TAB 8

2014 SCC 7, 2014 CSC 7
Supreme Court of Canada

Hryniak v. Mauldin

2014 CarswellOnt 640, 2014 CarswellOnt 641, 2014 SCC 7, 2014 CSC 7, [2014] 1 S.C.R. 87, [2014] A.C.S. No. 7, [2014] S.C.J. No. 7, 12 C.C.E.L. (4th) 1, 21 B.L.R. (5th) 248, 239 A.C.W.S. (3d) 896, 27 C.L.R. (4th) 1, 314 O.A.C. 1, 366 D.L.R. (4th) 641, 37 R.P.R. (5th) 1, 453 N.R. 51, 46 C.P.C. (7th) 217, 95 E.T.R. (3d) 1

Robert Hryniak, Appellant and Fred Mauldin, Dan Myers, Robert Blomberg, Theodore Landkammer, Lloyd Chelli, Stephen Yee, Marvin Cleair, Carolyn Cleair, Richard Hanna, Douglas Laird, Charles Ivans, Lyn White and Athena Smith, Respondents and Ontario Trial Lawyers Association and Canadian Bar Association, Interveners

McLachlin C.J.C., LeBel, Abella, Rothstein, Cromwell, Karakatsanis, Wagner JJ.

Heard: March 26, 2013
Judgment: January 23, 2014
Docket: 34641

Proceedings: affirming *Combined Air Mechanical Services Inc. v. Flesch* (2011), 13 R.P.R. (5th) 167, 14 C.P.C. (7th) 242, 2011 ONCA 764, 2011 CarswellOnt 13515, 10 C.L.R. (4th) 17, 344 D.L.R. (4th) 193, 108 O.R. (3d) 1, 286 O.A.C. 3, 97 C.C.E.L. (3d) 25, 93 B.L.R. (4th) 1 (Ont. C.A.); affirming *Combined Air Mechanical Services Inc. v. Flesch* (2010), 71 B.L.R. (4th) 27, 2010 CarswellOnt 2026, 2010 ONSC 1729 (Ont. S.C.J.); affirming *Parker v. Casalese* (2010), 99 C.L.R. (3d) 1, 2010 ONSC 5636, 2010 CarswellOnt 7991 (Ont. Div. Ct.); affirming *Parker v. Casalese* (2010), 2010 CarswellOnt 4406, 268 O.A.C. 378 (Ont. S.C.J.); affirming *394 Lakeshore Oakville Holdings Inc. v. Misek* (2010), 98 R.P.R. (4th) 21, 2010 ONSC 6007, 2010 CarswellOnt 8323 (Ont. S.C.J.); reversing in part *Bruno Appliance & Furniture Inc. v. Cassels Brock & Blackwell LLP* (2010), 2010 ONSC 5490, 2010 CarswellOnt 8325 (Ont. S.C.J.)

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Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Employment; Labour; Property; Public; Torts; Family

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Civil practice and procedure

III Parties
III.3 Capacity to sue or be sued

Civil practice and procedure

XVIII Summary judgment
XVIII.1 General principles

Civil practice and procedure

XVIII Summary judgment
XVIII.9 Practice and procedure
XVIII.9.b Miscellaneous

Civil practice and procedure

XVIII Summary judgment
XVIII.10 Evidence on application
XVIII.10.a General principles

Civil practice and procedure

XVIII Summary judgment
XVIII.10 Evidence on application
XVIII.10.d Miscellaneous

Civil practice and procedure

XVIII Summary judgment
XVIII.13 Miscellaneous

Civil practice and procedure

XX Trials
XX.8 Summary trial
XX.8.e Miscellaneous

Civil practice and procedure

XX Trials
XX.10 Simplified procedure
XX.10.e Summary judgment

Civil practice and procedure

XXIV Costs
XXIV.6 Effect of success of proceedings
XXIV.6.b Successful party deprived of costs
XXIV.6.b.i Jurisdiction and discretion of court

Labour and employment law

II Employment law
II.2 Elements of employment relationship
II.2.b Duties of employee to employer
II.2.b.ii Fiduciary duties

Professions and occupations

IX Barristers and solicitors
IX.6 Relationship with others
IX.6.c Duty to third parties

IX.6.c.v Miscellaneous

Real property

VIII Easements
VIII.2 Definitions
VIII.2.b Licence

Real property

VIII Easements
VIII.3 Creation of easements
VIII.3.c Prescription
VIII.3.c.iii Requirements
VIII.3.c.iii.A Enjoyment as of right

Torts

IV Conversion
IV.1 What constituting

Torts

VII Fraud and misrepresentation
VII.1 Fraudulent misrepresentation
VII.1.a General principles

Torts

XI Interference with economic relations
XI.1 Elements of tort
XI.1.c Actual interference or causation

Headnote

Civil practice and procedure --- Summary judgment — General principles

Group of American investors, led by M, provided funds to Canadian "traders" — H was principal of company T that traded in bonds and debt instruments, and P was lawyer who acted for H, T and C who was principal of Panamanian investment company — Money wired by M group to law firm was pooled with other funds and transferred to T — T forwarded pooled funds to offshore bank, and money disappeared — M group joined another plaintiff in action for fraud against H, P and law firm, and motions for summary judgment were heard together — Motion judge used powers under new R. 20.04(2.1) of Rules of Civil Procedure to weigh evidence, evaluate credibility and draw inferences — Motion judge concluded trial was not required against H, and dismissed remainder of motion for summary judgment — H appealed, and Court of Appeal set out threshold test stating that "interest of justice" required that new powers be exercised only at trial, unless motion judge can achieve "full appreciation" of evidence and issues required to making dispositive findings on motion for summary judgment — Court found that, given factual complexity and voluminous record, action was type that generally required full trial, however, record supported that H had committed tort of civil fraud and dismissed his appeal — H appealed — Appeal dismissed — Summary judgment motion enhances access to justice as cheaper, faster alternative to full trial, and new R. 20 reflects recommendations for improving access to justice — New fact-finding powers in R. 20 can be exercised unless it is in interest of justice for them to be exercised only at trial — When judge is able to make necessary findings of fact, apply law to facts, and achieve just result in proportionate, expeditions and less expensive means, then there will be no genuine issue requiring trial — On summary judgment motion, evidence need not be equivalent to that at trial, but must be such that judge can fairly resolve dispute — While summary judgment must be granted where there

is no genuine issue requiring trial, decision to use expanded fact-finding powers or call oral evidence is discretionary — In this case, motion judge made no palpable and overriding error in granting summary judgment as record was sufficient to make fair and just determination.

Civil practice and procedure --- Summary judgment — Evidence on application — General principles

Group of American investors, led by M, provided funds to Canadian "traders" — H was principal of company T that traded in bonds and debt instruments, and P was lawyer who acted for H, T and C who was principal of Panamanian investment company — Money wired by M group to law firm was pooled with other funds and transferred to T — T forwarded pooled funds to offshore bank, and money disappeared — M group joined another plaintiff in action for fraud against H, P and law firm, and motions for summary judgment were heard together — Motion judge used powers under new R. 20.04(2.1) of Rules of Civil Procedure to weigh evidence, evaluate credibility and draw inferences — Motion judge concluded trial was not required against H, and dismissed remainder of motion for summary judgment — H appealed, and Court of Appeal set out threshold test stating that "interest of justice" required that new powers be exercised only at trial, unless motion judge can achieve "full appreciation" of evidence and issues required to making dispositive findings on motion for summary judgment — Court found that, given factual complexity and voluminous record, action was type that generally required full trial, however, record supported that H had committed tort of civil fraud and dismissed appeal — H appealed — Appeal dismissed — Summary judgment motion enhances access to justice as cheaper, faster alternative to full trial, and new R. 20 reflects recommendations for improving access to justice — New fact-finding powers in R. 20 can be exercised unless it is in interest of justice for them to be exercised only at trial — When judge is able to make necessary findings of fact, apply law to facts, and achieve just result in proportionate, expeditions and less expensive means, then there will be no genuine issue requiring trial — On summary judgment motion, evidence need not be equivalent to that at trial, but must be such that judge can fairly resolve dispute — While summary judgment must be granted where there is no genuine issue requiring trial, decision to use expanded fact-finding powers or call oral evidence is discretionary — In this case, motion judge made no palpable and overriding error in granting summary judgment as record was sufficient to make fair and just determination.

Procédure civile --- Jugement sommaire — Principes généraux

Groupe d'investisseurs américains dirigés par M ont confié leur argent à des « courtiers » canadiens — H était le dirigeant de T, une société qui faisait le commerce des obligations et des titres de créance, et P était l'avocat de H, T et C, lequel était le dirigeant d'une société de placement panaméenne — Fonds transférés par le groupe M au cabinet d'avocats ont été mis en commun avec d'autres fonds puis transférés à T — T a viré les fonds à une banque étrangère, et l'argent a disparu — Groupe M s'est joint à un autre demandeur en vue d'intenter une action pour fraude civile contre H, P et le cabinet d'avocats, et des requêtes en jugement sommaire ont été instruites ensemble — Juge saisi de la requête a exercé les pouvoirs prévus en vertu du nouvel art. 20.04(2.1) des Règles de procédure civile pour apprécier la preuve, évaluer la crédibilité et tirer des conclusions — Juge saisi de la requête a estimé qu'il n'était pas nécessaire de tenir un procès contre H et a rejeté les autres points soulevés dans la requête — H a interjeté appel, et la Cour d'appel a énoncé un critère préliminaire affirmant que « l'intérêt de la justice » exigeait que les nouveaux pouvoirs ne soient exercés que lors d'un procès, sauf si un juge saisi d'une requête peut procéder à la « pleine appréciation » de la preuve et des questions en litige qui s'impose pour tirer des conclusions décisives sur une requête en jugement sommaire — Cour a conclu que l'action était du type de celles qui nécessitent généralement la tenue d'un procès, compte tenu de la complexité des faits en cause et de son dossier volumineux; toutefois, le dossier étayait la conclusion selon laquelle H avait commis le délit de fraude civile, et la Cour a rejeté l'appel de H — Ce dernier a formé un pourvoi — Pourvoi rejeté — Requête en jugement sommaire améliore l'accès à la justice en tant que solution de rechange moins coûteuse et plus rapide à un procès formel, et la nouvelle R. 20 découle de recommandations visant à améliorer l'accès à la justice — Nouveaux pouvoirs en matière de recherche des faits prévus à la R. 20 peuvent être exercés, à moins qu'il ne soit dans l'intérêt de la justice qu'ils ne soient exercés que dans le cadre d'un procès — Lorsque le juge est en mesure de tirer les conclusions de fait nécessaires, d'appliquer les règles de droit aux faits et d'en arriver à un résultat juste en ayant recours à des moyens proportionnés, plus expéditifs et

moins coûteux, alors il n'existe pas de véritable question litigieuse nécessitant la tenue d'un procès — Dans le cadre d'une requête en jugement sommaire, il n'est pas nécessaire que la preuve soit la même que celle présentée lors d'un procès, mais elle doit être telle que le juge puisse résoudre équitablement le litige — Bien qu'une requête en jugement sommaire doit être accueillie lorsqu'il n'existe pas de véritable question litigieuse nécessitant la tenue d'un procès, la décision d'exercer le pouvoir élargi en matière de recherche des faits ou le pouvoir d'ordonner la présentation de témoignages oraux est de nature discrétionnaire — En l'espèce, le juge saisi de la requête n'a pas commis d'erreur manifeste et dominante en exerçant les pouvoirs pour accueillir la requête en jugement sommaire, étant donné que le dossier était suffisant pour permettre de rendre une décision juste.

Procédure civile --- Jugement sommaire — Preuve en instance — Principes généraux

Groupe d'investisseurs américains dirigés par M ont confié leur argent à des « courtiers » canadiens — H était le dirigeant de T, une société qui faisait le commerce des obligations et des titres de créance, et P était l'avocat de H, T et C, lequel était le dirigeant d'une société de placement panaméenne — Fonds transférés par le groupe M au cabinet d'avocats ont été mis en commun avec d'autres fonds puis transférés à T — T a viré les fonds à une banque étrangère, et l'argent a disparu — Groupe M s'est joint à un autre demandeur en vue d'intenter une action pour fraude civile contre H, P et le cabinet d'avocats, et des requêtes en jugement sommaire ont été instruites ensemble — Juge saisi de la requête a exercé les pouvoirs prévus en vertu du nouvel art. 20.04(2.1) des Règles de procédure civile pour apprécier la preuve, évaluer la crédibilité et tirer des conclusions — Juge saisi de la requête a estimé qu'il n'était pas nécessaire de tenir un procès contre H et a rejeté les autres points soulevés dans la requête — H a interjeté appel, et la Cour d'appel a énoncé un critère préliminaire affirmant que « l'intérêt de la justice » exigeait que les nouveaux pouvoirs ne soient exercés que lors d'un procès, sauf si un juge saisi d'une requête peut procéder à la « pleine appréciation » de la preuve et des questions en litige qui s'impose pour tirer des conclusions décisives sur une requête en jugement sommaire — Cour a conclu que l'action était du type de celles qui nécessitent généralement la tenue d'un procès, compte tenu de la complexité des faits en cause et de son dossier volumineux; toutefois, le dossier étayait la conclusion selon laquelle H avait commis le délit de fraude civile, et la Cour a rejeté l'appel de H — Ce dernier a formé un pourvoi — Pourvoi rejeté — Requête en jugement sommaire améliore l'accès à la justice en tant que solution de rechange moins coûteuse et plus rapide à un procès formel, et la nouvelle R. 20 découle de recommandations visant à améliorer l'accès à la justice — Nouveaux pouvoirs en matière de recherche des faits prévus à la R. 20 peuvent être exercés, à moins qu'il ne soit dans l'intérêt de la justice qu'ils ne soient exercés que dans le cadre d'un procès — Lorsque le juge est en mesure de tirer les conclusions de fait nécessaires, d'appliquer les règles de droit aux faits et d'en arriver à un résultat juste en ayant recours à des moyens proportionnés, plus expéditifs et moins coûteux, alors il n'existe pas de véritable question litigieuse nécessitant la tenue d'un procès — Dans le cadre d'une requête en jugement sommaire, il n'est pas nécessaire que la preuve soit la même que celle présentée lors d'un procès, mais elle doit être telle que le juge puisse résoudre équitablement le litige — Bien qu'une requête en jugement sommaire doit être accueillie lorsqu'il n'existe pas de véritable question litigieuse nécessitant la tenue d'un procès, la décision d'exercer le pouvoir élargi en matière de recherche des faits ou le pouvoir d'ordonner la présentation de témoignages oraux est de nature discrétionnaire — En l'espèce, le juge saisi de la requête n'a pas commis d'erreur manifeste et dominante en exerçant les pouvoirs pour accueillir la requête en jugement sommaire, étant donné que le dossier était suffisant pour permettre de rendre une décision juste.

In June 2001, members of a group of American investors led by M met with two principals of investments companies and a Canadian lawyer to discuss an investment opportunity. H was the principal of T, a company which traded in bonds and debt instruments. C was the principal of F, a Panamanian investment company. P was the lawyer representing H, T and C. The M group wired US$1.2 million to the law firm, which was pooled with other funds and transferred to T. T then forwarded the pooled funds to an offshore bank, and the money then disappeared. H claimed that T's funds were stolen.

The M group joined another plaintiff in an action for civil fraud against H, P and the law firm, and brought a motion for summary judgment. The motion judge held that a trial was not required against H. The remainder of the

motion was dismissed. H appealed, and this was the first occasion on which the Court of Appeal considered the new R. 20 of the Rules of Civil Procedure regarding summary judgment. The Court of Appeal set out a threshold test for when a judge could employ the new evidentiary powers under R. 20.04(2.1), stating that the "interest of justice" required that the new powers be exercised only at trial unless a motion judge can achieve the "full appreciation" of the evidence and issues required to make dispositive findings. The Court found that, given the factual complexity and voluminous record, the action was the type for which a trial would generally be required, however, the record supported the finding that H had committed the tort of civil fraud and dismissed H's appeal. H appealed.

Held: The appeal was dismissed

Per Karakatsanis J. (McLachlin C.J.C., LeBel, Abella, Rothstein, Cromwell, Wagner JJ. concurring): Rule 20 was amended in 2010 following recommendations concerning improving access to justice. The reforms create a legitimate alternative to trials as a means for adjudicating and resolving legal disputes. The amendments changed the test for summary judgment from asking whether a case presents "a genuine issue for trial" to asking whether there is a "genuine issue requiring a trial", demonstrating that a trial is not the default procedure. The new powers in the Rule permit motion judges to weigh evidence, evaluate credibility and draw reasonable inferences, as well as call oral evidence.

The Court of Appeal suggested that summary judgment would be most appropriate when cases were document driven, with few witnesses and limited contentious factual issues, or where the record could be supplemented by oral evidence on discrete points. However, this is not a strict rule. There is no genuine issue requiring a trial when a judge can make necessary findings of fact, apply the law to the facts, and achieve a just result in proportionate, expeditious and less expensive means.

The evidence on a summary judgment motion must be such that the judge can fairly resolve the dispute, and the powers in R. 20.04(2.1) and 20.04(2.2) provide the motion judge with a valid manner of fact finding. The guidelines suggested by the Court of Appeal for calling oral evidence concerning small number of witnesses, the issue having significant impact, and the issue being narrow and discrete are useful, however these are not absolute rules. The power to call oral evidence should be employed when it allows the judge to reach a fair and just adjudication, and it is the proportionate course of action.

The first step on a motion for summary judgment under R. 20.04 is a determination of whether there is a genuine issue requiring trial based on the evidence without using the new fact-finding powers. If there appears to be a genuine issue requiring trial, the judge should then determine if the need for a trial can be avoided by using the new powers under R. 20.04(2.1) and 20.04(2.2). These powers can be used, provided that their use is not against the interest of justice. The powers are presumptively available, and the decision to use the fact-finding powers or to call oral evidence is discretionary.

The action underlying this motion for summary judgment was for civil fraud, which has four elements. First, a false representation. Second, some level of knowledge of the falsehood of the representation, whether through knowledge or recklessness. Third, the false representation caused the plaintiff to act. And finally, the plaintiff's actions resulted in a loss. The Court of Appeal agreed with the motion judge that the M group was induced to invest with H due to what H said at their meeting in 2001. The motion judge also found the requisite knowledge or recklessness as to the falsehood of the representation, and rejected the defence that the funds were stolen. There was also intention that the M group would act on H's false representations, and clearly there was loss by the M group. The motion judge properly concluded there was no issue requiring a trial, and made no palpable and overriding error in granting summary judgment. The motion judge did not err in exercising his fact-finding powers under R. 20.04(2.1) as the record was sufficient to make a fair and just determination.

En juin 2001, les membres d'un groupe d'investisseurs dirigés par M ont rencontré deux dirigeants de sociétés de placement de même qu'un avocat canadien dans le but de discuter d'une possibilité d'investissement. H était le dirigeant de T, une société qui faisait le commerce des obligations et des titres de créance. C était le dirigeant de F, une société de placement panaméenne. P était l'avocat de H, T et C. Le groupe M a transféré 1,2 million $US au cabinet d'avocats, où cette somme a été mise en commun avec d'autres fonds puis transférée à T. T a alors viré les fonds à une banque étrangère, et l'argent a disparu. Selon H, les fonds de T ont été dérobés.

Le groupe M s'est joint à un autre demandeur en vue d'intenter une action pour fraude civile contre H, P et le cabinet d'avocats et ils ont présenté des requêtes en jugement sommaire. Le juge saisi de la requête a estimé qu'il n'était pas nécessaire de tenir un procès contre H. Les autres points soulevés dans la requête ont été rejetés. H a interjeté appel, et il s'agissait de la première fois que la Cour d'appel appliquait la nouvelle R. 20 des Règles de procédure civile à un jugement sommaire. La Cour d'appel a énoncé un critère préliminaire pour déterminer dans quelles circonstances un juge peut exercer les nouveaux pouvoirs en matière de preuve prévus à la R. 20.04(2.1) des Règles, affirmant que « l'intérêt de la justice » exigeait que les nouveaux pouvoirs ne soient exercés que lors d'un procès, sauf si un juge saisi d'une requête peut procéder à la « pleine appréciation » de la preuve et des questions en litige qui s'impose pour tirer des conclusions décisives. La Cour a conclu que l'action était du type de celles qui nécessitent généralement la tenue d'un procès, compte tenu de la complexité des faits en cause et de son dossier volumineux. Toutefois, le dossier étayait la conclusion selon laquelle H avait commis le délit de fraude civile, et la Cour a rejeté l'appel de H. Ce dernier a formé un pourvoi.

Arrêt: Le pourvoi a été rejeté.

Karakatsanis, J. (McLachlin, J.C.C., LeBel, Abella, Rothstein, Cromwell, Wagner, JJ., souscrivant à son opinion) : La R. 20 a été modifiée en 2010 à la suite de recommandations visant à améliorer l'accès à la justice. Les réformes ont créé une solution de rechange légitime pour trancher et régler les litiges d'ordre juridique. Les modifications ont eu pour effet de modifier le critère applicable aux jugements sommaires en remplaçant la question de savoir si la cause ne « soulève pas de question litigieuse » par celle de savoir si la cause soulève une « véritable question litigieuse nécessitant la tenue d'une instruction », démontrant que la tenue d'un procès ne constitue pas la procédure par défaut. Les nouveaux pouvoirs prévus aux Règles permettent au juge saisi d'une requête d'apprécier la preuve, d'évaluer la crédibilité et de tirer des conclusions raisonnables et d'ordonner la présentation de témoignages oraux.

La Cour d'appel a laissé entendre qu'il est le plus souvent indiqué de rendre un jugement sommaire dans des affaires où les documents occupent une place prépondérante, où il y a peu de témoins et de questions de fait litigieuses, ou encore des affaires dans lesquelles il est possible de compléter le dossier en présentant des témoignages oraux sur des points distincts. Toutefois, il ne s'agit pas d'une règle stricte. Il n'existe pas de véritable question litigieuse nécessitant la tenue d'un procès lorsque le juge est en mesure de tirer les conclusions de fait nécessaires, d'appliquer les règles de droit aux faits et d'arriver à un résultat juste de manière proportionnée, plus expéditive et moins coûteuse.

La preuve dans le cadre d'une requête en jugement sommaire doit être telle que le juge soit confiant de pouvoir résoudre équitablement le litige, et l'exercice des pouvoirs prévus à la R. 20.04(2.1) et 20.04(2.2) des Règles permet au juge saisi de la requête de procéder à une recherche des faits valable. Bien que les indications suggérées par la Cour d'appel lorsqu'il est possible d'entendre les témoignages oraux d'un nombre restreint de témoins, lorsque la question soulevée a une incidence importante et lorsque cette question est précise et distincte soient utiles, ces règles ne sont pas absolues. Le pouvoir d'ordonner des témoignages oraux devrait être exercé lorsqu'il permet au juge de rendre une décision juste et équitable sur le fond et que son exercice constitue la marche à suivre proportionnée.

La première étape à suivre dans le cadre d'une requête en jugement sommaire en vertu de la R. 20.04 est de décider, sans recourir aux nouveaux pouvoirs en matière de recherche des faits, s'il existe une véritable question litigieuse

nécessitant la tenue d'un procès. S'il semble y avoir une véritable question nécessitant la tenue d'un procès, le juge devrait alors déterminer si l'exercice des nouveaux pouvoirs prévus à la R. 20.04(2.1) et (2.2) des Règles permettra d'éviter la tenue d'un procès. Le juge peut exercer ces pouvoirs à son gré, pourvu que leur exercice ne soit pas contraire à l'intérêt de la justice. Ces pouvoirs sont présumés être disponibles, et la décision d'exercer les pouvoirs en matière de recherche des faits ou d'ordonner des témoignages oraux est discrétionnaire.

C'était une action pour fraude civile qui était à l'origine de la présente requête en jugement sommaire. La fraude civile comporte quatre éléments : premièrement, une fausse déclaration du défendeur; deuxièmement, une certaine connaissance de la fausseté de la déclaration de la part du défendeur (connaissance ou insouciance); troisièmement, le fait que la fausse déclaration a amené le demandeur à agir; et quatrièmement, le fait que les actes du demandeur ont entraîné une perte. La Cour d'appel partageait l'avis du juge saisi de la requête que le groupe M avait été amené à investir avec H en raison des propos tenus par H lors de la réunion de 2001. Le juge saisi de la requête a également conclu à l'existence de la connaissance ou de l'insouciance requise quant à la fausseté de la déclaration et a rejeté la thèse invoquée en défense selon laquelle les fonds avaient été dérobés. Il y avait également l'intention de H que ses fausses déclarations incitent le groupe M à agir et, manifestement, le groupe M a subi une perte. Le juge saisi de la requête a eu raison de conclure qu'il n'y avait pas de question litigieuse nécessitant la tenue d'un procès et n'a pas commis d'erreur manifeste et dominante en rendant un jugement sommaire. Le juge saisi de la requête n'a pas commis d'erreur en exerçant les pouvoirs en matière de recherche des faits que lui confère la R. 20.04(2.1) des Règles, étant donné que le dossier était suffisant pour permettre de rendre une décision juste et équitable.

Table of Authorities

Cases considered by *Karakatsanis J.*:

Aguonie v. Galion Solid Waste Material Inc. (1998), 38 O.R. (3d) 161, 107 O.A.C. 114, 1998 CarswellOnt 417, 17 C.P.C. (4th) 219, 156 D.L.R. (4th) 222 (Ont. C.A.) — referred to

Bal Global Finance Canada Corp. c. Aliments Breton (Canada) inc. (2010), 2010 CarswellQue 854, 2010 QCCS 325 (C.S. Que.) — considered

Combined Air Mechanical Services Inc. v. Flesch (2014), 37 R.P.R. (5th) 63, 2014 CarswellOnt 642, 2014 CarswellOnt 643, 2014 SCC 8 (S.C.C.) — considered

Dawson v. Rexcraft Storage & Warehouse Inc. (1998), 26 C.P.C. (4th) 1, 111 O.A.C. 201, 164 D.L.R. (4th) 257, 1998 CarswellOnt 3202, 20 R.P.R. (3d) 207 (Ont. C.A.) — referred to

Housen v. Nikolaisen (2002), 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, 286 N.R. 1, [2002] 7 W.W.R. 1, 2002 CarswellSask 178, 2002 CarswellSask 179, 2002 SCC 33, 30 M.P.L.R. (3d) 1, 219 Sask. R. 1, 272 W.A.C. 1, [2002] 2 S.C.R. 235 (S.C.C.) — followed

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Papaschase Indian Band No. 136 v. Canada (Attorney General) (2008), (sub nom. *Lameman v. Canada (Attorney General)*) 372 N.R. 239, [2008] 5 W.W.R. 195, 2008 CarswellAlta 398, 2008 CarswellAlta 399, 2008

SCC 14, [2008] 2 C.N.L.R. 295, 68 R.P.R. (4th) 59, 292 D.L.R. (4th) 49, (sub nom. *Canada (Attorney General) v. Lameman)* [2008] 1 S.C.R. 372, (sub nom. *Lameman v. Canada (Attorney General))* 429 A.R. 26, (sub nom. *Lameman v. Canada (Attorney General))* 421 W.A.C. 26, 86 Alta. L.R. (4th) 1 (S.C.C.) — considered

Saturley v. CIBC World Markets Inc. (2011), 2011 CarswellNS 6, 2011 NSSC 4, 943 A.P.R. 371, 297 N.S.R. (2d) 371, 16 C.P.C. (7th) 242 (N.S. S.C.) — referred to

Szeto v. Dwyer (2010), 297 Nfld. & P.E.I.R. 311, 918 A.P.R. 311, 87 C.P.C. (6th) 79, 320 D.L.R. (4th) 243, 2010 CarswellNfld 163, 2010 NLCA 36 (N.L. C.A.) — considered

Vaughan v. Warner Communications Inc. (1986), 10 C.P.C. (2d) 205, 1986 CarswellOnt 372, 10 C.P.R. (3d) 492, 56 O.R. (2d) 242 (Ont. H.C.) — referred to

Statutes considered:

Code de procédure civile, L.R.Q., c. C-25
art. 4.2 [ad. 2002, c. 7, art. 1] — referred to

art. 54.1 et seq. — referred to

art. 165 al. 4 — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
Generally — referred to

R. 1.04(1) — considered

R. 1.04(1.1) [en. O. Reg. 438/08] — considered

R. 20 — considered

R. 20.04(2) — considered

R. 20.04(2)(a) — considered

R. 20.04(2.1) [en. O. Reg. 438/08] — considered

R. 20.04(2.2) [en. O. Reg. 438/08] — considered

R. 20.05 — considered

R. 20.05(1) — considered

R. 20.05(2) — considered

R. 20.05(2)(a)-20.05(2)(p) — referred to

R. 20.06(a) — considered

Supreme Court Civil Rules, B.C. Reg. 168/2009

R. 1-3(2) — referred to

APPEAL by defendant from judgment reported at *Combined Air Mechanical Services Inc. v. Flesch* (2011), 13 R.P.R. (5th) 167, 14 C.P.C. (7th) 242, 2011 ONCA 764, 2011 CarswellOnt 13515, 10 C.L.R. (4th) 17, 344 D.L.R. (4th) 193, 108 O.R. (3d) 1, 286 O.A.C. 3, 97 C.C.E.L. (3d) 25, 93 B.L.R. (4th) 1 (Ont. C.A.), affirming motion judge's decision to grant summary judgment in favour of plaintiff.

POURVOI formé par le défendeur à l'encontre d'un jugement publié à *Combined Air Mechanical Services Inc. v. Flesch* (2011), 13 R.P.R. (5th) 167, 14 C.P.C. (7th) 242, 2011 ONCA 764, 2011 CarswellOnt 13515, 10 C.L.R. (4th) 17, 344 D.L.R. (4th) 193, 108 O.R. (3d) 1, 286 O.A.C. 3, 97 C.C.E.L. (3d) 25, 93 B.L.R. (4th) 1 (Ont. C.A.), ayant confirmé la décision du juge des requêtes de rendre un jugement sommaire en faveur du demandeur.

***Karakatsanis J.* (McLachlin C.J.C., LeBel, Abella, Rothstein, Cromwell, Wagner JJ. concurring):**

1 Ensuring access to justice is the greatest challenge to the rule of law in Canada today. Trials have become increasingly expensive and protracted. Most Canadians cannot afford to sue when they are wronged or defend themselves when they are sued, and cannot afford to go to trial. Without an effective and accessible means of enforcing rights, the rule of law is threatened. Without public adjudication of civil cases, the development of the common law is stunted.

2 Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. This shift entails simplifying pre-trial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just.

3 Summary judgment motions provide one such opportunity. Following the *Civil Justice Reform Project: Summary of Findings and Recommendations* (2007) (the Osborne Report), Ontario amended the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (*Ontario Rules* or Rules) to increase access to justice. This appeal, and its companion, *Combined Air Mechanical Services Inc. v. Flesch*, 2014 SCC 8 (S.C.C.), address the proper interpretation of the amended Rule 20 (summary judgment motion).

4 In interpreting these provisions, the Ontario Court of Appeal placed too high a premium on the "full appreciation" of evidence that can be gained at a conventional trial, given that such a trial is not a realistic alternative for most litigants. In my view, a trial is not required if a summary judgment motion can achieve a fair and just adjudication, if it provides a process that allows the judge to make the necessary findings of fact, apply the law to those facts, and is a proportionate, more expeditious and less expensive means to achieve a just result than going to trial.

5 To that end, I conclude that summary judgment rules must be interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims.

6 As the Court of Appeal observed, the inappropriate use of summary judgment motions creates its own costs and delays. However, judges can mitigate such risks by making use of their powers to manage and focus the process and, where possible, remain seized of the proceedings.

7 While I differ in part on the interpretation of Rule 20, I agree with the Court of Appeal's disposition of the matter and would dismiss the appeal.

I. Facts

8 More than a decade ago, a group of American investors, led by Fred Mauldin (the Mauldin Group), placed their money in the hands of Canadian "traders". Robert Hryniak was the principal of the company Tropos Capital, which traded in bonds and debt instruments; Gregory Peebles, is a corporate-commercial lawyer (formerly of Cassels Brock

& Blackwell) who acted for Hryniak, Tropos and Robert Cranston, formerly a principal of a Panamanian company, Frontline Investments Inc.

