See para. 738, 820, 821, 833

Case Name:

Barrick Gold Corp. v. Goldcorp Inc.

Between
Barrick Gold Corporation, Plaintiff, and
Goldcorp Inc., New Gold Inc., Datawave Sciences Inc.,
Inversiones El Morro Limitada, Xstrata Copper Chile S.A.,
Xstrata Canada Corporation, Xstrata Queensland Limited and
Sociedad Contractual Minera El Morro, Defendants

[2012] O.J. No. 2927

2011 ONSC 3725

99 B.L.R. (4th) 1

2012 CarswellOnt 8085

Court File No. CV-10-8539-00CL

Ontario Superior Court of Justice

H.J. Wilton-Siegel J.

Heard: June 6-10, 13-16, 20-21, 24, 27-30, October 12-14,
17-21, 24-28, 31, 2011; January 30-31, February 1-3, 2012.
Judgment: June 26, 2012.

(1046 paras.)

Contracts -- Formation -- Offer -- Rights of first refusal -- Action by plaintiff for specific performance of contract or for damages for breach of contract dismissed -- Plaintiff had agreement to purchase interest in mining project from defendant -- Defendant sold interest to co-defendant pursuant to right of first refusal in shareholders agreement -- Co-defendant sold interest under multi-party agreement -- Execution of multi-party agreement and exercise of right of first refusal not breach of shareholders agreement -- Plaintiff's agreement terminated upon exercise of right of first refusal -- No misuse of confidential information -- No interference with contractual relations or conspiracy -- Specific performance would have been appropriate remedy.

Contracts -- Breach of contract -- General principles -- Action by plaintiff for specific performance of contract or for damages for breach of contract dismissed -- Plaintiff had agreement to purchase interest in mining project from defendant -- Defendant sold interest to co-defendant pursuant to right of first refusal in shareholders agreement -- Co-defendant sold interest under multi-party agreement -- Execution of multi-party agreement and exercise of right of first refusal not breach of shareholders agreement -- Plaintiff's agreement terminated upon exercise of right of first refusal -- No misuse of confidential information -- No interference with contractual relations or conspiracy -- Specific performance would have been appropriate remedy.

Contracts -- Remedies -- Equitable remedies -- Availability of remedies -- Specific performance -- Action by plaintiff for specific performance of contract or for damages for breach of contract dismissed -- Plaintiff had agreement to purchase interest in mining project from defendant -- Defendant sold interest to co-defendant pursuant to right of first refusal in shareholders agreement -- Co-defendant sold interest under multi-party agreement -- Execution of multi-party agreement and exercise of right of first refusal not breach of shareholders agreement -- Plaintiff's agreement terminated upon exercise of right of first refusal -- No misuse of confidential information -- No interference with contractual relations or conspiracy -- Specific performance would have been appropriate remedy.

Tort law -- Interference with contractual relations -- Elements of tort -- Action by plaintiff for specific performance of contract or for damages for breach of contract dismissed -- Plaintiff had agreement to purchase interest in mining project from defendant -- Defendant sold interest to co-defendant pursuant to right of first refusal in shareholders agreement -- Co-defendant sold interest under multi-party agreement -- Execution of multi-party agreement and exercise of right of first refusal not breach of shareholders agreement -- Plaintiff's agreement terminated upon exercise of right of first refusal -- No misuse of confidential information -- No interference with contractual relations or conspiracy -- Specific performance would have been appropriate remedy.

Tort law -- Conspiracy -- Nature and elements of tort of conspiracy -- Action by plaintiff for specific performance of contract or for damages for breach of contract dismissed -- Plaintiff had agreement to purchase interest in mining project from defendant -- Defendant sold interest to co-defendant pursuant to right of first refusal in shareholders agreement -- Co-defendant sold interest under multi-party agreement -- Execution of multi-party agreement and exercise of right of first refusal not breach of shareholders agreement -- Plaintiff's agreement terminated upon exercise of right of first refusal -- No misuse of confidential information -- No interference with contractual relations or conspiracy -- Specific performance would have been appropriate remedy.

