *CCAA* proceedings would be of significance to the practice. Of course, it is of significance to the parties here because if leave is granted and

> a stay ordered, the *CCAA* proceeding will likely fail. It would also have the consequential effect of vaulting the priority of GTP's debts ahead of the general security of Callidus.

[16] In this comment, the judge refers to the possibility of the *CCAA* proceedings failing if leave was granted and a stay ordered. Later, he addresses concerns, that, even without a stay, the granting of leave might scuttle attempts at reorganization under the *CCAA*:

> [25] Clearly Callidus will need to continue extending credit if NATC is to continue operating. ... Upon an adverse Court decision, GTP could immediately set off its debt against amounts owing. It would therefore disproportionately benefit GTP while others forbear from exercising their rights. The possibility of this occurring also explains NATC's position that it will stop selling to GTP if leave to appeal is granted.

[17] While the appellant reads this paragraph as suggesting that the chambers judge was reluctant to grant leave because he considered success on the appeal for the appellant would be undesirable, I do not read it in that way. Rather, it seems to me that the chambers judge is simply underlining the point that the uncertainty generated by an appeal might destabilize the situation in a way that could threaten the restructuring – a conclusion supported by the evidence that was before him.

[18] The judge also addressed the overriding issue of the interests of justice. In that regard, he expressed concern that GTP's conduct, particularly in the timing of its claim to setoff, was unfair to the other participants in the *CCAA* proceedings:

> [19] ... Had GTP raised its claim of set-off at the outset, it would have had nothing to set off against. NATC would not have shipped any product to GTP in the face of that claim, as GTP would not pay for it. By leaving the issue to this late stage, GTP built up its post-filing debt, at the expense of the other stakeholders, against the NATC pre-filing debt.
>
> [20] ... [T]he GTP funds are critical to NATC's ability to continue operations and meet its obligations. The likely result of an order granting leave to appeal and a stay is that NATC will cease operations and fall into bankruptcy. The fundamental purpose of the underlying proceeding is to enable NATC to reorganize and restructure its affairs to allow it to continue operations pending sale. A shut-down and liquidation would terminate the *CCAA* proceedings. The reorganization and restructuring would be at an end.
>
> [21] Where granting leave would be fatal to the company's ability to restructure and would necessitate a shut-down of operations, leave has been denied: see *Canada v. Temple City Housing Inc.*, 2008 ABCA 1 at para. 15.

> As noted by the Court in *Edgewater Casino*, these events are unfolding in real time. In my view, a consideration of the objects of the *CCAA* demonstrates that the position advanced by GTP must fail.
>
> [22] By not raising set-off until a post-filing debt had accrued and a plan was in place, GTP is attempting to do precisely what the *CCAA* is designed to prevent. As Farley J. describes in *Lehndorff General Partner Ltd. (Re)* (1993), 17 C.B.R. (3d) 24 at 31 (Ont. Ct. J.):
>
> > ... the intention of the *CCAA* is to prevent any manoeuvres for positioning among the creditors during the period required to develop a plan and obtain approval of creditors. Such manoeuvres could give an aggressive creditor an advantage to the prejudice of others who are less aggressive and would undermine the company's financial position making it even less likely that the plan will succeed.

Issues on the Review Application

[19] It is well established that a review application is not a re-argument or re-assessment of the issues decided by the chambers judge. Rather, the issues on a review application are whether the chambers judge was wrong in law or principle, or misconceived the facts: *Halderson v. Coquitlam (City)*, 2000 BCCA 672. Only if the court identifies such errors can it proceed to consider whether a variation of the order is appropriate.

[20] The appellant has argued that the chambers judge erred in law in several respects. I do not intend to review all of the appellant's contentions. In my view, the arguments that need to be addressed in these reasons can be distilled into four issues:

1. Did the chambers judge apply too stringent a test for leave to appeal?
2. Did the chambers judge err in finding the appellant's interpretation of ss. 11 and 21 of the *CCAA* is not meritorious?
3. Did the chambers judge err in considering the probable failure of the *CCAA* restructuring as a factor militating against the granting of leave?
4. Did the chambers judge err in considering the appellant's conduct as a factor in denying leave?

The Test for Leave to Appeal in a *CCAA* Matter

[21] In the course of his reasons for judgment, the chambers judge made certain comments that the appellant says show that he considered that a more stringent test

applies to leave applications under the *CCAA* than to other applications for leave to appeal. In particular, the appellant points to the following statements of the trial judge:

> [10] I turn now to consider the merits of the proposed appeal. GTP argues the threshold is low and all that is required is that the points raised are "not frivolous". ... While GTP is correct that the threshold is generally low on applications for leave to appeal, the merits requirement is applied strictly on applications made under the *CCAA*....
>
> ...
>
> [26] ... [L]eave to appeal orders made under the *CCAA* is to be granted sparingly, at least where the court would interfere with an ongoing restructuring. ...
>
> ...
>
> [28] ... I cannot find that that this is one of the rare circumstances where it is in the interests of justice to grant leave to appeal an order of a *CCAA* judge.

[22] The factors that this court generally applies on applications for leave to appeal were succinctly set out by McLachlin J.A. (as she then was) in *Power Consolidated (China) Pulp Inc. v. B.C. Resources Investment Corp.* (1988), 19 C.P.C. (3d) 396 (B.C.C.A. in Chambers):

> a) whether the point on appeal is of significance to the parties;
> b) whether the point raised is of significance to the action itself;
> c) whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and
> d) whether the appeal will unduly hinder the progress of the action.

[23] These considerations have been repeated in dozens of decisions of this Court. In addition to these four considerations, the court must take into account, as an overriding factor, the interests of justice.