9 In June 2001, two members of the Mauldin Group met with Cranston, Peebles, and Hryniak, to discuss an investment opportunity.

10 At the end of June 2001, the Mauldin Group wired US$1.2 million to Cassels Brock, which was pooled with other funds and transferred to Tropos. A few months later, Tropos forwarded more than US$10 million to an offshore bank, and the money disappeared. Hryniak claims that at this point, Tropos's funds, including the funds contributed by the Mauldin Group, were stolen.

11 Beyond a small payment of US$9,600 in February 2002, the Mauldin Group lost its investment.

II. Judicial History

A. Ontario Superior Court of Justice, 2010 ONSC 5490 (Ont. S.C.J.)

12 The Mauldin Group joined with Bruno Appliance and Furniture, Inc. (the appellants in the companion appeal) in an action for civil fraud against Hryniak, Peebles and Cassels Brock. They brought motions for summary judgment, which were heard together.

13 In hearing the motions, the judge used his powers under the new Rule 20.04(2.1) to weigh the evidence, evaluate credibility, and draw inferences. He found that the Mauldin Group's money was disbursed by Cassels Brock to Hryniak's company, Tropos, but that there was no evidence to suggest that Tropos had ever set up a trading program. Contrary to the investment strategy that Hryniak had described to the investors, the Mauldin Group's money was placed in an account with the offshore New Savings Bank, and then disappeared. He rejected Hryniak's claim that members of the New Savings Bank had stolen the Mauldin Group's money.

14 The motion judge concluded that a trial was not required against Hryniak. However, he dismissed the Mauldin Group's motion for summary judgment against Peebles, because that claim involved factual issues, particularly with respect to Peebles' credibility and involvement in a key meeting, which required a trial. Consequently, he also dismissed the motion for summary judgment against Cassels Brock, as those claims were based on the theory that the firm was vicariously liable for Peebles' conduct.

B. Court of Appeal for Ontario, 2011 ONCA 764, 108 O.R. (3d) 1 (Ont. C.A.)

15 The Court of Appeal simultaneously heard Hryniak's appeal of this matter, the companion *Bruno Appliance* appeal, and three other matters which are not before this Court. This was the first occasion on which the Court of Appeal considered the new Rule 20.

16 The Court of Appeal set out a threshold test for when a motion judge could employ the new evidentiary powers available under Rule 20.04(2.1) to grant summary judgment under Rule 20.04(2)(a). Under this test, the "interest of justice" requires that the new powers be exercised only at trial, unless a motion judge can achieve the "full appreciation" of the evidence and issues required to make dispositive findings on a motion for summary judgment. The motion judge should assess whether the benefits of the trial process, including the opportunity to hear and observe witnesses, to have the evidence presented by way of a trial narrative, and to experience the fact-finding process first-hand, are necessary to fully appreciate the evidence in the case.

17 The Court of Appeal suggested that cases requiring multiple factual findings, based on conflicting evidence from a number of witnesses, and involving an extensive record, are generally not fit for determination in this manner. Conversely, cases driven by documents, with few witnesses, and limited contentious factual issues are appropriate candidates for summary judgment.

18 The Court of Appeal advised motion judges to make use of the power to hear oral evidence, under Rule 20.04(2.2), to hear only from a limited number of witnesses on discrete issues that are determinative of the case.

19 The Court of Appeal concluded that, given its factual complexity and voluminous record, the Mauldin Group's action was the type of action for which a trial is generally required. There were numerous witnesses, various theories of liability against multiple defendants, serious credibility issues, and an absence of reliable documentary evidence. Moreover, since Hryniak and Peebles had cross-claimed against each other and a trial would nonetheless be required against the other defendants, summary judgment would not serve the values of better access to justice, proportionality, and cost savings.

20 Despite concluding that this case was not an appropriate candidate for summary judgment, the Court of Appeal was satisfied that the record supported the finding that Hryniak had committed the tort of civil fraud against the Mauldin Group, and therefore dismissed Hryniak's appeal.

III. Outline

21 In determining the general principles to be followed with respect to summary judgment, I will begin with the values underlying timely, affordable and fair access to justice. Next, I will turn to the role of summary judgment motions generally and the interpretation of Rule 20 in particular. I will then address specific judicial tools for managing the risks of summary judgment motions.

22 Finally, I will consider the appropriate standard of review and whether summary judgment should have been granted to the respondents.

IV. Analysis

A. Access to Civil Justice: A Necessary Culture Shift

23 This appeal concerns the values and choices underlying our civil justice system, and the ability of ordinary Canadians to access that justice. Our civil justice system is premised upon the value that the process of adjudication must be fair and just. This cannot be compromised.

24 However, undue process and protracted trials, with unnecessary expense and delay, can *prevent* the fair and just resolution of disputes. The full trial has become largely illusory because, except where government funding is available, [1] ordinary Canadians cannot afford to access the adjudication of civil disputes. [2] The cost and delay associated with the traditional process means that, as counsel for the intervener the Advocates' Society (in *Bruno Appliance*) stated at the hearing of this appeal, the trial process denies ordinary people the opportunity to have adjudication. And while going to trial has long been seen as a last resort, other dispute resolution mechanisms such as mediation and settlement are more likely to produce fair and just results when adjudication remains a realistic alternative.

25 Prompt judicial resolution of legal disputes allows individuals to get on with their lives. But, when court costs and delays become too great, people look for alternatives or simply give up on justice. Sometimes, they choose to represent themselves, often creating further problems due to their lack of familiarity with the law.

26 In some circles, private arbitration is increasingly seen as an alternative to a slow judicial process. But private arbitration is not the solution since, without an accessible public forum for the adjudication of disputes, the rule of law is threatened and the development of the common law undermined.

27 There is growing support for alternative adjudication of disputes and a developing consensus that the traditional balance struck by extensive pre-trial processes and the conventional trial no longer reflects the modern reality and needs to be re-adjusted. A proper balance requires simplified and proportionate procedures for adjudication, and impacts the

role of counsel and judges. This balance must recognize that a process can be fair and just, without the expense and delay of a trial, and that alternative models of adjudication are no less legitimate than the conventional trial.

28 This requires a shift in culture. The principal goal remains the same: a fair process that results in a just adjudication of disputes. A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found. However, that process is illusory unless it is also accessible — proportionate, timely and affordable. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure.

29 There is, of course, always some tension between accessibility and the truth-seeking function but, much as one would not expect a jury trial over a contested parking ticket, the procedures used to adjudicate civil disputes must fit the nature of the claim. If the process is disproportionate to the nature of the dispute and the interests involved, then it will not achieve a fair and just result.

30 The proportionality principle is now reflected in many of the provinces' rules and can act as a touchstone for access to civil justice.[3] For example, Ontario Rules 1.04(1) and 1.04(1.1) provide:

> **1.04** (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.
>
> **1.04** (1.1) In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.

31 Even where proportionality is not specifically codified, applying rules of court that involve discretion "includes ... an underlying principle of proportionality which means taking account of the appropriateness of the procedure, its cost and impact on the litigation, and its timeliness, given the nature and complexity of the litigation" (*Szeto v. Dwyer*, 2010 NLCA 36, 297 Nfld. & P.E.I.R. 311 (N.L. C.A.), at para. 53).

32 This culture shift requires judges to actively manage the legal process in line with the principle of proportionality. While summary judgment motions can save time and resources, like most pre-trial procedures, they can also slow down the proceedings if used inappropriately. While judges can and should play a role in controlling such risks, counsel must, in accordance with the traditions of their profession, act in a way that facilitates rather than frustrates access to justice. Lawyers should consider their client's limited means and the nature of their case and fashion proportionate means to achieve a fair and just result.

33 A complex claim may involve an extensive record and a significant commitment of time and expense. However, proportionality is inevitably comparative; even slow and expensive procedures can be proportionate when they are the fastest and most efficient alternative. The question is whether the added expense and delay of fact finding at trial is necessary to a fair process and just adjudication.

B. Summary Judgment Motions

34 The summary judgment motion is an important tool for enhancing access to justice because it can provide a cheaper, faster alternative to a full trial. With the exception of Quebec, all provinces feature a summary judgment mechanism in their respective rules of civil procedure.[4] Generally, summary judgment is available where there is no genuine issue for trial.

35 Rule 20 is Ontario's summary judgment procedure, under which a party may move for summary judgment to grant or dismiss all or part of a claim. While, Ontario's Rule 20 in some ways goes further than other rules throughout the country, the values and principles underlying its interpretation are of general application.

36 Rule 20 was amended in 2010, following the recommendations of the Osborne Report, to improve access to justice. These reforms embody the evolution of summary judgment rules from highly restricted tools used to weed out clearly unmeritorious claims or defences to their current status as a legitimate alternative means for adjudicating and resolving legal disputes.

37 Early summary judgment rules were quite limited in scope and were available only to plaintiffs with claims based on debt or liquidated damages, where no real defence existed. [5] Summary judgment existed to avoid the waste of a full trial in a clear case.

38 In 1985, the then new Rule 20 extended the availability of summary judgement to both plaintiffs and defendants and broadened the scope of cases that could be disposed of on such a motion. The rules were initially interpreted expansively, in line with the purposes of the rule changes. [6] However, appellate jurisprudence limited the powers of judges and effectively narrowed the purpose of motions for summary judgment to merely ensuring that: "claims that have no chance of success [are] weeded out at an early stage". [7]

39 The Ontario Government commissioned former Ontario Associate Chief Justice Coulter Osborne Q.C., to consider reforms to make the Ontario civil justice system more accessible and affordable, leading to the report of the Civil Justice Reform Project (the Osborne Report). The Osborne Report concluded that few summary judgment motions were being brought and, if the summary judgment rule was to work as intended, the appellate jurisprudence that had narrowed the scope and utility of the rule had to be reversed (p. 35). Among other things, it recommended that summary judgment be made more widely available, that judges be given the power to weigh evidence on summary judgment motions, and that judges be given discretion to direct that oral evidence be presented (pp. 35-36).

40 The report also recommended the adoption of a summary trial procedure similar to that employed in British Columbia (p. 37). This particular recommendation was not adopted, and the legislature made the choice to maintain summary judgment as the accessible procedure.

41 Many of the Osborne Report's recommendations were taken up and implemented in 2010. As noted above, the amendments codify the proportionality principle and provide for efficient adjudication when a conventional trial is not required. They offer significant new tools to judges, which allow them to adjudicate more cases through summary judgment motions and attenuate the risks when such motions do not resolve the entire case.

42 Rule 20.04 now reads in part: [8]

> **20.04** . . .
>
> (2) [General] The court shall grant summary judgment if,
>
> (a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or
>
> (b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment.
>
> (2.1) [Powers] In determining under clause (2) (a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:
>
> 1. Weighing the evidence.
>
> 2. Evaluating the credibility of a deponent.

3. Drawing any reasonable inference from the evidence.

(2.2) [Oral Evidence (Mini-Trial)] A judge may, for the purposes of exercising any of the powers set out in subrule (2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation.

43 The Ontario amendments changed the test for summary judgment from asking whether the case presents "a genuine issue for trial" to asking whether there is a "genuine issue requiring a trial". The new rule, with its enhanced fact-finding powers, demonstrates that a trial is not the default procedure. Further, it eliminated the presumption of substantial indemnity costs against a party that brought an unsuccessful motion for summary judgment, in order to avoid deterring the use of the procedure.

44 The new powers in Rules 20.04(2.1) and (2.2) expand the number of cases in which there will be no genuine issue requiring a trial by permitting motion judges to weigh evidence, evaluate credibility and draw reasonable inferences. [9]

45 These new fact-finding powers are discretionary and are presumptively available; they may be exercised *unless* it is in the interest of justice for them to be exercised only at a trial; Rule 20.04(2.1). Thus, the amendments are designed to transform Rule 20 from a means to weed out unmeritorious claims to a significant alternative model of adjudication.

46 I will first consider when summary judgment can be granted on the basis that there is "no genuine issue requiring a trial" (Rule 20.04(2)(a)). Second, I will discuss when it is against the "interest of justice" for the new fact-finding powers in Rule 20.04(2.1) to be used on a summary judgment motion. Third, I will consider the power to call oral evidence and, finally, I will lay out the process to be followed on a motion for summary judgment.

(1) When is There no Genuine Issue Requiring a Trial?

47 Summary judgment motions must be granted whenever there is no genuine issue requiring a trial (Rule 20.04(2)(a)). In outlining how to determine whether there is such an issue, I focus on the goals and principles that underlie whether to grant motions for summary judgment. Such an approach allows the application of the rule to evolve organically, lest categories of cases be taken as rules or preconditions which may hinder the system's transformation by discouraging the use of summary judgment.

48 The Court of Appeal did not explicitly focus upon when there is a genuine issue requiring a trial. However, in considering whether it is against the interest of justice to use the new fact-finding powers, the court suggested that summary judgment would most often be appropriate when cases were document driven, with few witnesses and limited contentious factual issues, or when the record could be supplemented by oral evidence on discrete points. These are helpful observations but, as the court itself recognized, should not be taken as delineating firm categories of cases where summary judgment is and is not appropriate. For example, while this case is complex, with a voluminous record, the Court of Appeal ultimately agreed that there was no genuine issue requiring a trial.

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

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

51 Often, concerns about credibility or clarification of the evidence can be addressed by calling oral evidence on the motion itself. However, there may be cases where, given the nature of the issues and the evidence required, the judge cannot make the necessary findings of fact, or apply the legal principles to reach a just and fair determination.

(2) The Interest of Justice

52 The enhanced fact-finding powers granted to motion judges in Rule 20.04(2.1) may be employed on a motion for summary judgment unless it is in the "interest of justice" for them to be exercised only at trial. The "interest of justice" is not defined in the Rules.

53 To determine whether the interest of justice allowed the motion judge to use her new powers, the Court of Appeal required a motion judge to ask herself, "can the full appreciation of the evidence and issues that is required to make dispositive findings be achieved by way of summary judgment, or can this full appreciation only be achieved by way of a trial?" (para. 50).

54 The Court of Appeal identified the benefits of a trial that contribute to this full appreciation of the evidence: the narrative that counsel can build through trial, the ability of witnesses to speak in their own words, and the assistance of counsel in sifting through the evidence (para. 54).

55 The respondents, as well as the interveners, the Canadian Bar Association, the Attorney General of Ontario and the Advocates' Society, submit that the Court of Appeal's emphasis on the virtues of the traditional trial is misplaced and unduly restrictive. Further, some of these interveners submit that this approach may result in the creation of categories of cases inappropriate for summary judgment, and this will limit the development of the summary judgment vehicle.

56 While I agree that a motion judge must have an appreciation of the evidence necessary to make dispositive findings, such an appreciation is not only available at trial. Focussing on how much and what kind of evidence could be adduced at a trial, as opposed to whether a trial is "requir[ed]" as the Rule directs, is likely to lead to the bar being set too high. The interest of justice cannot be limited to the advantageous features of a conventional trial, and must account for proportionality, timeliness and affordability. Otherwise, the adjudication permitted with the new powers — and the purpose of the amendments — would be frustrated.

57 On a summary judgment motion, the evidence need not be equivalent to that at trial, but must be such that the judge is confident that she can fairly resolve the dispute. A documentary record, particularly when supplemented by the new fact-finding tools, including ordering oral testimony, is often sufficient to resolve material issues fairly and justly. The powers provided in Rules 20.04(2.1) and 20.04(2.2) can provide an equally valid, if less extensive, manner of fact finding.

58 This inquiry into the interest of justice is, by its nature, comparative. Proportionality is assessed in relation to the full trial. It may require the motion judge to assess the relative efficiencies of proceeding by way of summary judgment, as opposed to trial. This would involve a comparison of, among other things, the cost and speed of both procedures. (Although summary judgment may be expensive and time consuming, as in this case, a trial may be even more expensive and slower.) It may also involve a comparison of the evidence that will be available at trial and on the motion as well as the opportunity to fairly evaluate it. (Even if the evidence available on the motion is limited, there may be no reason to think better evidence would be available at trial.)

59 In practice, whether it is against the "interest of justice" to use the new fact-finding powers will often coincide with whether there is a "genuine issue requiring a trial". It is logical that, when the use of the new powers would enable a judge to fairly and justly adjudicate a claim, it will generally not be against the interest of justice to do so. What is fair and just turns on the nature of the issues, the nature and strength of the evidence and what is the proportional procedure.

60 The "interest of justice" inquiry goes further, and also considers the consequences of the motion in the context of the litigation as a whole. For example, if some of the claims against some of the parties will proceed to trial in any

event, it may not be in the interest of justice to use the new fact-finding powers to grant summary judgment against a single defendant. Such partial summary judgment may run the risk of duplicative proceedings or inconsistent findings of fact and therefore the use of the powers may not be in the interest of justice. On the other hand, the resolution of an important claim against a key party could significantly advance access to justice, and be the most proportionate, timely and cost effective approach.

(3) The Power to Hear Oral Evidence

61 Under Rule 20.04(2.2), the motion judge is given the power to hear oral evidence to assist her in making findings under Rule 20.04(2.1). The decision to allow oral evidence rests with the motion judge since, as the Court of Appeal noted, "it is the motion judge, not counsel, who maintains control over the extent of the evidence to be led and the issues to which the evidence is to be directed" (para. 60).

62 The Court of Appeal suggested the motion judge should only exercise this power when

> (1) Oral evidence can be obtained from a small number of witnesses and gathered in a manageable period of time; (2) Any issue to be dealt with by presenting oral evidence is likely to have a significant impact on whether the summary judgment motion is granted; and (3) Any such issue is narrow and discrete — *i.e.*, the issue can be separately decided and is not enmeshed with other issues on the motion. [para. 103]

This is useful guidance to ensure that the hearing of oral evidence does not become unmanageable; however, as the Court of Appeal recognized, these are not absolute rules.

63 This power should be employed when it allows the judge to reach a fair and just adjudication on the merits and it is the proportionate course of action. While this is more likely to be the case when the oral evidence required is limited, there will be cases where extensive oral evidence can be heard on the motion for summary judgment, avoiding the need for a longer, more complex trial and without compromising the fairness of the procedure.

64 Where a party seeks to lead oral evidence, it should be prepared to demonstrate why such evidence would assist the motion judge in weighing the evidence, assessing credibility, or drawing inferences and to provide a "will say" statement or other description of the proposed evidence so that the judge will have a basis for setting the scope of the oral evidence.

65 Thus, the power to call oral evidence should be used to promote the fair and just resolution of the dispute in light of principles of proportionality, timeliness and affordability. In tailoring the nature and extent of oral evidence that will be heard, the motion judge should be guided by these principles, and remember that the process is not a full trial on the merits but is designed to determine if there is a genuine issue requiring a trial.

(4) The Roadmap/Approach to a Motion for Summary Judgment

66 On a motion for summary judgment under Rule 20.04, the judge should first determine if there is a genuine issue requiring trial based only on the evidence before her, *without* using the new fact-finding powers. There will be no genuine issue requiring a trial if the summary judgment process provides her with the evidence required to fairly and justly adjudicate the dispute and is a timely, affordable and proportionate procedure, under Rule 20.04(2)(a). If there appears to be a genuine issue requiring a trial, she should then determine if the need for a trial can be avoided by using the new powers under Rules 20.04(2.1) and (2.2). She may, at her discretion, use those powers, provided that their use is not against the interest of justice. Their use will not be against the interest of justice if they will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole.

67 Inquiring first as to whether the use of the powers under Rule 20.04(2.1) will allow the dispute to be resolved by way of summary judgment, before asking whether the interest of justice requires that those powers be exercised only at trial, emphasizes that these powers are presumptively available, rather than exceptional, in line with the goal of proportionate, cost-effective and timely dispute resolution. As well, by first determining the consequences of using the new powers, the

benefit of their use is clearer. This will assist in determining whether it is in the interest of justice that they be exercised only at trial.

68 While summary judgment *must* be granted if there is no genuine issue requiring a trial, [10] the decision to use either the expanded fact-finding powers or to call oral evidence is discretionary. [11] The discretionary nature of this power gives the judge some flexibility in deciding the appropriate course of action. This discretion can act as a safety valve in cases where the use of such powers would clearly be inappropriate. There is always the risk that clearly unmeritorious motions for summary judgment could be abused and used tactically to add time and expense. In such cases, the motion judge may choose to decline to exercise her discretion to use those powers and dismiss the motion for summary judgment, without engaging in the full inquiry delineated above.

C. Tools to Maximize the Efficiency of a Summary Judgment Motion

(1) Controlling the Scope of a Summary Judgment Motion

69 The *Ontario Rules* and a superior court's inherent jurisdiction permit a motion judge to be involved early in the life of a motion, in order to control the size of the record, and to remain active in the event the motion does not resolve the entire action.

70 The Rules provide for early judicial involvement, through Rule 1.05, which allows for a motion for directions, to manage the time and cost of the summary judgment motion. This allows a judge to provide directions with regard to the timelines for filing affidavits, the length of cross-examination, and the nature and amount of evidence that will be filed. However, motion judges must also be cautious not to impose administrative measures that add an unnecessary layer of cost.

71 Not all motions for summary judgment will require a motion for directions. However, failure to bring such a motion where it was evident that the record would be complex or voluminous may be considered when dealing with costs consequences under Rule 20.06(a). In line with the principle of proportionality, the judge hearing the motion for directions should generally be seized of the summary judgment motion itself, ensuring the knowledge she has developed about the case does not go to waste.

72 I agree with the Court of Appeal (at paras. 58 and 258) that a motion for directions also provides the responding party with the opportunity to seek an order to stay or dismiss a premature or improper motion for summary judgment. This may be appropriate to challenge lengthy, complex motions, particularly on the basis that they would not sufficiently advance the litigation, or serve the principles of proportionality, timeliness and affordability.

73 A motion for summary judgment will not always be the most proportionate way to dispose of an action. For example, an early date may be available for a short trial, or the parties may be prepared to proceed with a summary trial. Counsel should always be mindful of the most proportionate procedure for their client and the case.

(2) Salvaging a Failed Summary Judgment Motion

74 Failed, or even partially successful, summary judgment motions add — sometimes astronomically — to costs and delay. However, this risk can be attenuated by a judge who makes use of the trial management powers provided in Rule 20.05 and the court's inherent jurisdiction.

75 Rule 20.05(1) and (2) provides in part:

> **20.05** (1) Where summary judgment is refused or is granted only in part, the court may make an order specifying what material facts are not in dispute and defining the issues to be tried, and order that the action proceed to trial expeditiously.

> (2) If an action is ordered to proceed to trial under subrule (1), the court may give such directions or impose such terms as are just ...

76 Rules 20.05(2)(a) through (p) outline a number of specific trial management orders that may be appropriate. The court may: set a schedule; provide a restricted discovery plan; set a trial date; require payment into court of the claim; or order security for costs. The court may order that: the parties deliver a concise summary of their opening statement; the parties deliver a written summary of the anticipated evidence of a witness; any oral examination of a witness at trial will be subject to a time limit or; the evidence of a witness be given in whole or in part by affidavit.

77 These powers allow the judge to use the insight she gained from hearing the summary judgment motion to craft a trial procedure that will resolve the dispute in a way that is sensitive to the complexity and importance of the issue, the amount involved in the case, and the effort expended on the failed motion. The motion judge should look to the summary trial as a model, particularly where affidavits filed could serve as the evidence of a witness, subject to time-limited examinations and cross-examinations. Although the Rules did not adopt the Osborne Report's recommendation of a summary trial model, this model already exists under the simplified rules or on consent. In my view, the summary trial model would also be available further to the broad powers granted a judge under Rule 20.05(2).

78 Where a motion judge dismisses a motion for summary judgment, in the absence of compelling reasons to the contrary, she should also seize herself of the matter as the trial judge. I agree with the Osborne Report that the involvement of a single judicial officer throughout

> saves judicial time since parties will not have to get a different judge up to speed each time an issue arises in the case. It may also have a calming effect on the conduct of litigious parties and counsel, as they will come to predict how the judicial official assigned to the case might rule on a given issue. [p. 88]

79 While such an approach may complicate scheduling, to the extent that current scheduling practices prevent summary judgment motions being used in an efficient and cost effective manner, the courts should be prepared to change their practices in order to facilitate access to justice.

D. Standard of Review

80 The Court of Appeal concluded that determining the appropriate test for summary judgment — whether there is a genuine issue requiring a trial — is a legal question, reviewable on a correctness standard, while any factual determinations made by the motions judge will attract deference.

81 In my view, absent an error of law, the exercise of powers under the new summary judgment rule attracts deference. When the motion judge exercises her new fact-finding powers under Rule 20.04(2.1) and determines whether there is a genuine issue requiring a trial, this is a question of mixed fact and law. Where there is no extricable error in principle, findings of mixed fact and law, should not be overturned, absent palpable and overriding error, *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.), at para. 36.

82 Similarly, the question of whether it is in the "interest of justice" for the motion judge to exercise the new fact-finding powers provided by Rule 20.04(2.1) depends on the relative evidence available at the summary judgment motion and at trial, the nature, size, complexity and cost of the dispute and other contextual factors. Such a decision is also a question of mixed fact and law which attracts deference.

83 Provided that it is not against the "interest of justice", a motion judge's decision to exercise the new powers is discretionary. Thus, unless the motion judge misdirected herself, or came to a decision that is so clearly wrong that it resulted in an injustice, her decision should not be disturbed.

84 Of course, where the motion judge applies an incorrect principle of law, or errs with regard to a purely legal question, such as the elements that must be proved for the plaintiff to make out her cause of action, the decision will be reviewed on a correctness standard (*Housen v. Nikolaisen*, at para. 8).

E. Did the Motion Judge Err by Granting Summary Judgment?

85 The motion judge granted summary judgment in favour of the Mauldin Group. While the Court of Appeal found that the action should not have been decided by summary judgment, it nevertheless dismissed the appeal. Hryniak argues this constituted "prospective overruling" but, in light of my conclusion that the motion judge was entitled to proceed by summary judgment, I need not consider these submissions further. For the reasons that follow, I am satisfied that the motion judge did not err in granting summary judgment.

(1) The Tort of Civil Fraud

86 The action underlying this motion for summary judgment was one for civil fraud brought against Hryniak, Peebles, and Cassels Brock.

87 As discussed in the companion *Bruno Appliance* appeal, the tort of civil fraud has four elements, which must be proven on a balance of probabilities: (1) a false representation by the defendant; (2) some level of knowledge of the falsehood of the representation on the part of the defendant (whether knowledge or recklessness); (3) the false representation caused the plaintiff to act; (4) the plaintiff's actions resulted in a loss.

(2) Was There a Genuine Issue Requiring a Trial?

88 In granting summary judgment to the Mauldin Group against Hryniak, the motion judge did not explicitly address the correct test for civil fraud but, like the Court of Appeal, I am satisfied that his findings support that result.

89 The first element of civil fraud is a false representation by the defendant. The Court of Appeal agreed with the motion judge that "[u]nquestionably, the Mauldin group was induced to invest with Hryniak because of what Hryniak said to Fred Mauldin" at the meeting of June 19, 2001 (at para. 158), and this was not disputed in the appellant's factum.

90 The motion judge found the requisite knowledge or recklessness as to the falsehood of the representation, the second element of civil fraud, based on Hryniak's lack of effort to ensure that the funds would be properly invested and failure to verify that the eventual end-point of the funds, New Savings Bank, was secure. The motion judge also rejected the defence that the funds were stolen, noting Hryniak's feeble efforts to recover the funds, waiting some 15 months to report the apparent theft of US$10.2 million.

91 The motion judge also found an intention on the part of Hryniak that the Mauldin Group would act on his false representations, the third requirement of civil fraud. Hryniak secured a US$76,000 loan for Fred Mauldin and conducted a "test trade", actions which, in the motion judge's view, were "undertaken ... for the purpose of dissuading the Mauldin group from demanding the return of its investment" (para. 113). Moreover, the motion judge detailed Hryniak's central role in the web of deception that caused the Mauldin Group to invest its funds and that dissuaded them from seeking their return for some time after they had been stolen.

92 The final requirement of civil fraud, loss, is clearly present. The Mauldin Group invested US$1.2 million and, but for a small return of US$9,600 in February 2002, lost its investment.

93 The motion judge found no credible evidence to support Hryniak's claim that he was a legitimate trader, and the outcome was therefore clear, so the motion judge concluded there was no issue requiring a trial. He made no palpable and overriding error in granting summary judgment.

(3) Did the Interest of Justice Preclude the Motion Judge from Using his Powers Under Rule 20.04?

94 The motion judge did not err in exercising his fact-finding powers under Rule 20.04(2.1). He was prepared to sift through the detailed record, and was of the view that sufficient evidence had been presented on all relevant points to allow him to draw the inferences necessary to make dispositive findings under Rule 20. Further, while the amount involved is significant, the issues raised by Hryniak's defence were fairly straightforward. As the Court of Appeal noted, at root, the question turned on whether Hryniak had a legitimate trading program that went awry when the funds were stolen, or whether his program was a sham from the outset (para. 159). The plaintiffs are a group of elderly American investors and, at the return date of the motion, had been deprived of their funds for nearly a decade. The record was sufficient to make a fair and just determination and a timely resolution of the matter was called for. While the motion was complex and expensive, going to trial would have cost even more and taken even longer.

95 Despite the fact that the Mauldin group's claims against Peebles and Cassels Brock had to proceed to trial, there is little reason to believe that granting summary judgment against Hryniak would have a prejudicial impact on the trial of the remaining issues. While the extent of the other defendants' involvement in the fraud requires a trial, that matter is not predetermined by the conclusion that Hryniak clearly was *a* perpetrator of the fraud. The motion judge's findings speak specifically to Hryniak's involvement and neither rely upon, nor are inconsistent with, the liability of others. His findings were clearly supported by the evidence. It was neither against the interest of justice for the motion judge to use his fact-finding powers nor was his discretionary decision to do so tainted with error.

V. Conclusion

96 Accordingly, I would dismiss the appeal, with costs to the respondents.

Appeal dismissed.

Pourvoi rejeté.

Appendix

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

RULE 20 SUMMARY JUDGMENT

20.01 [Where Available] (1) [To Plaintiff] A plaintiff may, after the defendant has delivered a statement of defence or served a notice of motion, move with supporting affidavit material or other evidence for summary judgment on all or part of the claim in the statement of claim.

(2) The plaintiff may move, without notice, for leave to serve a notice of motion for summary judgment together with the statement of claim, and leave may be given where special urgency is shown, subject to such directions as are just.

(3) [To Defendant] A defendant may, after delivering a statement of defence, move with supporting affidavit material or other evidence for summary judgment dismissing all or part of the claim in the statement of claim.

20.02 [Evidence on Motion] (1) An affidavit for use on a motion for summary judgment may be made on information and belief as provided in subrule 39.01 (4), but, on the hearing of the motion, the court may, if appropriate, draw an adverse inference from the failure of a party to provide the evidence of any person having personal knowledge of contested facts.

(2) In response to affidavit material or other evidence supporting a motion for summary judgment, a responding party may not rest solely on the allegations or denials in the party's pleadings, but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue requiring a trial.

20.03 [Factums Required] (1) On a motion for summary judgment, each party shall serve on every other party to the motion a factum consisting of a concise argument stating the facts and law relied on by the party.

(2) The moving party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least seven days before the hearing.

(3) The responding party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least four days before the hearing.

(4) Revoked.

20.04 [Disposition of Motion] (1) [General] Revoked.

(2) The court shall grant summary judgment if,

(a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or

(b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment.

(2.1) [Powers] In determining under clause (2) (a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:

1. Weighing the evidence.

2. Evaluating the credibility of a deponent.

3. Drawing any reasonable inference from the evidence.

(2.2) [Oral Evidence (Mini-Trial)] A judge may, for the purposes of exercising any of the powers set out in subrule (2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation.

(3) Where the court is satisfied that the only genuine issue is the amount to which the moving party is entitled, the court may order a trial of that issue or grant judgment with a reference to determine the amount.

(4) [Only Genuine Issue Is Question Of Law] Where the court is satisfied that the only genuine issue is a question of law, the court may determine the question and grant judgment accordingly, but where the motion is made to a master, it shall be adjourned to be heard by a judge.