Action by Barrick Gold Corp. ("Barrick") for specific performance of an agreement with Xstrata Copper Chile S.A. ("Xstrata") or for damages for breach of contract. Barrick alleged that Xstrata breached an agreement to sell Barrick a 70 per cent interest in a Chilean mining project. Xstrata sold the interest pursuant to a right of first refusal to Datawave Sciences Inc. ("Datawave"), who

then sold the interest to a subsidiary of Goldcorp Inc. ("Goldcorp") by means of a sale of shares of a subsidiary of Datawave, which was created to acquire the interest. The sale was set out in the "Goldcorp Agreement", which provided for the sale of the interest to Datawave conditional upon its exercise its right of first refusal.

HELD: Action dismissed. The laws of Ontario applied to the Goldcorp Agreement. Chilean law applied to the shareholders agreement. The execution of the Goldcorp Agreement and the exercise of the right of first refusal by Datawave did not result in a breach of the shareholders agreement between Datawave and Xstrata. The agreement between Barrick and Xstrata terminated upon Datawave's exercise of its right of first refusal. There was no misuse of confidential information by Goldcorp or its subsidiary. Barrick did not establish its claims of inducing breach of contract, interference with contractual relations, and conspiracy. Had there been a breach of contract, the appropriate remedy would have been specific performance.

Statutes, Regulations and Rules Cited:

Chilean Civil Code, Article 1546, Article 1560, Article 1561, Article 1562, Article 1563, Article 1564, Article 1565, Article 1707

Counsel:

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David I.W. Hamer, Harry C.G. Underwood, Junior Sirivar and *Brendan Brammall*, for the Defendants Xstrata Copper Chile S.A., Xstrata Canada Corporation and Xstrata Queensland Limited.

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SCHEDULE A

REASONS FOR JUDGMENT

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

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

Overview

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

4 In these Reasons, I reach the following conclusions:

1. neither the execution of the Goldcorp Agreement nor the exercise of the

right of first refusal by Datawave Sciences Inc. resulted in a breach of the shareholders agreement pertaining to the El Morro Project given the structure of the Goldcorp Transaction as described above;

2. as a consequence, Barrick's principal claim for breach of contract is dismissed on the basis that the agreement between Barrick Corporation and Xstrata Chile S.A. terminated upon the exercise of the right of first refusal;
3. certain additional claims of breach of contract against Xstrata Chile S.A. also fail for the same reason; and certain other additional claims of breach of contract fail on legal and factual grounds;
4. certain tort claims against New Gold Inc. and Goldcorp Inc. are also dismissed as a consequence of the determination that the exercise of the right of first refusal by Datawave Sciences Inc. did not result in a breach of the shareholders agreement and on other grounds;
5. claims against New Gold Inc. and Goldcorp Inc. for breach of a duty of confidence based on an alleged misuse of confidential information are dismissed on legal and factual grounds;
6. a claim of unjust enrichment against Goldcorp Inc. is dismissed as a necessary consequence of the foregoing determinations; and
7. if the court had held that Datawave Sciences Inc. had breached the shareholders agreement upon the exercise of its right of first refusal, the appropriate remedy would have been an order of specific performance directed against Xstrata Chile S.A. and Goldcorp Inc.

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

6 These Reasons are therefore organized in the following order. In Part I of these Reasons I set out the evidence regarding the circumstances giving rise to this action. Part IIA of these Reasons addresses Barrick's principal claim of breach of contract against Xstrata Chile S.A. based on its failure to complete the sale of its 70% interest in the El Morro Project to Barrick Corporation. Part IIB of these Reasons addresses the additional claims against the defendants. Part III of these Reasons summarizes the considerable evidence introduced by the parties pertaining to Barrick's claim for specific performance or damages. In Part IV of these Reasons, I set out the basis for the conclusion that the appropriate remedy in the present circumstances would be an order for specific performance directed against Xstrata Chile S.A. and Goldcorp.