[24] The issue of whether different criteria apply, and the issue whether the criteria are applied differently, in *CCAA* cases was thoroughly canvassed by a division of this Court in *Edgewater Casino Inc. (Re)*. Tysoe J.A., speaking for the Court, said:

> [16] The requirement for leave to appeal from an order made in *CCAA* proceedings is found in the *CCAA* itself (section 13), as opposed to the provincial or territorial statutes governing the appellate courts in Canada. This

> suggests that Parliament recognized that appeals as of right from orders made in *CCAA* proceedings could have an adverse effect on the efforts of debtor companies to reorganize their financial affairs pursuant to the Act and that appeals in *CCAA* proceedings should be limited: see *Algoma Steel Inc., Re* (2001), 147 O.A.C. 291, 25 C.B.R. (4th) 194 (Ont. C.A.) at para. 8.
>
> [17] However, it does not follow from the fact that the statute itself is the source of the requirement for leave that the test or standard applicable to applications for leave to appeal orders made in *CCAA* proceedings is different from the test or standard for other leave applications. It is my view that the same test applicable to all other leave applications should be utilized when considering an application for leave to appeal from a *CCAA* order. ....

[25] Tysoe J.A. noted that leave is granted sparingly in *CCAA* cases, but emphasized that this is due to the nature of *CCAA* proceedings, and not due to the application of different standards to those cases. In particular, he said that the highly discretionary nature of *CCAA* orders will typically limit the availability of meritorious appeals, and that the time-sensitive nature of *CCAA* restructuring can make delay of proceedings a particularly important consideration on a leave application.

[26] Counsel for the respondents cite passages from *Doman Industries Ltd., Re*, 2004 BCCA 253 (Chambers) and *Quinsam Coal Corp., Re*, 2000 BCCA 386 (Chambers) (the latter of which was also cited by the chambers judge) to suggest that the standards applied to a leave application in a *CCAA* matter are higher than the standards applied in other types of cases. *Doman* and *Quinsam* were chambers decisions. The precedential value of a chambers decision of this court is very limited. Further, the passages cited have been overtaken by the judgment of the Court in *Edgewater*, which does have precedential effect. To the extent that *Doman* and *Quinsam* suggest different standards for the granting of leave in *CCAA* proceedings, they are no longer good law.

[27] Some of the language used by the chambers judge in the case before us indicates that he was of the view that a particularly stringent standard applies to leave applications in *CCAA* matters. The law does not support such a view. I agree with the appellant that, to the extent that the judge's adoption of an incorrect standard affected his decision, the order that he made is the product of an error in

principle. I will return to the question of whether the standard he selected affected the result after considering the other issues raised on this review application.

The Merits of the Appeal

[28] The judge's main reason for denying leave was that he found that the appeal was not meritorious. After analyzing ss. 11 and 21 of the *CCAA*, the judge concluded that s. 21 was not a restriction on the trial court's discretionary powers in s. 11 of the *Act*.

[29] The issue, at the leave stage, is, of course, not whether the appellant's interpretation of the statute is the correct one, but rather whether it is sufficiently cogent to found a meritorious (or "arguable") case. I am not persuaded that the chambers judge made any error in finding that the appeal lacks merit.

[30] As the judge noted, s. 11 of the *CCAA* is in Part II of the statute, which deals with the jurisdiction of the court. It has consistently been interpreted as giving the court extremely broad discretion (see, for example, the comments of the Supreme Court of Canada at para. 68 of *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60).

[31] Section 21, by contrast, is in Part III of the statute, under the heading "claims", which is comprised of ss. 19 to 21. Those provisions set out the types of claims that can be dealt with by compromise or agreement, and the quantification of those claims. In that statutory context, there is nothing to suggest that s. 21 is intended to preclude the staying of rights of setoff.

[32] Mr. Dalziel points out that, when it was originally enacted, the predecessor to s. 21 (s. 18.1, enacted by S.C. 1997, c. 12, s. 125) was placed in Part II of the statute, under the heading "Jurisdiction". The organization of the *Act* at that time, however, was much different than the organization that exists today. All of the sections dealing with the quantification of claims were also contained in that part of the statute. It is difficult to draw any inferences from the provision's original place in the statute.

[33] Moreover, in 2005, the original provision was replaced by the current provision with the enactment of S.C. 2005, c. 47, s. 131. The various sections dealing with quantification of claims were moved from the "Jurisdiction" section of the statute into the "General" section, and grouped together under the heading "Claims", where they continue to be. Given the legislative history, I am of the view that the chambers judge's analysis of the statutory context is irrefutable.

[34] As the judge also recognized, where other provisions of the statute are intended to restrict the powers under ss. 11 and 11.02 of the statute, they do so in unequivocal terms.

[35] Reading s. 21 in context, it is clear that the section does not preclude the making of an order such as the one made by the Supreme Court judge in this case.

[36] The appellant has not cited any cases that would suggest a contrary interpretation of the legislation. *Quintette Coal*, cited by the chambers judge, supports the idea that claims of setoff may be stayed in *CCAA* proceedings, though it is important to recognize that the case, decided in 1990, predates the enactment of s. 21 of the *Act* and its predecessors.

[37] The appellant suggests that *Cam-net Communications v. Vancouver Telephone Co.*, 1999 BCCA 751 supports its view that setoff cannot be stayed under the statute. It does not appear to me that the case goes nearly that far. Rather, the case emphasizes that stays should not be granted where they unfairly prejudice a creditor. I note, in particular, the following paragraphs of the judgment:

> [21] In *Lindsay v. Transtec Canada Ltd.* (1994), 28 C.B.R. (3d) 110 (B.C.S.C.), Huddart J. (as she then was) explained the importance to the continuing vitality of the *CCAA* regime of ensuring that creditors not be permitted to avoid the *CCAA* compromise in an effort to realize the full value of their claim. She emphasized, at pp. 127 and 129, the particular need to ensure that those who purchase companies emerging from reorganization can do so with the confidence that all claims have been compromised:
>
> > [M]odern *CCAA* re-organization plans contemplate the acquisition by third parties of the re-organized debtor company, frequently to the benefit of general creditors, employees, and the general community. I accept that courts should recognize this development. Tax losses are

> purchased. Liabilities are assumed. There is a need for certainty that all claims have been compromised.
>
> This is an important factor in this case because it is absolutely clear that no general creditor would have received anything on a bankruptcy or liquidation by a receiver. 8808's offer, founded on the proposition that all creditors were included in the Plan, came just in time to avert such a result. An extension of the stay of proceedings had been granted only to protect those claiming in tort. All parties were aware that another extension of the stay was unlikely. In a sense 8808's offer gave value to Mr. Lindsay's contingent claim it would not otherwise have had, even as it gave value to the claims of other unsecured creditors.
>
> ...
>
> Those who participate in *CCAA* proceedings must be assured that there are not others waiting outside them for a mistake to be made of which they can take advantage. Those who purchase the reorganized companies must be assured of whatever certainty a court can ensure in its supervision of these voluntary proceedings.
>
> [Emphasis added.]