(5) [Only Claim Is For An Accounting] Where the plaintiff is the moving party and claims an accounting and the defendant fails to satisfy the court that there is a preliminary issue to be tried, the court may grant judgment on the claim with a reference to take the accounts.

20.05 [Where A Trial Is Necessarry] (1) [Powers of Court] Where summary judgment is refused or is granted only in part, the court may make an order specifying what material facts are not in dispute and defining the issues to be tried, and order that the action proceed to trial expeditiously.

(2) [Directions And Terms] If an action is ordered to proceed to trial under subrule (1), the court may give such directions or impose such terms as are just, including an order,

(a) that each party deliver, within a specified time, an affidavit of documents in accordance with the court's directions;

(b) that any motions be brought within a specified time;

(c) that a statement setting out what material facts are not in dispute be filed within a specified time;

(d) that examinations for discovery be conducted in accordance with a discovery plan established by the court, which may set a schedule for examinations and impose such limits on the right of discovery as are just, including a limit on the scope of discovery to matters not covered by the affidavits or any other evidence filed on the motion and any cross-examinations on them;

(e) that a discovery plan agreed to by the parties under Rule 29.1 (discovery plan) be amended;

(f) that the affidavits or any other evidence filed on the motion and any cross-examinations on them may be used at trial in the same manner as an examination for discovery;

(g) that any examination of a person under Rule 36 (taking evidence before trial) be subject to a time limit;

(h) that a party deliver, within a specified time, a written summary of the anticipated evidence of a witness;

(i) that any oral examination of a witness at trial be subject to a time limit;

(j) that the evidence of a witness be given in whole or in part by affidavit;

(k) that any experts engaged by or on behalf of the parties in relation to the action meet on a without prejudice basis in order to identify the issues on which the experts agree and the issues on which they do not agree, to attempt to clarify and resolve any issues that are the subject of disagreement and to prepare a joint statement setting out the areas of agreement and any areas of disagreement and the reasons for it if, in the opinion of the court, the cost or time savings or other benefits that may be achieved from the meeting are proportionate to the amounts at stake or the importance of the issues involved in the case and,

(i) there is a reasonable prospect for agreement on some or all of the issues, or

(ii) the rationale for opposing expert opinions is unknown and clarification on areas of disagreement would assist the parties or the court;

(l) that each of the parties deliver a concise summary of his or her opening statement;

(m) that the parties appear before the court by a specified date, at which appearance the court may make any order that may be made under this subrule;

(n) that the action be set down for trial on a particular date or on a particular trial list, subject to the direction of the regional senior judge;

(o) for payment into court of all or part of the claim; and

(p) for security for costs.

(3) [Specified Facts] At the trial, any facts specified under subrule (1) or clause (2) (c) shall be deemed to be established unless the trial judge orders otherwise to prevent injustice.

(4) [Order re Affidavit Evidence] In deciding whether to make an order under clause (2) (j), the fact that an adverse party may reasonably require the attendance of the deponent at trial for cross-examination is a relevant consideration.

(5) [Order re Experts, Costs] If an order is made under clause (2) (k), each party shall bear his or her own costs.

(6) [Failure To Comply With Order] Where a party fails to comply with an order under clause (2) (o) for payment into court or under clause (2) (p) for security for costs, the court on motion of the opposite party may dismiss the action, strike out the statement of defence or make such other order as is just.

(7) Where on a motion under subrule (6) the statement of defence is struck out, the defendant shall be deemed to be noted in default.

20.06 [Costs Sanctions For Improper Use Of Rule] The court may fix and order payment of the costs of a motion for summary judgment by a party on a substantial indemnity basis if,

(a) the party acted unreasonably by making or responding to the motion; or

(b) the party acted in bad faith for the purpose of delay.

20.07 [Effect Of Summary Judgment] A plaintiff who obtains summary judgment may proceed against the same defendant for any other relief.

20.08 [Stay Of Execution] Where it appears that the enforcement of a summary judgment ought to be stayed pending the determination of any other issue in the action or a counterclaim, crossclaim or third party claim, the court may so order on such terms as are just.

20.09 [Application To Counterclaims, Crossclaims And Third Party Claim] Rules 20.01 to 20.08 apply, with necessary modifications, to counterclaims, crossclaims and third party claims.

Footnotes

1 For instance, state funding is available in the child welfare context under *G. (J.)* orders even where legal aid is not available (see *New Brunswick (Minister of Health & Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46 (S.C.C.), or for cases involving certain minority rights (see the Language Rights Support Program).

2 In M. D. Agrast, J. C. Botero and A. Ponce, the 2011 *Rule of Law Index*, published by the World Justice Project, Canada ranked 9th among 12 European and North American countries in access to justice. Although Canada scored among the top ten countries in the world in four rule of law categories (limited government powers, order and security, open government, and effective criminal justice), its lowest scores were in access to civil justice. This ranking is "partially explained by shortcomings in the affordability of legal advice and representation, and the lengthy duration of civil cases" (p. 23).

3 This principle has been expressly codified in British Columbia, Ontario, and Quebec: *Supreme Court Civil Rules*, B.C. Reg. 168/2009, Rule 1-3(2); *Ontario Rules*, Rule 1.04(1.1); and *Code of Civil Procedure*, R.S.Q., c. C-25, art. 4.2. Aspects of Alberta's and Nova Scotia's rules of court have also been interpreted as reflecting proportionality: *Medicine Shoppe Canada Inc. v. Devchand*, 2012 ABQB 375, 541 A.R. 312 (Alta. Q.B.), at para. 11; *Saturley v. CIBC World Markets Inc.*, 2011 NSSC 4, 297 N.S.R. (2d) 371 (N.S. S.C.), at para. 12.

4 Quebec has a procedural device for disposing of abusive claims summarily: see arts. 54.1 ff of the *Code of Civil Procedure*. While this procedural device is narrower on its face, it has been likened to summary judgment: see *Bal Global Finance Canada Corp. c. Aliments Breton (Canada) inc.*, 2010 QCCS 325 (C.S. Que.). Moreover, s. 165(4) of the Code provides that the defendant may ask for an action to be dismissed if the suit is "unfounded in law".

5 For a thorough review of the history of summary judgment in Ontario, see T. Walsh and L. Posloski, "Establishing a Workable Test for Summary Judgment: Are We There Yet?", in T. L. Archibald and R. S. Echlin, eds., *Annual Review of Civil Litigation 2013* (2013), 419, at pp. 422-32.

6 *Ibid.*, at p. 426; for example, see *Vaughan v. Warner Communications Inc.* (1986), 56 O.R. (2d) 242 (Ont. H.C.).

7 *Papaschase Indian Band No. 136 v. Canada (Attorney General)*, 2008 SCC 14, [2008] 1 S.C.R. 372 (S.C.C.), at para. 10.

8 The full text of Rule 20 is attached as an Appendix.

9 As fully canvassed by the Court of Appeal, the powers in Rule 20.04(2.1) were designed specifically to overrule a number of long-standing appellate decisions that had dramatically restricted the use of the rule; *Aguonie v. Galion Solid Waste Material Inc.* (1998), 38 O.R. (3d) 161 (Ont. C.A.); *Dawson v. Rexcraft Storage & Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.).

10 Rule 20.04(2): "The court shall grant summary judgment if, (a) the court is satisfied that there is no genuine issue requiring a trial ...".

11 Rule 20.04(2.1): "In determining ... whether there is a genuine issue requiring a trial ... if the determination is being made by a judge, the judge may exercise any of the following powers ... 1. Weighing the evidence. 2. Evaluating the credibility of a deponent. 3. Drawing any reasonable inference from the evidence." Rule 20.04(2.2): "A judge may ... order that oral evidence be presented ...".

End of Document

TAB 9

2000 BCSC 312
British Columbia Supreme Court

JTI-Macdonald Corp. v. British Columbia (Attorney General)

2000 CarswellBC 375, 2000 BCSC 312, [2000] 6 W.W.R. 227, [2000] B.C.W.L.D. 546, [2000] B.C.J. No. 349, [2000] B.C.T.C. 178, 184 D.L.R. (4th) 335, 73 C.R.R. (2d) 110, 74 B.C.L.R. (3d) 149, 94 A.C.W.S. (3d) 891

JTI-MacDonald Corp., Plaintiff and Attorney General of British Columbia, Defendant

Imperial Tobacco Limited, a Division of Imasco Limited, Plaintiff and Attorney General of British Columbia, Defendant

Rothmans, Benson & Hedges Inc., Plaintiff and Attorney General of British Columbia, Defendant

Her Majesty the Queen in Right of British Columbia, Plaintiff and Imperial Tobacco Limited, Imasco Limited, British American Tobacco (Investments) Ltd., B.A.T. Industries p.l.c., British American Tobacco p.l.c., Brown & Williamson Tobacco Corporation, American Tobacco Company, B.A.T. #1, #2, #3, #4, #5, #6, #7, #8, #9, #10, Rothmans, Benson & Hedges Inc., Rothmans Inc., Rothmans International Limited, Rothmans International p.l.c., Rothmans International N.V., Rothmans #1, #2, #3, #4, #5, #6, #7, #8, #9, #10, Philip Morris Companies Inc., Philip Morris Incorporated, Philip Morris International Inc., Philip Morris #1, #2, #3, #4, #5, #6, #7, #8, #9, #10, RJR-MacDonald Inc., R.J. Reynolds Tobacco Company, RJR Nabisco Inc., R.J. Reynolds Tobacco International Inc., RJR #1, #2, #3, #4, #5, #6, #7, #8, #9, #10, Liggett Group Inc., Canadian Tobacco Manufacturers' Council, the Council for Tobacco Research — U.S.A. Inc., the Tobacco Institute Inc., Defendants

Holmes J.

Heard: October 5-8, 12-15, and 18-22, 1999
Judgment: February 21, 2000 *
Docket: Vancouver C985777, C985780, C985781, C985776

Counsel: *Jack Giles, Q.C.*, *Jeffrey J. Kay* and *Ludmila B. Herbst*, for Plaintiff JTI-Macdonald Corp. in Action No. C985777 and for Defendants R.J. Reynolds Tobacco Company, RJR Nabisco Inc. in Action No. C985776.
W.S. Berardino, Q.C., *David C. Harris* and *Lyndon A.J. Barnes*, for Plaintiff Imperial Tobacco, a division of Imasco Limited in Action No. C985780.
James A. Macaulay, Q.C., *Kenneth N. Affleck* and *Stephen A. Kurelek*, for Plaintiff Rothmans, Benson & Hedges Inc. in Action No. C985781 and Defendants Rothmans Inc., Rothmans International Limited, Rothmans International p.l.c. & Rothmans International N.V. in Action No. C985776.
Thomas R. Berger, Q.C., *Daniel A. Webster, Q.C.*, *Craig Jones* and *Robin Elliott*, for Plaintiff Her Majesty the Queen in Right of British Columbia in Action No. C985776 and Defendant Attorney General of British Columbia in Action Nos. C985777, C985780 & C985781.
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Paul D.K. Fraser, Q.C., and *Bruce MacDougall*, for Defendants Brown & Williamson Tobacco Corporation, American Tobacco Company in Action No. C985776.
D. Ross Clark and *Cynthia A. Millar*, for Defendants Philip Morris Companies Inc., Philip Morris Incorporated & Philip Morris International Inc. in Action No. C985776.
Richard B.T. Goepel, Q.C., and *Kathryn Seely*, for Defendants Council for Tobacco Research — U.S.A. Inc., Tobacco Institute Inc. in Action No. C985776.

Subject: Constitutional; Public

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Constitutional law

VII Distribution of legislative powers
VII.3 Nature of general provincial powers
VII.3.c Rights outside province

Constitutional law

VII Distribution of legislative powers
VII.4 Areas of legislation
VII.4.l Judicature
VII.4.l.iv Miscellaneous

Constitutional law

IX Determining constitutionality
IX.2 Presumption of validity (reading down)

Judges and courts

I Constitutional issues
I.2 Jurisdiction of courts under Constitution Act, 1867 (s. 96)
I.2.d Miscellaneous

Headnote

Constitutional law --- Distribution of legislative powers — Nature of general provincial powers — Rights outside province

Provincial legislature enacted Tobacco Damages and Health Care Costs Recovery Act — Act created new civil cause of action which permitted government to directly recover health-care costs incurred by persons insured under provincial health insurance program from tobacco manufacturers — Tobacco manufacturers were mostly foreign or federally incorporated companies registered as extra-provincial companies under British Columbia law — Government brought action against tobacco manufacturers for recovery of health-care costs pursuant to Act — Tobacco manufacturers brought action challenging constitutional validity of Act — Action by tobacco manufacturers allowed — Government action dismissed — Provincial legislature has no power to impose its own laws on extra-territorial status, contracts, conduct or property pursuant to s. 92 of Constitution Act — Act contained broad definition of "manufacturer" and "enterprise liability" provisions which had effect of imposing liability for health-care costs on all members of defined group for conduct by single member with respect to sale of tobacco products in British Columbia — Act exceeded extra-territorial limitations by establishing liability for acts or omissions outside British Columbia — Act purported to affect status, structure and shareholder rights of foreign corporations, and also had effect of overriding substantive laws of other Canadian or foreign jurisdictions in respect of contracts relating to purchase, lease or acquisition of any part of tobacco-related business — Act attempted to legislate use of tobacco-related trade-marks outside of province — Cumulative effect of provisions gave provincial government power to recover health-care costs from tobacco manufacturers on global basis, such that no action of international tobacco industry or location of assets would be beyond reach of province's attempt to recover health-care costs under Act — Act was ultra vires Constitution Act and as such was invalid — Claims founded upon statutory cause of action under invalidated legislation dismissed — Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5, s. 92 — Tobacco Damages and Health Care Costs Recovery Act, S.B.C. 1997, c. 41.

Constitutional law --- Determining constitutionality — Presumption of validity (reading down)

Provincial legislature enacted Tobacco Damages and Health Care Costs Recovery Act — Act created new civil cause of action which permitted government to directly recover health-care costs incurred by persons insured under provincial health insurance program from tobacco manufacturers — Government brought action against tobacco manufacturers for recovery of health-care costs pursuant to Act — Tobacco manufacturers brought action challenging constitutional validity of Act — Action by tobacco manufacturers allowed — Government action dismissed — Provincial legislature has no power to impose its own laws on extra-territorial status, contracts, conduct or property pursuant to s. 92 of Constitution Act — Reading down doctrine is not to be employed if effect is to alter essence of legislation — Act was carefully integrated legislative scheme having central purpose of ability to recover health-care benefits related to tobacco disease from national and international tobacco manufacturers — Enterprise liability provisions were inextricably bound up with remaining features — Provisions could not be read down or severed without effecting original intent of legislature — Act as whole was ultra vires Constitution Act and as such was invalid — Claims founded upon statutory cause of action under invalidated legislation dismissed — Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5, s. 92 — Tobacco Damages and Health Care Costs Recovery Act, S.B.C. 1997, c. 41.

Judges and courts --- Constitutional issues — Jurisdiction of courts in 1867 (s. 96) — General

Provincial legislature enacted Tobacco Damages and Health Care Costs Recovery Act — Act created new civil cause of action which permitted government to directly recover health-care costs incurred by persons insured under provincial health insurance program from tobacco manufacturers — Provisions of Act allowed government to bring action on behalf of individual or on aggregate basis — Government brought action against tobacco manufacturers for recovery of health-care costs pursuant to Act — Tobacco manufacturers brought action challenging constitutional validity of Act — Action by tobacco manufacturers allowed on other grounds — Government action dismissed — Act did not manipulate or interfere with adjudicative process or independence of judiciary by preventing court from receiving evidence necessary to perform fact-finding function — Aggregate action was intended to provide for relief where traditional tort actions did not realistically meet need of large-scale loss-recovery where large numbers of individuals were exposed to toxic substances that allegedly had adverse health effects through non-observable means of causation — Inability to identify individual insured persons or to have unlimited access to records did not unfairly prevent manufacturers from presenting evidence to rebut presumption that breach of duty caused persons to be exposed to tobacco products — Provisions of Act creating aggregate cause of action by government for recovery of costs of health-care benefits were within constitutional competence of province — Tobacco Damages and Health Care Costs Recovery Act, S.B.C. 1997, c. 41.

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s. 66 — referred to

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Generally — considered

Pt. XV — considered

s. 15(1) — considered

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Generally — referred to

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ss. 284-286 — considered

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Generally — referred to

s. 7 — referred to

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s. 11(g) — considered

s. 15 — considered

s. 26 — considered

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Generally — considered

Preamble — considered

s. 91 ¶ 2 — considered

s. 92 — considered

s. 92 ¶ 13 — considered

s. 92 ¶ 14 — considered

s. 92 ¶ 16 — considered

s. 96 — considered

s. 100 — referred to

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Generally — referred to

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Generally — referred to

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Generally — considered

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s. 11 — referred to

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Generally — considered

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Generally — referred to

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s. 17 — referred to

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Generally — referred to

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Generally — considered

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Generally — unconstitutional

s. 1 [am. 1998, c. 45, s. 2] — referred to

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s. 1(1) "insured person" [renumbered 1998, c. 45, s. 2(l)] — considered

s. 1(1) "manufacturer" [rep. & sub. 1998, c. 45, s. 2(g)] — considered

s. 1(1) "person" [en. 1998, c. 45, s. 2(h)] — considered

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s. 1(2) [en. 1998, c. 45, s. 2(l)] — considered

s. 1(3) [en. 1998, c. 45, s. 2(l)] — considered

s. 1(3)(a) [en. 1998, c. 45, s. 2(l)] — considered

s. 1(3)(b) [en. 1998, c. 45, s. 2(l)] — considered

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s. 13(5)(b) [en. 1998, c. 45, s. 3] — considered

s. 13(6) [en. 1998, c. 45, s. 3] — considered

s. 13(6)(a) [en. 1998, c. 45, s. 3] — considered

s. 13(6)(a)(i) [en. 1998, c. 45, s. 3] — considered

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s. 13(6)(a)(iii) [en. 1998, c. 45, s. 3] — considered

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s. 13.1 [en. 1998, c. 45, s. 3] — considered

s. 13.1(1)(a) [en. 1998, c. 45, s. 3] — considered

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s. 13.1(4) [en. 1998, c. 45, s. 3] — considered

s. 13.2 [en. 1998, c. 45, s. 3] — considered

s. 17 [am. 1998, c. 45, s. 6] — considered

s. 17(2) [rep. & sub. 1998, c. 45, s. 6] — considered

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s. 17.1(1)(a) [en. 1998, c. 45, s. 7] — considered

s. 17.1(2) [en. 1998, c. 45, s. 7] — considered

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Generally — considered

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Generally — referred to

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Generally — referred to

R. 13 — referred to

R. 13(10) — referred to

ACTION by provincial government for tobacco-illness related damages; ACTION by tobacco manufacturers for declaratory judgment that *Tobacco Damages and Health Care Costs Act* is ultra vires *Constitution Act*.

***Holmes J.*:**

Tobacco Action

1 The three actions for trial concern the constitutional validity of the *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 1997, c. 41 [the " *Act*"]. The plaintiffs in the three actions are named defendants ["manufacturers"] in the Supreme Court of British Columbia, Vancouver Registry Action No. C985776 commenced by Her Majesty the Queen in Right of British Columbia (the "government action") pursuant to the statutory cause of action conferred by Section 13 of the Act. They are the Canadian manufacturers of tobacco products whose products have been marketed in British Columbia.

2 The plaintiffs seek declaratory judgments that the *Act* is ultra vires the Constitution of Canada and consequently of no force and effect.

3 The Council for Tobacco Research-U.S.A. Inc. and Tobacco Institute, Inc. ["Tobacco Institute"]; British America Tobacco p.l.c, British American Tobacco Investments, British American Tobacco Industries ["B.A.T."]; Brown & Williamson Tobacco Corporation ["Brown & Williamson"], American Tobacco Company; and Phillip Morris Companies Inc., Phillip Morris Incorporated and Phillip Morris International Inc.; collectively termed the " *ex juris* defendants", are defendants named in the government action who have been served *ex juris*.

4 The *ex juris* defendants have motions pending pursuant to Rule 13(10) of the *Rules of Court* to set aside service of the Writs of Summons and Statements of Claim but by agreement they appear in these proceedings to argue in support of the constitutional invalidity of the *Act*. The balance of their Rule 13 motions are to be heard at a later date.

5 The manufacturers' and the *ex juris* defendants' attack upon the *Act* is broadly based and essentially tripartite. They allege the *Act* exceeds the territorial jurisdiction of the Province; that it is an unconstitutional interference with judicial independence; and that it violates the rule of law protection of equality under the law and against retroactive penal legislation.

Legislative History of the Act

6 The *Tobacco Damages Recovery Act*, S.B.C. 1997, c. 41 received Royal Assent July 28, 1997. It was to be brought into force by regulation. By virtue of the Interpretation Act, R.S.C. 1985, c. I-21, only the title of the *Act* and the commencement section came into force July 28, 1997 and the balance of the *Act* remained unproclaimed.

7 For convenience, I refer hereafter to the manufacturers and the *ex juris* defendants collectively as "the manufacturers".

8 The *Act* remained dormant for approximately a year. On July 30, 1998 the *Tobacco Damages Recovery Amendment Act*, S.B.C. 1998, c. 45, which provided for extensive amendments to the original Act, received Royal Assent. The original *Act* and the Amendments were brought into force by Regulation, November 12, 1998 [Order in Council No. 1357]. The three manufacturers' actions now being tried were commenced immediately thereafter.

9 The status of the *Act* following the amendment was that Section 1 and Sections 13 to 19 were added to the title and the commencement section (s.20) previously in force. Sections 2 to 12 of the original *Act* remained unproclaimed.

10 The *Act* was further amended by Sections 61 to 65 of the *Miscellaneous Statutes Amendment Act* (No.3), 1999. On July 16, 1999, Royal Assent was given and on July 19, 1999, Order in Council No. 870 brought Sections 61 to 65 into force. The unproclaimed Sections 2 to 12 of the original *Act* were repealed.

11 It is not contentious that the Province has an exclusive right to make laws in respect of Property and Civil Rights in the Province; in respect of the Administration of Justice in the Province including matters of Civil Procedure in the Courts; and generally all matters of a merely local or private nature in the Province. [Sections 92(13), (14), and (16) of the *Constitution Act*, 1867 (U.K.), 30 & 31 Victoria, c. 3, rep R.S.C. 1985, App. II, No. 5].

12 The *Act* creates a new civil cause of action in British Columbia permitting the government to directly recoup a cost incurred on behalf of another and in addition deals substantively with rights and obligations. It is therefor legislation that deals with "Civil Rights in the Province" under s.92(13). [*City National Leasing Ltd. v. General Motors of Canada Ltd.* (1989), 58 D.L.R. (4th) 255 (S.C.C.); *Ontario (Attorney General) v. Scott* (1955), 1 D.L.R. (2d) 433 (S.C.C.)].

13 There are several provisions of the *Act* directed to "Procedure in Civil Matters" coming under s.92(14). [*Reference re Status of the Supreme Court of British Columbia* (1882), 1 B.C.R. 243 (S.C.C.); *Joseph Jacob Holdings Ltd. v. Prince George (City)* (1980), 118 D.L.R. (3d) 243 (B.C. S.C.); *Hunt v. T & N plc*, [1993] 4 S.C.R. 289 (S.C.C.), at 320, 109 D.L.R. (4th) 16 at 37].

14 The *Act* may also be said to relate to an aspect of the organization and delivery of health care within a Province which comes within s.92(16).

15 One illustration of prior Canadian legislation that provides government a direct cause of action to recoup from a third party costs incurred on behalf of another is found in the *Canada Shipping Act*, R.S.C. 1985, c. S-9, at ss.284-286. The federal government is accorded a right of action to recover from a ship owner, regardless of fault, the medical expenses paid to treat an illness of a seaman.

16 In fact, industry specific liability laws have long existed in the area of worker compensation legislation in England, U.S.A., and Canada.

17 A number of British Columbia statutes currently have liability provisions relating to specific industries, including:

Mines Act, R.S.B.C. 1996, c. 293, s.17

Pipeline Act, R.S.B.C. 1996, c. 364

Securities Act, R.S.B.C. 1996, c. 418, at s.131

Livestock Act, R.S.B.C. 1996, c. 270, at s.11

Architects Act, R.S.B.C. 1996, c. 17, at s.66

18 The *Act* is modelled in significant degree on the State of Florida's *Medicaid Third-Party Liability Act*, 409.910 Fla.Stat. (1995). On challenge in the Supreme Court of Florida, in *Agency for Health Care Admin. v. Associated Industries of Florida Inc.*, 678 So. 2d 1239 (U.S. Fla. 1996), at 1257, the Court upheld the statutory cause of action conferred on the state to recover health care costs on the basis that the state "... must have the freedom to craft causes of action to meet society's changing needs".

19 The arguments of the manufacturers here are predicated upon alleged constitutional inconsistencies that require the *Act* be invalidated entirely rather than remedied by severance or reading down. The Attorney-General without conceding that *Act* is unconstitutional in any way takes the position that reading down or severance could be appropriate in the event certain aspects of the *Act* are found to be unconstitutional.

20 The provisions of the *Act* have application to actions brought by the government and provide for a direct action for recovery of the cost of health care benefits incurred on behalf of an individual insured person, a number of individual insured persons or "on an aggregate basis".

21 It is the statutory cause of action under s.13(5)(b) in respect of the " aggregate action" that is the focus of the present declaratory actions. That is essentially because the provisions of the *Act* that formulate an aggregate cause of action are a radical departure from traditional common law damage actions requiring proof of individual causation and damages.

22 All arguments advanced cannot necessarily be segregated to the three main headings of constitutional analysis. There is some overlap and a flow of reasoning and analysis in common.

Interference with Independence of the Judiciary

23 The manufacturers claim that the *Act* constitutes an impermissible interference by the government with the judicial independence of the Court. The manufacturers argue that the effect of the scheme allowing the government an aggregate action for recovery of health care costs interferes with the Court's right to hear from relevant witnesses and receive the evidence necessary and appropriate to a determination of the facts. The manufacturers perceive the *Act* to involve the Court in a process that gives the appearance of partiality to the government's case and is, in reality, inherently unfair.

24 The argument of the manufacturers is grounded upon interference with judicial function and though centered upon the principle of judicial independence also raises issues as to separation of powers, the rule of law, and inviolability of the core judicial function of fact-finding, which in combination renders the *Act* constitutionally invalid.

25 The principle of independence of the functions of the judiciary is grounded in the preamble to the *Constitution Act* and Section 96. Chief Justice Lamer traced the origins of judicial independence in *R. v. Campbell*, [1997] 3 S.C.R. 3 (S.C.C.) at 76, 150 D.L.R. (4th) 577:

> The historical origins of the protection of judicial independence in the United Kingdom, and thus in the Canadian Constitution, can be traced to the *Act of Settlement* of 1701. And as we said in *Valente, supra*, that *Act* was the "historical inspiration" for the judicature provisions of the *Constitution Act*, 1867. Admittedly, the *Act* only extends protection to judges of the English superior courts. However, our Constitution has evolved over time. In the same way that our understanding of rights and freedoms have grown, such that they have now been expressly entrenched through the enactment of the *Constitution Act*, 1982, so too has judicial independence grown into a principle that now extends to all courts, not just the superior courts of this country.

26 And concluded at pp. 77-78 that:

> ... the express provisions of the *Constitution Act, 1867*, and the *Charter* are not an exhaustive written code for the protection of judicial independence in Canada. Judicial independence is an unwritten norm, recognized and affirmed by the preamble to the *Constitution Act, 1867*. ...

27 The *Act* is specific legislation for the benefit of the government who is plaintiff in the recovery action commenced. A new and unusual statutory cause of action is created that incorporates specific evidentiary rules and procedures and targets only the tobacco industry.

28 The *Act* gives the government:

> ... a direct and distinct action against a manufacturer to recover the cost of health care benefits ...
>
> [Section 13(1)].

29 The action is neither a subrogated action of individual claims, nor is it a class action. [Section 13(2)]. It permits two separate and divergent routes by which the government may recover health care benefits:

> In an action under subsection (1), the government may recover the cost of health care benefits
>
> (a) that have been provided or will be provided to particular individual insured persons, or
>
> (b) on an aggregate basis, that have been provided or will be provided to that portion of the population of insured persons who have suffered disease as a result of exposure to a type of tobacco product
>
> [Section 13(5)(a) and (b)].

30 The *Act* provides that if the government in an aggregate action proves, on a balance of probabilities, in respect of a type of tobacco product:

> (a) the defendant manufacturer breached a common law, equitable or statutory duty or obligation owed to persons who have been exposed or might become exposed to the type of tobacco product,
>
> (b) exposure to the type of tobacco product can cause or contribute to disease, and
>
> (c) during all or part of the period of the breach referred to in paragraph (a), the type of tobacco product, manufactured or promoted by the defendant manufacturer or the manufacturers related to the defendant manufacturer, was offered for sale in British Columbia
>
> [Section 13.1(1)(a), (b) and (c)].

31 The Court must presume:

> 13.1(2) Subject to subsections (1) and (4) ... that
>
> (a) the population of insured persons who were exposed to a tobacco product, manufactured or promoted by the defendant manufacturer or the manufacturers related to the defendant manufacturer, would not have been exposed to the product but for the breach referred to in subsection (1)(a), and
>
> (b) the exposure described in paragraph (a) caused or contributed to disease in a portion of the population described in paragraph (a).

32 The manufacturers argue this shifts the onus to them to disprove the presumptions, while s.13(6) denies them access to the evidence necessary to rebut the inference:

> 13(6) If the government seeks in an action under subsection (1) to recover the cost of health care benefits on an aggregate basis,
>
> (a) it is not necessary
>
> (i) to identify particular individual insured persons,
>
> (ii) to prove the cause of disease in any particular individual insured person, or
>
> (iii) to prove the cost of health care benefits that have been provided or will be provided to any particular individual insured person,
>
> (b) the health care records and documents of particular individual insured persons or the documents relating to the provision of health care benefits to particular individual insured persons are not compellable

except as provided under a rule of law, practice or procedure that requires the production of documents relied on by an expert witness,

(c) no person is compellable to answer questions with respect to the health of, or the provision of health care benefits to, particular individual insured persons

33 The manufacturers therefore allege that these legislative provisions allow the government, a party before the Court as plaintiff in the recovery action, to manipulate and interfere with the adjudicative process. More specifically, the manufacturers allege the inter-relationship of the sections of the *Act* structuring the aggregate form of action creates an interference striking at the core judicial fact-finding function, thus impairing the Court's ability to fairly determine the action. They rely upon judicial independence to safeguard against what they consider as legislative abuse.

34 The manufacturers, as an ancillary argument, point to the lack of separation between the legislative and executive branches of government in the present circumstance. They allege the effect is that the government as a party to the action has conscripted the legislature to interfere with the independence of the trier of fact.

35 The manufacturers' view the *Act* as the executive seeking a method to recover health care costs from the tobacco manufacturers by employing their controlling legislative capacity to create an entirely new cause of action. Clear and explicit language is required to extinguish rights that have been previously conferred. [*Wells v. Newfoundland* (September 15, 1999), No. 26362, [reported [1999] 3 S.C.R. 199 (S.C.C.)] p.41-42].

36 There is however no strict separation of powers doctrine in Canada. In any event, I do not accept that the *Act* does violate the separation of powers doctrine:

> There is no general "separation of powers" in the *Constitution Act*, 1867. The *Act* does not separate the legislative, executive and judicial functions and insist that each branch of government exercise only " its own" function. As between the legislative and executive branches, any separation of powers would make little sense in a system of responsible government; and it is clearly established that the *Act* does not call for any separation. As between the judicial and the two political branches, there is likewise no general separation of powers.
>
> [Peter W. Hogg, Constitutional Law of Canada (4th ed.) (Toronto: Carswell, 1997), p.190].

37 In *Reference re Secession of Québéc*, [1998] 2 S.C.R. 217 (S.C.C.), at 233, 161 D.L.R. (4th) 185 the Court noted:

> ... the Canadian Constitution does not insist on a strict separation of powers. Parliament and the provincial legislatures may properly confer other legal functions on the courts, and may confer certain judicial functions on bodies that are not courts. The exception to this rule relates only to s.96 courts.