General Factual Background

The Parties

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

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

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

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

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

12 Inversiones El Morro Limitada ("Finco") is a wholly-owned subsidiary of Datawave. It is a limited liability company under the laws of Chile that was formed for the purposes of receiving carried funding and providing shareholder funding to the El Morro Mining Company (as defined below) on Datawave's behalf pursuant to the Carried Funding Loan Agreement (as defined below).

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

Shareholders Agreement and section 16.1 of the Datawave Purchase Agreement (each as defined below).

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

The El Morro Mining Project

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

The El Morro Mining Company

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

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

BHP Royalty

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

Fluor Feasibility Study

19 In early 2006, a predecessor of Xstrata Chile entered into an agreement with the Chilean subsidiary of Fluor Corporation, an engineering company, for a comprehensive feasibility study of El Morro (the "Fluor Feasibility Study"). The purpose of the Fluor Feasibility Study was to assess whether El Morro should be advanced to the final engineering and construction stage - that is,

whether the mineral deposit could be mined profitably. The Fluor Feasibility Study included a mine design, a production schedule, a detailed process flow sheet, product recoveries, a detailed plant design, a consideration of the environmental issues, detailed capital and operating costs estimates, and an economic model of the project. The final report of the Fluor Feasibility Study was issued on March 31, 2008.

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

The El Morro Contractual Arrangements

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

The El Morro Shareholders Agreement

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

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

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

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

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

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

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

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

Parent Entities Addendum

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

The Carried Funding Loan Agreement

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

32 This arrangement was implemented by a further agreement among Xstrata Chile, Datawave,

Finco and the El Morro Mining Company dated March 12, 2009 (the "Carried Funding Loan Agreement" or "CFLA"). The CFLA is written in English but is also expressed to be governed by the laws of the Republic of Chile.

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

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

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

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

37 In these Reasons, capitalized terms that are defined in the Shareholders Agreement have the meanings ascribed to them in that agreement unless the context otherwise requires. Xstrata's interest in the El Morro Project other than its interest in the BHP Royalty, comprising 70% of the outstanding shares of the Company, its interest under the El Morro Shareholders Agreement and its interest under the CFLA, including all loans extended thereunder and all security for such loans, is referred to as the "Xstrata Interest" or the "70% Interest", as the context requires. Similarly, New Gold's interest in the El Morro Project other than its interest in the BHP Royalty, comprising 30% of the outstanding shares of the Company held by Datawave, together with Datawave's interest under the El Morro Shareholders Agreement as well as Finco's interest under the CFLA, is referred to as the "New Gold Interest" or the "Datawave Interest". In addition, I have used the terms "joint venture party", "joint venture partner" and "shareholder" interchangeably.

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

The Sale of the Xstrata Interest

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

The Xstrata Auction Process

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

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

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

42 On or about March 26, 2009, pursuant to a requirement in section 12.11(2) of the El Morro Shareholders Agreement, Xstrata Chile notified New Gold of its intention to disclose such confidential information to one or more prospective purchasers, subject to execution of confidentiality agreements with such parties. This notice alerted New Gold to the Xstrata Chile auction process and prompted New Gold to consider a sale of the New Gold Interest in the same process in order to maximize the value of the New Gold Interest.

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

44 Barrick has interests in two other development properties in Chile, being the Cerro Casale mining project (located approximately 80 km to the northeast of the El Morro Project) and the

Pascua-Lama mining project (located approximately 80 km to the south). In addition to its interest in the El Morro Project in its own right, Barrick believed that it could realize corporate, construction and tax synergies if it were able to develop and operate El Morro as well as these two other mining projects.

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

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

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

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

49 In a telephone call on June 16, 2009, Xstrata and New Gold discussed the possibility of a New Gold involvement in the Xstrata Chile auction process, as certain parties participating in that process had expressed an interest in acquiring 100% of the El Morro Project. This raised the possibility of an increased value for 100% of the Project, although if such a transaction proceeded the parties would need to negotiate the allocation of the purchase price.