[22] Using, or rather misusing, the law of set-off is one example of how persons with a claim against the company in reorganization might attempt to escape the *CCAA* compromise. A party claiming set-off, as Cam-Net notes in its factum, realizes its claim on a dollar-for-dollar basis while other creditors, who participated in the *CCAA* proceedings, have their claims reduced substantially. For this reason, the legislative intent animating the *CCAA* reorganization regime requires that courts remain vigilant to claims of set-off in the reorganization context. In that regard, see *Re/Max Metro-City Realty Ltd. v. Baker (Trustee of)* (1993), 16 C.B.R. (3d) 308 (Ont. Bktcy.) at 313, where set-off was refused when allowing equitable set-off would have the effect of defeating the intention of the bankruptcy legislation and, in particular, giving the claimant a preference over other creditors.

[38] In *Cam-net*, this Court found that Vancouver Telephone Company Limited had a legitimate claim of set-off, and that it would have been unfairly prejudicial to it to stay its claim. The set-off in that case was intimately connected to the debt, and there was no suggestion of manipulation by Vancouver Telephone Company with a view to "avoid the *CCAA* compromise in an effort to realize the full value". The case, in my view, stands for two propositions of law. First, a set-off, to be considered in *CCAA* proceedings, must meet the common law requirements of a true set-off. Second, where such a set-off exists, and the circumstances show that there has been no attempt to circumvent the *CCAA* compromise, it would be unfair for the courts to penalize the affected creditor by staying the set-off. I do not read *Cam-net*

as suggesting that s. 11 of the *CCAA* does not extend to the staying of rights of set-off.

[39] I note that, in the case before us, in contrast to *Cam-net*, there is no suggestion that the stay of the set-off constitutes an improper exercise of discretion on the basis that it unfairly penalizes the creditor. Rather, GTP's argument amounts to an assertion that it is, in law, entitled to a set-off, even if the set-off is an attempt to avoid the *CCAA* compromise, and the court has no power to stay the exercise of the set-off.

[40] As I have indicated, there does not appear to be any arguable basis for that proposition, either in the language of the statute, or the jurisprudence.

Interference with the *CCAA* proceeding

[41] I agree with the position of the appellant that it will not normally be acceptable for a chambers judge to consider the consequences of a successful appeal as a reason for denying leave. If the law mandates a particular result in an appeal, this court cannot circumvent the result on the basis of a vague notion of unfairness.

[42] On the other hand, a judge is entitled to consider whether allowing an appeal to proceed will, itself, have adverse consequences for the administration of justice. Here, the judge assessed the situation, and came to the conclusion that the existence of an appeal would probably undermine restructuring efforts, and effectively scuttle the *CCAA* proceedings. There was a basis for the judge's assessment, and he was entitled to consider it as one factor in deciding the leave application.

[43] The appellant argues that the only type of interference with the proceedings in the trial court that may legitimately be considered is delay. In support of that proposition, he notes the emphasis in *Edgewater Casino* on delay.

[44] I note, however, that in *Consolidated (China) Pulp* and in virtually all of the subsequent cases that set out the considerations on a leave application, the fourth

consideration is described as "undue hindrance of the progress of the action" rather than as "delay". I would be reluctant to accept that the consideration should be narrowed. In *Great Basin Gold Ltd. (Re)* (October 3, 2012), C.A. Docket no. CA40276, Tysoe J.A. said:

> [15] In *CCAA* proceedings, the fourth factor [*i.e.* whether the appeal will unduly hinder the progress of the action] involves a consideration of whether the granting of leave to appeal will adversely affect the ability of the debtor company to reorganize its financial affairs.

[45] I agree with that proposition, and would endorse the chambers judge's consideration of that factor in the case before us.

The Conduct of GTP as a Factor in the Leave Application

[46] The final factor that I wish to address was the judge's reference to the timing of GTP's assertion of a setoff, and his apparent taking into account of the conduct of GTP in denying leave. In my view, these issues were legitimate considerations for the chambers judge. The possibility that GTP, through its conduct, was manipulating the *CCAA* proceedings to its benefit was a legitimate consideration.

[47] As *Cam-net* recognized, the scheme of the *CCAA* would be subverted if creditors were able to take actions to remove themselves from the compromise. If the timing of a claim to set-off and the bringing of an appeal appear to have been calculated to subvert the reorganization of the debtor company, that is a factor to be considered by the court. The court must be vigilant to ensure that its own processes are not used in that way.

Conclusion

[48] The judge erred in principle in his statement of the standards for granting leave to appeal in a *CCAA* matter. His analysis, however, was otherwise sound, and applying the correct standards to his analysis leads to the conclusion that leave ought to be denied.

[49] Accordingly, I would refuse the application to vary the order of the chambers judge.

[50] **NEILSON J.A.**: I agree.

[51] **FENLON J.A.**: I agree.

[52] **NEILSON J.A.**: The application to vary the order of the chambers is accordingly dismissed.