38 I accept that research by counsel for the Attorney-General disclosed only four cases attempting a challenge to the validity of legislation in Canada based on separation of powers and none succeeded on that ground. The most notable was *Singh v. Canada (Attorney General)* (1999), 170 F.T.R. 215 (Fed. T.D.) affirmed on appeal January 14, 2000, Doc. A-426-99 [reported(2000), (sub nom. *Westergard-Thorpe v. Canada (Attorney General)*) 183 D.L.R. (4th) 458 (Fed. C.A.)].

39 I do not accept as tenable the manufacturers' argument that the right to a fair trial is a component of the rule of law. Comparison to s.7 or 11(d) *Charter* rights, although not directly relied upon, is a poor analogy as the *Charter* does not guarantee property rights.

40 In regard to economic interests within the context of a civil action:

> The omission of property rights from s.7 greatly reduces its scope. It means that s.7 affords no guarantee of compensation or even of a fair procedure for the taking of property by government. It means that s.7 affords no guarantee of fair treatment by courts, tribunals or officials with power over the purely economic interests of

> individuals or corporations. It also requires ... that [liberty and security of the person] be interpreted as excluding economic liberty and economic security; otherwise, property, having been shut out of the front door, would enter by the back.
>
> [Hogg, *supra*, at p.1074; ***Wells v. Newfoundland***, *supra*].

41 Madam Justice McLachlin, in *MacKeigan v. Hickman*, [1989] 2 S.C.R. 796, 61 D.L.R. (4th) 688 (S.C.C.), noted a distinction between independence of the judiciary and impartiality of the judiciary:

> It should be noted that the independence of the judiciary must not be confused with impartiality of the judiciary. As Le Dain J. points out in *Valente v. The Queen*, impartiality relates to the mental state possessed by the judge; judicial independence, in contrast, denotes the underlying relationship between the judiciary and other branches of government which serves to ensure that the court will function and be perceived to function impartially. Thus the question in a case such as this is not whether the government action in question would in fact affect a judge's impartiality, but rather whether it threatens the independence which is the underlying condition of judicial impartiality in the particular case.
>
> [***Reference Re: Public Sector Pay Reduction Act***, *supra*; ***R. v. Beauregard***, [1986] 2 S.C.R. 56 at 84, 30 D.L.R. (4th) 481 (S.C.C.)].

42 Chief Justice Lamer noted in *Lippé c. Charest*, [1991] 2 S.C.R. 114 (S.C.C.) at p.139: "... the overall objective of guaranteeing judicial independence is to ensure a reasonable perception of impartiality."

43 Chief Justice Dickson in *R. v. Beauregard*, *supra*, described the principle of judicial independence as:

> Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider — be it government, pressure group, individual or even another judge — should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision. This core continues to be central to the principle of judicial independence.
>
> [***R. v. Beauregard***, p.420, para.71].

44 A test to determine judicial independence emphasizing that the legislation must be viewed objectively from the standpoint of an informed reasonable person was proposed by Chief Justice Lamer in *R. v. Valente (No. 2)* (1983), 2 C.C.C. (3d) 417, 145 D.L.R. (3d) 452 (Ont. C.A.), [1985] 2 S.C.R. 673, 24 D.L.R. (4th) 161 (S.C.C.) that:

> ... a reasonable person, who was informed of the relevant statutory provisions, their historical background and the traditions surrounding them, after viewing the matter realistically and practically [would conclude that the tribunal or court was independent].
>
> [***R. v. Valente (No. 2)***, *supra*, at p.684].

45 The Court in *Canada (Minister of Citizenship & Immigration) v. Tobiass*, [1997] 3 S.C.R. 391 (S.C.C.), after considering these prior comments on how to determine whether the appearance of judicial independence has been maintained, formulated as a simple objective test:

> ... whether a reasonable observer would perceive that the court was able to conduct its business free from the interference of the government and of other judges.
>
> [***Canada (Minister of Citizenship & Immigration) v. Tobiass***, *supra*, para.72].

46 The manufacturers' central contention is that, where the government purports to go beyond creating a cause of action and enacts legislation which interferes with the fact-finding process required of the judge to determine the action, the judicial independence of the Court is compromised. The manufacturers' view is that the "blocking" provisions of s.13(6), restricting the admissibility of evidence, creates this impermissible effect.

47 The manufacturers argue the legislature having dealt with the creation of a cause of action and necessary procedural matters then engages the judicial fact-finding function. Having done so it may not immediately interfere and frustrate the independence of the judge in a core adjudicative function by keeping from him or her the evidence necessary to a fair decision.

48 The manufacturers see the government's cause of action as founded upon a breach of duty to an individual or a group of individuals. The definition of the " cost of health care benefits" in s.1(1) of the *Act* relates to the treatment of an individual person. The definition of an "insured person" in the *Act* is "a person ... provided with [or entitled to] health care benefits" [Section 1(1)].

49 The plaintiffs analyze the government's aggregate cause of action as giving rise to four major issues of fact to be determined by the Court; regardless of the party upon whom the onus of proof lies:

> 1. What was the knowledge of the person or persons to whom the duty was owed as to the facts related to the acts or omissions, which are the basis of the alleged breach of duty?
>
> 2. Did any of the acts or omissions of the defendants cause individuals to start smoking, or fail to quit smoking?
>
> 3. Did smoking cause disease to individuals and did smoking cause the government to incur the health care costs claimed?
>
> 4. Were the health care costs incurred properly in all respects?

50 The manufacturers, stressing the need in their view for proof in regard to " individual persons", argue that the pool of evidence available for the Court to determine these necessary factual issues consists of:

> 1. Direct evidence of the individuals who received health care;
>
> 2. Direct evidence of doctors and others involved in delivering the health care;
>
> 3. Other relevant direct evidence from persons relating to 1 & 2;
>
> 4. Health care records of the government and others;
>
> 5. Statistical evidence that correlates the direct and the documentary evidence.

51 Section 13(6)(a)(i),(ii), and (iii) together provide that the government is not required to identify any particular individual insured person, to prove the cause of disease in any particular insured person, or to prove the cost of health care benefits provided to any individual insured person.

52 Section 13(6)(b),(c),(d), and (e) together effectively bar access to records and evidence relating to individual insured persons.

53 First the production of individual health care records is restricted:

> 13(6) If the government seeks in an action under subsection (1) to recover the cost of health care benefits on an aggregate basis,

...

> (b) the health care records and documents of particular individual insured persons or the documents relating to the provision of health care benefits to particular individual insured persons are not compellable except as provided under a rule of law, practice or procedure that requires the production of documents relied on by an expert witness,

54 Secondly:

> 13(6) If the government seeks in an action under subsection (1) to recover the cost of health care benefits on an aggregate basis,
>
> ...
>
> (c) no person is compellable to answer questions with respect to the health of, or the provision of health care benefits to, particular individual insured persons[.]

55 However the Court has a discretion and may on application of a defendant:

> 13(6)(d)
>
> despite paragraphs (b) and (c), ... order discovery of a statistically meaningful sample of the documents referred to in paragraph (b) and the order must include directions concerning the nature, level of detail and type of information to be disclosed[.]

56 Additionally, in any statistical sample ordered:

> 13(6)(e)
>
> if an order is made under paragraph (d), the identity of particular individual insured persons must not be disclosed and all identifiers that disclose or may be used to trace the names or identities of any particular individual insured persons must be deleted from any documents that are disclosed.

57 In sum, the manufacturers characterize s.13(6) as a "blocking" provision, effectively eliminating the defendants' access to direct evidence of the individuals the cost of whose health care benefits have been aggregated in the action. They view this as ensuring their inability to defend themselves in rebutting the onus shifted upon them. They urge these provisions demonstrate legislative interference, by preventing the Court receiving the evidence necessary to fairly perform its core adjudicative fact-finding function.

58 They urge the effect of the provisions of the *Act* compels the Court to determine the facts on a fictional, statistical basis because the *Act* effectively bans any inquiry into the medical history of the actual individuals whose costs of health care benefits are aggregated. The manufacturers argue the Court is left without the ability to test the statistical evidence of experts against the direct evidence of the persons who comprise the cohort from which samples are taken.

59 The manufacturers argue the process mandated by the *Act* prevents and interferes with the ability to hear, test and weigh evidence on the issues to be decided and forces the trier of fact to rely on secondary hypothetical evidence of questionable accuracy.

60 The concept of a constitutionally protected core judicial function was recognized by the Supreme Court of Canada in *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725 (S.C.C.). At issue was s.47(2) of the *Young Offenders Act*, R.S.C. 1985, c. Y-1, which granted to the youth court exclusive jurisdiction in respect of *ex facie* contempt by a youth of any Court. A Superior Court was thus deprived of jurisdiction to deal with an *ex facie* contempt of its own Court.

61 The Court held that the grant of jurisdiction to the youth court of the power to deal with contempt of a Superior Court was within the test for s.96 of the *Constitution Act, 1867*, in *Reference re Residential Tenancies Act (Ontario)*, [1981] 1 S.C.R. 714, 123 D.L.R. (3d) 554 (S.C.C.). The Court however was divided on the issue of whether it was constitutionally permissible to remove the contempt jurisdiction from the Superior Court.

62 The majority of the Court, led by Chief Justice Lamer, held that where a non-section 96 body received a grant of exclusive jurisdiction which formed part of the core jurisdiction of a Superior Court it was constitutionally invalid.

63 In *MacMillan Bloedel Ltd. v. Simpson, supra*, a specific jurisdiction of the Court was entirely removed. By contrast, an interference with jurisdiction by a concurrent grant to the youth court was insufficient to constitutionally invalidate the grant.

64 In relation to the case at bar the Province clearly has power to legislate in the field of civil procedure. The facts of this case do not trigger s.96. There is no core jurisdiction of Court that is removed when it is directed by legislation in regard to evidentiary or procedural matters ancillary to a civil cause of action. The *Rules of Court* and *B.C. Evidence Act* are examples.

65 I do not accept that the principle of judicial independence can be extended to a trier of fact in a civil action having an unfettered right to determine what evidence may be adduced.

66 The provisions of the *Act* do not remove from the Court its function of finding the facts necessary to reach a decision. The fact-finding process may at most be said to suffer some interference or constraint as a result of procedural provisions, but I do not consider that inference impairment of a core judicial function.

67 The manufacturers draw an analogy to the decision in *R. v. Seaboyer*, [1991] 2 S.C.R. 577 (S.C.C.) striking down the Rape Shield Law. Madam Justice McLachlin said at p.609:

> It is fundamental to our system of justice that the rules of evidence should permit the judge and jury to get at the truth and properly determine the issues. This goal is reflected in the basic tenet of relevance which underlies all our rules of evidence.
>
> ...
>
> In general, nothing is to be received which is not logically probative of some matter requiring to be proved and everything which is probative should be received unless its exclusion can be justified on some other ground. A law which prevents the trier of fact from getting at the truth by excluding relevant evidence in the absence of a clear ground of policy or law justifying the exclusion runs afoul of our fundamental conceptions of justice and what constitutes a fair trial.

68 The issue concerned a criminal law of general application. There was no reverse onus, and the application of the *Act* was specific not general. The restrictions in the case at bar apply only to the government's ability to bring an aggregate action and do not apply to an individual action.

69 The manufacturers also rely upon the recent decision of the Supreme Court of Canada in *R. v. Mills* (1999), 28 C.R. (5th) 207, 248 N.R. 101 (S.C.C.) , concerning the constitutionality of ss.278.1 to 278.91 of the *Criminal Code* and the production of records in sexual offence proceedings. McLachlin and Iacobucci JJ. write at para.89:

> From our discussion of the [accused's] right to make full answer and defence, it is clear that the accused will have no right to the records in question so far as they contain information that is either irrelevant or would serve to distort the search for truth, as access to such information is not included with the ambit of the accused's right ... However, the accused's right must prevail where the lack of disclosure or production of the record would render him unable to make full answer and defence. This is because our justice system has always held that the threat of

convicting an innocent individual strikes at the heart of the principles of fundamental justice. However, between these extremes lies a spectrum of possibilities regarding where to strike a balance between these competing rights in any particular context.

70 Certainly, the case at bar invokes the right of the manufacturers to make " full answer and defence", but the right applies to a set of facts significantly different from the position of an individual defending against an accusation of sexual misconduct in the criminal context. Moreover, as both *R. v. Seaboyer*, *supra*, and *R. v. Mills*, *supra*, clearly indicate, the threshold requirement that triggers any analysis of the content of the right to make full answer and defence is that the information sought must be relevant to the inquiry. But the relevance of the evidence is precisely what is disputed when access to individual health records is sought for the purposes of defending against an aggregate cause of action.

71 I do not agree that the analysis of the manufacturers which focuses on evidence of insured individuals and the application of traditional rules regarding tort-based actions and conventional civil procedures may be fairly transferred to the statutory aggregate cause of action created under the *Act*.

72 The aggregate action is intended to provide for relief where the traditional, individually oriented tort action does not realistically meet the need of a large-scale loss-recovery action, where very substantial numbers of people have been exposed to toxic substances said to have resulted in adverse health effects through non-observable means of causation.

Fleming, "*Probabilistic Causation in Tort Law*" (1989), 68 Can. Bar. Rev. 661.

Fleming, "*Probabilistic Causation in Tort Law: A Postcript*" (1991), 70 Can. Bar. Rev. 136.

73 The legislature has accepted that the conduct of tobacco companies and the related effect of tobacco smoking on health has become a tort of a dimension which, to approach on an individual basis, is entirely uneconomic, an unreasonable strain on judicial resources, but may be fairly dealt with on an aggregate basis utilizing evidence based on statistical, epidemiological and sociological studies.

74 The basic tenet that causation within a population may be more accurately identified statistically than by means of attribution of individual causation in a multiplicity of conventional tort-based actions appears sound.

75 The use of statistical and epidemiological evidence is an essential aspect of an aggregate action. The question in issue becomes causation in the group rather than of any individual group member.

76 It is important to note the *Act* provides only for the admission of the evidence. The credibility and weight remain for the trier of fact.

77 The central focus of the argument of the manufacturers, that the *Act* is "unfair" and that the independence of the judge charged with deciding the facts becomes compromised, is that s.13(6) severely restricts access to and use of particular evidence of individual group members.

78 The argument of the manufacturers tends to mischaracterize the *Act* and fails to accord recognition of the main feature of an aggregate action. The group is not simply a collection of individual claimants such that proof is the product of the evidence supplied by each constituent member.

79 The aggregated claims are at once a collection and a mixture in which individual identity is lost.

80 The evidence, histories, and medical and health records of individuals within the population lose their individual relevance but assume a statistical relevance as part of the cohort of the larger group from which statistical conclusions are drawn.

81 The most reliable and relevant evidence in an aggregated claim becomes statistical and epidemiological, and access to those forms of evidence is of import.

82 As the individual records of members of the aggregate group have only statistical relevance the shielding of the identification of individuals prevents the action reverting to an individualized action permitting individual forms of discovery. The information in respect of the individuals subsumed in the aggregate group has statistical relevance; their personal identification does not. In this case, there is sufficient reason for names being protected from disclosure.

83 Recognizing however the statistical relevance and importance of the individual records, the *Act* provides the Court with the power to order a "meaningful sample" of the population and to control the detail required to be disclosed [Section 13(6)(d)].

84 A "meaningful sample" is not defined in the *Act* and might therefore, in appropriate circumstances, approach the whole of the population.

85 A similar direct and aggregate action to that contemplated by the *Act* was upheld in *State of Florida et al v. The American Tobacco Company et al* (October 18, 1996) (District Court Case No. CL 95-1466 AH). The enabling statute was there held defective because it prohibited disclosure of the identification of Medicaid recipients without providing a mechanism that would permit the manufacturers to challenge improper payments made to persons as the result of fraud, misdiagnosis or unnecessary treatment; the resulting prohibition thus amounted to an irrebuttable presumption regarding such payments. The provisions were struck down on the basis of protection of "life, liberty and property" pursuant to due process under Florida law.

86 This defect in the Florida statute however was later remedied by a mechanism for disclosure of records, subject to a restriction on the identification of individuals.

87 That concept appears analogous in effect to the controlled disclosure allowed in section 13(6)(d) of the *Act*.

88 The *Act* contains two rebuttable presumptions in regard to causation. When the government proves a breach of duty by a tobacco manufacturer it is presumed:

> 13.1(2) Subject to subsections (1) and (4) ... that
>
> (a) the population of insured persons who were exposed to a tobacco product, manufactured or promoted by the defendant manufacturer or the manufacturers related to the defendant manufacturer, would not have been exposed to the product but for the breach referred to in subsection (1)(a), and
>
> (b) the exposure described in paragraph (a) caused or contributed to disease in a portion of the population described in paragraph (a).

89 The first presumption is necessary to remove the need in an aggregate action to provide proof of individual causation. There is a rational connection between the facts that are required to prove a breach of duty and the fact of exposure the presumption mandates.

90 The reversal of onus in respect of a causation issue is an accepted remedial procedure. As Sopinka J. wrote in *Snell v. Farrell*, [1990] 2 S.C.R. 311, 72 D.L.R. (4th) 289 (S.C.C.) at 299:

> ... If I were convinced that defendants who have a substantial connection to the injury were escaping liability because plaintiffs cannot prove causation under currently applied principles, I would not hesitate to adopt one of these alternatives. ...

91 In *Kripps v. Touche Ross & Co.* (1997), 33 B.C.L.R. (3d) 254 (B.C. C.A.) the court held that a plaintiff alleging a negligent misrepresentation need not prove their decision or action would not have been made but for the misrepresentation. This is where there may have been a number of reasons of which the misrepresentation was only one.

92 Another example where the general rule that a plaintiff must establish the reasonableness of a variation in proof of causation is found in *Hollis v. Birch*, [1995] 4 S.C.R. 634, 129 D.L.R. (4th) 609 (S.C.C.). The Supreme Court of Canada held that a patient who suffered injury because of a manufacturer's failure to warn her doctor about the medical risks of a product did not have to prove causation by showing the doctor would have communicated the warning to her.

93 Section 131 of the *Securities Act*, R.S.B.C. 1996, c. 418 is an example of a statutory assumption of detrimental reliance once a misrepresentation is shown. The Court of Appeal in *Sidhu Estate v. Bains* (1996), 25 B.C.L.R. (3d) 41 (B.C. C.A.) held that upon establishing a misrepresentation which might reasonably lead to a claimed loss the onus shifts to the defendant to prove the misrepresentation was not in fact relied upon.

94 It is the Attorney-General's position that the constitutional challenge is premature as there is no proper factual basis to test whether the challenged " blocking" provisions of s.13(6), after exercise of the Court's discretion as to a "meaningful sample", prevents access to any information relevant to a required factual decision. I agree that it would be preferable.

95 The Court in *R. v. Mills*, at paragraph 105, supports the view that constitutional complaint should not precede utilization of procedures the legislation may provide to access disputed records.

96 I do not accept on present evidence that the inability to identify individual insured persons or to have unlimited access to the records of all insured persons unfairly prevents manufacturers from presenting evidence to rebut the presumption that their breach of duty caused persons to be exposed to tobacco products.

97 The manufacturers may present evidence as outlined by the Attorney-General in argument including:

> ... direct and particularistic evidence of health officials, medical professionals and smokers themselves regarding what causes persons to smoke. They may bring expert medical, behavioural and psychological evidence, based on studies and surveys to support their claims about smoking behaviour — for example, to show that a portion, or all, of their customers would have smoked and would have incurred disease in any event, even if the Manufacturers had not breached any duty to them.
>
> [Attorney-General Brief, p.62]

98 The second presumption, namely that exposure to tobacco causes disease, provides that if the government is able to establish a breach of duty by a manufacturer, and that exposure to a tobacco product causes disease it should be presumed the exposure to the product caused or contributed to disease in a portion of the population who were exposed to the product.

99 The presumption provides that if exposure to a generic tobacco product causes or contributes to disease, it will be presumed that exposure to a specific type of that tobacco product also caused or contributed to disease in a portion of the population.

100 The presumption eliminates the necessity of proof on a brand by brand basis. The presumption appears neither illogical nor unfair. Section 13.1(4) provides that the manufacturer may offer evidence in rebuttal. It may be assumed a manufacturer would be most familiar with the effects of his own product and have access to the necessary evidence to demonstrate a brand differential. [*Snell v. Farrell*, *supra*, Sopinka J., at p.300]:

> In many malpractice cases, the facts lie particularly within the knowledge of the defendant. In these circumstances, very little affirmative evidence on the part of the plaintiff will justify the drawing of an inference of causation in the absence of evidence to the contrary. ...

101 I do not accept that the impugned legislation here predetermines the result. The presumptions involved have a logical connection to the factual issues.

102 The aggregate action, after resolution of issues of breach of duty, causation and disease, requires the government to introduce evidence as to cost of health care benefits in respect of those diseases.

103 The *Act* requires the Court to determine the aggregate cost of health care benefits that have been provided after the date of breach and the defendants then become liable on the basis of proportionality in market share. [Section 13.1(3)].

104 An award is a matter of assessment by the Court. There is no award upon certification by the government as to the amount of the health care costs it has or will incur. The amount of any award is to be by assessment based upon the evidence. As in many tort actions the assessment would not be without difficulty or amenable to precise measurement. However, as Cory J.A. observed:

> The court, I believe, would be shirking its duty if it were to say that no damages should flow because of the difficulty of calculating and assessing such damages and that they are therefore too remote. An assessment of future loss of profits must, of necessity, be an estimate. ... The task will always be difficult but not insurmountable. It poses no greater obstacle to a court than the assessment of general damages in a serious personal injury claim.
>
> [*Canlin v. Thiokol Fibres Canada Ltd.* (1983), 40 O.R. (2d) 687 (Ont. C.A.) at 691].

105 Equally, the "market" share theory appears a logical and fair method in an aggregate action to ensure that a defendant manufacturer is held responsible only for that portion of injury that represents their product's contribution to the market place.

106 The provisions of the *Act* preclude a combination of market share and joint and several liability, the two being inconsistent concepts. Joint and several liability is permitted only where it is established that all of the manufacturers either committed a wrong in concert [Section 13.2] or where they committed the same tobacco related wrong [Section 17(2)].

107 I conclude the provisions of the *Act* permitting the government an aggregate cause of action for the recovery of the costs of health care benefits it has incurred is within the constitutional competence of the Province. The procedural and evidentiary components of the legislation are necessary features ancillary to the new cause of action created.

108 At this time, adopting a broad view of the legislation, I do not find on the basis of the test suggested by Chief Justice Lamer in *R. v. Valente (No. 2)*, that the independence of a trier of fact is compromised or interfered with. A reasonable person, informed as to the tenets of an aggregate action together with all the evidentiary and procedural provisions enacted in respect of the new cause of action, would not, viewing the matter realistically and practically, believe the trier of fact was unfairly kept from evidence required to adjudicate the issues raised.

109 In my view the *Act* does not offend against the independence of the judiciary by interfering with the Court's fact-finding power and is not constitutionally invalid on that ground.

The Rule of Law

110 The manufacturers argue that the *Act* breaches the equality rights and principles enshrined within the rule of law. They argue that the *Act* offends against both equality between subjects and between subject and Crown.

111 It is also the manufacturers' position that if the *Act* is not compensatory in nature it is retroactive and penal, a designation rendering even legislation of a civil nature unconstitutional under the rule of law.

112 The manufacturers complain the *Act* singles out tobacco manufacturers from all others and applies a different standard of product liability law in respect of them.

113 They argue that inequality arises because the effect of the legislation permits a defendant manufacturer to be found liable without having committed any actionable wrong against anyone and to be required to pay large sums of money to the government which may have suffered no loss.

114 In the result, a retrospective penalty occurs because the *Act* targets a specific group of politically vulnerable manufacturers based on past acts related to the manufacture, sale and use of tobacco products that have passed beyond their control and are now associated with the payment of health care benefits.

115 Section 11(g) of the *Charter* deals specifically with retroactive criminal offences and s.15 with aspects of equality rights under law. The manufacturers argue that protection to similar effect exists based on the rule of law. The manufacturers therefore do not rely directly on provisions of the *Charter*, rather they rely upon the rule of law as an integral aspect of the Constitution to invalidate the *Act*.

116 The manufacturers argue that the rule of law, which is constitutionally entrenched, is a source of the prohibition on retroactive penal legislation and of equality rights. It is part of the foundation of the *Charter* and specifically referenced in its preamble.

117 The rule of law is an unwritten component of the Canadian Constitution and without need for specific provision; it is taken to be "... a fundamental principle of the Canadian constitutional order." [*Reference re Language Rights Under s. 23 of Manitoba Act, 1870 & s. 133 of Constitution Act, 1867*, [1985] 1 S.C.R. 721 at 724, 19 D.L.R. (4th) 1, [1985] 4 W.W.R. 385 (S.C.C.)].

118 That unwritten constitutional principles form part of the fabric of the Canadian Constitution is clear. As expressed by Chief Justice Lamer, the provisions of the preamble to the *Constitution Act, 1867* provide " organizing principles" that may be used to "fill out gaps in the express terms of the constitutional scheme." [*Reference Re: Public Sector Pay Reduction Act*, at paras. 83 and 95].

119 Section 52(2) of the *Constitution Act, 1982* does not purport to provide an exhaustive list of instruments defining the ambit of the Canadian constitution.

120 Section 26 of the *Charter of Rights and Freedoms* expressly excludes the fact of express *Charter* rights "... denying the existence of any other rights or freedoms that exist in Canada".

121 *Reference re Secession of Québéc, supra*, affirms that there are unwritten rules that are considered an integral part of our Constitution.

122 *R. v. Beauregard* recognized that judicial independence was passed to Canada as a constitutional principle by the language of the preamble to the *Constitution Act, 1867*.

123 Our system of government has evolved to a system of constitutional supremacy rather than just parliamentary supremacy [*Reference re Secession of Québéc*].

124 The manufacturers' position is that retroactive legislation obviously violates the rule of law, on which the Constitution rests, as it changes the law in respect of past events making discovery of law unascertainable until after the event.

125 The rule against Bills of Attainder is suggested by the manufacturers to represent one of the component parts of an implied bill of rights. The manufacturers equate any non-compensatory view of s.13 of the *Act* as targeting tobacco manufacturers for punishment for acts that attracted no penalty at the suit of government at the time they occurred.

126 Bills of Attainder are expressly prohibited under the *American Constitution Article 1*, s.9, CL.3. Although there is no equivalent written *Charter* or constitutional prohibition in Canada:

> ... it would surely be unthinkable today that Parliament could enact a Bill of Attainder or a Bill of Pains and Penalties ...
>
> ...
>
> In England and in Canada, such methods of Parliamentary trial and punishment have passed into desuetude. As I have said, it may be assumed that, even apart from the Charter, such a method of finding guilt and imposing punishment would be generally regarded as beyond the power of Parliament in a country like Canada which has "a Constitution similar in Principle to that of the United Kingdom"...
>
> [*R. v. Bowen*, [1989] 2 W.W.R. 213 (Alta. Q.B.) at 259-60, aff'd at [1991] 1 W.W.R. 466 (Alta. C.A.); p.32 *Ex Juris* Brief]

127 The experience in American law has been that governments should not be permitted to manipulate the form of proceeding and Courts have recognized that criminal prohibition in the guise of a civil statute will not succeed. [*Cummings v. Missouri*, 71 U.S. 277 (U.S. Mo. 1866); and *United States v. Lovett*, 328 U.S. 303 (U.S. Cl. Ct. 1946) at 315-16)].

128 I do not consider that any party has raised a serious issue as to the *Act* being interpreted as other than compensatory legislation intended to recoup health care costs incurred by the government. In my view, no reasonable interpretation of the *Act* would make it penal legislation. It imposes neither prohibitions nor penalties. [*United States v. Ivey* (1995), 26 O.R. (3d) 533 (ont. Gen. Div.) at 544, aff'd (1996), 139 D.L.R. (4th) 570 (Ont. C.A.)]:

> The scope of the category "penal" laws was defined by the Privy Council in *Huntington v. Attrill*, [1893] A.C. 150 at p.157, 20 O.A.R. App. 1, as (quoting Gray J. in *Wisconsin v. Pelican Insurance Co.*, 127 U.S. 265):
>
> > ... all suits in favour of the State for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue or other municipal laws, and to all judgments for such penalties.
>
> In my view, the C.E.R.C.L.A. provisions imposing liability against the defendants cannot be classified as penal in nature. In *United States v. Monsanto*, 878 F.2d 160 (4th Cir., 1988) at pp.174-75, C.E.R.C.L.A. was characterized as follows:
>
> > C.E.R.C.L.A. does not exact punishment. Rather it creates a reimbursement obligation on any person judicially determined responsible for the costs of remedying hazardous conditions at a waste disposal facility. The restitution of cleanup costs was not intended to operate, nor does it operate in fact, as a criminal penalty or a punitive deterrent.
>
> The measure of recovery is directly tied to the cost of the required environmental clean-up. The court must be satisfied that the amounts it seeks to recover were actually expended in response to the environmental threat, and that those costs were incurred in the manner prescribed by C.E.R.C.L.A. and the National Recovery Plan. While the nature of liability imposed may be unexpected, it is restitutionary in nature and is not imposed with a view to punishment of the party responsible.

129 The manufacturers urge that the *Act* offends against four basic tenets of the rule of law.

> 1. It is presumed the legislature did not intend one law for one class and a different law for others.
>
> 2. It is presumed there is no departure from an existing system of law except by words of irresistible clearness.
>
> 3. It is presumed no vested rights are abolished, such as defenses or immunity to suit prospectively or retrospectively unless plainly expressed.

> 4. It is presumed there is no retrospectivity or retroactivity except to the extent made unavoidable by 1 or 2 or any reasonable construction to the contrary.

130 The *Act* is clearly intended to apply only to the tobacco industry but it treats all within that industry equally. The intent is that there be departures from the existing product liability and tort law is patently manifest.

131 The manufacturers argue that the *Act* should be interpreted according to the statutory language. Extra-statutory material such as the Minister's speeches in the Legislature or the views of the executive are of assistance only in understanding a problem calling for a legislative solution and are not to be considered in interpretation of the solution adopted.

132 The gist of the Attorney-General's position is that the *Act* does not offend against any principle of the rule of law, and, in any event, the rule of law is not capable of being used to strike down legislation in the manner the manufacturers advocate.

133 The manufacturers' view is that by any reasonable interpretation the *Act* singles out the tobacco industry for special treatment. They stress the *Act* creates a new wrong but fails to provide a customary fundamental protection requiring there be proof of damage to someone. It abolishes vested rights on limitation of claims for compensation and, in light of the Reply pleading of the Attorney-General in the government action, has removed or abolished all defences traditionally available to a person defending a damage action.

134 I agree with the submissions on behalf of the Attorney-General that it is premature to rule in the abstract on the limitation provisions in the *Act*. I do not consider it a constitutional issue to be determined at this time. It should be decided in the progress of the action when clothed with factual context.

135 I also make no determination as to the status of affirmative defences raised and pleaded in the action commenced. The *Act* does not appear to specifically abolish any particular defence although in respect of aggregate actions the nature of some defences may by necessary implication become inapplicable or change in form. I do not take either the fact, in the recovery action commenced, that the manufacturers have plead a particular defence, or that the Attorney-General has denied the existence of the defence, as a definitive interpretation of the *Act*.

136 It is alleged the words of the *Act* have not conveyed with the " irresistible clearness" required the intention of the legislature to override the application of the principle of the rule of law.

> ... The principle of the sovereignty of Parliament requires judicial obedience to the strict terms of the statute. In the process of applying a statute, however, uncertainties concerning its scope or effect in particular circumstances are bound to arise. The rule of law requires that these uncertainties be resolved, so far as possible, in a manner which would most conform to the reasonable understanding of the subject to whom the statute is primarily addressed. Implicit in this understanding is the expectation that Parliament will conform to the generally accepted notions of fairness and justice — that punishment will not be authorized for acts which were not known to be unlawful when committed, that vested rights will not be destroyed without reasonable compensation, that the powers of officials are to be limited by proper respect for the liberty of the citizen. "If the words are not conclusive in themselves, the reasonableness or otherwise of the construction contended for has always been recognized as a matter fairly to be taken in account".
>
> [T.R.S. Allan, "Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism" (1985), 44 C.L.J. 111 at 121].