50 In the same conversation, Xstrata advised that, although the Xstrata Confidential Information Memorandum described the operation of the right of first refusal in favour of New Gold in the Shareholders Agreement, in its view, the right no longer operated. In correspondence dated June 17, 2009, Xstrata Chile stated in writing its position that the right of first refusal did not apply because "a decision to proceed with Development" had been made which triggered the provisions of section 10.5(a) of the Shareholders Agreement. New Gold responded advising Xstrata that it did not agree that "a decision to proceed with Development" had occurred. No agreement was reached between

Xstrata and New Gold on this issue. Meanwhile, however, New Gold's unwillingness to confirm that the right of first refusal no longer operated became bound up with the issue of whether Xstrata Chile would agree to include the New Gold Interest in its auction process.

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

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

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

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

55 On September 1, 2009, Barrick submitted a binding offer to purchase the Xstrata 70% Interest, together with the Fluor Feasibility Study and Xstrata Chile's interest in the BHP Royalty (the Fluor Feasibility Study and Xstrata Chile's interest in the BHP Royalty being referred to as the "Unrelated Assets"), for an aggregate purchase price of U.S. $400 million to be payable according to a conditional payment structure. Along with its binding offer, Barrick enclosed a draft sale agreement that required Xstrata to deliver, as conditions of closing the transaction, (1) a waiver of the right of first refusal in favour of New Gold that would arise upon acceptance of Barrick's offer, and (2) executed deeds of assignment acknowledged by Datawave for the El Morro Shareholders Agreement and the CFLA.

56 Barrick's bid was the lowest of the three bids received by Xstrata Chile. However, Xstrata Chile advised Barrick that it could become Xstrata's preferred bid if the price were increased to the middle of the range in its indicative offer and the conditional payment structure were removed.

Xstrata Chile also wanted the condition removed that required a New Gold waiver of its rights under the right of first refusal.

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

The Barrick Agreement

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

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

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

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

62 In these Reasons, the conditions in section 4.1(a), (b) and (c) are collectively referred to as the "Conditions Precedent". As a legal matter, Barrick's offers dealt with the matters addressed in these sections as conditions of closing. However, as finalized, these conditions are expressed to be conditions precedent and the Barrick Agreement is expressed to be conditional on satisfaction of each of these conditions. Xstrata requested the language of conditions precedent to avoid adverse tax consequences to it if the Barrick Transaction were determined to be unconditional before

November 6, 2009. While this unusual language might suggest that the Barrick Agreement was not intended to be binding until all of the Conditions Precedent were satisfied, it is my understanding that the parties have proceeded on the basis that the Barrick Agreement became a binding agreement as of November 6, 2009. In any event, it does not appear that this question is material to the issues in this action and it is therefore not necessary to determine whether this is the correct interpretation of the legal effect of the Conditions Precedent.

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

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

The Right of First Refusal

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

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

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

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

Developments During the Exercise Period

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

Preliminary Comments

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

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

72 It is also important, at the outset, to note the economic conditions that made the Goldcorp Transaction feasible. The Barrick Transaction involved the sale of the Xstrata Interest for cash at a price fixed on October 11, 2009. Subsequent to that date, copper and gold prices rose materially. As a result, the Xstrata Interest and the New Gold Interest increased in value and, because the Barrick Transaction sale price was fixed, the Right of First Refusal also became valuable in its own right.

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

Barrick's Negotiations with New Gold

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

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

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

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

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

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

79 On December 21, 2009, Bianchini proposed that Barrick consider an agreement under which

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

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

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

82 On January 5, 2010, Bianchini contacted Blasutti to advise Barrick for the first time that there was a possible transaction that contemplated New Gold exercising the Right of First Refusal, such that Barrick was at risk of losing the Xstrata Interest. In response to Blasutti's question as to how New Gold could exercise the Right of First Refusal, Bianchini said that he did not know but a team of lawyers was working on it. Bianchini advised Blasutti that the New Gold board of directors was meeting the next afternoon. He told Blasutti that, if Barrick did not want to lose the Xstrata Interest, Barrick needed to make an offer significantly higher than U.S. $250 million.