"The Honourable Mr. Justice Groberman"

TAB 4

2008 BCCA 27
British Columbia Court of Appeal

Sutherland v. Canada (Attorney General)

2008 CarswellBC 109, 2008 BCCA 27, [2008] B.C.W.L.D. 2072, [2008] B.C.W.L.D. 2074, [2008] B.C.W.L.D. 2080, [2008] B.C.W.L.D. 2187, [2008] B.C.W.L.D. 2208, [2008] B.C.J. No. 103, 165 A.C.W.S. (3d) 418, 250 B.C.A.C. 260, 416 W.A.C. 260, 50 C.P.C. (6th) 252, 77 B.C.L.R. (4th) 142

Wilfred Gary Sutherland and others (Respondents / Plaintiffs) and The Attorney General of Canada, The Vancouver International Airport Authority (Appellants / Defendants)

Finch C.J.B.C., Prowse, Huddart JJ.A.

Heard: November 21, 2007
Judgment: January 23, 2008
Docket: Vancouver CA032930, CA032931

Proceedings: reversing in part *Sutherland v. Canada (Attorney General)* (2005), 2005 CarswellBC 741, 2005 BCSC 479, 15 C.P.C. (6th) 368 (B.C. S.C.); additional reasons at *Sutherland v. Canada (Attorney General)* (2006), 30 C.P.C. (6th) 157, 2006 CarswellBC 1115, 2006 BCSC 737 (B.C. S.C.)

Counsel: A.D. Borrell, M. Booker for Appellant, Vancouver International Airport Authority
L. Lachance for Appellant, Attorney General of Canada
J.R. Shewfelt for Respondents

Subject: Civil Practice and Procedure; Public; Torts

Related Abridgment Classifications

Civil practice and procedure

XXIV Costs
XXIV.6 Effect of success of proceedings
XXIV.6.c Divided success
XXIV.6.c.ii Apportionment of costs

Civil practice and procedure

XXIV Costs
XXIV.24 Appeals as to costs
XXIV.24.b Interference with discretion of lower court

Public law

I Crown
I.5 Practice and procedure involving Crown in right of Canada
I.5.h Costs

Torts

XVII Nuisance
XVII.4 Practice and procedure

XVII.4.f Costs

Headnote

Civil practice and procedure — Costs — Effect of success of proceedings — Divided success — Apportionment of costs

Plaintiff property owners brought action against airport authority and Crown for damages, alleging that defendants committed nuisance by creating and operating new airport runway — Action was allowed but defendants successfully appealed on basis that defence of statutory authority provided complete defence — Plaintiffs applied for apportionment of costs on issue of nuisance, on which they were successful at trial and which was not reversed on appeal — Plaintiffs were awarded 25/39ths of all their properly assessable costs and defendants were each entitled to 14/39ths of all their respective properly assessable costs — Defendants appealed — Appeal allowed in part — General rule of costs as codified in R. 57(9) of Rules of Court, 1990, is that, absent special considerations, successful litigant has reasonable expectation of obtaining order for payment of his/her costs — Defendants were ultimately successful in defeating entire claim so unless there were special circumstances warranting depriving defendants of costs following trial, they should receive their costs — Plaintiffs' allegation of nuisance and defence of statutory authority were separate and discrete issues and trial judge was able to identify time at trial devoted to those separate issues — However, it would not be manifestly just or fair to apportion costs — Trial judge erred in apportioning costs under R. 57(15) of Rules because he failed to take into consideration that defendants, as successful parties, did not prolong case unnecessarily through their conduct of nuisance issue — Trial judge took irrelevant factor into consideration in suggesting that defendants should not have thought they had much chance of success in defending against allegation of nuisance — Trial judge misdirected himself in finding that defendants "ignored" recommendation of Environmental Assessment Review Process Panel.

Civil practice and procedure — Costs — Appeals as to costs — Interference with discretion of lower court

Plaintiff property owners brought action against airport authority and Crown for damages, alleging that defendants committed nuisance by creating and operating new airport runway — Action was allowed but defendants successfully appealed on basis that defence of statutory authority provided complete defence — Plaintiffs applied for apportionment of costs on issue of nuisance, on which they were successful at trial and which was not reversed on appeal — Plaintiffs were awarded 25/39ths of all their properly assessable costs and defendants were each entitled to 14/39ths of all their respective properly assessable costs — Defendants appealed — Appeal allowed in part — Standard of review for interfering with trial judge's order for costs requires that trial judge had misdirected himself/herself or that his/her decision is so clearly wrong as to amount to injustice — Trial judge misdirected himself in apportioning costs under R. 57(15) of Rules of Court, 1990 — Trial judge failed to take into consideration relevant factor that defendants, as successful parties, did not prolong case unnecessarily through their conduct of nuisance issue — Trial judge took irrelevant factor into consideration in suggesting that defendants should not have thought they had much chance of success in defending against allegation of nuisance — Trial judge misdirected himself in finding that defendants "ignored" recommendation of Environmental Assessment Review Process Panel.

Public law — Crown — Practice and procedure involving Crown in right of Canada — Costs

Plaintiff property owners brought action against airport authority and Crown for damages, alleging that defendants committed nuisance by creating and operating new airport runway — Action was allowed but defendants successfully appealed on basis that defence of statutory authority provided complete defence — Plaintiffs applied for apportionment of costs on issue of nuisance, on which they were successful at trial and which was not reversed on appeal — Plaintiffs were awarded 25/39ths of all their properly assessable costs and defendants were each entitled to 14/39ths of all their respective properly assessable costs — Defendants appealed — Appeal allowed in part — Trial judge erred in apportioning costs under R. 57(15) of Rules of Court, 1990, because he failed to take into consideration that defendants, as successful parties, did not prolong case unnecessarily through their conduct of nuisance issue — Trial judge took irrelevant factor into consideration in suggesting that defendants should not have

thought they had much chance of success in defending against allegation of nuisance — Trial judge misdirected himself in finding that defendants "ignored" recommendation of Environmental Assessment Review Process Panel.