137 The manufacturers argue that when legislation creates a wrong without damage to an individual or the government, for example, a departure from the principles in *Moran v. Pyle National (Canada) Ltd.*, [1975] 1 S.C.R. 393, 43 D.L.R. (3d) 239 (S.C.C.), it is necessarily arbitrary and penal.

138 The manufacturers say the cumulative effect of the wide and encompassing breaches of the principle of the rule of law should therefore lead to invalidation of the legislation.

139 It is of some significance, as the Attorney-General has noted, that the cases upon which the manufacturers rely to demonstrate a constitutional entrenchment of the rule of law and its application to invalidate the legislation arose only in circumstances where the legislation was also found unconstitutional on the basis of specific provisions of the *Charter* or a specific written provision of the *Constitution Act, 1867*.

140 Examples include *R. v. Valente*; *Lippé c. Charest*, *supra*; *Reference Re: Public Sector Pay Reduction Act*; *R. v. Seaboyer*, all these cases were decided on the basis of s.11(d) of the *Charter*; *R. v. Beauregard*, was decided on the basis of s.100 of the *Constitution Act, 1867* and s.1(b) of the *Canadian Bill of Rights*; *MacMillan Bloedel v. Simpson*, was decided on the basis of s.96 of the *Constitution Act, 1867*.

141 The ability to use the rule of law in sword-like fashion to strike down legislation was directly considered in *Singh v. Canada (Attorney General)* (1999), 170 F.T.R. 215 (Fed. T.D.). The issue in that case concerned provisions of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, that prohibited the production of cabinet documents. There is factual similarity to the issue raised in this proceeding, specifically the provisions of s.13(6) of the *Act* which deny access to the records and information on individual insured persons. The applicants in *Singh v. Canada (Attorney General), supra*, at para.18, relied upon the constitutional supremacy view expressed in *Reference re Secession of Quebec*:

> The applicant argues that, given the supremacy of the Constitution, Section 39 should be declared invalid.

142 In the analysis, the following was at issue (at para.28):

> The applicants submit that the decision in the Quebec Human Rights case, ... is not determinative of this application since the Supreme Court of Canada "has now made it clear that Canada is a constitutional democracy". To support their position that the Constitution and not Parliament is now supreme, the applicants rely on the *Quebec Secession* case ... at p.258:
>
> > The constitutional principle bears considerable similarity to the rule of law, although they are not identical. The essence of constitutionalism in Canada is embodied in s.52(1) of the *Constitution Act, 1982*, which provides that "[t]he Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." Simply put, the constitutionalism principle requires that all government action comply with the Constitution. The rule of law principle requires that all government action must comply with the law, including the Constitution. ... The Constitution binds all governments, both federal and provincial, including the executive branch (*Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, at p.455). They may not transgress its provisions; indeed, their sole claim to exercise lawful authority rests in the powers allocated to them under the Constitution, and can come from no other source.

143 The position argued, founded on the *Reference re Secession of Québéc*, is the essence of the manufacturers' argument here.

144 Mr. Justice McKeown held at para.39:

> The Supreme Court of Canada has concluded that unwritten constitutional norms may be used to fill a gap in the express terms of the constitutional text or used as interpretive tools where a section of the Constitution is not clear. However, as noted by La Forest J., dissenting in *Provincial Court Judges Reference*, the principles of judicial review do not enable a Court to strike down legislation in the absence of an express provision of the Constitution which is contravened by the legislation in question.

145 Mr. Justice Edwards in *Babcock v. Canada (Attorney General)* (28 July 1999), Vancouver Registry No. C963189 [reported(1999), 70 B.C.L.R. (3d) 128 (B.C. S.C.)], followed *Singh v. Canada (Attorney General)*.

146 The decision of McKeown J. in *Singh v. Canada (Attorney General)* was upheld in *sub nom. Westergard-Thorpe v. Canada (Attorney General)*, *supra*.

147 Justice of Appeal Wakeling writing for the Saskatchewan Court of Appeal in *Bacon v. Saskatchewan Crop Insurance Corp.* (14 May 1999) [reported, [1999] 11 W.W.R. 51 (Sask.C.A.)], [1997] 9 W.W.R. 258 (Sask. Q.B.) provides an insightful analysis of the "... one law for all" concept based on the rule of law providing the law be supreme over both the acts of government and private persons:

> The observation of the Supreme Court (para.78) that the rule of the law and the constitution are not in conflict is a compelling statement. It is a statement made in 1998 with full knowledge that on many occasions over the preceding years Parliament has passed and relied upon legislation restricting or eliminating contractual and property rights which would otherwise have been available. Since the Supreme Court does not find this historical background to constitute a conflict with the rule of law, it must of necessity indicate they accept that legislation constitutes an important source of the laws which rule us and the sole restriction on that right to legislate is contained in the relevant Constitution.
>
> I am unable to accept that these justices of the Supreme Court, whilst providing an analysis of our federal system, were at the same time engaged in changing that system. That is particularly so when we are not talking of a subtle or marginal change, but one which would reduce the supremacy of Parliament by subjecting it to the scrutiny of superior court judges to be sure it did not offend the rule of law and if it did, to determine whether it was an arbitrary action. If the Supreme Court of Canada meant to embrace such a doctrine, I would expect it would see the need to say so very clearly in a case where that was the issue before them. This is particularly so when they are not only cognizant of the many cases in various jurisdictions acknowledging the supremacy of Parliament, but must also be aware of their own previous judgments which have endorsed that principle such as: *PSAC v. Canada*, [1987] 1 S.C.R. 424, *Reference re Canada Assistance Plan*, [1991] 2 S.C.R. 525, *Attorney General for British Columbia v. Esquimalt & Nanaimo Railway*, [1950] A.C. 87 (P.C.). Furthermore, I am unable to accept that when the justices were laying a foundation for their decisions in the *Secession* case by reviewing the historical and legal development of federalism in this country, that they were also engaged in changing that foundation. If that were so, it would surely not be done in such a subtle manner as to be questionable whether it had happened at all.
>
> [*Bacon v. Saskatchewan Crop Insurance Corp.*, *supra*, at paras. 28 - 29].

148 In *Bacon v. Saskatchewan Crop Insurance Corp.*, the Court held that *Reference re Secession of Québec* does not provide authority that allows the Courts on the basis of the preamble to the *Constitution Act, 1867* to strike down legislation as offending the rule of law.

149 I find the manufacturers have not shown that the provisions of the *Act* offend against specific principles of the rule of law in constitutional context.

150 I also accept the reasoning and the result in *Singh v. Canada (Attorney General)*, and *Bacon v. Saskatchewan Crop Insurance Corp.*, and by Edwards J. in *Babcock v. Canada (Attorney General)*, *supra*, that in any event the rule of law of itself is not a basis for setting aside legislation as unconstitutional.

Extra-Territorality

151 Analysis of the purpose and effect of the *Act* demonstrates its dominant characteristic or pith and substance. The purpose of the *Act* is the recovery by the Province of the tobacco related health care costs it has incurred from the tobacco industry nationally and internationally.

152 The effect of the *Act* is to impose a new form of liability on the mostly extra-territorial defendants founded on shareholdings and other types of property ownership, wherever those rights may be situate, for the acts or omissions attributable to some of them. This result follows regardless of whether the locus of the acts or omissions was within British Columbia, Canada, or elsewhere in the world.

153 The purpose and effect of the *Act* at this stage is to be discerned from the history of the legislation and analysis of the *Act*'s provisions, as assisted by what may be gleaned from the Statement of Claim and Reply to Defences in the government action commenced pursuant to the statutory cause of action.

154 Sections 1(5) and 17.1(1)(a) impose a Group liability on the defendants. Foreign and federally incorporated defendant companies are divided into four major Groups: namely, Imperial Tobacco Limited, a division of Imasco Limited; Rothmans, Benson & Hedges Inc.; British American Tobacco ("B.A.T."); and JTI-Macdonald Corp.

155 The conduct of a member of a Group in any country with adverse consequences in that country or in any other country can result in liability to all the members of the Group if any one member of that Group has offered a tobacco product for sale in British Columbia. [Section 1(1), "tobacco related wrong"; Section 13.1 and Section 17.1].

156 Group membership is determined by the comprehensive definition of "manufacturer" in s.1(1) and ss.1(2), (3), and (4), the relation and affiliation provisions.

157 Affiliation between companies is based on shareholdings that entitle election of a director, or have a market value equal to 50% of the total shares [Section 1(3)(a)]; a partnership, trust or joint venture having an entitlement to 50% of the profits or assets on dissolution [Section 1(3)(b)]; control by direct or indirect influence [Section 1(4)].

158 In Section 1(1), manufacturers, by definition, include owners of tobacco trademarks or persons who generate 10% of their worldwide income from the manufacture or promotion of tobacco products.

159 The effect of the *Act* is that the conduct of foreign manufacturers in foreign countries is to be judged by a British Columbia Court. [Section 13.1(1)(a)]. The result is that the cost of health care benefits is imposed on all members of the Group to which the foreign manufacturer belongs. [Section 13.1(3)].

160 If a Group member acquires a tobacco related part of the business of another manufacturer by any means, the Group is liable for any past wrongful conduct of the acquired business regardless of the contractual terms of acquisition or the law of the Province or country that governs the terms of the purchase contract. [Section 17.1(2)].

161 The locus of the acquired business or of the wrongful conduct does not affect or modify the determination of liability. The vendor need not be a member of the Group to effect this result.

162 Each Group has one British Columbia resident corporation. An immediate effect of the *Act* therefore is to impose an artificial "real and substantial" connection to British Columbia on all Group members since the members of a Group must be considered "one manufacturer" for purposes of determining liability arising from a tobacco related wrong.

163 Four of the defendants in the government action commenced are federally incorporated and manufacture cigarettes sold in British Columbia. They are registered as extra-provincial companies under British Columbia law. The balance of the defendants are foreign companies, incorporated under foreign law, with registered offices or places of business in foreign countries.

164 None of the companies were incorporated in British Columbia. The Statement of Claim describes the Groups as "four worldwide multinational tobacco enterprises".

165 Section 17.1 and sections 1(2), (3) and (4) of the *Act*, which encompass what the Attorney-General terms the "theory of enterprise liability", were not part of the original *Act*. They were added by amendment in 1998. The Attorney-

General argues an amendment to an *Act* could not have the effect of transforming its essential character. I disagree. The addition of the enterprise liability provisions given the wide meaning of manufacturer indicates a deliberate shift in the territorial reach and is designed to give the *Act* global application.

166 That is not an incidental effect of the legislation. It becomes a central feature and an integral part of the aim and focus of the amended *Act*.

167 The Minister's speech relating to the amendments lends substance to the view that the *Act* attacks national and international companies and makes them accountable for tobacco related health care benefit costs in British Columbia:

> Another important set of changes involves the corporate structure of the tobacco industry. The nature of these changes is to broaden the definition of what constitutes a tobacco "manufacturer", and to widen the linkages to related companies. The effect of these changes is to establish a more accurate and realistic description of what constitutes a tobacco manufacturer. Provisions have been added to ensure that various corporate entities which effectively own, control, are related to or have a substantial interest in the manufacture, promotion or sale of tobacco products, will be subject to this legislation.
>
> Any legal entity, whether in the form of an affiliate, a joint venture, a trust, a partnership or some other arrangement which has a beneficial interest in a corporation which produced, promoted or sold tobacco products that may give rise to a claim under the legislation will not be able to avoid liability behind some kind of corporate veil.
>
> [British Columbia, *Debates of the Legislative Assembly*, Vol.12, No. 11 (July 29, 1988) at 10713].

168 It is difficult to characterize such sophisticated and specifically crafted amendments to the *Act* as intending to produce only an incidental effect on the territorial reach of the legislation. The provisions demonstrate, as a dominant aspect, the targeting of extra-territorial entities, ensnaring a variety of legal personalities including shareholders, control persons, foreign purchasers and lessors, trademark holders, and substantial investors. These consequences are too purposeful and far-reaching to qualify as an incidental aspect of seeking recovery from manufacturers directly marketing or selling tobacco products in British Columbia.

169 The Attorney-General submits that the manufacturers ought not to "lump together a series of qualitatively different extra-provincial rights that are or might be adversely affected by the legislation and ask the Court to deal with all those rights concurrently". I am of the view that the cumulative effect of the provisions evinces a legislative intention to craft the *Act* in a form that ensures in a global basis that no action of the international tobacco industry or location of their assets would be beyond the reach of the Province's attempt to recover health care costs under the *Act*.

170 The legislative power of a Province is to be found under Section 92 of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3. The section contains words of clear territorial limitation.

171 The federal parliament, in the *Statute of Westminster 1931* (U.K.), 22 & 23 Geo. 5, c.4, reprinted in R.S.C. 1985, App. II, No. 27, gained extra-territorial legislative competence, but the Provinces did not. [*Reference re Seabed & Subsoil of Continental Shelf Offshore Newfoundland*, [1984] 1 S.C.R. 86 (S.C.C.) at pp. 102-103, 5 D.L.R. (4th) 385 at pp.400-401; *Interprovincial Co-operatives Ltd. v. R.* (1975), [1976] 1 S.C.R. 477 (S.C.C.) at 512, 53 D.L.R. (3d) 321 at p.356; *Reference re Offshore Mineral Rights*, [1967] S.C.R. 792 (S.C.C.); See Edinger, E., "*Territorial Limitations on Provincial Powers*" (1982), 14 Ottawa L. Rev. 57 at pp.60-61; *Sullivan: Interpreting the Territorial Limitations on the Provinces* (1985), Supreme Court L. Rev. 511 at pp.525-527].

172 The combined effect of Sections 1, 13, 13.1, 17 and 17.1 purport to affect the status, structure and corporate personality of foreign corporations and the rights of their shareholders.

173 The *Act* has the effect of abolishing the separate corporate personalities of companies incorporated under federal or foreign law with domiciles outside British Columbia.

174 A company's registered office establishes its domicile. [*Gasque v. Inland Revenue Commissioners*, [1940] 2 K.B. 80 (Eng. K.B.) *Fraser & Stewart*, op. cit. at p.144; *National Trust Co. Ltd. v. Ebro Irrigation & Power Co. Ltd.*, [1954] 3 D.L.R. 326 (Ont. H.C.); *Voyage Co. Industries v. Craster* (August 11, 1998), Doc. Vancouver C976871 (B.C. S.C. [In Chambers])].

175 A corporation's domicile determines the law respecting its creation and continuation (corporate personality), matters of internal management, share capital structure, and shareholder rights. [Castel, J.G., *Canadian Conflict of Laws 4th ed.*, (Toronto: Butterworths, 1997) pp.574-575; *Voyage Co. Industries v. Craster*, *supra*; *National Trust Co. Ltd. v. Ebro Irrigation & Power Co. Ltd.*, *supra*; *Fraser & Stewart*, op. cit. p.144; *Palmer's Company Law* (looseleaf ed.) Vol. I, (London: Sweet & Maxwell, 1997) pp.2105-2106]:

> Questions concerning the status of a foreign corporation, especially whether it possesses the attributes of legal personality, are, on the analogy of natural persons, governed by the law of the domicile of the corporation. This domicile is in the state or province of incorporation or organization and cannot be changed during the corporation's existence even if it carries on business elsewhere. Thus, the law of the state or province under which a corporation has been incorporated or organized determines whether it has come into existence, its corporate powers and capacity to enter into any legal transaction, the persons entitled to act on its behalf, including the extent of their liability for the corporation's debts, and the rights of the shareholders.
>
> [Castel, *supra*, at p.574-575].

176 It is a fundamental principle of company law that a corporation is a legal entity distinct from its shareholders. [*Salomon v. Salomon & Co. Ltd.*, [1897] A.C. 22 (U.K. H.L.); *Palmer's Company Law 24th ed.*, Schmitthoff, C.M. Ed., (London: Stevens & Sons, 1987) pp.200-201; *Fraser & Stewart Company Law of Canada 6th ed.*, (Carswell, 1993) at p.17; *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, S.15(1)].

177 This distinction is operative in a parent and subsidiary relationship and applies to related corporations owned by a common shareholder. [*Fraser & Stewart*, op. cit. at p.21, Davies, P.L., *Gower's Principles of Modern Company Law 6th ed.* (London: Sweet & Maxwell, 1997) at pp.80, 159-163; *B.G. Preeco I (Pacific Coast) Ltd. v. Bon Street Holdings Ltd.* (1989), 60 D.L.R. (4th) 30 (B.C. C.A.)].

178 There is a distinction in Canadian constitutional law between the power to incorporate and the power to regulate the activities of a company. The power to incorporate a company is the ability to bestow legal personality on an association of persons, regulate a corporate structure and define the rights of shareholders.

179 A company once incorporated however will be responsible to the laws of jurisdictions in which it operates. A federally incorporated company is, for example, accountable under provincial security laws.

180 The provisions of the *Act*: Sections 1(1), 1(2), 1(3), 1(5), 13 and 17.1 attempt to alter or derogate from the rights of shareholders of federal and foreign companies.

181 The *Act* makes shareholders liable, where they hold a sufficient number of shares, for the conduct of the company itself.

182 A company domiciled anywhere in the world that owns the majority of shares of any company, which by the terms of the *Act* is a member of a Group and obtains 10% of its revenue from tobacco, becomes a member of the Group and is liable for the conduct of the other members.

183 In such a manner may a completely passive foreign investor be made liable under the *Act*.

184 An example of the destruction of immunity from liability of a federally-incorporated company by the operation of the provisions of the *Act* is the claim the government makes in its action against the defendant *Rothmans Inc.*

185 The government alleges in its Statement of Claim that *Rothmans Inc.* owns the majority of the shares of the defendant *Rothmans, Benson & Hedges Inc.* It is alleged *Rothmans Inc.* sold the tobacco related part of its business in 1985 and this business is now that of *Rothmans, Benson & Hedges Inc.* The effect of the provisions of the *Act* make *Rothmans Inc.*, solely on proof of its shareholdings, liable for any tobacco related wrong on the part of *Rothmans, Benson & Hedges Inc.* since it commenced business and will be assessed for recovery of health care benefit costs based on the market share of *Rothmans, Benson & Hedges Inc.*

186 All the *ex juris* defendants appear, on the extremely limited evidence before the Court, to have been made parties because of the *Act*'s extended definitions relating to manufacturers. Those definitions include the associated, related, and grouping of company provisions in the *Act* that make all related manufacturers one and each jointly and severally liable for the acts of any other in their group.

187 It does not appear from the recovery action commenced by the government that any of these defendants are alleged to actually have manufactured or to have sold tobacco products in British Columbia.

188 Several of the *ex juris* companies are not operating companies but are joined because of their shareholdings, derivation of income, control positions, by virtue of past acquisition, or because they are a trade association.

189 The *Act* therefore attempts to alter and derogate from what are clearly domiciliary rights under the law of foreign jurisdictions, a legislative manoeuvre that is impermissible and against the rule in *Upper Churchill Water Rights Reversion Act, 1980, Re, supra.*

190 The *Act* extends to and attaches legal consequences to the conduct of a defendant manufacturer outside of British Columbia. The definition of a tobacco related wrong envisages a breach of duty owed by a manufacturer to a person who has or might become exposed to a tobacco product.

191 The manufacturer referenced is a Group and its members [Section 17.1(1)(a)]. The conduct of any member of the Group becomes the conduct of all, without territorial limitation.

192 The *Act* defines both "persons" and "insured persons". Section 13.1(1)(a) refers to persons to whom a duty is owed. The definition of tobacco related wrong imposes the duty in respect of "persons who have been exposed or might be exposed to a tobacco related wrong". There appears to be no territorial boundary to the use of "persons" and it could have global reach.

193 In contrast, Section 13.1(1)(c) contains a territorial limitation, namely, " ... the type of tobacco product [that] ... was offered for sale in B.C."

194 The wide and territorially unrestricted use of the word "persons" in Section 13.1(1)(a) is to be contrasted with the precisely defined term " insured persons", which by definition of "health care benefits" is territorially restricted to British Columbia, and was not used. Those who qualify as "insured persons" are British Columbia residents who qualify as beneficiaries under the *Medicare Protection Act*, R.S.B.C. 1996, c. 286 or the *Hospital Insurance Act*, R.S.B.C. 1996, c. 204 that comprise under the Provincial universal medicare system nearly the entire population of British Columbia.

195 The *Act* therefore provides that the duty on which liability is based is not necessarily a duty owed in British Columbia; the person affected may be domiciled outside British Columbia and the alleged breach may occur elsewhere.

196 In *Interprovincial Co-operatives v. R., supra*, at 516 (per Pigeon J.) a Provincial statute conferring a statutory cause of action on government against parties in the Province, but applied to conduct outside the Province giving rise to liability, was held to be *ultra vires*:

> ... [I]n respect of injury caused by acts performed outside its territory, I cannot accede to the view that this can be treated as a matter within its legislative authority when those acts are done in another province any more than when they are accomplished in another country. In my view, although the injurious acts cannot be justified by or under legislation adopted in the province or state where the plants are operated, by the same token, Manitoba is restricted to such remedies as are available at common law or under federal legislation.

197 In *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, 20 D.L.R. (4th) 289 (S.C.C.), La Forest J. notes that the *lex loci delecti* rule relating to the jurisdiction of a claim in tort is based partly on constitutional considerations. The effect of the rule is that a Province cannot, by attaching new consequences to extra-territorial acts or omissions, impose its law on a tort which occurs beyond its borders.

198 A Province may not pass legislation that has the effect of imposing obligations outside the Province or has other extra-provincial consequences unless the effect is merely collateral or incidental to legislation otherwise within its power. [*Upper Churchill Water Rights Reversion Act, 1980, Re*, [1984] 1 S.C.R. 297, 8 D.L.R. (4th) 1 (S.C.C.); Hogg, *Constitutional Law of Canada* (looseleaf ed.) pp.13-14].

199 In particular, section 17.1(2) purports to alter and affect the contractual terms of the acquisition of part of a tobacco related business by imposing upon the purchasers or lessee the assumption of liability for any wrongful conduct on the part of the vendor or lessor that would qualify as a tobacco related wrong.

200 Additionally, retroactive consequences arise pursuant to Sections 17.1(2) and 20(2) in any commercial transaction of this type. Where the transaction involves an extra-territorial purchaser or lessor, the legislation affects adversely the extra-territorial contractual rights of the parties and therefore offends the rule in *Upper Churchill Water Rights Reversion Act, 1980, Re.*

201 The *Act* also attaches consequences to the ownership of a tobacco trademark or a right to the use of a trademark. Each of these rights is caught by the extended definition of "manufacturer".

202 Trademark ownership is governed in Canada by the *Trade-marks Act*, 1985, c. T-13 and jurisdiction under section 91(2) of the *Constitution Act, 1867* is with the Parliament of Canada.

203 But the *Act* does not restrict the application of its provisions to trade mark use in British Columbia, and the legislation consequently has an extra-territorial effect, thus derogating from extra-provincial property rights and offending against the rule in *Upper Churchill Water Rights Reversion Act, 1980, Re.*

204 The *Act* by its manifold effects imposes the law of British Columbia on the extra-territorial status, contracts, property, and conduct of parties.

205 The *Act* overrides the substantive laws of extra-territorial Canadian or foreign jurisdictions in four major areas:

> (a) in respect of the status and corporate personalities of corporate tobacco manufacturers with domiciles outside British Columbia;
>
> (b) in respect of legal consequences of acts or omissions outside British Columbia, characterized as tobacco related wrongs;
>
> (c) in respect of contracts relating to the purchase, lease or acquisition by any means whatsoever of any part of a tobacco related business wherever situate and whatever the proper law of contract applicable; and
>
> (d) in respect of shareholder's rights and liabilities regarding shares of federal or foreign corporations.

206 The Supreme Court of Canada has held that a tortious act committed in another Province involving extra-Provincial parties makes the applicable law the substantive law of that Province and must be applied by the Courts of the Province where the action is tried:

> ... [A]n attempt by one province to impose liability for negligence in respect of activities that have taken place wholly in another province by residents of the latter or, for that matter, residents of a third province, would give rise to serious constitutional concerns.
>
> [*Tolofson v. Jensen*, *supra*, at 1066]
>
> ...
>
> ... because a rigid rule on the international level could give rise to injustice, in certain circumstances, I am not averse to retaining a discretion in the court to apply our own law to deal with such circumstances. I can, however, imagine few cases where this would be necessary.
>
> [*Tolofson v. Jensen*, at 1054]

207 The *Act* does not require a connection between "a tobacco related wrong" and the health care benefits claimed. The connection is artificial, a presumption, and contrary to *Tolofson v. Jensen*.

208 The rationale of the choice of law rule requires the Court to connect the alleged wrongful conduct to the place of its occurrence. The parties will be judged under the law governing them where they took the action in question.

209 A "tobacco related wrong" includes a breach of "statutory duty". There are statutory duties imposed under British Columbia statutes like the *Trade Practice Act*, R.S.B.C. 1996, c. 457. These can lead to foreign corporations with no presence in British Columbia, conducting their affairs in conformity with their domestic law, being judged under Section 13.1(1)(a) according to standards of conduct under British Columbia statutes for acts or omissions that occur in their own country.

210 A provincial legislature has no power to impose its own laws on extra-territorial status, contracts, conduct or property.

211 Choice of law rules are part of the Provinces' common law and subject to the same constitutional limits as are all legislative endeavors. [Hogg, op. cit. At pp.13-23].

212 There are four federally-incorporated defendants in the government action. Parliament has an exclusive legislative power to incorporate companies with other than provincial objects under the residual power of the peace, order and good government provisions of Section 91 of the *Constitution Act, 1867*.

213 Sections 1, 13, 13.1, 17, and 17.1, when they purport to govern the status, structure and corporate personality of a federally-incorporated company under the *Canada Business Corporations Act* are not only extra-territorial in effect they trench upon the exclusive jurisdiction of the Parliament of Canada.

214 There is much force to the argument that a practical cumulative effect of these provisions of the *Act* is to "amalgamate" or "merge" defendant tobacco companies such that those "amalgamated" by the operation of the provisions of the *Act* incur liability for civil claims against others in the involuntary merger. That is a fundamental interference with a federal jurisdiction reserved under Part XV of the *Canada Business Corporations Act*.

215 The combined effect of Sections 1(2), (3), (4), (5) and 17.1(1)(a) of the *Act* ignores the separate identities of federally-incorporated companies for the purpose of establishing a tobacco related wrong committed by a related company and for the purpose of calculating amounts assessed against them.

216 The separate legal personality conferred under s.15(1) of the *Canada Business Corporations Act* is removed and the corporation loses its legal status as distinct from its shareholders.

217 The reach of the *Act* encompasses the conduct of the national and international tobacco industry worldwide to found liability for costs incurred by the government on behalf of tobacco users in British Columbia.

218 The provisions of the *Act* appear not so much designed to "pierce the corporate veil" as they are to strip away separate identities and treat them as if they had legally merged or amalgamated. The effect of provisions of the *Act* is not to look through the façade of a company shell; it is to deny the right to any separate corporate existence.

219 The plaintiff manufacturers in these proceedings have shown a strong case that the *Act* in pith and substance, according to its purpose and effect, is extra-territorial and beyond the powers of the Province under the *Constitution Act, 1867* and the *Statute of Westminster, 1931*.

220 I have not found it necessary as a result of my finding to address the paramountcy argument which assume both valid, but conflicting, federal and provincial legislation.

Constitutional Invalidity, Severance or Reading Down

221 I have found the dominant characteristic, or pith and substance of the *Act*, to be the pursuit nationally and internationally of the tobacco industry for the cost of health care benefits incurred by the government of B.C relating to residents of the Province who suffered from a tobacco related disease.

222 The extra-territorial reach of the *Act* places it beyond the constitutional competence of the Province.

223 The Attorney-General argues if the enterprise liability provisions of the *Act* give rise to constitutional concern, as I find they do, they may be easily severed or read down as appropriate and the balance of the *Act* would remain viable and conform to the original legislative intent.

224 The course suggested is that the *Act* could be read down as required so it applies only to tobacco related wrongs with the requisite real and substantial connection to British Columbia; a *Moran v. Pyle*, *supra*, type of analysis.

225 The Attorney-General reasons that as the impugned provisions were added to an existing *Act* by amendment in 1998 they could be as easily removed. The basic intent of the legislature would then still be fulfilled relying on a *Moran v. Pyle* view of liability. This would treat the impugned provisions of the present *Act* as embellishments that did not change its essential character.

226 The manufacturers urge that the *Act* is a carefully integrated legislative scheme, the central purpose of which is the ability to recover the very substantial costs of health care benefits related to tobacco disease from the national and international tobacco industry following upon a unique streamlined civil proceeding. The *Act* cannot be unraveled in piecemeal fashion and is rendered *ultra vires* in its entirety.

227 Reading down is a doctrine of constitutional remedy that may be employed as an interpretive technique to preserve the validity of statutory provisions. When alternative constructions exist the Court should select a construction that is consistent with the legislative intent and constitutionally valid.

228 However, the reading down doctrine is not to be employed if the effect is to alter the essence of the legislation:

> ... In this respect, I agree with the following comment made by Carol Rogerson in her article ...
>
> While the courts continue to describe reading down as a technique of interpretation rather than of invalidation, as a practical matter reading down is difficult to distinguish from a remedy which would operate to declare particular

applications of a law unconstitutional. Reading down does require an initial determination by the court that particular applications of the statute would be unconstitutional.

The process of interpreting a statutory provision that is susceptible of more than one meaning was traditionally governed by the basic precept that the Court's function is to discover the intention of the legislature. In a case in which the ordinary rules of construction yield two equally plausible meanings, policy considerations are a factor in resolving the conflict. In constitutional cases before the *Charter* this was reflected in the practice of interpreting statutes by applying a presumption that a legislative body does not intend to exceed its powers under the Constitution.

...

In the final analysis, a law that is invalid in so many of its applications will, as a result of wholesale reading down, bear little resemblance to the law that Parliament passed and a strong inference arises that it is invalid as a whole.

[*Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69 (S.C.C.), Sopinka J., at pp.103-105].

229 The use of severance as a technique to preserve the constitutional validity of legislation is described by Hogg in the following terms:

Occasionally, however, it is possible to say that part only of a statute is invalid, and the balance of the statute would be valid if it stood alone. Of course, the balance does not stand alone; and the question arises whether the court should "sever" the bad part, thereby preserving the good part, or whether the court should declare the entire statute to be bad. The rule which the courts have developed is that severance is inappropriate when the remaining good part "is so inextricably bound up with the part declared invalid that what remains cannot independently survive"; in that event, it may be assumed that the legislative body would not have enacted the remaining part by itself. On the other hand, where the two parts can exist independently of each other, so that it is plausible to regard them as two laws with two different "matters", then severance is appropriate, because it may be assumed that the legislative body would have enacted one even if it had been advised that it could not enact the other.

[Hogg, at 15-21, 15-22, Tab 4].

230 In *Schachter v. Canada*, [1992] 2 S.C.R. 679 (S.C.C.) at 697, Chief Justice Lamer refers to a classic test for severance:

Where the offending portion of a statute can be defined in a limited manner, it is consistent with legal principles to declare inoperative only that limited portion. In that way, as much of the legislative purpose as possible may be realized. However, there are some cases in which to sever the offending portion would actually be more intrusive to the legislative purpose than the alternate course of striking down provisions which are not themselves offensive but which are closely connected with those that are.

231 It is an essential feature of severance that in deleting some legislative provisions the Court must be satisfied the legislature: "... would have enacted what survives without enacting the part that is *ultra vires* at all." [*Reference re Alberta Bill of Rights Act*, [1947] A.C. 503 at 518 (Alberta P.C.)].

232 The impugned *Act* does not impose liability in the *Moran v. Pyle* context where a tobacco manufacturer breaches a duty that causes disease in a person in British Columbia resulting in a health care cost to the government.

233 The design of the *Act* imposes liability upon a foreign defendant not on the basis of wrongful conduct but on the basis of being deemed a member of a group in which another member commits a wrongful act.