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

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

$325 it was a "slam dunk".

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

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

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

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

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

89 Therefore, Barrick saw no reason to bid against itself by raising its offer price. Moreover, it was prepared to accept a new 30% joint venture partner because the carried funding arrangements under the CFLA would terminate pursuant to section 9.4 of the Shareholders Agreement. Conversely, it considered itself to be an attractive majority partner/developer of the project and, therefore, did not consider that it was necessary to address New Gold's concerns that it might defer development of El Morro in favour of Barrick's Pascua-Lama or Cerro Casale projects.

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

develop the El Morro Project on its own. Given these considerations, Barrick considered that New Gold was more likely to sell the New Gold Interest than to increase its interest in the El Morro Project.

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

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

93 As a consequence, Barrick was inclined to interpret the limited information that it received concerning Goldcorp's activity in late December skeptically. In Barrick's eyes, it was at least as likely that New Gold was attempting to give the impression of an alternative transaction to force Barrick's hand as it was that New Gold was seriously negotiating a transaction with a third party. Similarly, when Barrick first learned in late December 2009 of the dispute regarding the ownership of the Fluor Feasibility Study described below, Barrick interpreted New Gold's position on the issue through the same lens. It was inclined to view this issue as a strategy designed to force Xstrata and Barrick to renegotiate the terms of the Barrick Agreement and thereby re-set the expiry date for the Right of First Refusal to permit further marketing activity by New Gold (and thus as a further sign of New Gold's lack of success to that point).

New Gold's Value Maximization Process

94 In August 2009, having been excluded from the Xstrata Chile auction process and having no guarantee that Barrick would talk to it even if Barrick were successful in that process, New Gold

began consideration of its own process to maximize the value of the New Gold Interest.

Preliminary Considerations and Developments

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

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

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

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

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

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

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

New Gold's Conduct of its Value Maximization Process

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

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

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

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

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

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

Goldcorp Enters the Process

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

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

110 The ensuing discussions considered two options: (1) a purchase of 100% of the El Morro Project; and (2) a purchase of 70% of the El Morro Project. Each of these options proceeded on the basis that New Gold would exercise its Right of First Refusal. Because Goldcorp had not participated in the Xstrata Chile auction process, it was not prevented from transacting with New Gold for the New Gold Interest by the restrictions in the confidentiality agreement used in the Xstrata Chile auction process.

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

Xstrata Chile in section 10.4 of the Shareholders Agreement).

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

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

113 In this memorandum, Jeannes used the phrase "acquire the ROFR" in the context of acquiring the New Gold Interest including the Right of First Refusal as part of an acquisition of 100% of the El Morro Project. At the time, Jeannes was not aware of the complication presented by the right of first refusal in favour of Xstrata Chile in respect of the New Gold Interest.

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

> I didn't realize that Xstrata "probably" has a [Right of First Refusal] on [New Gold]'s 30% interest. So we would have to effectively buy the [New Gold] ROFR and exercise it before making a deal for the remaining 30%, because if we agree to buy the 30% up front it triggers a ROFR for Xstrata. So we have to be

> careful - we can have an understanding as to what we would pay/trade for the 30% but nothing in place, and I think we'll have to pay something -- $1m?, $5m -- for the ROFR in order to keep the lawyers happy.

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

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

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

118 Goldcorp and New Gold representatives commenced negotiations at a meeting held on December 11, 2009. At that meeting, among other things, New Gold confirmed its interest in acquiring an operating asset in exchange for the New Gold Interest and identified a particular property of Goldcorp in which it was interested. New Gold commenced due diligence on this property on or about December 14. By December 16, 2009, Goldcorp had retained its own financial advisor in connection with a possible transaction. On December 21 and 22, 2009, to Barrick's knowledge, Goldcorp representatives conducted a site visit of the El Morro Project.