Torts — Nuisance — Practice and procedure — Costs

Plaintiff property owners brought action against airport authority and Crown for damages, alleging that defendants committed nuisance by creating and operating new airport runway — Action was allowed but defendants successfully appealed on basis that defence of statutory authority provided complete defence — Plaintiffs applied for apportionment of costs on issue of nuisance, on which they were successful at trial and which was not reversed on appeal — Plaintiffs were awarded 25/39ths of all their properly assessable costs and defendants were each entitled to 14/39ths of all their respective properly assessable costs — Defendants appealed — Appeal allowed in part — There was no basis for denying defendants their costs on issue of nuisance and no basis for awarding costs on that issue to plaintiffs — Defendants did not raise issue of nuisance nor inflate nor overlitigate that issue — Trial judge erred in apportioning costs under R. 57(15) of Rules of Court, 1990, because he failed to take into consideration that defendants, as successful parties, did not prolong case unnecessarily through their conduct of nuisance issue — Trial judge took irrelevant factor into consideration in suggesting that defendants should not have thought they had much chance of success in defending against allegation of nuisance — Trial judge misdirected himself in finding that defendants "ignored" recommendation of Environmental Assessment Review Process Panel.

Table of Authorities

Cases considered by *Finch C.J.B.C.*:

British Columbia v. Worthington (Canada) Inc. (1988), 1988 CarswellBC 281, 29 B.C.L.R. (2d) 145, [1989] 1 W.W.R. 1, 32 C.P.C. (2d) 166 (B.C. C.A.) — considered

Currie v. Thomas (1985), 3 C.P.C. (2d) 42, 19 D.L.R. (4th) 594, 1985 CarswellBC 593 (B.C. C.A.) — referred to

Elsom v. Elsom (1989), 37 B.C.L.R. (2d) 145, [1989] 1 S.C.R. 1367, [1989] 5 W.W.R. 193, 59 D.L.R. (4th) 591, 96 N.R. 165, 20 R.F.L. (3d) 225, 1989 CarswellBC 95, 1989 CarswellBC 707 (S.C.C.) — referred to

Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd. (2002), 16 C.P.C. (5th) 23, 170 B.C.A.C. 315, 279 W.A.C. 315, 100 B.C.L.R. (3d) 146, 2002 BCCA 219, 2002 CarswellBC 676 (B.C. C.A.) — referred to

Laurin v. Ford Credit Canada Ltd. (1992), 20 B.C.A.C. 73, 22 C.P.C. (3d) 141, 35 W.A.C. 73, 86 B.C.L.R. (2d) 282, 1992 CarswellBC 421 (B.C. C.A.) — referred to

Van Halteren v. Wilhelm (1997), 22 C.P.C. (4th) 319, 1997 CarswellBC 2825 (B.C. S.C.) — referred to

Webber v. Canadian Aviation Insurance Managers Ltd. (2003), 29 C.P.C. (5th) 226, 5 C.C.L.I. (4th) 205, 2003 CarswellBC 381, 2003 BCSC 274 (B.C. S.C.) — referred to

Rules considered:

Rules of Court, 1990, B.C. Reg. 221/90
Generally — referred to

R. 57(9) — considered

R. 57(15) — considered

Regulations considered:

Aeronautics Act, R.S.C. 1985, c. A-2
Canadian Aviation Regulations, SOR/96-433

Generally — referred to

Words and phrases considered

misdirection

[Per Finch C.J.B.C. (Prowse and Huddart JJ.A. concurring):] The standard for review of a trial judge's order for costs is high. The Court of Appeal is justified in interfering with the trial judge's exercise of discretion only if the trial judge misdirects himself, or his decision is so clearly wrong as to amount to an injustice: *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, 2002 BCCA 219, 100 B.C.L.R. (3d) 146 (B.C. C.A.) at para. 7 and *Laurin v. Ford Credit Canada Ltd.* (1992), 20 B.C.A.C. 73, 22 C.P.C. (3d) 141, 86 B.C.L.R. (2d) 282 (B.C. C.A.), at 284. Misdirection may include making an error as to the facts of the case, taking into consideration irrelevant factors or failing to take into account relevant factors, all of which would amount to an error in principle: *Elsom v. Elsom*, [1989] 1 S.C.R. 1367 (S.C.C.), at 1377.

In the case at bar, the trial judge misdirected himself in apportioning costs under Rule 57(15) [Rules of Court, 1990, B.C. Reg. 221/90]. He failed to take a relevant factor into consideration, namely that the defendants, the parties who were ultimately successful, did not prolong the case unnecessarily through their conduct with respect to the nuisance issue (the issue on which they failed). The trial judge also took an irrelevant factor into consideration in suggesting that the defendants should not have thought they had much chance of success in defending against the allegation of nuisance. Lastly, he misdirected himself in finding that the defendants "ignored" the recommendation of the EARP Panel. As a result of these errors, this Court is justified in interfering with the trial judge's order for costs.

APPEAL by defendants from judgment reported at *Sutherland v. Canada (Attorney General)* (2005), 2005 CarswellBC 741, 2005 BCSC 479, 15 C.P.C. (6th) 368 (B.C. S.C.), additional reasons at *Sutherland v. Canada (Attorney General)* (2006), 30 C.P.C. (6th) 157, 2006 CarswellBC 1115, 2006 BCSC 737 (B.C. S.C.), apportioning costs, notwithstanding that defendants were successful in having nuisance action dismissed in its entirety.

***Finch C.J.B.C.*:**

I. Introduction

1 This appeal involves the review of a trial judge's exercise of discretion in apportioning costs between parties based on their respective successes on discrete issues in the proceedings.

2 The defendants appeal the order of the Supreme Court of British Columbia pronounced 1 April 2005 and entered 2 November 2006 apportioning costs between the parties, despite the defendants' success in having the action dismissed in its entirety on appeal to this Court.

3 At trial, the learned trial judge gave judgment in the plaintiffs' favour, holding the defendants liable in nuisance and rejecting the defence of statutory authority: *Sutherland v. Canada (Attorney General)*, 2001 BCSC 1024, 202 D.L.R. (4th) 310 (B.C. S.C.).