234 The constituent provisions of the theory of enterprise liability resulting in the *Act*'s extra-territorial effect are inextricably bound up with the remaining features of the *Act*. I do not have confidence they may be read down or severed in a manner that would leave remaining an *Act* clearly identifiable with the original intent of the legislature.

235 There are several provisions of the *Act* necessary to the consideration of a reading down or severance. They include the s.1(1) definition of "manufacturer" with its several subsections; s.1(2), (3) and (4), the "related" and "affiliate" provisions; s.1(5), the definition of market share on a related company basis; s.13, concerning whether it imposes a duty upon a person not in British Columbia; and s.17.1.

236 I am of the view that any attempt to craft change through severance or reading down would inevitably result in a form of legislative redrafting.

237 In the result, the plaintiff manufacturers have shown entitlement on the basis of the extra-territorial reach of the *Act* to the declaration they seek. I find the *Tobacco Damages and Health Care Costs Recovery Act* to be inconsistent with the provisions of the Constitution of Canada as *ultra vires* the Legislative Assembly of British Columbia.

238 It follows that action C985776, *JTI-Macdonald Corp. v. British Columbia (Attorney General)*, that is founded entirely upon a statutory cause of action under the invalidated *Tobacco Damages and Health Care Costs Recovery Act*, is dismissed.

Order accordingly.

Footnotes

* A corrigendum adding counsel's name in action C985780 has been incorporated herein.

TAB 10

2006 BCSC 1102
British Columbia Supreme Court

Minera Aquiline Argentina SA v. IMA Exploration Inc.

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

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

M.M. Koenigsberg J.

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

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

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

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Christopher v. Zimmerman (2000), 2000 BCCA 532, 2000 CarswellBC 2027, 80 B.C.L.R. (3d) 229, [2000] 10 W.W.R. 437, 192 D.L.R. (4th) 476, 35 E.T.R. (2d) 6, 144 B.C.A.C. 152, 236 W.A.C. 152 (B.C. C.A.) — considered

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Ltd. v. International Corona Resources Ltd.) [1989] 2 S.C.R. 574, 6 R.P.R. (2d) 1, (sub nom. *LAC Minerals Ltd. v. International Corona Resources Ltd.)* 26 C.P.R. (3d) 97, 1989 CarswellOnt 126, 1989 CarswellOnt 965 (S.C.C.) — followed

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Soulos v. Korkontzilas (1997), 212 N.R. 1, 1997 CarswellOnt 1489, 9 R.P.R. (3d) 1, 46 C.B.R. (3d) 1, 32 O.R. (3d) 716 (headnote only), 146 D.L.R. (4th) 214, 100 O.A.C. 241, 17 E.T.R. (2d) 89, [1997] 2 S.C.R. 217, 1997 CarswellOnt 1490 (S.C.C.) — referred to

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Vien, Re (1988), 49 D.L.R. (4th) 558, 25 O.A.C. 253, 28 E.T.R. 165, 12 R.F.L. (3d) 94, 64 O.R. (2d) 230, 1988 CarswellOnt 202 (Ont. C.A.) — considered

Visagie v. TVX Gold Inc. (1998), 1998 CarswellOnt 3961, 42 B.L.R. (2d) 53, 78 O.T.C. 1 (Ont. Gen. Div.) — followed

Visagie v. TVX Gold Inc. (2000), 2000 CarswellOnt 1888, 187 D.L.R. (4th) 193, 49 O.R. (3d) 198, 6 B.L.R. (3d) 1, 132 O.A.C. 231 (Ont. C.A.) — referred to

War Eagle Mining Co. v. Robo Management Co. (1995), 13 B.C.L.R. (3d) 362, 44 C.P.C. (3d) 118, [1996] 2 W.W.R. 504, 1995 CarswellBC 963 (B.C. S.C. [In Chambers]) — referred to

Statutes considered:

Civil Code, 1869
Art. 1083 — considered

Company Act, R.S.B.C. 1996, c. 62
Generally — referred to

Protection of Confidential Information, 1997
Article 1 — considered

Article 3 — considered

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

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

Introduction

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

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

3 IMA was a potential purchaser of a mining property called "Calcatreu" owned by Newmont along with several other mining companies including the ultimate purchaser, the plaintiff in these proceedings, Minera Aquiline Argentina SA ("Aquiline"). Each potential

purchaser, including the defendant, IMA, signed a Confidentiality Agreement before receiving access to data and the Calcatreu mining site for the purpose of evaluating it. The plaintiff obtained ownership of the data used by IMA to make the discovery as a result of being the successful purchaser of Calcatreu.

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

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

Background and the Players

Development of Calcatreu and the Confidential Data

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

24 An anomalous reading or a cluster of anomalies may well indicate the presence of a mineralized deposit. When a significant anomaly or cluster of anomalies is identified, a

geologist can then go to the location of the relevant samples to find the source of the anomaly because it is presumed that the mineralized material washed into the drainage system from a particular location or source.

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

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

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

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

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

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

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

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

32 Mr. Worland's report was prepared on July 30, 2002. It was Worland and Achilles Aquilera who collected the samples in the area that later became known as the Navidad Project. In his report, Worland commented on the gold anomalies in the BLEG A data and also commented on silver anomalies in the "Sacanana" area which was the name he gave to the area that is now known as the Navidad Project. Worland gave the gold anomalies higher priority than the silver anomalies and described the silver anomalies in the Sacanana area as "medium" targets for follow-up but not for immediate staking.

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

The Sale Process of Calcatreu

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

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

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

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

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

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

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

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

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

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

42 Various potential purchasers executed the Confidentiality Agreement and received the bid package. Some of them chose to visit the Jacobacci office and the Calcatreu site. Some of these potential bidders requested various types of additional digital raw data, which was then provided to them. The evidence was undisputed that it is typical in the due diligence process for potential bidders to ask for additional information to permit them to analyse the

data and come to their own conclusions in respect of it prior to making a bid. IMA, alone among other potential bidders, requested that Mr. Cuburu provide copies of the BLEG A data, as well as, like other bidders, various other digital data.

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

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

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

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

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

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

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

> When you say no geochem. Do you mean no surface sample data of any kind or just no multi-element stuff. It would be critical to get all surface sample data as that combined with geophysics is the key to areas not drilled or tested by single holes...
>
> . . . . .
>
> My gut feeling is that you should be emailing me anything that looks useful. After today it will be a serious pain in the ass and may be very expensive to get until I return to Mendoza. Have you got a list of what you received? That would be great as then I know

> in a pinch at least one of us has it. If for instance head office sent one set of maps to Jacobacci then there will be no way Carlos [Cuburu] will part with them. As to digital data Latinos tend to be tight with data and just cause head office is giving it out does not mean that he will be keen to.

49 The sale of Calcatreu was taking place at a time of increased interest in the Chubut Province by explorationists, and IMA was one of several exploration companies actively searching there for targets and potential resources. It had employed a number of geologists to provide it with advice in relation to Argentina and it had directed much of its resources to looking for potential resources in Argentina and in the Chubut Province specifically. It was continuing to do so when it reviewed Calcatreu and it had under consideration some areas that fell within the area covered by the regional BLEG A data. At that time, all of IMA's claims in the Province of Chubut were located in western Chubut, although it had conducted some field work in central Chubut and had identified areas for further consideration in eastern Chubut. The southern portion of Calcatreu is located in north-central Chubut, as is what is now called Navidad. Navidad is south and east of Calcatreu.

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

> 1678 Q All right. You were doing that at the request of IMA?
>
> A Yes, sir.
>
> 1679 Q For the purpose of?
>
> A the Calcatreu project.
>
> 1680 Q You didn't have any other reason to go and see Mr. Cuburu, did you?
>
> A No, I didn't know him previously and had no other reason.
>
> . . . . .
>
> 1780 Q So apart from the general discussion about dividing the work up so it could be done efficiently, do you recall any more specific discussion before you got to the Jacobacci office?
>
> A Yes, I would have generally advised both of the geologists there was a confidentiality agreement.
>
> 1781 Q You say you would have. Do you specifically recall that?

A I'm quite sure that I did.

1782 Q Why are you quite sure of that?

A It's good practice and I try to do things right.

1783 Q Why is it good practice?

A Because they are going to be viewing confidential information and they have to be aware of that.

1784 Q Did you tell them that anything they see during the course of their visit to the office and the site was confidential and they should treat it as confidential?

A That would be the normal situation.

1785 Q All right. That's what you recall telling them; isn't it?

A Yes, that would be what you would expect going to do a site exam, yes. That's what you would expect.

1786 Q That's what you recall telling them?

A Yes, sir.

1787 Q That's how you intended to govern your own conduct; isn't it?

A Yes, sir.

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

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

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

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

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

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

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

Staking Navidad

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

2002, prior to visiting the property covered by the cluster of silver anomalies in the BLEG A data. This is the claim which was later publicly described by IMA as the Navidad Project.

59 In 2003, IMA staked further claims solely as a consequence of having staked the Navidad Project. These additional claims, together with the Navidad Project, are referred to collectively in the Statement of Claim as the "Navidad Claims". To put these other claims in context, most of the exploration work by IMA to date has been on the Navidad Project, or the first claim staked by IMA on December 6, 2002.

The Confidentiality Agreement

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

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

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

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

> THIS AGREEMENT is made as of September 6, 2002 by and between Newmont Mining Corporation, a Delaware corporation, on behalf of LaSource Development, a French corporation and Minera Normandy Argentina S.A. an Argentinean corporation, whose address is 1700 Lincoln Street, Denver, Colorado, U.S.A. 80203 (collectively "Newmont") and IMA Exploration Inc., a Canadian corporation, whose address is 709-837 W. Hastings St. Vancouver, Canada ("Reviewer") (Newmont and Reviewer are collectively called the "Participants").
>
> Reviewer is interested in reviewing certain confidential information in relation to exploration and mining rights at Newmont's Calcatreu Project in the Rio Negro and Chubut Provinces, Argentina, which are further described on the attached Exhibit "A", for the purpose of evaluating a possible transaction concerning such project (the "Project").
>
> In connection with Reviewer's review of the Project, Newmont may provide to Reviewer certain financial, operating, technical, geological and other information (the "Confidential Information") concerning the Project. Confidential Information in this Agreement will include all communications, whether written, electronically stored or

delivered, or oral, of any kind, between the Participants relating to the Project, any observations made by Reviewer during site visits or tours, and any and all information, reports, analyses, studies, compilations, forecasts or other materials prepared by Reviewer relating to the Project which contains or otherwise reflects such information.

In consideration of Newmont providing Confidential Information to Reviewer, the Participants agree as follows:

1. **Use of Confidential Information**. The Participants agree that Confidential Information provided by Newmont to Reviewer will be used by Reviewer or Reviewer's Representatives only for the purpose of the Project and that the Confidential Information will otherwise be kept confidential by Reviewer and their Representatives. For purposes of this Agreement, "Representatives" means Reviewer and its directors, officers, employees, consultants, agents, accountants, legal counsel, bankers and those of its direct and indirect wholly-owned subsidiaries and parent companies.

> (a) any of such Confidential Information may be disclosed to Reviewer's Representatives who need to know such information for the purpose of the Project (it being agreed that each such Representative will be informed by Reviewer of the confidential nature of such information and the terms of this Agreement and will agree to be bound by the terms of this Agreement and further, that Reviewer will be responsible for any breach of this Agreement by its Representatives); and

. . .

4. **Portions of Confidential Information Not Applicable To This Agreement**. This Agreement will terminate or become inoperative with respect to any portion of the Confidential Information if:

> . . .
>
> (c) Reviewer can establish that such information was developed by it independently of any disclosure by Newmont or was available to Reviewer on a non-confidential basis prior to its disclosure by Newmont; or

. . .

5. **Termination**. Except as provided herein, this Agreement and all obligations hereunder will terminate and be of no further force or effect on the date that is the **second anniversary** of the date hereof (the "Termination Date"). Within 30 days of written request by Newmont, made at any time before or after the

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

The Meaning of the Agreement

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

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

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

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

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

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

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

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

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

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

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

73 The plaintiff submits that this construction of the Agreement is consistent with the business purpose of the transaction. Newmont was willing to provide information to IMA in connection with its review of the project — information which is proprietary and not available to the public — on the basis that IMA agreed that it would only use the information for review purposes, and would maintain its confidentiality, subject to the exceptions noted in clause 4 of the Agreement.

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

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

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

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

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

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

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

> (1) it was not referenced in the Information Brochure;

(2) it was not provided to any other bidders;

(3) it does not cover the geographic area of Calcatreu (as defined by Exhibit A);

(4) it covers an extensive area outside the "area of interest" specified in the Agreement; and,

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

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

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

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

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

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

Q And some of the proprietary data that vendors make available to bidders for an exploration asset are regional — is regional data, regional exploration data?

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

[emphasis added]

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

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

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

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

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

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

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

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

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

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

The Area of Interest Clause

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

93 Clause 8 of the Agreement provides as follows:

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

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

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

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

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

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

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

99 The most compelling submission of the defendants, in my view, is that if the BLEG A data is covered by the Confidentiality Agreement without being specifically

referenced anywhere in the Bid Package or the Confidentiality Agreement, any bidder could inadvertently run afoul of the Confidentiality Agreement in carrying out their own explorations. For instance, if IMA had not asked to see the data, and did not have notice that Normandy had it, but later made the Navidad discovery, it still could not stake it without risking an allegation of breach of the Agreement.

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

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

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

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

103 Mr. Lhotka was the IMA representative most familiar with IMA's on-the-ground exploration in the Chubut Province. He was on a due diligence visit to Calcatreu and understood that "everything" he saw or observed was covered by the Confidentiality Agreement. He advised the two junior geologists who accompanied him of that fact. While

visiting Calcatreu, he noticed the data points on the map in the Jacobacci office and discussed them generally with Mr. Cuburu. He was not offered the data — he asked for it. After receiving it, he still believed it was not only confidential but that the use of it by IMA may be covered by the Confidentiality Agreement. In other words, if IMA intended to imminently explore and stake in the area covered by the BLEG A data, Mr. Lhotka surely would not have asked to see the data during his site visit.

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

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

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

107 There was no evidence, at any time, given by any witness, that a confidential data set would be "given" without consideration from one company to another without any

immediate business reason. There was no issue that the cost of the development of the BLEG A data was high — in the many hundreds of thousands of dollars. It is simply not plausible on the evidence in this case to find that the BLEG A data was simply given away.

108 The defence also argued with some force that the reason Mr. Lhotka noticed and asked for the BLEG A data was that Mr. Lhotka was a "data pig," as Mr. Cowper put it — this is not a pejorative description in the industry and is apparently a commonly shared characteristic of exploration geologists. I do not accept that this characteristic negates my findings made on the basis of his own words, that Mr. Lhotka sought the data in pursuance of his evaluation of Calcatreu. However, it may explain, in part, the ease with which he brushed aside his doubts and reinterpreted events from his site visit to allow himself to open and use data that he knew or strongly suspected was not available for use for staking by IMA.

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

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

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

Confidentiality at Common Law

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

113 It must first be acknowledged that Clause 16 of the Confidentiality Agreement constitutes an entire agreement with respect to data defined as "Confidential Information" under the agreement. Clause 16 specifically excludes a relationship of confidence, other than

as provided for in the agreement. However, to the extent that the Confidentiality Agreement does not apply, the exclusion clause within it cannot operate to exclude a common law duty of confidentiality in respect of data received outside the agreement.

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

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

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

117 It was only after signing the Confidentiality Agreement that the data package (within which the BLEG A data was not included) was distributed to interested buyers who, if they wished to proceed to the next step, could then arrange for a site visit. At that point, in going to the site having signed the Confidentiality Agreement, the buyer would be permitted a detailed review with unconstrained access to all data.

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

119 Thus the factual issue for the common law claim revolves around whether the receipt of the BLEG A data during the site visit, which data is not specifically covered by

the Confidentiality Agreement, but which is conceded to be confidential in nature, would disentitle the defendant from using the data in order to further its own exploration efforts.

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

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

121 Other testimony to the same effect is as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

133 There was some controversy at trial over whether that exact conversation took place. Mr. Cuburu testified that he did not recall the conversation about the rock samples, although he did recall that he had rock samples (as opposed to a "file" with rock sample data) from well outside Calcatreu in his office on display. He doubted that Mr. Lhotka cautioned him about showing rock samples from outside Calcatreu because the samples would not be of importance in giving confidential information; they were just samples of different mineralization and rocks from several places that could act as comparators with rock samples from within Calcatreu.

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

data freely that was unconnected to his evaluation of Calcatreu and that he felt compelled to indicate that to Mr. Cuburu.

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

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

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

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

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

139 When Mr. Patterson and Mr. Lhotka left the site in November of 2002 with the BLEG A data and the other data they obtained that day, they had essentially already decided that as a result of their evaluation they would not be recommending that IMA make a bid on Calcatreu. Subsequently they did not make a bid. It was close to one month later when Mr. Lhotka was reviewing other projects, and in particular, the exploration of possible claims somewhat to the north and west of the area covered by the BLEG A data points, that he thought about looking at the BLEG A data he had obtained from Newmont. He sent off the email of November 20, 2002, to IMA's management querying whether it was appropriate

for IMA to use the BLEG A data given its confidential nature. He received no response whatsoever.

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

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

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

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

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

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

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

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

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

(a) that the information conveyed was confidential;

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

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

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

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

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

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

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

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

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

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

153 Once the first two elements of breach of confidence have been established, and it has been shown that the defendants have used confidential information, the burden shifts to

the defendants to demonstrate that their use was a permitted use. In *Lac Minerals Ltd.*, La Forest J. stated at para. 139:

> In establishing a breach of a duty of confidence, the relevant question to be asked is, "what is the confidee entitled to do with the information?" and not, "to what use he is prohibited from putting it?" Any use other than a permitted use is prohibited and amounts to a breach of duty. When information is provided in confidence, the obligation is on the confidee to show that the use to which he put the information is not a prohibited use.

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

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

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

[emphasis added]

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

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

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

The Conflict of Laws Issue

158 As is readily apparent in the above analysis, I have applied the law of this province to determine the issue of whether IMA's use of the BLEG A data constituted a breach of confidence at common law. I have found that British Columbia law is applicable after careful consideration of the defendant's pleadings in para. 31 of its Amended Statement of Defence, which states as follows:

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

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

How should the claim be characterized?

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

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

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

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

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

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

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

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

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

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

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

> Admittedly, as Smith J. points out in *Duke v. Andler*, a long line of authorities has held that Canadian courts have jurisdiction to enforce rights affecting land in foreign countries if these rights are based on contract, trust or equity and the defendant resides in Canada. In exercising this jurisdiction, Canadian courts are enforcing a personal obligation between the parties. In other words, they are exercising an *in personam* jurisdiction. This *in personam* jurisdiction is an exception to the general rule that Canadian courts have no jurisdiction to decide title to foreign land. The exception recognizes that some claims may have both a proprietary aspect and a contractual aspect [and I would add, an equitable aspect]. Canadian courts, however, will exercise this exceptional *in personam* jurisdiction only if four criteria are met. These four criteria ... are discussed by McLeod [McLeod, ***The Conflict of Laws***, (Calgary: Carswell, 1983) at 321-325]:
>
> > In order to ensure that only effective *in personam* jurisdiction is exercised pursuant to the exception, the courts have insisted on four prerequisites:
> >
> > (1) The court must have *in personam* jurisdiction over the defendant. The plaintiff must accordingly be able to serve the defendant with originating process, or the defendant must submit to the jurisdiction of the court.
> >
> > (2) There must be some personal obligation running between the parties. The jurisdiction cannot be exercised against strangers to the obligation unless they have become personally affected by it...
> >
> > (3) The jurisdiction cannot be exercised if the local court cannot supervise the execution of the judgment.
> >
> > (4) Finally, the court will not exercise jurisdiction if the order would be of no effect in the *situs*. Thus, jurisdiction will be declined if the *lex situs* prohibits effective enforcement of the decree. This requirement seems reasonable in the abstract since the *lex situs* has ultimate control over the immovable. The mere fact, however, that the *lex situs* would not recognize the personal obligation upon which jurisdiction is based will not be a bar to the granting of the order.

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

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

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

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

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

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

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

> the rule. Such points, however, are better dealt with in the context of the enforcement of contracts...

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

> A court of equity would decline to act if it were proved that the local law forbade the owner to sell his own property. ... It would not order the defendant to defy the laws of the foreign state; an exercise not only pointless, but disrespectful to the authority of the sovereign of that state. But usually the local sovereign does permit privately owned land to be alienated.

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

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

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

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

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

182 The above analysis does not determine that British Columbia law ought to apply to the issues in this action. It means only that the claim is not primarily a claim over a

foreign immovable dictating that the law of Argentina should apply. It remains to properly characterize the claim and apply the appropriate choice of law rule.

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

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

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

> (a) If the obligation arises in connection with a contract, its proper law is the law applicable to the contract;
>
> (b) If it arises in connection with a transaction concerning an immovable (land) its proper law is the law of the country where the immovable is situated (*lex situs*); and
>
> (c) If it arises in any other circumstances, its proper law is the law of the country where the enrichment occurs.

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

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

188 Although the plaintiff accepts, for the purpose of this alternative common law claim only, that the BLEG A data may not have been strictly covered by the Confidentiality Agreement, the plaintiff argues that the obligation of confidence with respect to the data nevertheless arose "in connection with" that agreement or at least in connection with the pre-

existing contractual relationship between these parties. Absent that contractual relationship, there would have been no delivery of the BLEG A data to the defendants and no opportunity for the breach of confidence alleged here. The plaintiff submits that in such circumstances, the court ought to conclude that the parties addressed their minds to the choice of law that would govern their relationship, and subrule (a) must apply.

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

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

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

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

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

concerning an obligation that arises "in connection with" a transaction concerning an immovable. The same broad interpretation applied to (a) must surely be applied to (b).

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

195 In my view, any difficulty arising from the apparent clash of the first two subrules can be resolved by taking a principled rather than a categorical approach to the choice of law issue. The essential question to be answered in choosing the appropriate law to govern a claim is, "what legal system has the closest and most real connection to the obligation?" This principle is supported by the comments of Castel & Walker at §32.1:

> Since choice of law rules tend to be based on the elements of a cause of action and not on the appropriate consequences of seeking relief, the law governing a claim for unjust enrichment will depend on the nature of the wrong giving rise to the claim. For instance, where the obligation arises in connection with a pre-existing contractual relationship either actual or intended, the obligation is most closely connected with the law applicable to the contractual relationship. Similarly, the obligation to restore the benefit of an unjust enrichment in connection with a person's ownership of an immovable may have its closest and most real connection with the law of the legal unit where the immovable is situated. Thus, it has been proposed that the law governing restitutionary claims in general should be the "law of the unjust factor." Should an analysis based on this approach fail to yield a compelling result, the obligation to restore the unjust enrichment could be regarded as more closely connected with the law of the place where the immediate or ultimate enrichment occurred since the enrichment is at the heart of the action and "the law of the place of the defendant's enrichment is more closely connected with the defendant than the law of the place of the plaintiff's impoverishment."

196 Thus, the principle underlying the subrules set out by Dicey and Morris appears to be the strength of the connection between the obligation and the competing legal systems. Additional support for this statement of principle can be found in *Christopher v. Zimmerman* (2000), 80 B.C.L.R. (3d) 229, 2000 BCCA 532 (B.C. C.A.), where our Court of Appeal found that the appropriate choice of law was the law of the place where the enrichment occurred because that was the law that had "the closest and most real connection" with the obligation in question. Similarly, in *Unifund Assurance Co. of Canada v. Insurance Corp.*

of British Columbia, [2003] 2 S.C.R. 63, 2003 SCC 40 (S.C.C.), at para. 58, and *Castillo v. Castillo*, [2005] 3 S.C.R. 870, 2005 SCC 83 (S.C.C.), at para. 44, the Supreme Court of Canada emphasized the relative strength of the connection when it held that the connection required for choice of law issues must be more robust and requires a higher threshold than the "real and substantial" connection applied to questions of jurisdiction.

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

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

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

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

200 In my view, a more principled approach to a case such as this one, where the obligation arises in connection with both a pre-existing contractual relationship and a transaction involving foreign land, would be to examine all the factors that could be relevant to the strength of the connection between the obligation and the competing legal systems. Such factors should be given weight according to a reasonable view of the evidence and their relative importance to the issues at stake. Thus, each of the factors listed by Dicey and Morris would be considered and weighed along with the following non-exhaustive list of factors to determine which set of laws has the closest and most substantial connection to the obligation.

- Where the transaction underlying the obligation occurred or was intended to occur;
- Where the transaction underlying the obligation was or was intended to be carried out;
- where the parties are resident;
- where the parties carry on business;
- what the expectations of the parties were with respect to governing law at the time the obligation arose; and
- whether the application of a particular law would cause an injustice to either of the parties.

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

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

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

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

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

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

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

Breach of Confidence under Argentine law

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

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

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

> **Art. 1** Physical or juridical persons shall be able, in respect of information lawfully under their control, to restrain its disclosure to others, or its acquisition or use by third parties without their consent in a manner contrary to honest commercial practices, provided that such information meets the following conditions:
>
> (a) It is secret in the sense that it is not, as a body or in its configuration, or in the precise assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with such kind of information; and
>
> (b) It has commercial value because it is secret; and
>
> (c) It has been subject to reasonable measures to keep it secret, under the circumstances, taken by the person lawfully in control of it.

> It shall be deemed contrary to honest commercial practices: breach of contract; breach of confidence; inducement to infringement; and the acquisition of undisclosed information by third parties who knew, or were grossly negligent in failing to know, that such practices were involved in the acquisition.
>
> **Art. 3** Any person who, because of his work, employment, post, position, exercise of profession, or business relationship, has access to an information complying with the conditions listed in Article 1, and about whose confidentiality the person has been warned, shall refrain from using or disclosing it without good cause, or without the consent of the person controlling such information, or of a user authorized by the latter.

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

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

213 The correspondence with the test for confidentiality under B.C. law is clear: As explained earlier, the Supreme Court of Canada in *Lac Minerals Ltd.* has said that information is confidential if it has "the necessary quality of confidence" about it, and if it is "communicated in circumstances importing an obligation of confidence". Two of the relevant factors in determining whether information has the "necessary quality of confidence" are the value of the information and the extent of measures taken by its owner to guard its secrecy: *Ebco Industries Ltd. v. Kaltech Manufacturing Ltd.*, [1999] B.C.J. No. 2350 (B.C. S.C. [In Chambers]) at para. 36, citing *Pharand Ski Corp. v. Alberta* (1991), 37 C.P.R. (3d) 288 (Alta. Q.B.) and *Deta Nominees Pty. Ltd. v. Viscount Plastic Products Pty. Ltd.*, [1979] V.R. 167 (Victoria S.C.) at p. 193.

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

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

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

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

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

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

218 Whether or not Mr. Lhotka had additional reasons, unrelated to Calcatreu, for requesting the data, such reasons were not communicated to Mr. Cuburu or anyone

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

219 My findings that support both a breach of the Confidentiality Agreement and unlawful use of confidential information at common law underscore that all parties understood the data was confidential. It is therefore clear that the BLEG A data ought to be considered confidential information under both Argentine and B.C. law. Its disclosure to IMA through Mr. Lhotka gave rise to an obligation of confidence. The question remains whether Argentine law would consider that IMA breached that confidence by staking the Navidad Claims.

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

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

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

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

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

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

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

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

227 According to Mr. Lucero, use of confidential information for purposes other than the negotiations represents a failure to keep it secret and therefore constitutes bad faith or conduct "contrary to honest commercial practices." Both Mr. Lucero and Mr. Bianchi agreed

that Article 1 does not require a warning because persons who use information contrary to honest commercial practices do not deserve a warning.

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

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

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

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

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

233 However, the key here is that there is no question of honest mistake. The defendants did not receive so much confidential and non-confidential information from the plaintiff that they were unable to determine which was which. The defendants knew that the BLEG A data was inherently confidential and had been received under circumstances that restricted its use.

To absolve the defendants from liability for deliberate misuse of confidential data merely because certain words were not spoken would be contrary to justice, whether in Argentina or in B.C.

Remedies

Applicable Law

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

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

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

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

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

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

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

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

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

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

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

claims of unjust enrichment but for other causes of action as well: *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217, 146 D.L.R. (4th) 214 (S.C.C.) at para. 17.

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

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

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

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

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

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

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

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

251 *Vien, Re* (1988), 64 O.R. (2d) 230, 49 D.L.R. (4th) 558 (Ont. C.A.) (*sub. nom. Leclerc v. St.-Louis*), is cited in support; however, that was a case in which the Ontario Court dismissed the claim because it found the proper law of a marriage contract was the law of Quebec, and under that law at the time, there could be no unjust enrichment between spouses. While the court noted that the concept of a constructive trust did not exist in the civil law of Quebec, the decision turned on the absence of liability. Moreover, perhaps because it was released in 1988, this decision appears to fall into the error described by Madam Justice McLachlin in *Peter v. Beblow*, that is, it conflates the concepts of unjust enrichment and constructive trust. Consequently, the judgment cannot be understood to suggest that the lack of a constructive trust remedy in the law of Quebec would have prevented such a remedy from being awarded had liability been established.

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

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

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

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

Remedies under Argentine Law

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

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

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

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

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

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

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

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

262 He concluded from these examples that the duty to compensate "in kind" involves more than simply returning a specific good to its previous owner. Thus, in Mr. Lucero's opinion, if the court should find that Aquiline would have staked the Navidad Claims first had the defendants not wrongfully intervened, it would be open to the Argentine court under s. 1083

to order the transfer of the mineral claims to the plaintiff and the disgorgement of any profits earned in the period between the wrongful staking of the claim and its return to the plaintiff.

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

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

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

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

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

outlined above, Mr. Bianchi explained that s. 1083 grants the Argentine court extremely broad jurisdiction as to the type of remedy it could order. He said:

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

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

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

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

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

> Geologically, the Navidad discovery is hosted in an Upper Jurassic series of mixed calcareous sediments and intermediate volcanics mapped by government geologists as the Canadon Asfalto Formation. This formation has never been the focus of metallic

> mineral exploration. Says Lhotka: "You wouldn't go out looking for a Navidad, because there is nothing like it in the Patagonia".
>
> . . .
>
> There was no one hammer mark on anything. says Lhotka. You could walk past this from 50 metres away, but you could not walk on it and not find it. It's impossible. You can see copper oxide on the top of the hill, and the rocks are so heavy you can't pick them up.

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

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

Remedies under B.C. Law

(i) The availability of a constructive trust

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

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

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

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

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

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

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

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

281 The plaintiff has urged the court to find that the conduct of the defendants was dishonest. There is no question that senior management of IMA — after Mr. Lhotka made what I find to be essentially an honest mistake in deciding he could open the BLEG A data — was far from honestly mistaken about the use that could be made of the data. Mr. Patterson should have known that Mr. Lhotka's query about the use of confidential information required a response. He made no response. Once the "discovery" was made using the BLEG

A data, I find that IMA's corporate management engaged in providing misinformation regarding how the discovery was made. This misinformation, if not deliberate lies, was at least wilful blindness to the truth. Nevertheless, there is no basis for any finding that the conduct of IMA was vicious and no need to make such a finding before imposing a constructive trust.

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

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

(ii) Lost Opportunity

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

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

> **Measure of the "Lost Opportunity"**
>
> The applicable concept of restoration was set out in the reasons of McLachlin J. in *Canson Enterprises* as follows, at p. 556:

> In summary, compensation is an equitable monetary remedy which is available when the equitable remedies of restitution and account are not appropriate. By analogy with restitution, it attempts to restore to the plaintiff what has been lost as a result of the breach; i.e., the plaintiff's lost opportunity. The plaintiff's actual loss as a consequence of the breach is to be assessed with the full benefit of hindsight. Foreseeability is not a concern in assessing compensation, but it is essential that the losses made good are only those which, on a common sense view of causation, were caused by the breach.

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

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

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

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

> Q. All right. Now, Mr. Bussandri went and did some reconnaissance work in early December, as we know.
>
> . . .
>
> Q. 2002?
>
> A Correct.
>
> Q All right. And the first place he went was an area he described as El Alamo to find the source of the silver anomalies?
>
> A Correct.

