IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Minera Aquiline Argentina SA v. IMA Exploration Inc. and Inversiones Mineras Argentinas S.A.,*** 2006 BCSC 1102

Date: 20060714
Docket: S041353
Registry: Vancouver

Between:

Minera Aquiline Argentina SA

Plaintiff

And:

IMA Exploration Inc. and Inversiones Mineras Argentinas S.A.

Defendants

Before: The Honourable Madam Justice Koenigsberg

Reasons for Judgment

Counsel for the Plaintiff:	G. Nathanson, Q.C. S.R. Schachter, Q.C. J. MacInnis
Counsel for the Defendants:	M.P. Carroll, Q.C. D. Geoffrey Cowper, Q.C. Brent Meckling J. Horswill
Date and Place of Trial:	October 11, 12, 14, 17-21, 25-27 November 7-10, 16-18, 21-24, 28-30 December 1-2, 5-9, 2005 Vancouver, B.C.

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: ***R. v. Nowegijick***, [1983] 1 S.C.R. 29, 144 D.LR. (3d) 193, 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 non-specific 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*** 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*** 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., Ltd. v. Campbell Engineering Co. Ltd.*** (1948), 65 R.P.C. 203 at 215 (Eng. C.A.):

> 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, Southin J.A. (concurring in a result) considered the facts of ***Lac Minerals*** 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.***, [1969] R.P.C. 41, [1968] F.S.R. 415 (Ch.D.) 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***, 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 e-mails 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 at para. 11 (Ont. C.A.).

[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 at 739, [1932] 4 D.L.R. 529.

[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 (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 (S.C.).

[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 (QL) (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***, [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. F.B.I. Foods Ltd.,*** [1999] 1 S.C.R. 142, 59 B.C.L.R. (3d) 1, ***Lac Minerals Ltd. v. International Corona Resources Ltd.***, [1989] 2 S.C.R. 574, 61 D.L.R. (4th) 14.

[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 (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, 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. v. Insurance Corp. of British Columbia***, [2003] 2 S.C.R. 63, 2003 SCC 40, at para. 58, and ***Castillo v. Castillo***, [2005] 3 S.C.R. 870, 2005 SCC 83, 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 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*** 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***, 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*** 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 (QL)(S.C.) 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 Plastics Products Pty Ltd.***, [1979] V.R. 167 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*** and ***Cadbury Schweppes***:

> 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***, again citing ***Coco's case*** and ***Lac Minerals***:

> 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, 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 et cie. v. Rouyer Guillet & Co.***, [1949] All E.R. 244 at 244 (C.A.); ***Allen v. Hay*** (1922), 64 S.C.R. 76.

[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 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, 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*** 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*** 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 Estate v. Vien Estate*** (1988), 64 O.R. (2d) 230, 49 D.L.R. (4th) 558 (*sub. nom.* ***Leclerc v. St.-Louis***) (Ont. C.A.), 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***, relied upon in part by the defendants, does not stand for such a proposition. The comment in ***Lac Minerals*** 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***.

[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***.

(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***, 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, 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***, 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*** 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; aff'd 49 O.R. (3d) 198, 187 D.L.R. (4th) 193 (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, 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***, 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*** 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*** 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,*** 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***, 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,*** in some cases, such as ***Lac Minerals***, 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***, 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***. 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***, 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.

"M.M. Koenigsberg, J."
The Honourable Madam Justice M.M. Koenigsberg

July 21, 2006 – ***Revised Judgment***

On the front page of the Reasons for Judgment, Brent Meckling also appears as Counsel for the Defendants.