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

120 On or about December 24, 2010, New Gold advised Goldcorp that the Goldcorp asset that was being considered in exchange for the New Gold Interest was not suitable to New Gold. In order to keep the possibility of a transaction alive in the face of the practical impossibility of agreeing on another asset by January 7, 2011, on the same day, Goldcorp proposed that the parties concentrate

on a transaction for the Xstrata Interest with "sweeteners" to enhance the value of the New Gold Interest and a commitment to talk in good faith about an exchange of the New Gold Interest for an asset of Goldcorp after the transaction closed. Although not mentioned, this approach was also consistent with the practical problem described above regarding any sale of the New Gold Interest in exchange for an operating asset of Goldcorp. New Gold accepted this proposal on the same day.

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

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

123 In the evening of January 5, Goldcorp's general counsel delivered an indicative term sheet to New Gold and BMO. The reference in this term sheet to an "Acquisition and Funding Agreement" reflects the fact that, concurrently with these negotiations, external legal counsel for Goldcorp and New Gold had already addressed the structure of the proposed transaction at least on a preliminary basis.

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

> Datawave Sciences Inc. ("Datawave"), a wholly-owned subsidiary of New Gold, will exercise its right of first refusal to acquire a 70% interest in [the El Morro Mining Company] from Xstrata Copper Chile SA ("Xstrata Chile"). Datawave will enter into a sale agreement (the "Datawave-Xstrata Sale Agreement") with Xstrata Chile on the same terms and conditions as the sale agreement dated October 11, 2009 between Xstrata Chile and Barrick Gold Corporation.

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

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

1. a cash payment to New Gold of $50 million upon completion of the acquisition of Datawave Subco by Goldcorp;
2. a positive construction decision and commencement of construction within sixty (60) days following receipt of all necessary permits and approvals, with a penalty of $1,500,000 per month until the construction decision is made and announced (the "construction guarantee");
3. an amendment to the El Morro Shareholders Agreement and the CFLA providing for a Goldcorp commitment to carry 100% of the necessary funding for the El Morro Mining Project and to reduce the interest rate payable on the carried funding loans to a rate to be fixed later according to a specific formula (the "enhancements");
4. acquisition by the El Morro Mining Company of the Fluor Feasibility Study from Xstrata for $100; and
5. New Gold was to use commercially reasonable efforts to acquire, or cause a subsidiary of New Gold to acquire, Xstrata Chile's 70% interest in the BHP Royalty for $2 million, or such other amount at which Xstrata Chile was willing to sell the 70% interest to New Gold, subject to Goldcorp's prior approval, and to transfer such royalty to Goldcorp, or a subsidiary of Goldcorp, for the same consideration.

The New Gold Decision

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

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

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

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

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

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

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

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

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

132 By way of overview, communications between Xstrata and New Gold addressed two general areas during the Exercise Period. First, Xstrata wished to book the sale of the Xstrata Interest in 2009, although it did not make this clear until mid-December 2009. In order to do so, Xstrata required the consent of New Gold and Barrick to the closing documentation for the Barrick Transaction, in particular the Assignment Agreements contemplated by sections 4.1(a) and 4.1(b) of

the Barrick Agreement. As described below, this resulted in leverage in New Gold's favour which it used to settle the issue of the ownership of the Fluor Feasibility Study. Second, by virtue of various communications from New Gold, Xstrata received some information regarding the status of New Gold's value maximization process. The extent of such disclosure, and the timing of Xstrata's disclosure of such information to Barrick, are issues in this action. I will address each category of disclosure separately as the evidence indicates that these were discrete and unrelated matters.