Q And you were advised that he found them very quickly?

A He did.

Q And that was brought to your attention in December 2002?

A It was.

Q By Mr. Lhotka?

A Correct.

Q All right. Were you also advised that he was looking in other areas in the same month in that northwest and southeast corridor from David Jorge's property?

A Correct. During that same visit he visited a number of other areas.

Q Right. Did you ever send him back to those areas after December of 2002?

A No, we didn't.

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

A To be honest, I don't recall.

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

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

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

> Daniel and I exchanged emails about one comment in his report about uncertainty of old BLEG sites. He felt that some were not good sites with very poorly developed drainage and he questioned whether they really sampled there or might there have been a

> coordinate error. I am not concerned for errors as we used the data to make the discovery so why should we doubt it now? Our sampling should shortly at least partly confirm the old data.
>
> . . .
>
> The huge strength and size of anomaly gives me a lot of faith. If it was potty and small would we have found it so fast when the exposure is not supposed to be great?

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

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

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

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

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

> Question 83:

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

. . .

A I do.

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

A I understood that, yes.

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

. . .

Q Do you see that?

A I see that.

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

. . .

A I do.

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

A I see that.

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

A I do.

Q And you were directly involved with that circumstance?

A I was.

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

A Yeah, I see those.

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

A Yes.

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

A They would remain in IMA.

Question 104:

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

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

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

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

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

A Yes.

Question 140:

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

A They were always in IMA.

Q All right.

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

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

A Correct.

Q Because it was natural to keep them together?

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

Q Right. They all relate to one another.

A Correct.

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

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

Question 169:

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

A I believe so.

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

296 In sum, the Navidad project was staked on December 6, 2002, as a direct result of the use by IMA of the BLEG A data. The other properties, indirectly owned by IMA through the chain of subsidiaries leading to Inversiones, were staked because they had similar characteristics to the Navidad Project and IMA hoped to find a similar style of Navidad mineralization on those properties. There was no evidence from IMA's witnesses,

not surprisingly, that any of the Navidad area properties would have been staked had IMA not staked the original Navidad Claim.

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

(iii) Inadequacy of Damages

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

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

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

300 The same difficulty was relied upon in *Visagie v. TVX Gold Inc.* (1998), 78 O.T.C. 1, 42 B.L.R. (2d) 53 (Ont. Gen. Div.); aff'd (2000), 49 O.R. (3d) 198, 187 D.L.R. (4th) 193

(Ont. C.A.), a case where Feldman J. awarded a constructive trust over the defendant's joint venture interest in a mine located in Greece obtained through the use of the plaintiff's confidential information. Feldman J. rejected damages as the appropriate remedy stating the following:

> A further issue is whether there is any other reason why it would be more appropriate in this case to make a compensatory award of damages reflecting the full value of the property, rather than a restitutionary award. In my view this is the type of case, like Lac, involving a gold mine where the value is a moving target and therefore the damage is 'virtually impossible to determine with any degree of certainty.'

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

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

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

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

> Without the information acquired during the course of his employment, McTavish would not have staked the adjoining claim. This was highly confidential information and the purpose for which it was being sought was obvious — the acquisition of other

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

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

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

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

> The issue then is this. If it is established that one party, (here Lac), has been enriched by the acquisition of an asset, the Williams property, that would have, but for the actions of that party been acquired by the plaintiff, (here Corona), and if the acquisition of that asset amounts to a breach of duty to the plaintiff, here either a breach of fiduciary obligation or a breach of a duty of confidence, what remedy is available to the party deprived of the benefit? In my view the constructive trust is one available remedy, and in this case it is the only appropriate remedy.
>
> In my view the facts present in this case make out a restitutionary claim, or what is the same thing, a claim for unjust enrichment. When one talks of restitution, one normally talks of giving back to someone something that has been taken from them

> (a restitutionary proprietary award), or its equivalent value (a personal restitutionary award). As the Court of Appeal noted in this case, Corona never in fact owned the Williams property, and so it cannot be "given back" to them. However, there are concurrent findings below that but for its interception by Lac, Corona would have acquired the property. In *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161, at pp. 1202-03, I said that the function of the law of restitution "is to ensure that where a plaintiff has been deprived of wealth that is either in his possession or would have accrued for his benefit, it is restored to him. The measure of restitutionary recovery is the gain [page 670] the [defendant] made at the [plaintiff's] expense." [Emphasis added.] In my view the fact that Corona never owned the property should not preclude it from the pursuing a restitutionary claim: see Birks, *An Introduction to the Law of Restitution*, at pp. 133-39. Lac has therefore been enriched at the expense of Corona.

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

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

(iv) Mandatory Injunction

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

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

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

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

311 On the facts of this case, the plaintiff certainly contributed to the acquisition of the Navidad Claims by the defendants. Despite IMA's public announcements about the quality of the rock lying about the area, the BLEG A data was clearly "the springboard which led to the acquisition" because it put IMA "in a preferred position vis-à-vis others with respect to knowledge of the desirability of acquiring the property": *Lac Minerals Ltd.*, at paras. 61-62. However, I do not think it necessary for the plaintiffs to establish a pre-existing proprietary right to the Navidad Claims in order to support an order for their transfer. The transfer is not required to recognize the plaintiff's contribution to the asset, but rather because it is the only equitable way to compensate the plaintiff for the legal wrong it suffered; namely, the defendants' breach of confidence.

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

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

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

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

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

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

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

Assessing Damages

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

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

321 The damages in this case must be assessed based on my finding that but for IMA having staked the Navidad Project in December and further related staking in the ensuing few months, Aquiline would have likely staked it at the latest in May 2003 and would have followed a similar process to stake the related claims. The actual staking by IMA in December

of 2002 was solely because of the use of Newmont's confidential BLEG A data. Almost no other public information was used and certainly none that would have led Daniel Bussandri to "discover" Navidad. Without that initial "discovery," IMA would not likely have staked the related Navidad Claims.

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

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

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

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

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

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

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

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

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

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

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

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

> Well, that phrase is commonly applied to very large and spectacular occurrences of metal, of first minerals. "World class" means that no matter where you find it in the world, it's worth developing, and that **there's tremendous amount of prestige, I guess, too, attributable to the company that owns one of these things.** Examples of world-class deposits, Yanacocha in Peru, a gold quarry mine. The Macassa mine in the Abitibi for

> 50 years I think turned out — oh, I can't remember the number of million ounces of gold, **but the Northern Miner, interestingly, published this historic newspaper for their 100th anniversary or whatever it was in which they highlighted the news items of the day going back to the beginning of their publication, and they had fabulous deposits that they put in that listing, including the nickel deposits in Sudbury and so forth, and one of the last entries is Navidad**. So the Northern Miner essentially placed it in that elite category. Now, that's not to say — we don't even know if Navidad is economic at this point in time, but it is big and you can afford to spend a lot of money evaluating it. [emphasis added]

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

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

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

> Q Yes, All right. Now, just a question about the value of Navidad. This resource is in the very early stages of being identified, that is, fully identified; is that correct?
>
> A Rephrase that again, sir.
>
> Q I'll try it again. You haven't fully explored by various means the full extent of the resource there, have you?
>
> A No, not by all means.
>
> Q No. But based on the technical work that's been done by the IMA staff, you understand this resource is going to be — you believe it's going to be significantly increased, do you not?

A We hope so.

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

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

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

A Most likely.

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

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

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

Conclusion

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

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

2) This court grants a mandatory injunction requiring:

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

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

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

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

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

339 Judgment for the plaintiff.

Action allowed.

2007 BCCA 319
British Columbia Court of Appeal

Minera Aquiline Argentina SA v. IMA Exploration Inc.

2007 CarswellBC 1291, 2007 BCCA 319, [2007] 10 W.W.R. 648, [2007] B.C.W.L.D. 5027, [2007] B.C.W.L.D. 5054, [2007] B.C.W.L.D. 5055, [2007] B.C.W.L.D. 5134, [2007] B.C.W.L.D. 5135, [2007] B.C.W.L.D. 5136, [2007] B.C.W.L.D. 5137, [2007] B.C.W.L.D. 5166, [2007] B.C.J. No. 1232, 246 B.C.A.C. 1, 32 B.L.R. (4th) 242, 406 W.A.C. 1, 43 C.P.C. (6th) 45, 68 B.C.L.R. (4th) 242

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

Prowse, Levine, Thackray JJ.A.

Heard: April 10-12, 2007
Judgment: June 7, 2007
Docket: Vancouver CA034280

Proceedings: affirmed *Minera Aquiline Argentina SA v. IMA Exploration Inc.* (2006), 32 C.P.C. (6th) 31, 58 B.C.L.R. (4th) 217, [2007] 1 W.W.R. 43, 2006 BCSC 1102, 2006 CarswellBC 1776 (B.C. S.C.)

Counsel: L. Doust, Q.C., W. Milman, M. Feder for Appellants
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Subject: Estates and Trusts; Corporate and Commercial; Restitution; Natural Resources; Property; Civil Practice and Procedure

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APPEAL by defendants from judgment reported at *Minera Aquiline Argentina SA v. IMA Exploration Inc.* (2006), 32 C.P.C. (6th) 31, 58 B.C.L.R. (4th) 217, [2007] 1 W.W.R. 43, 2006 BCSC 1102, 2006 CarswellBC 1776, 32 B.L.R. (4th) 165 (B.C. S.C.), finding that defendants made unlawful use of confidential information in staking certain mining claims and ordering that defendants held claims pursuant to constructive trust.

***Per curiam*:**

Introduction

1 IMA Exploration Inc. ("IMA") and Inversiones Mineras Argentinas S.A. ("Inversiones") (collectively "the appellants") are appealing from the order of a trial judge, made July 14, 2006, following a 32-day trial, awarding Minera Aquiline Argentina SA ("Aquiline") judgment against the appellants for unlawful use of confidential information. (See *Minera Aquiline Argentina SA v. IMA Exploration Inc.* (2006), 58 B.C.L.R. (4th) 217 (B.C. S.C.).) That information has been referred to throughout the proceedings as the "BLEG A data", and was used by the appellants to stake valuable silver mineral claims in Argentina.

2 The original claims staked by the appellants in December 2002 using the BLEG A data have been referred to throughout these proceedings as the "Navidad Project". In 2003, the appellants staked other claims as a direct consequence of having staked the Navidad Project. The combination of the Navidad Project and the related claims staked by the appellants are referred to in these reasons as the "Navidad claims".

3 The key provisions of the order giving rise to this appeal are as follows:

THIS COURT DECLARES that:

1. Inversiones Mineras Argentinas S.A. ("Inversiones") holds the mining claims in Argentina particularized in Schedule "A" to this Order (the "Navidad Claims"), and any assets related thereto, pursuant to a constructive trust in favour of Minera Aquiline Argentina SA ("Minera Aquiline");

AND THIS COURT FURTHER ORDERS that:

2. Inversiones transfer the Navidad Claims, and any assets related thereto, to Minera Aquiline or its nominee within 60 days of this Order;

3. IMA Exploration Inc. ("IMA") take any and all steps required to cause Inversiones to comply with the terms of this Order;

4. 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;

. . . . .

4 In the event the appellants are successful in setting aside the order for the constructive trust of the claims, Aquiline is cross-appealing to the extent of seeking an order imposing a constructive trust in favour of Aquiline with respect to IMA's shares in IMA Holding Corp., and a mandatory injunction requiring IMA to transfer those shares to Aquiline, or its nominee, forthwith.

5 The parties have reached an agreement as to the status of this order pending the disposition of this appeal.

Issues on Appeal

6 The appellants submit that the trial judge made palpable and overriding errors in her assessment of the evidence which caused her to conclude, erroneously, that IMA made unlawful use of confidential information obtained from Newmont Mining Corporation ("Newmont") through Minera Normandy Argentina SA ("Minera") in staking the Navidad claims. In particular, the appellants submit that the trial judge erred in finding that IMA's use of the BLEG A data breached the confidentiality agreement between the parties and also gave rise to a breach of a duty of confidentiality that IMA owed to Newmont at common law.

7 The appellants further submit that, if the trial judge was correct in finding that IMA made unlawful use of confidential information, she erred in imposing a constructive trust remedy, accompanied by a mandatory injunction, rather than a remedy in damages.

8 In its cross-appeal, Aquiline submits that if the trial judge erred in ordering a constructive trust of the Navidad claims *per se*, the appropriate remedy would be a constructive trust of the shares of IMA in IMA Holding Corp.

Conclusion

9 We are not persuaded that the trial judge made any palpable and overriding errors in her assessment of the evidence or that she erred in finding that IMA had breached both the confidentiality agreement between the parties and its common law duty of confidentiality in using the BLEG A data to stake the Navidad Project and related claims. Nor are we persuaded that the trial judge erred in concluding that a constructive trust with an injunction in aid were appropriate remedies in the circumstances of this case. For the reasons which follow, we would dismiss the appeal.

General Background

10 The subject of this action and appeal is the Navidad Project (and related claims) in Argentina, which counsel for the appellants referred to at the outset of the appeal as one of the largest undeveloped silver deposits in the world. The circumstances which led to the staking of these claims by Inversiones on behalf of IMA continue to be a matter of dispute. It is useful, therefore, to describe the general background giving rise to these proceedings, including the key players who were involved at the relevant time.

11 IMA is a British Columbia company engaged in the business of acquiring and exploring mineral properties, primarily in Argentina and Peru. Inversiones is an Argentine company which was owned and controlled at all material times by IMA. Its sole mineral assets (prior to the order under appeal) were the Navidad Project located in the Chubut province of Argentina, which IMA caused Inversiones to stake in December 2002, and the related claims which were staked in 2003.

12 Minera is an Argentine company formerly known as Minera Normandy Argentina SA. Until 2002, Normandy Mining Corporation ("Normandy"), a multinational company based in Australia, owned and controlled Minera. In 2002, Normandy and Minera were acquired by Newmont, which was the world's largest gold mining company and was based in the United States. In 2003, after the principal events giving rise to these proceedings, Newmont sold Minera to Aquiline Resources Inc., a Toronto-based exploration company, which subsequently changed its name to Minera Aquiline Argentina SA, referred to in this judgment as "Aquiline".

13 Prior to its acquisition by Aquiline, Minera's principal mineral asset was the Calcatreu Project — a series of mineral claims located primarily in the Rio Negro province of Argentina,

covering approximately 730 square kilometres. Minera managed the Calcatreu Project, first on behalf of Normandy, and later on behalf of Newmont, from its office in the town of Jacobacci in the Rio Negro province.

14 Between 1998 and 2001, at the direction of Normandy, Minera collected approximately 500 stream sediment samples from within and nearby the Calcatreu Project, mainly for the purpose of locating additional gold mineralization structures within the boundaries of the Calcatreu Project. The resulting data was known as the "BLEG B data". As noted by the trial judge (at para. 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."

15 In early 2001, Normandy concluded that the Calcatreu Project contained only one tenth of the gold resources necessary to make it economical for Normandy to mine. As a result, Normandy decided to fund additional exploration work by Minera ("Project Generation") with a view to locating additional resources in the area. Under Project Generation, Minera geologists Carlos Cuburu, Rohan Worland and Achilles Aquilera collected approximately 1,000 stream sediment samples over an area of approximately 12,000 square kilometres. Most of those samples were taken at varying distances south of the southern boundary of the Calcatreu Project, with fewer than 20 of these samples being taken within the Calcatreu area. That data became known as the "BLEG A data".

16 In early 2002, Newmont completed its acquisition of Normandy and thereafter set up a meeting in Santiago, Chile, in March 2002. One purpose of the meeting was to review the exploratory work which had been done to date with respect to the Calcatreu Project and Project Generation. Following that meeting, Newmont decided to cease operating in Argentina, to terminate Project Generation and to sell the Calcatreu Project.

17 On July 30, 2002, Mr. Worland provided a written report on Project Generation to Newmont management stating that the BLEG A data did not reveal any exceptional anomalies requiring immediate staking, but identifying for follow-up purposes three "high" priority anomaly clusters and two "medium" priority anomaly clusters. (As noted by the trial judge, an anomalous reading or a cluster of anomalies may indicate the presence of a mineralized deposit.) The Sacanana silver anomalies comprised one of the two medium priority anomaly clusters. It is the Sacanana anomalies which led to the eventual staking of the Navidad Project and related claims by Inversiones at the direction of IMA.

18 Newmont continued with its plan to sell the Calcatreu Project, with Esteban Crespo (Newmont's Director of Lands for Latin America) being placed in charge of the sale. Nick Green, the President of Minera, prepared an information brochure for prospective purchasers, with some assistance from Mr. Cuburu. The information brochure contained

references to the BLEG B data in the immediate vicinity of the Calcatreu Project, but did not refer to BLEG B data in areas further afield, or to the BLEG A data.

19 Newmont arranged for various prospective purchasers, including IMA, to receive the brochure and, if desired, to participate in site visits after signing a standard form confidentiality agreement prepared by Newmont. IMA signed the confidentiality agreement on September 6, 2002 (the "Agreement"). Thereafter, on September 20-22, 2002, IMA sent three representatives to conduct a site visit, including Paul Lhotka (a geologist on contract to IMA). They met with Mr. Cuburu, who was in charge of the site visits for Newmont. Mr. Lhotka requested a variety of information in relation to the Calcatreu Project, including BLEG B data referenced in the brochure. This data was provided. During the September site visit, Mr. Lhotka also expressed interest in a satellite map on the wall of Mr. Cuburu's office in Jacobacci which depicted the locations of the BLEG A samples. Mr. Lhotka asked if the data generated from these samples was available and Mr. Cuburu indicated that he would consult with Mr. Crespo in that regard. Subsequently, after consulting with Mr. Harvey (Newmont's Director of Latin American Exploration), Mr. Crespo authorized the release of the data to Mr. Lhotka.

20 In late October 2002 (October 31, November 1 and 2), IMA sent Mr. Lhotka and Keith Patterson (IMA's Manager of Exploration) to conduct a second site visit in relation to the Calcatreu Project. About half an hour before the end of that visit (on November 2) Mr. Cuburu provided Mr. Lhotka with a computer disk containing the requested BLEG A data, which Mr. Lhotka copied to his computer. Mr. Patterson was present during this transaction.

21 On October 31, 2002, Aquiline offered to purchase the Calcatreu Project from Newmont for $2 million. At that time, Aquiline was unaware of the BLEG A data.

22 On November 6, 2002, IMA advised Newmont that it would not be bidding on the project.

23 On November 20, 2002, Mr. Lhotka considered looking at the BLEG A data (which he had not yet viewed) and sent a memorandum to Mr. Patterson indicating that it was unclear to him whether this data could be used to acquire lands more than two kilometres from the lands referred to in the Agreement. Having received no response to this memorandum, he opened the BLEG A data on November 27, 2002. Shortly thereafter, he noticed the silver anomalies that had been identified as medium targets by Mr. Worland in his written report to Newmont of July 30, 2002. Mr. Lhotka sought and received permission from IMA's management to stake the surrounding area, and Inversiones did so on December 6, 2002. The resulting mineral claims became known as the Navidad Project (later expanded to include all of the Navidad claims).

24 On January 28, 2003, Aquiline completed the purchase of the Calcatreu Project through the purchase of Minera's shares, with a closing date of July 10, 2003. The BLEG A data was an asset of Minera and, as such, was included in the purchase. In May 2003, Aquiline examined the BLEG A data and discovered the silver anomalies which had drawn Mr. Lhotka's attention and which had led to the staking of the Navidad Project. Aquiline decided to stake the area but, when it moved to do so, it discovered that Inversiones had staked the area approximately six months earlier.

25 Aquiline commenced the proceedings leading to this appeal on March 5, 2004.

Decision of the Trial Judge

26 After reviewing the background giving rise to the action in some detail, the trial judge addressed the issue of whether the BLEG A data was covered by the Agreement. She concluded that, although the BLEG A data was not specifically mentioned in the Agreement, it was covered by the Agreement, and that the appellants had breached the Agreement by using that data to stake the Navidad Project. In coming to that conclusion, she gave an expansive interpretation to provisions of the Agreement which (she found) protected information "in connection with the Reviewer's review of the [Calcatreu] Project", "concerning the Project" and "relating to the Project". She concluded that, given the fact that the Agreement was executed in relation to a proposed sale of the Calcatreu Project, any information provided in the context of IMA's evaluation of a possible transaction concerning Calcatreu was protected by the Agreement. She rejected the appellants' submission that the Agreement, including the definition of the "Project" covered by Agreement, should be narrowly construed by reference to Exhibit A to the Agreement, which listed only the Calcatreu claims.

27 Although she was not required to do so, the trial judge then went on to consider whether the BLEG A data was also protected by confidentiality at common law. She concluded that the data met the criteria for confidentiality at common law: namely, that (a) the information conveyed was confidential (this was not disputed); (b) that it was communicated in confidence; and (c) that it was misused by the party to whom it was communicated. (See *International Corona Resources Ltd. v. LAC Minerals Ltd.*, [1989] 2 S.C.R. 574 (S.C.C.).)

28 In coming to this conclusion, the trial judge repeated her earlier finding that the information had been requested and provided solely within the context of the sale of the Calcatreu Project. She rejected various submissions put forward by the appellants in support of their theory that the BLEG A data had been provided to them as a gift in exchange for favourable future considerations in relation to properties owned by IMA in Peru. Finally, she reiterated her earlier finding that IMA's use of the data to stake the Navidad Project was an unauthorized use.

29 In determining the question of remedy, the trial judge found that but for the prior staking of the Navidad Project by IMA, Aquiline would have staked the Navidad Project in or around May 2003 when it reviewed the data for the first time and realized its significance. The trial judge went on to find that the appropriate remedy in the circumstances was the order set out at para. 3, *supra*.

30 The trial judge rejected damages as an appropriate remedy on the basis that there were too many unknowns related to the value of the claims and that an award of damages could operate unfairly to the detriment of one of the parties. At the request of the parties, however, she reluctantly agreed to assess damages. She stated that, if she were required to award damages, she would award $85 million (U.S. funds), subject to an update of the valuation of the report prepared by the respondent's expert, Ms. Hodos.

Discussion of the Issues

1. Liability

(a) Position of the Parties

31 IMA acknowledged at trial and on appeal that the BLEG A data constituted confidential information, in the sense that it was not information available in the public domain. It is also common ground that IMA came into possession of this data solely as a result of Newmont's invitation to it to bid on the Calcatreu Project. IMA's position at trial (and on appeal), however, was that the BLEG A data was not related to the Calcatreu Project, but was data obtained from an area outside that Project which was not protected by either the Agreement or by a common law duty of confidentiality. IMA also reiterates its position at trial that Newmont's purpose in providing IMA with the BLEG A data was to curry favour with IMA so that IMA would look favourably on Newmont in relation to other claims and mining activities IMA was carrying on in Peru and elsewhere in South America.

32 IMA submits that the trial judge rejected IMA's "gift" theory out of hand because of palpable and overriding errors she made in assessing the evidence, and in the inferences she drew, or failed to draw, from the evidence. IMA submits that the errors the trial judge made in her assessment of the evidence also affected her interpretation of the Agreement, with the result that she wrongfully concluded that the BLEG A data was protected by the Agreement. IMA further submits that the trial judge's misapprehension of the evidence led her to the erroneous conclusion that IMA had breached its duty of confidentiality at common law in relation to its use of the BLEG A data. In the result, IMA submits that this Court should allow the appeal and remit the case to the Supreme Court for a new trial.

33 Aquiline's position at trial (and on appeal) is that there was no evidentiary foundation for IMA's theory that Newmont provided the BLEG A data to IMA as a gift for future considerations, and that it is clear that the BLEG A data was provided to IMA to permit IMA to conduct due diligence with respect to the sale of the Calcatreu Project and for no other reason. Thus, the data was covered by the terms of the Agreement and its use by the appellants to stake the Navidad Project was in breach of the Agreement and was also an unauthorized use of the data at common law.

34 On appeal, Aquiline denies that the trial judge made any errors of substance in her apprehension or assessment of the evidence, and submits that any errors she made were of a minor nature which could not reasonably have affected the result. Aquiline also submits that the trial judge's conclusions that the BLEG A data was confidential under the Agreement and at common law, and that IMA's use of the data was in breach of both the Agreement and its common law duties, are fully supported by the evidence and the relevant authorities.

(b) Alleged Palpable and Overriding Errors

35 IMA submits that the trial judge made palpable and overriding errors with respect to three key propositions which, it says, went to the heart of the "gift" theory which was the foundation of its defence to Aquiline's claim. The three propositions upon which IMA relied at trial are set out at para. 49 of its factum as follows:

> (i) Newmont was interested in IMA's mineral properties in Peru and was therefore motivated to garner goodwill with IMA with a view to participating in their exploitation;
>
> (ii) Newmont attached minimal, if any, value to the BLEG A Data (and was therefore prepared to give it away); and
>
> (iii) Newmont considered the BLEG A Data to be unrelated to the Calcatreu Project.

36 Although these propositions overlap to some extent, we will endeavour to address them individually as they were addressed by IMA in its submissions. In so doing, we do not propose to refer to every aspect of the evidence referred to by the parties in their submissions. The trial was lengthy, the evidence voluminous, and there is an ever-present danger of an appellate court losing sight of the "big picture" by placing discrete portions of the evidence under a microscope. We have endeavoured to keep that larger context in mind in examining the impugned evidence.

(i) Newmont's Interest in IMA's Peruvian Properties

37 The trial judge addressed IMA's submission that Newmont provided the BLEG A data to IMA in order to curry favour with IMA in relation to the latter's properties in Peru, in part, at paras 104-107 of her reasons for judgment:

> [104] ... The defendants argued that Newmont waived any restriction on its [the BLEG A data's] 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 the 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.
>
> [Emphasis added.]

38 IMA submits that neither Mr. Harvey nor Mr. Crespo testified that by the time of the first site visit by IMA, Newmont was disinterested in "doing a deal" with IMA in relation to its Peru properties. It also submits that neither of these witnesses testified that the BLEG A data would be given to IMA for "no other reason" than for due diligence in relation to the

Calcatreu Project. It says the absence of such evidence, combined with the apparent weight which the trial judge attributed to the credibility of these witnesses (concerning evidence which they did not give) completely undermines her ultimate conclusion that the BLEG A data was not given to IMA as a gift. At the very least, IMA says that these errors were instrumental in the trial judge's rejection of their "gift" theory.

39 IMA submits that the evidence shows that Mr. Harvey was interested in IMA's Peruvian properties at the relevant time and that there was evidence tying his interest to the release of the BLEG A data to IMA. In that respect, IMA places particular emphasis on notes made by Mr. Cuburu and/or Mr. Crespo (the evidence is not entirely clear on this point) on a "contact tracker" spreadsheet following the first site visit by IMA, in which information relating to the various prospective bidders on Calcatreu was recorded. That note states: "IMA had some properties in Peru that Newmont (from Bruce Harvey) showed interest." IMA says that this note is important evidence which the trial judge overlooked in rejecting IMA's "gift" theory.

40 Aquiline agrees that the trial judge erred in stating that Mr. Harvey and Mr. Crespo gave evidence that *by the time of the first site visit* by IMA, Newmont had evidenced no interest in doing a deal with IMA in relation to its Peru properties. Aquiline states, however, that the error is of no consequence since it is clear that *by the time of the second site visit*, Newmont had specifically rejected IMA's offer of a joint venture in relation to Calcatreu in exchange for future considerations relating to some of IMA's Peruvian interests. Newmont had also rejected IMA's request for exclusivity, or preference over other bidders, in relation to the Calcatreu Project. Thus, Aquiline says that the trial judge's error in this regard is simply one of timing and that nothing of consequence turns on it.

41 Aquiline also acknowledges that neither Mr. Harvey nor Mr. Crespo gave direct evidence that IMA's access to the BLEG A data should be restricted to IMA performing due diligence in relation to the sale of Calcatreu. Rather, this evidence came indirectly through Mr. Cuburu. Aquiline submits, however, that that is the only reasonable conclusion which could be drawn from the evidence as a whole. For example, Aquiline refers to Mr. Cuburu's evidence that after Mr. Lhotka requested the BLEG A data, Mr. Cuburu obtained instructions from Mr. Crespo (who, in turn, had checked with Mr. Harvey) that IMA was to be given access to the BLEG A data in the context of IMA's due diligence in relation to Calcatreu.

42 Aquiline also says that the trial judge referred to the fact that Newmont had a continuing interest in IMA's Peru properties and submits that there was no evidence that Newmont's interest was such that it was prepared to give away the BLEG A data in order to curry favour with IMA in relation to those properties in the future. Aquiline submits that no reasonable inference could be drawn from the evidence to that effect. In that regard, Aquiline emphasizes

that Newmont specifically rejected an offer of IMA to link the Calcatreu Project and IMA's Peruvian properties.

43 In our view, the trial judge was mistaken in saying that Newmont had rejected any possibility of a deal with IMA which tied the sale of the Calcatreu Project (or the release of the BLEG A data) to an interest in IMA's Peruvian properties prior to the first site visit. It is clear, however, that the only deal proposed by IMA in that regard (by letter forwarded to Mr. Harvey by email dated September 24, 2002) was rejected by Newmont on October 8, 2002, which was before the second site visit in late October 2002. Further, although the trial judge stated in para. 105 that "Newmont had no interest in doing a deal with IMA in relation to its Peru properties", she made it clear in para. 106 that Newmont expected to continue to enjoy a good business relationship with IMA in the future, although, in her view, the nature of that business relationship did not involve giving IMA special consideration in relation to Calcatreu. In other words, she was not saying that Newmont had no interest in IMA's properties in Peru, but only that Newmont was not sufficiently interested in those properties to cut a special deal with IMA in relation to the Calcatreu Project. While the trial judge did not expressly refer to the contact tracker in coming to that conclusion, we are not persuaded that she overlooked it or that it was such a critical piece of evidence that it required special mention.

44 In our view, the fact that the contact tracker refers to Mr. Harvey's interest in IMA's properties in Peru, that Mr. Crespo said that he told Mr. Cuburu that Mr. Harvey had some interest in IMA's Peruvian properties (and that Mr. Cuburu acknowledged this in cross-examination), and the other evidence to which counsel referred relating to Mr. Harvey's general interest in IMA's properties in Peru, cannot reasonably give rise to the inference that Newmont was prepared to give the BLEG A data to IMA as a gift in the hopes that it would be given special consideration in relation to the Peruvian properties in the future. The evidence in that regard is tenuous, at best. Further, in weighing that evidence, the trial judge was entitled to take into account the fact that the "gift" theory was never put to any of the Aquiline witnesses in cross-examination. That is, it was never put to any of these witnesses that Newmont's desire to maintain good relations with IMA extended to offering the BLEG A data to IMA as a gift or inducement to favourable treatment in relation to Peruvian properties in the future.

45 In summary on this point, the evidence falls far short of establishing, either directly or by inference, that at the time of the first (or second) site visit Newmont had an interest in making a deal with IMA in relation to its properties in Peru which in any way involved giving IMA any preferential treatment in relation to Calcatreu, or in sharing the BLEG A data. Rather, the evidence shows that IMA had some interest in making a deal with Newmont in relation to Calcatreu, but that shortly after the first site visit, Newmont rejected that proposal. Newmont did not make a counterproposal, nor offer to give IMA any preference

with respect to the sale of Calcatreu, or otherwise. At best, the evidence shows that Newmont and IMA had an ongoing relationship, recognized by the trial judge in her reasons, and that that relationship continued long past the events giving rise to this action. IMA's theory that Newmont was prepared to, or did, offer IMA the BLEG A data as a gift in relation to the Peruvian properties is just that, a theory.

(ii) The Value of the BLEG a Data to Newmont

46 IMA also sought to support its theory that Newmont gave IMA the BLEG A data as a gift for future considerations on the basis that the BLEG A data had no value to Newmont and, therefore, Newmont was prepared to give it away.