4 On the defendants' appeal to this Court, we held in a judgment pronounced 3 July 2002 that the learned trial judge did not err in holding that the defendants' conduct in the operation of a runway at Vancouver International Airport

constituted a private nuisance. We held, however, that the trial judge did err in holding that the Attorney General and others had not met the onus of establishing the defence of statutory authority, a complete answer to the plaintiffs' claims: 2002 BCCA 416, 215 D.L.R. (4th) 1 (B.C. C.A.). In subsequent reasons pronounced 10 January 2003, we held that the defendants were entitled to their costs of the appeal, except for one-half of the disbursements incurred for the preparation of the appeal books and transcripts, and one-half day's costs of the appeal in respect of the nuisance issues, which were disallowed: 2003 BCCA 14 (B.C. C.A.). The issue of costs in the Supreme Court of British Columbia was remitted for disposition by the trial judge.

5 In his ruling on costs of 1 April 2005, reported at 2005 BCSC 479, 15 C.P.C. (6th) 368 (B.C. S.C.), the learned trial judge ordered that:

> (1) the plaintiffs are entitled to 25/39ths of all their properly assessable costs and the defendants are each entitled to 14/39ths of all their respective properly assessable costs;
>
> (2) costs shall be assessed at scale 5;
>
> (3) costs relating to the class proceeding certification application in this action are not assessable; and
>
> (4) costs of the apportionment application and of the application to settle the order will be as now settled for the action.

6 The proportion of costs awarded to the parties was arrived at on the basis that the trial lasted 39 days, 25 of which were occupied with the issue of nuisance, on which the plaintiffs succeeded in this Court, and 14 of which were occupied with the defence of statutory authority, the issue on which the defendants succeeded in having the action dismissed.

7 Applications to apportion costs are not a regular part of litigation. They should be confined to relatively rare cases: *British Columbia v. Worthington (Canada) Inc.* (1988), 32 C.P.C. (2d) 166, 29 B.C.L.R. (2d) 145 (B.C. C.A.) (*Worthington*).

8 The learned trial judge held that this was one of the rare cases where the apportionment of costs permitted under Rule 57(15) of the *Rules of Court* was "manifestly fair and just". That rule reads:

> The court may award costs that relate to some particular issue or part of the proceeding or may award costs except so far as they relate to some particular issue or part of the proceeding.

9 Despite the deference which this Court shows to discretionary decisions by trial judges on matters of costs, I am of the view that there is no justification in principle for depriving the defendants of their full costs at trial, or for apportioning costs between the parties as the trial judge ordered. For the reasons that follow, I would allow the appeal, set aside paras. 1 and 4, and affirm paras. 2 and 3 of the trial judge's order on costs. I would award both defendants their full costs at trial without apportionment on scale 5.

II. Facts

10 This action arose from the construction of the "north runway" at Vancouver International Airport (YVR). The runway opened on 4 November 1996. The airport is owned by the federal government, represented in this litigation by the Attorney General for Canada. The Vancouver International Airport Authority operates the airport under a lease from the federal government, granted by the Ministry of Transport.

11 The plaintiffs are resident land owners in a neighbouring subdivision, whose properties are located almost directly under the flight path of aircraft landing on the north runway. They allege that the noise caused by use of the runway creates an unreasonable interference with the use and enjoyment of their properties. The plaintiffs sought damages for that nuisance.

12 The defendants denied the allegation of nuisance and pleaded the defence of statutory authority. They contended that the construction, maintenance and operation of the runway was specifically authorized under the *Aeronautics Act*, the Canadian Aviation Regulations, and an Order in Council of the Federal Government. They said the runway was an undertaking authorized by statute, and that any noise nuisance caused by its operation was the inevitable result of the authorized activity.

13 Throughout the proceedings the plaintiffs sought to have all issues tried at the same time. In pre-trial proceedings, the plaintiffs argued that the overall factual inquiry, including the plaintiffs' evidence as to aircraft noise, was relevant to the defence of statutory authority. The Airport Authority, however, submitted that the defence of statutory authority could be tried separately. The Attorney General for Canada supported that position.

14 The plaintiffs resisted the defendants' proposal. They said that the defence of statutory authority could not be tried "in the abstract", and insisted that all issues be tried together. The defendants did not move to have the defence of statutory authority tried in a summary manner under the *Rules of Court*.

15 In the result, the action proceeded to trial on all liability issues. The nuisance issue took 25 trial days to litigate. The defence of statutory authority took up a further 14 days.

16 The learned trial judge held that a nuisance had been created, and that the defence of statutory authority had not been made out. This Court upheld the trial judge's determination that a nuisance had been created, but held that the defence of statutory authority was proven, and was a complete answer to the plaintiffs' claims. The action was dismissed.

III. Trial Judge's Reasons on Costs

17 The learned trial judge reviewed the parties' positions on costs. The plaintiffs applied for an order that they were entitled to all costs at trial, or alternatively, costs relating to the issue of nuisance. They said that in the event the defendants were entitled to any costs, they were entitled to assess only one bill of costs between them.

18 The defendants opposed the plaintiffs' application. Each sought an order for costs against the plaintiffs.

19 The learned trial judge found that this was an appropriate case to apportion costs under Rule 57(15), quoted above at para. 8. The judge held that there were three fundamental criteria to consider in a decision to apportion costs, namely:

> (1) there must be separate or distinct issues clearly delineated;
>
> (2) the use of court time and the expenditure of resources must be taken into account;
>
> (3) the purpose of Rule 57(15) is to "effect a just result" between the parties.

20 With respect to the third factor, the learned trial judge said:

> [17] The third criteria requires recognition that the purpose of Rule 57(15) is to "effect a just result" between the parties. When it will be "manifestly fair and just" to apportion is fact dependent. [***British Columbia v. Worthington (Canada) Inc.*** (1988), 29 B.C.L.R. (2d) 145 (C.A.)].
>
> [18] The plaintiffs argue, with considerable merit, that the severity of the interference with private property, at least in respect of the location of the test plaintiffs' properties, give credence to the observation of Esson J.A. in ***Worthington*** that the defendants should "...not have thought they had much chance of success" in denying the existence of a basic finding of nuisance.
>
> [19] The defendants ignored the studied recommendation of the EARP Panel which clearly defined the inference [interference] with use and enjoyment of property that would occur by the construction of the north runway and the

need to compensate affected owners. The defendants also ignored the dramatic and relatively consistent evidence of persons living in the affected areas, even allowing for some exaggeration of those involved in the litigation.