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

Overview

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

134 Ultimately, on or about December 31, 2009, New Gold and Xstrata agreed concurrently to: (1) the form of the Assignment Agreements, to allow Xstrata Chile to book the sale transaction in 2009; and (2) an agreement by which Xstrata would transfer the Fluor Feasibility Study to the Company for U.S. $100 in the event New Gold exercised the Right of First Refusal (the "Feasibility Study Agreement"). These matters were documented separately, with the result that Barrick did not learn of the Feasibility Study Agreement until after the announcement of the Goldcorp Transaction. However, it is clear that New Gold was only prepared to consent to the form of the Assignment Agreements, which contained a release of Xstrata Chile's obligations that was not contemplated by the Shareholders Agreement, if Xstrata agreed to the Feasibility Study Agreement.

The Negotiations Regarding the Assignment Agreements and the Feasibility Study Agreement

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

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

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

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

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

140 Nothing appears to have happened regarding the Fluor Feasibility Study ownership issue for several weeks, during which time the internal lawyers of Xstrata Chile, New Gold and Barrick negotiated the terms of the Assignment Agreements. As discussed below, the possible sale of the Fluor Feasibility Study if the Right of First Refusal were exercised was raised in a telephone conversation between Xstrata and New Gold on December 8, 2009. The Fluor Feasibility Study issue then resurfaced in an email on December 15, 2009, when Xstrata Chile reiterated its position that Xstrata Chile owned the Fluor Feasibility Study and advised New Gold of its view on the limited use and disclosure of the Fluor Feasibility Study that was permitted under the Shareholders Agreement. On the same day, Xstrata Chile sent New Gold revised draft Assignment Agreements and indicated that it wished to finalize the documents within a few days. In the email, Xstrata took the position that it was entitled to a release from its obligations under the CFLA as it was exiting the project. For the first time, Xstrata stated that it wanted to recognize the sale in its financial statements for 2009 and that, to do so, Xstrata needed the approval of New Gold/Datawave and Barrick to the form of the draft Assignment Agreements.

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

142 A conference call on December 24, 2009 between Xstrata and New Gold proved fruitless. However, on December 25, 2009, New Gold wrote to Xstrata Chile suggesting a resolution of the Fluor Feasibility Study ownership dispute. New Gold proposed that Xstrata Chile enter into a conditional agreement that required the transfer of the Fluor Feasibility Study to the El Morro Mining Company for U.S. $100 in the event that New Gold exercised its Right of First Refusal.

New Gold suggested that Xstrata draft an agreement reflecting these terms. Xstrata prepared a draft which was forwarded to New Gold by email on December 29, 2009.

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

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

145 From this email, Xstrata appears to have recognized for the first time that New Gold was only going to agree to the draft Assignment Agreements, including the release of Xstrata Chile, if Xstrata agreed to the proposed Feasibility Study Agreement. Consequently, on December 31, 2009, Xstrata Chile forwarded an executed copy of the Feasibility Study Agreement to New Gold for Datawave's execution that day.

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

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

147 This section addresses the nature and timing of information that Xstrata and Barrick received during the Exercise Period concerning developments in New Gold's value maximization process. While most of the conversations described below involved either or both of Greville and Baker, I

have only referred to them personally in these Reasons where it is relevant to an understanding of the particular events.

Overview

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

Principal Developments

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

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

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

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

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

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

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

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

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

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

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

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

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

160 Third, the December 18 New Gold Letter went on to state that New Gold intended to start preparing a draft agreement for the possible acquisition of the Xstrata Interest through the exercise of the Right of First Refusal. Referring to the telephone call of December 2, 2009, New Gold stated that it intended to use the Barrick Agreement as the template for an agreement between Xstrata Chile and New Gold and that it intended to disclose this draft sale agreement to Goldcorp and the

third party "pursuant to the same provisions of the [El Morro Shareholders] Agreement and for the same reasons as set out above".