47 IMA says it is clear that the BLEG A data had no value to Newmont because Newmont was in the process of getting out of Argentina altogether when it decided to sell Calcatreu with a view to investigating other projects in Peru and elsewhere in South America. Thus, by the time the Sacanana anomalies revealed by the BLEG A data were referred to in Mr. Worland's report as a "medium" target, Newmont had no interest in pursuing them. IMA also relies on the fact that Mr. Crespo appeared to have little, if any, knowledge about the BLEG A data when he was marketing Calcatreu and that it was only after the sale of Calcatreu to Aquiline that he said he would have attached a separate value to the BLEG A data if he had been aware of it. Further, the BLEG A data was not referred to in the information brochure provided to prospective purchasers, or in the Agreement.

48 IMA also placed considerable reliance on Mr. Lhotka's evidence of a conversation he said he had with Mr. Cuburu at the first site visit. At that time, Mr. Lhotka showed interest in the map depicting sample collection sites both inside and outside Calcatreu, and in obtaining a copy of the BLEG A data. He testified that Mr. Cuburu provided him with rock sampling data from well outside the Calcatreu boundaries at that time, and that, when Mr. Lhotka cautioned Mr. Cuburu that the data wasn't relevant to the Calcatreu Project, Mr. Cuburu replied "no importa"; that is, "it doesn't matter". The inference which IMA asked the trial judge to draw with respect to that conversation was that Mr. Cuburu did not regard the rock sample data from outside Calcatreu as having any importance to Newmont, and, therefore, it was reasonable for Mr. Lhotka and IMA to treat the BLEG A data which fell outside the Calcatreu boundaries as being equally unimportant. IMA submits that, if the trial judge had properly understood this evidence, it was open to her to infer that neither Mr. Cuburu nor Mr. Lhotka regarded either the rock sampling data or the BLEG A data to be of importance or of a restricted nature. IMA says that the trial judge's failure to make a finding with respect to this evidence effectively precluded her from drawing an inference in favour of IMA.

49 Mr. Cuburu was cross-examined by counsel for IMA with respect to this conversation with Mr. Lhotka, but counsel for IMA mistakenly referred to *rock samples*, rather than to

rock sample data, in his questions. Mr. Cuburu did not recall any such conversation about rock samples, but said that he did have such rock samples in his office which were not important in the sense that they did not reveal anything of a confidential nature. He was not asked about rock sample data.

50 The trial judge declined to draw the inferences from this conversation suggested by IMA. She found that there was some confusion with respect to this evidence and that it was not possible to resolve that confusion. However, she concluded that to the extent Mr. Lhotka expressed some reservations about Mr. Cuburu showing him data from outside the Calcatreu Project, this was an indication that Mr. Lhotka viewed such data as being confidential.

51 In our view, the trial judge was justified in finding that there was an air of confusion surrounding the evidence with respect to the rock samples and rock sample data. This confusion was reflected in para. 132 of her reasons where she refers to rock samples, rather than rock sample data. The confusion arose in part from the fact that Mr. Cuburu testified prior to Mr. Lhotka and was cross-examined about *rock samples* before Mr. Lhotka gave evidence about *rock sample data*. The direct examination of Mr. Lhotka and the cross-examination of Mr. Cuburu did not correspond on this point, and the trial judge was not bound to accept the evidence of Mr. Lhotka in that regard. We are not persuaded that the trial judge's refusal to draw an inference favourable to IMA with respect to this evidence constituted error, and certainly not error of the magnitude which could justify ordering a new trial.

52 Nor are we persuaded that the trial judge erred in rejecting IMA's other bases for claiming that the BLEG A data had little value to Newmont. The trial judge referred to those submissions, and gave her reasons for rejecting them, at paras. 104, 107 and 152 of her reasons:

> [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. ...
>
> . . . . .

> [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.
>
> . . . . .
>
> [152] I have found that there is evidence that Newmont placed relatively little value on the Project Generation data in general and 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* [*v. A.N. Clark (Engineers) Ltd.*, [1969] R.P.C. 41 (Ch. D.)].
>
> [Emphasis added.]

53 IMA referred to the hundreds of thousands of dollars of development costs linked to the BLEG A data as "sunk costs" and drew an analogy with the purchase price of a losing lottery ticket; that is, as being costs already expended and of no further value. As Aquiline pointed out, however, all development costs could be regarded as sunk costs if they have not yet resulted in the production of revenue. Further, in many cases, sunk costs give rise to winnings, as evidenced in this case by the results of the BLEG A data.

54 In the result, we are satisfied that the trial judge's conclusion that the BLEG A data had a value to Newmont is supported by the evidence and that she did not make any palpable and overriding error in coming to that conclusion.

(iii) The BLEG a Data's Connection to the Calcatreu Project

55 IMA submits that the trial judge erred in finding that the BLEG A data related to the Calcatreu Project, was requested and provided solely in relation to that project, and was thus covered by both the Agreement and the common law duty of confidentiality. IMA's submission in this regard overlaps to some extent with its earlier submissions that Newmont regarded the BLEG A data as being of no value and that Newmont provided the data as a gift relative to future dealings with IMA's Peruvian properties.

56 The issue of the relationship between the BLEG A data and the Calcatreu Project was addressed by the trial judge at various points in her decision. For example, in discussing IMA's submission with respect to the relationship between the BLEG A data and the scope of the Agreement, the trial judge stated (at para. 78 of her reasons):

> 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.

57 With respect to the first four arguments, the trial judge noted that several experts called by each of the parties agreed that regional exploration data like the BLEG A data could be relevant when evaluating a known resource (in this case, the Calcatreu Project). In that regard, the trial judge also noted that Normandy (later Newmont) undertook the regional geochemical survey from which the BLEG A data was derived for the express purpose of potentially adding to the Calcatreu claims. The trial judge further observed, but accorded less weight to, the evidence that the experts would not have expected a seller to disclose regional exploration data that was confidential without some protection for that confidentiality.

58 At para. 84 of her judgment, the trial judge responded directly to IMA's submission that the BLEG A data was unrelated to the Calcatreu Project and, therefore, not covered by the Agreement:

> 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 BLEG A data — in the circumstances — was in furtherance of IMA's due diligence evaluation of Calcatreu.

59 IMA says that this paragraph is contrary to the evidence of these witnesses and amounts to a palpable and overriding error. Aquiline submits that this paragraph was not intended by

the trial judge to address all five points raised by IMA (set forth at para. 56, *supra*), and, in any event, that the evidence supports the trial judge's conclusion. In that regard, both parties referred the Court to extracts from the evidence which, they submit, support their respective views. We will deal briefly with that evidence in relation to para. 84 of the trial judge's reasons.

60 With respect to Mr. Lhotka, the trial judge referred to the fact that, on discovery, Mr. Lhotka said that when Mr. Cuburu gave him the diskette with the BLEG A data on it (at the second site visit), he assumed that it was given to him for the purpose of his evaluation of Calcatreu. At trial, he initially agreed with his discovery evidence, but then qualified it by saying that he was not sure what he thought at the time. The trial judge preferred his evidence on discovery on the basis that it was taken closer in time to the events and was therefore more reliable. It was clearly open to her to come to this conclusion.

61 Similarly, IMA submits that other evidence of Mr. Lhotka, including his evidence relating to the rock sample data, should have led the trial judge to find that Mr. Lhotka believed the BLEG A data was not relevant to the Calcatreu Project. We have already found that the trial judge reasonably declined to make a finding on his evidence in that regard because of the confusion surrounding that issue.

62 The trial judge also relied on the evidence that Mr. Lhotka sent a memorandum to Mr. Patterson on November 20, 2002, raising a concern as to whether the BLEG A data was covered by the Agreement, as some evidence that Mr. Lhotka associated the BLEG A data with Calcatreu.

63 In our view, Mr. Lhotka's evidence as a whole supports the trial judge's conclusion that Mr. Lhotka viewed the BLEG A data as a product relating to IMA's due diligence of the Calcatreu Project.

64 With respect to Mr. Cuburu, the trial judge rejected IMA's submission that because Mr. Cuburu made a point of checking with Mr. Crespo before releasing the BLEG A data to Mr. Lhotka, it followed that Mr. Cuburu did not believe the BLEG A data was related to the Calcatreu Project. At para. 87 of her reasons, she stated:

> 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 [Calcatreu] deal more attractive to IMA.

65 With respect to Mr. Lhotka's request for the BLEG A data being vetted by Mr. Crespo and Mr. Harvey, Mr. Cuburu gave evidence as follows:

> Q. Did you have a follow-up call with Mr. Crespo?
>
> A. We continued to talk with Esteban Crespo during those days after the conversation that Esteban Crespo had with Bruce Harvey. Esteban Crespo mentions to me that he had the approval from the exploration manager from Latin America — for Latin America, pardon me, from Newmont to facilitate the information that IMA deems necessary in order to assess a bid for the Calcatreu project.
>
> He also mentioned that Mr. Harvey showed interest in establishing a good relationship with IMA in view that Newmont was showing interest in properties from this company in Peru. Mr. Esteban Crespo concludes by saying that we have to fully cooperate with IMA in order with the — that with the original available data they could then submit a bid.

66 Similarly, when asked why he thought Mr. Lhotka (accompanied by Mr. Patterson) was interested in the BLEG A data, Mr. Cuburu stated:

> A. From a point of view any supply of data may assist the consultant geologist in making a better decision or preparing a better report, any additional information request, I thought it could have as a goal to obtain sufficient tools in order to specify a concrete bid for the project.

67 When asked whether Newmont considered the BLEG B data alone to be sufficient to enable prospective bidders to bid on Calcatreu, Mr. Cuburu replied: "It was sufficient, perhaps, for the needs of some companies and insufficient for others."

68 Further, while Mr. Cuburu was aware that Mr. Harvey had some interest in IMA's properties in Peru, he connected the request for information and the response of Mr. Harvey as authorizing him to release the information for the purpose of enabling IMA to bid on the Calcatreu project.

69 As earlier stated, the trial judge declined to find that Mr. Cuburu told Mr. Lhotka that other data from outside the Calcatreu boundaries was not important, and also declined to draw the inference that either Mr. Cuburu or Mr. Lhotka thought the BLEG A data was unimportant or unrelated to Calcatreu. Nor did the trial judge accept IMA's submission that Mr. Cuburu was releasing the data because he thought Mr. Harvey wanted to curry favour with IMA in relation to IMA's properties in Peru.

70 With respect to Mr. Harvey, we have already referred to the fact that he agreed he had some interest in IMA's properties in Peru, and that the decision was made after the May 2002 meeting to sell Calcatreu and pursue other interests outside Argentina. He also testified, however, that he would not have allowed access to Newmont data without cover of a confidentiality agreement. When specifically asked about the report of Mr. Worland of July 30, 2002, referring to the BLEG A data, he testified:

> Q. There is evidence of a report prepared by Rohan Worland in connection with project generation, the regional work in Argentina. The report is dated July 30th, 2002, and it is copied to you. Do you recall receiving a copy of such a report?
>
> A. Yes, I do.
>
> . . . . .
>
> Q. All right. And in that report there are references to anomalies. Can you say how these anomalies were viewed by you in relation to other anomalies in other parts of Latin America?
>
> A. At that time we felt those anomalies were lower priority than other targets or other anomalies we had elsewhere in South America.
>
> Q. What, if anything, did you think would be done with the project generation information in light of the decision to sell the Calcatreu project?
>
> A. I believe that that information would be available to people looking at Calcatreu in order to evaluate the project.

71 Thus, there was evidence from Mr. Harvey that he drew a connection between the BLEG A data and the sale of Calcatreu.

72 The evidence of Mr. Crespo was that he was not aware of the BLEG A data at the relevant time, and had no recollection of Mr. Cuburu asking him about the release of the BLEG A data, in particular. However, he did recall Mr. Cuburu asking about the release of data to purchasers in relation to the Calcatreu Project. In that regard, he stated:

> Q. All right. And do you recall having any discussions with [Mr. Cuburu] in connection with data being requested by any of the prospective purchasers?
>
> A. Yes, Carlos was asking me questions about data. In particular, there was a question about providing the raw data to the potential bidders.
>
> Q. And did you advise him what he could do in respect of the raw data?

> A. Yes, I advised him that he can proceed to provide the raw data to any potential bidders. The raw data being nothing more than the unprocessed data that had been used for the preparation of Nick Green's report for the property in addition to other information that — unprocessed information that might be of use to certain parties.

73 In relation to the earlier related issues concerning Newmont's interest in IMA's Peruvian properties and the suggestion that Newmont was interested in currying favour with IMA in relation to the Calcatreu Project or the BLEG A data, Mr. Crespo testified that Newmont had rejected IMA's requests for exclusivity and for a joint venture in the project.

74 In our view, Mr. Crespo's evidence was consistent with the trial judge's finding that he regarded requests from prospective purchasers for raw data in relation to the sale of Calcatreu to be requests related to the sale.

75 While the trial judge was satisfied that Mr. Patterson, too, recognized that the BLEG A data was connected to the Calcatreu Project in terms of its confidential nature, this was clearly an inference she drew from the evidence and the circumstances surrounding the disclosure of the data. In that regard, Mr. Patterson testified that he did not regard the data from outside the Calcatreu area to be relevant to the evaluation of Calcatreu. Having said that, he acknowledged that the only reason he attended the second site meeting was in relation to IMA making a prospective bid on Calcatreu, that he was there when the BLEG A data was requested, and that he did not question the relevance of that request, suggest that the data was irrelevant, or say anything at that time to indicate that he regarded the data as being different, in kind, from the other data that had been requested. He also testified that when he later received the memorandum from Mr. Lhotka effectively raising a question as to the use of the BLEG A data, he did not respond. He said that he did not regard data collected outside a two kilometre radius of Calcatreu to be "an important concern", but he offered no explanation for failing to respond to Mr. Lhotka's query, when it was obvious that Mr. Lhotka did regard it as a matter of concern.

76 Given IMA's admission that the BLEG A data was confidential (at least in the sense of belonging to Newmont and not being available to the public at large), the evidence of the experts as to the relevance of regional data in evaluating a project, the evidence of the other witnesses to whom the trial judge referred that the BLEG A data was offered and received in the context of the Calcatreu Project, and Mr. Patterson's own evidence that he received the data in relation to that project (even if he, personally, did not regard the data as relevant to an evaluation of Calcatreu), we find no error in the trial judge's conclusion that Mr. Patterson was aware that the BLEG A data was obtained "in furtherance of IMA's due diligence evaluation of Calcatreu."

77 This conclusion is reinforced by the trial judge at para. 142 of her reasons where she states that the only reasonable inference from the words and actions of Mr. Lhotka and Mr. Patterson at the time Mr. Lhotka asked for the BLEG A data was that they were aware they were obtaining the data for the purpose of evaluating Calcatreu and that it was being provided on that basis. She notes that the witnesses at times "skated away from this acknowledgment" but that "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."

78 In responding to these grounds of appeal, we note that the trial judge's reasons are lengthy and replete with references to the evidence of these and other witnesses. It is difficult to do justice to the trial judge's reasons by taking only bits and pieces of the evidence and examining them out of their full context. Suffice it to say that, while the trial judge made errors in certain aspects of her recitation of the facts, we are not persuaded that those errors, either individually, or cumulatively, cast doubt on her conclusion that the BLEG A data was provided and received as part of IMA's due diligence in relation to the sale of the Calcatreu Project, and that this was understood by the parties at the relevant times.

79 In summary with respect to these grounds of appeal, we are not persuaded that the trial judge made any palpable or overriding errors which could have affected the result.

(c) The Interpretation and Application of the Agreement

80 The trial judge found that the BLEG A data was covered by the Agreement. Counsel for IMA acknowledged during the course of the appeal that if he could not succeed on one or more of the points he raised in his first ground of appeal, he could not succeed in establishing that the trial judge erred in her conclusion that the BLEG A data was covered by the Agreement. For that reason, we do not find it necessary to engage in an analysis of the trial judge's interpretation of the Agreement. Suffice it to say that we are satisfied that she was correct in finding that the BLEG A data was covered by the Agreement, even though it was not expressly referred to in the Agreement.

(d) Breach of Confidence at Common Law

81 Because we have concluded that the trial judge did not err in finding that the BLEG A data was covered by the Agreement, it is not necessary to resolve the issue of whether she erred in finding that IMA had breached its duty of confidentiality owed to Newmont at common law. We note that IMA's submissions in this regard also turn, to a significant extent, on its submissions with respect to the first ground of appeal — submissions which we have rejected.

82 The entirety of IMA's submission in relation to this issue is set out at paras. 108 to 114 of its factum, as follows:

> 108. An action for breach of confidence lies where information having a confidential quality is imparted in confidence, then used in an unauthorized manner to the detriment of the confider.
>
> 109. It was and is not disputed that the BLEG A Data had, *prima facie*, a confidential quality. It was "private" to Minera and Newmont. It was not "public property and public knowledge".
>
> 110. It is less clear that the BLEG A Data was communicated in confidence, in the sense that it was obvious that it "was intended to be kept confidential" by IMA. Nothing was said about confidentiality at the time of its release. Moreover, Cuburu had indicated that he considered it "*no impuerta*" [*sic*] that he was supplying IMA with regional exploration data unrelated to the Calcatreu Project.
>
> 111. What is certain, however, is that IMA did not make unauthorized use of the BLEG A Data to Minera's detriment. As set out above, the BLEG A Data was irrelevant, and considered by Newmont to be irrelevant, to an evaluation of the Calcatreu Project. Newmont caused Minera to provide it to IMA because Newmont wanted to garner goodwill with IMA with a view to participating in one or more of IMA's projects in Peru. While IMA may have been able to do more with the BLEG A Data than Newmont expected, IMA's use of Newmont's hand-me-down-data to stake the Navidad Project was *exactly* the *type* of goodwill-generating use Newmont had in mind.
>
> 112. Furthermore, even if IMA's use of the BLEG A Data *was* unauthorized, there was no detriment to Minera attendant with that use. In May 2002, Newmont, which then controlled Minera, decided to sell Minera's sole mineral asset, to terminate Project Generation and to withdraw entirely from Argentina. At that stage, Newmont had specifically rejected exploration and staking of the Sacanana silver anomalies identified in the BLEG A Data by Minera.
>
> 113. On 6 December 2002, when IMA used the BLEG A Data to stake the Navidad Project, Newmont's decision was still in effect. While Crespo was now contemplating the sale of Minera to Aquiline, there was no definitive agreement, and no one involved in the sale knew or cared about the BLEG A Data. It was not until 28 January 2003 that Aquiline actually agreed to purchase Minera, and not until May 2003 that Minera, as a result of Aquiline's purchase, contemplated exploiting the BLEG A Data to stake the Navidad Project. In other words, there

> was no detriment to Minera, either actual or foreseeable, until some six months *after* IMA's use of the BLEG A Data to stake the Navidad Project.
>
> 114. It follows that the trial judge erred in concluding in the alternative that IMA breached a common law duty of confidence by using the BLEG A Data as it did.

[References omitted.]

83 The trial judge's findings of fact, and the inferences she drew from those facts, do not support IMA's submissions in relation to this ground of appeal. As earlier stated, we are not persuaded that the trial judge made palpable and overriding errors in her findings of the facts relevant to this ground of appeal. She found that the BLEG A data was confidential, that it related to and was provided for the sole purpose of IMA's evaluation of the Calcatreu Project, and that its use by IMA to stake the Navidad Project was unauthorized. Further, she rejected IMA's submission that the BLEG A data was of no value to Newmont and IMA's theory that the data was provided by Newmont to curry favour with IMA in relation to IMA's interests in Peru.

84 It is apparent from the remedy awarded by the trial judge that she was satisfied that Aquiline suffered a detriment as a result of IMA's unlawful use of the BLEG A data to stake the Navidad Project. In that regard, she found that, but for the staking of the Navidad Project by Inversiones on behalf of IMA, Aquiline would have staked the project based on the BLEG A data. In our view, IMA's submission that Aquiline suffered no detriment in these circumstances is without merit.

85 Given the fact that the trial judge found that Aquiline suffered a detriment as a result of IMA's unauthorized use of the BLEG A data, we do not find it necessary to analyze the question of whether detriment is a necessary element of an action founded in breach of confidence. We note that the law with respect to this question does not appear to be entirely settled.

86 The question of detriment also arises in the context of the appropriate remedy, to which we now turn.

2. Remedy

(a) Position of the Parties

87 The appellants take the position that damages are the only appropriate remedy for the breach of the Agreement and the common law breach of confidence. They challenge the remedy of a constructive trust and mandatory injunction on two grounds:

(a) The principles of comity, order and fairness prevalent in modern private international law foreclosed an order respecting a foreign immovable — the mineral claims. They challenge the *in personam* exception to the rule that courts do not have jurisdiction over foreign immovables on the ground that it is an historic anachronism and contrary to the trend in private international law. They cite academic criticisms of the *in personam* rule in support of this argument.

(b) The contractual "flavour" and *de minimus* nature of the breach of confidence leads to the conclusion that damages are the only appropriate remedy. For the "flavour" argument, the appellants cite *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142 (S.C.C.) at para. 26, where Binnie J. said that the underlying nature of the claim — tort, contract, property or trust — will influence the choice of remedy in a breach of confidence claim. The appellants say that their relationship with Aquiline was contractual, and damages are the only appropriate remedy for breach of contract. They note that common law principles of remoteness, foreseeability, causation and intervening cause are relevant in assessing equitable compensation (citing *Waxman v. Waxman* (2004), 186 O.A.C. 201, [2004] O.J. No. 1765 (Ont. C.A.) at paras. 659-662), and that at common law, damages are limited to the losses that were "in the reasonable contemplation of the parties at the time the contract was made" (*Fidler v. Sun Life Assurance Co. of Canada*, [2006] 2 S.C.R. 3 (S.C.C.) at para. 44; *Hadley v. Baxendale* (1854), [1843-60] All E.R. Rep. 461 (Eng. Ex. Div.) at 465). Because neither of the parties contemplated that the use of the BLEG A data would cause any loss to Minera when they entered into the Agreement or IMA staked the claims, the appellants say that the contemplated loss, if any, was nominal. The appellants say further that the difficulty of quantifying damages does not preclude the necessity to do so, and offer several alternative methods for assessing damages, using a "flexible and imaginative approach" (*Cadbury*, at para. 99).

88 Aquiline's position is that the trial judge had the jurisdiction, and correctly exercised her discretion, in rejecting damages as the appropriate remedy, and ordering a constructive trust of the Navidad Claims and a mandatory injunction. Aquiline argues:

(a) The court's *in personam* jurisdiction to order a proprietary remedy in respect of foreign lands has existed in the law for 250 years, was adopted by the Supreme Court of Canada in *Duke v. Andler*, [1932] S.C.R. 734 (S.C.C.), and has recently been confirmed by this Court in *Mountain-West Resources Ltd. v. Fitzgerald*, 2002 BCCA 545 (B.C. C.A.) at para. 11. Aquiline notes that recent jurisprudence has called for the expansion, not the restriction, of the jurisdiction of Canadian courts in matters of private international law to reflect the "globalization of commerce

> and the mobility of both people and assets": see *Pro Swing Inc. v. ELTA Golf Inc.*, [2006] 2 S.C.R. 612, 2006 SCC 52 (S.C.C.) at paras. 1, 78-79.
>
> (b) The "flavour" approach to the choice of remedy, suggested by the appellants, is inconsistent with the reasoning in *Cadbury*, which rejected a narrow doctrinal categorization in favour of a broad consideration of all of the equities (*Cadbury*, paras. 24, 48, 61). Aquiline also rejects the characterization of this case as one of contract. Aquiline takes the position that the "flavour" of this case is breach of confidence, which imports the consideration of the range of equitable remedies considered in *International Corona Resources Ltd. v. LAC Minerals Ltd.*, [1989] 2 S.C.R. 574 (S.C.C.), and *Cadbury*. Aquiline argues that this case is on all fours with *LAC*, and the constructive trust ordered by the trial judge was the most appropriate remedy.

(b) In Personam Jurisdiction

89 Aquiline's argument that the court's *in personam* jurisdiction is well established in Canadian law and was properly exercised by the trial judge is a complete response to the appellants' position. The authorities cited by Aquiline for the *in personam* exception to the rule that the court will not make orders affecting property interests in foreign lands are precedents binding on this Court.

90 Aquiline notes further that Professor Adrian Briggs, the academic quoted by the appellants as criticizing the *in personam* exception, has acknowledged the distinction between an *in rem* and *in personam* remedy in respect of foreign land. In *The Conflict of Laws*, (Oxford: Oxford University Press, 2002) at 63-64, Professor Briggs notes:

> ...the common law drew a similar jurisdictional distinction between determining legal title to foreign land (which it had no power to do) and enforcing a contract or other equity between the parties, albeit in the context of a land dispute (which it had).

91 Aquiline also notes that the academics who have criticized the categorization of claims to equitable interests in foreign land as *in rem* and *in personam* remedies have favoured the expansion of the court's jurisdiction to grant *in rem* relief, and not the elimination of the *in personam* exception: see Stephen Lee, "*Title to Foreign Real Property in Transnational Money Claims*" (1995), 32 *Colum J. Transnat'l Law* 607 at 610; Janeen M. Carruthers, *The Transfer of Property in the Conflict of Laws*, (Oxford: Oxford University Press, 2005) at 42-56.

92 This academic opinion is consistent with the general trend of private international law. The Supreme Court of Canada has recognized that the law has evolved to allow courts to deal with disputes arising in an increasingly interdependent global economy. In its recent jurisprudence, the Supreme Court has reasoned that, in the proper case, the limits of the

courts' jurisdiction should be expanded, not narrowed. In *Pro Swing Inc.* (at paras. 78-79), McLachlin C.J.C. (in dissent, but not on this issue) referred to *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 (S.C.C.) at 1098, *Hunt v. T & N plc*, [1993] 4 S.C.R. 289 (S.C.C.) at 321-322, and *Beals v. Saldanha*, [2003] 3 S.C.R. 416 (S.C.C.) at para. 27, for the rationale for extending the limits of the court's jurisdiction to enforce foreign non-monetary judgments. She commented that comity, order and fairness do not exclude the courts from enforcing foreign non-monetary judgments, and in the context of modern private international law, may require it. The majority of the Court in *Pro Swing Inc.* concluded that was not the right case to extend the jurisdiction, but all of the justices agreed that the "time is ripe to review the traditional common law rule" (para. 15) in light of changing global commercial realities.

93 In this case, the trial judge's order is enforceable in British Columbia against the appellants, who are British Columbia resident corporations. They will be required to carry out a transfer of the Navidad claims in Argentina under local law, but the courts of Argentina will not be involved. The appellants have not suggested there is any obstacle to carrying out the transfer.

94 We would not accede to this ground of appeal.

(c) Are Damages the Appropriate Remedy?

95 The appellants' reliance on *Cadbury* in support of their position that the choice of remedy for the breach of confidence must arise from the characterization of the breach as a breach of contract is misplaced. It is, as Aquiline points out, inconsistent with the reasoning in that case.

96 In discussing the "flavour" of the dispute, Binnie J. was referring to the relevance of the underlying policy objectives of various causes of action, and cautioning that a "Chancellor's foot" approach to the choice of remedy should be avoided (at para. 26). The "flavour" of the underlying obligation is one of the factors the court should consider in determining the appropriate remedy on the facts of the particular case, but it does not narrow the court's jurisdiction to consider the range of remedies. This is clear from the discussion of the result of *LAC* (at para. 24):

> The result of *Lac Minerals* is to confirm jurisdiction in the courts in a breach of confidence action to grant a remedy dictated by the facts of the case rather than strict jurisdictional or doctrinal considerations.

97 Justice Binnie, for the Court, quoted (at para. 25) with approval from *Aquaculture Corp. v. New Zealand Green Mussel Co.*, [1990] 3 N.Z.L.R. 299 (New Zealand C.A.) at 301:

> Whether the obligation of confidence in a case of the present kind should be classified as purely an equitable one is debatable, but we do not think that the question matters for any purpose material to this appeal. For all purposes now material, equity and common law are mingled or merged. The practicality of the matter is that in the circumstances of the dealings between the parties the law imposes a duty of confidence. For its breach a full range of remedies should be available as appropriate, no matter whether they originated in common law, equity, or statute. [Emphasis added.] [By Binnie J.]

98 Justice Binnie expressly rejected approaching the choice of remedy by attaching a label (at para. 48):

> It would be contrary to the authorities in this Court already mentioned to allow the choice of remedy to be driven by a label ("property") rather than a case-by-case balancing of the equities....In other cases, as in *LAC Minerals Ltd.*, the key to the remedy will not be the "property" status of the confidence but the course of events that would likely have occurred "but for" the breach. Application of the label "property" in this context would add nothing except confusion to the task of weighing the policy objectives furthered by a particular remedy and the particular facts of each case.

99 Thus the remedy should be the one that is most appropriate on the facts of the case, bearing in mind that in choosing the "appropriate relief from the full gamut of available remedies", "[t]he objective in a breach of confidence case is to put the confider in as good as position as it would have been in but for the breach" (*Cadbury*, at para. 61).

100 In *LAC* and *Cadbury*, the appropriate remedy was considered in the context of a breach of confidence. That is the appropriate consideration in this case, and the reasoning in *LAC* that led the Supreme Court to order a constructive trust of the mineral claims in favour of the plaintiff is apt here as well.

101 The factual parallels between *LAC* and this case are apparent.

102 In *LAC*, the confidential information was geological findings and a geologist's theory of the nature of mineralization of the site of gold claims, known as the "Williams" property. Here, the confidential information was the BLEG A samples and the map showing the mineralization of surrounding properties. Lac used the information to acquire the Williams property. Here, the trial judge found (at para. 296) that IMA used the confidential information to acquire the Navidad claims. In *LAC*, the Court found that the plaintiff, International Corona Resources Ltd., would otherwise have acquired the Williams property, and Lac acted to Corona's detriment when it used the confidential information to acquire it. In this case, the trial judge found that Aquiline would have staked the Navidad claims had

IMA not done so first (at para. 297). In staking the Navidad claims first, IMA clearly acted to Aquiline's detriment.

103 In determining that the appropriate remedy in *LAC* was a constructive trust over the Williams property, La Forest J., for the majority, said (at 668-669):

> The appropriate remedy in this case cannot be divorced from the findings of fact made by the courts below. As I indicated earlier, there is no doubt in my mind that but for the actions of Lac in misusing confidential information and thereby acquiring the Williams property, that property would have been acquired by Corona. That finding is fundamental to the determination of the appropriate remedy....
>
> 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 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.

104 The constructive trust was ordered as a restitutionary remedy for unjust enrichment. Justice La Forest rejected other remedies as not providing adequate compensation, including an injunction preventing the further use of the confidential information, and an account of profits, which he found did not measure the defendant's gain at the plaintiff's expense (at 671).

105 Justice La Forest rejected damages as the appropriate remedy on the basis that they could not be adequately assessed (at 672), and also on policy grounds. If on a breach of confidence a defendant could pay for the asset, that would not provide a deterrent for the breach and therefore would not protect the social values of bargaining in good faith and maintaining relationships of trust and confidence (at 672-673). Significantly, the Williams property was "unique and rare" (see 675 and 679), as are the Navidad claims — described by appellants' counsel as one of the largest undeveloped silver deposits in the world. The uniqueness of the Williams property meant not only that assessing its value was virtually impossible (see 679), but also lent support to the appropriateness of ordering a constructive trust in favour of Corona.

106 In concluding that damages were not an appropriate remedy, La Forest J. said (at 675):

> 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.

107 The facts and reasoning in *LAC* are equally applicable in this case. As we have already said, the appellants' argument that Aquiline suffered no detriment because it attached no specific value to the BLEG A data has no merit. Their suggestions for assessing damages do not reflect the uniqueness they ascribe to the Navidad claims. Confining the choice of remedies to those available in a breach of contract claim is inconsistent with the law, as set out in *Cadbury* and *LAC*.

108 In summary, the trial judge correctly exercised her discretion, in accordance with the facts of this case and the applicable law, in ordering that the Navidad claims be held in a constructive trust and transferred by Inversiones to Aquiline.

109 In light of this conclusion, it is not necessary to consider Aquiline's cross-appeal.

Conclusion

110 The trial judge made no palpable or overriding error in her assessment of the evidence, and did not err in finding that IMA had breached the Agreement and its common law duty of confidentiality. Nor did she err in concluding that a constructive trust and mandatory injunction to transfer the Navidad claims was the appropriate remedy in this case.

111 We would dismiss the appeal.

Appeal dismissed.