21 In deciding to apportion costs, the learned trial judge concluded:

> [42] In the totality of the evidence there is some overlap between the issues of nuisance and the inevitable result aspect [of] statutory authority. That admixture was not significantly large and I am of the view it did not distract from the basic nuisance issues being essentially discrete, capable of an assessment as portions of trial time, and did not detract from essentially distinct questions of fact or law.
>
> [43] I conclude that the circumstances here qualify as one of the rare cases where an apportionment of costs pursuant to Rule 57(15) is manifestly fair and just to allow costs on an issue in favour of a party despite overall loss of the action on a separate issue. I am of the view that the threshold test for apportionment is met, that costs can be assessed in respect of court time and resources, and that a just and fair result can be achieved that reflects the success of the plaintiffs on the base nuisance issue within the overall context of the ultimate success of the defendants on the statutory authority defence.
>
> [44] The trial lasted 39 days. I apportion to the plaintiffs pursuant to Rule 57(15) in relation to the nuisance issue their costs and disbursements based upon 25 days of trial. The defendants will be entitled to their costs and disbursements, except in relation to the nuisance issue, based on 14 days of trial.

22 The judge also held that both defendants were entitled to their separate assessable costs and disbursements. That conclusion is not an issue on this appeal.

IV. Issues

23 The defendants say the learned trial judge erred in principle in awarding costs to the unsuccessful plaintiffs. Specifically, the Airport Authority says the learned trial judge failed to exercise his discretion under Rule 57(15) in a judicial manner, because he applied the wrong test for apportionment, ignored a relevant factor, acted arbitrarily, and wrongly characterized this case as so "rare" or "special" as to warrant deviation from the general rule that costs go to the successful party.

V. Discussion

24 The standard for review of a trial judge's order for costs is high. The Court of Appeal is justified in interfering with the trial judge's exercise of discretion only if the trial judge misdirects himself, or his decision is so clearly wrong as to amount to an injustice: *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.* (2002), 2002 BCCA 219, 100 B.C.L.R. (3d) 146 (B.C. C.A.) at para. 7 and *Laurin v. Ford Credit Canada Ltd.* (1992), 20 B.C.A.C. 73, 22 C.P.C. (3d) 141, 86 B.C.L.R. (2d) 282 (B.C. C.A.), at 284. Misdirection may include making an error as to the facts of the case, taking into consideration irrelevant factors or failing to take into account relevant fctors, all of which would amount to an error in principle: *Elsom v. Elsom*, [1989] 1 S.C.R. 1367 (S.C.C.) at 1377.

25 In the case at bar, the trial judge misdirected himself in apportioning costs under Rule 57(15). He failed to take a relevant factor into consideration, namely that the defendants, the parties who were ultimately successful, did not prolong the case unnecessarily through their conduct with respect to the nuisance issue (the issue on which they failed). The trial judge also took an irrelevant factor into consideration in suggesting that the defendants should not have thought they had much chance of success in defending against the allegation of nuisance. Lastly, he misdirected himself in finding that the defendants "ignored" the recommendation of the EARP Panel. As a result of these errors, this Court is justified in interfering with the trial judge's order for costs.

26 The general rule of costs stipulates that absent special considerations, a successful litigant has a reasonable expectation of obtaining an order for the payment of his costs: see *Currie v. Thomas* (1985), 19 D.L.R. (4th) 594 (B.C. C.A.), at 608. This rule has been codified in Rule 57(9) of the *Rules of Court*, which provides that:

> Subject to subrule (12), costs of and incidental to a proceeding shall follow the event unless the court otherwise orders.

27 In the case at bar, the defendants were ultimately successful in defeating the plaintiffs' claim in its entirety. Thus, unless special circumstances can be established that would warrant depriving the defendants of an award of costs following trial, the defendants should receive their costs.

28 One exception to the general rule for costs is set out in Rule 57(15) of the *Rules of Court.* As noted above, this rule provides that:

> The court may award costs that relate to some particular issue or part of the proceeding or may award costs except so far as they relate to some particular issue or part of the proceeding.

29 A plain reading of the rule appears to give the judge a broad discretion to award costs to an unsuccessful party, or to deny costs to a successful party, with respect to an identifiable issue or part of the proceeding. As with every discretionary power, it must be exercised on a principled basis.

30 *British Columbia v. Worthington (Canada) Inc.* is the leading case with respect to the application of Rule 57(15). It affirms that under Rule 57(15) the Court has full power to determine by whom the costs related to a particular issue are to be paid. As Esson J.A. states in *Worthington*, the discretion of trial judges under Rule 57(15) is very broad, and must be exercised judicially, not arbitrarily or capriciously. There must be circumstances connected with the case which render it manifestly fair and just to apportion costs.

31 The test for the apportionment of costs under Rule 57(15) can be set out as follows:

> (1) the party seeking apportionment must establish that there are separate and discrete issues upon which the ultimately unsuccessful party succeeded at trial;
>
> (2) there must be a basis on which the trial judge can identify the time attributable to the trial of these separate issues;
>
> (3) it must be shown that apportionment would effect a just result.

32 In this case, the first and second branches of the test for apportionment are satisfied. The plaintiffs' allegation of nuisance, and the defence of statutory authority, can be seen as separate and discrete issues. In addition, the trial judge was able to identify the time attributable to the trial of these separate issues. The trial lasted 39 days, 25 of which were occupied with the issue of nuisance, and 14 of which were occupied with the defence of statutory authority.

33 However, in my respectful opinion, the trial judge erred in determining that the plaintiffs satisfied the third branch of the test for apportionment. In the circumstances of this case, it would not be manifestly just or fair to apportion costs as did the trial judge. There was no basis for denying the defendants their costs on the issue of nuisance and, even more clearly, no basis for awarding costs on that issue to the plaintiffs.

34 The trial judge first erred by failing to consider a relevant factor, namely that the defendants, the parties that were ultimately successful, did not prolong the case unnecessarily through their conduct with respect to the nuisance issue (the issue which they lost).

35 A party might prolong a case unnecessarily in various ways. One way would be by raising an unnecessary issue: see *Webber v. Canadian Aviation Insurance Managers Ltd.* (2003), 2003 BCSC 274, 29 C.P.C. (5th) 226, [2003] B.C.J.

No. 381 (B.C. S.C.) at para. 23; *Van Halteren v. Wilhelm* (1997), 22 C.P.C. (4th) 319 (B.C. S.C.) at 326. Another would be by raising a spurious or unsupportable defence to an issue raised by the other party. A third way to prolong a case unnecessarily would be to "over litigate" an issue properly raised by either party. In such cases it could be unfair to the party that is ultimately unsuccessful to have to pay costs for issues raised or prolonged unnecessarily by the other party. In order to remedy such unfairness, the judge may exercise his or her discretion to award costs to the party who succeeded on a particular issue, but lost overall.

36 In this case, there was no evidence that the defendant prolonged the case unnecessarily through its conduct with respect to the issue of nuisance. The defendants did not introduce the issue of nuisance into the litigation. That cause of action was advanced by the plaintiffs. In fact, the defendants sought, throughout the pre-trial process, to avoid a trial on the issue of nuisance by having the defence of statutory authority resolved first. The effect of this proposal would likely have been a shorter, simpler trial. The plaintiffs resisted that course of action. They succeeded in persuading the court to try all issues together.

37 Moreover, not only did the defendants not raise the issue of nuisance, but the trial judge did not find that the defendants inflated or "over litigated" that issue. The plaintiffs contended that the defendants led unnecessary and irrelevant evidence on the issue of nuisance, such as evidence related to noise levels both at the airport and elsewhere in the city, as well as expert evidence on the science of noise metrics. The learned trial judge referred to and summarized some of this evidence at trial (see reasons for judgment at trial para. 29 and following). The judge did not conclude that this evidence was irrelevant or unnecessary. Rather, he held:

> [68] All the various forms of relevant evidence must be considered and weighed to determine if the aircraft noise in issue "is an inconvenience materially interfering with the ordinary physical comfort of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions"... (citations omitted).

38 The fact that the defendants did not raise the nuisance issue, and did not inflate or "over litigate" the issue, are circumstances that weigh against a determination that apportionment of costs is needed to effect a just result. The trial judge erred by not taking these factors into consideration before awarding the plaintiffs costs on the nuisance issue.

39 The trial judge also erred by taking an irrelevant factor into consideration. At para. 18 of his reasons on costs, the learned trial judge, as part of his justification for apportioning costs, suggests that the defendants should not have thought they had much chance of success in defending against the allegation of nuisance. With respect, this consideration is irrelevant in determining whether it would be fair to apportion costs. As responsible public bodies, the defendants were entitled to defend, by all lawful means, against their alleged liability, including a denial of the alleged nuisance. The suggestion that the defendants should not have thought they had much chance of success could be relevant if the defendants had raised the issue knowing that to be so. In such a situation, the defendants could be considered as having unnecessarily prolonged the trial. However, as noted above, the defendants did not raise the issue of nuisance, and there was no evidence that the defendants unnecessarily prolonged the case through its litigation of the nuisance issue.

40 Lastly, the trial judge misdirected himself in finding that the defendants "ignored" the recommendation of the EARP Panel. At para. 19 of his reasons on costs, the trial judge says the defendants "ignored" important evidence supporting the allegations of nuisance. A fair reading of the trial judge's reasons on liability does not support the inference that the defendants "ignored" any evidence, nor does he say that in those reasons.

41 At paras. 11 and 12 of the trial judge's reasons on liability he said:

> [11] The Ministry of Transport accepted most of the recommendations of EARP. It did not, however, accept the recommendation to identify and compensate those adversely affected by noise. It chose instead to address the problem of noise in surrounding areas by requiring certain noise abatement procedures, including limiting traffic landing on the runway and placing a daily landing curfew from 10:00 p.m. to 7:00 a.m.

> [12] The commencement of lawsuits was an understandable reaction to the government's decision not to negotiate compensation for those directly affected by noise attributed to the operation of aircraft on the third runway...

42 The defendants chose not to adopt the recommendation of the EARP Panel which recommended compensation for those adversely affected by noise. To say, as the trial judge does at para. 19 of his reasons on costs, that the defendants "ignored" this recommendation suggests indifference or bad faith on their part. There is nothing in the reasons at trial to warrant such inferences. A more logical and coherent inference from the defendants' decision not to pay compensation is that they were advised, or were of the opinion, that they did not have a legal obligation to do so. The same may be said of the defendants' response to the evidence of the affected residents.

VI. Conclusion

43 It is not uncommon for the Crown to defend against the claim of government interference with individual rights by relying on the defence of statutory authority. Where the defence is successful, the result from the plaintiffs' perspective is often unfortunate, and may appear unfair. In this case a nuisance has been caused to many persons without any redress. With respect, that without more does not qualify the case as a rare or special case warranting the apportionment of costs permitted under Rule 57(15).

44 In my respectful opinion, the trial judge erred in apportioning costs under Rule 57(15). He failed to take a relevant factor into consideration, namely that the defendants, the parties who ultimately succeeded, did not prolong the case unnecessarily through their conduct of the nuisance issue. He took an irrelevant factor into consideration in suggesting that the defendants should not have thought they had much chance of success in defending against the allegation of nuisance. Lastly, he misdirected himself in finding that the defendants "ignored" the recommendation of the EARP Panel. As a result of these errors, this Court is justified in interfering with the trial judge's order for costs.

45 I would allow the appeal, and grant the relief set out in para. 9 above.

***Prowse J.A.*:**

I agree.

***Huddart J.A.*:**

I agree.

Appeal allowed in part.