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

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

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

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

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

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

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

165 On December 31, 2009 or January 1, 2010, New Gold wrote to Xstrata Chile to ask for copies of certain schedules to the Barrick Agreement. In responding on January 3, 2010 to Xstrata's question about why the schedules were needed, New Gold's internal legal counsel advised that it was "... looking for the info to assist in preparing a draft purchase agreement in connection with the possible exercise of our [Right of First Refusal]. I just want to ensure that we have all the necessary

documents to allow us to prepare what is required in the event of a possible exercise of the [Right of First Refusal]". Xstrata Chile provided copies of certain of the requested schedules on January 4, 2010. Xstrata Chile did not advise Barrick of this New Gold request. At the time, Xstrata Chile's principal concern appears to have been whether the failure to provide these schedules together with the Xstrata Chile Notice constituted non-compliance with section 10.4 of the Shareholders Agreement, which New Gold might use as a basis for an extension of the Exercise Period to continue its value maximization process.

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

Developments After the Goldcorp Agreement

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

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

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

Xstrata Chile's Communications with New Gold

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

give rise to a "mirror" right of first refusal in favour of Xstrata Chile in respect of either the New Gold Interest or the Xstrata Interest, and requested that Xstrata Chile raise the issue with New Gold.

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

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

173 Shortly afterward, Xstrata Chile received the New Gold Notice from New Gold, as mentioned above. The New Gold Notice also included an offer to purchase Xstrata's interest in the BHP Royalty for U.S. $2 million. In the covering email, among other things, New Gold confirmed its position, in response to the earlier telephone conversation with McConnachy and a subsequent email from him re-stating the issue, that a right of first refusal had not been triggered in favour of Xstrata Chile for the Xstrata Interest. A draft press release that accompanied the New Gold Notice gave Xstrata its first information regarding the Goldcorp Transaction.

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

175 New Gold responded to Xstrata Chile by letter dated January 7, 2010, sent by email. In that letter, New Gold set out its position that a binding agreement existed between Datawave and Xstrata

with respect to the Xstrata Interest as a result of Datawave's exercise of the Right of First Refusal. The letter dealt with the form of sale agreement and a proposed timing for closing. It also acknowledged Xstrata Chile's wish to reserve on a decision regarding a sale of its interest in the BHP Royalty. The letter concluded with a rejection of Xstrata's suggestion that the Goldcorp Transaction could give rise to a right of first refusal in Xstrata Chile's favour:

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

176 On January 8, 2010, McConnachy emailed New Gold asking for a copy of the "proposed Sale Agreement" and further details and an explanation of the specifics of the agreement that Datawave/New Gold had entered into with Goldcorp, including details of the subsidiary (i.e., DataSub) that was proposed to be sold to Goldcorp as part of the Goldcorp Agreement, in order "to assist [Xstrata's] analysis of our ability to accept the exercise of the Right of First Refusal". McConnachy indicated that Xstrata Chile was willing to accept any exercise of the Right of First Refusal provided it was on the basis that (1) the sale was in accordance with the terms in the Barrick Agreement; and (2) Xstrata Chile received any applicable notice of offer that may be triggered by any agreements between Datawave and Goldcorp.

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

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

New Gold attached a draft sale agreement "with substantially the same terms and conditions as the 'substantially agreed Sale Agreement' with Barrick", marked up to reflect a Datawave transaction. It also confirmed that Datawave "has not received any other offers to purchase its interest in El Morro

which would trigger a right of first refusal in [Xstrata Chile's] favour, and accordingly no other Notices of Offer are required". McConnachy did not make any further inquiries regarding the Goldcorp Agreement and did not receive a copy of the Goldcorp Agreement from New Gold.

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

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

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

Barrick's Communications with Xstrata and New Gold

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

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

183 By letter dated the same date, Garver advised Xstrata Chile of Barrick's position that Xstrata Chile was obligated to complete the transaction with Barrick and could not lawfully enter into any transaction with Datawave with respect to the El Morro Mining Project. In the letter, Garver made the following additional assertions: (1) Datawave had, in substance, attempted to sell its Right of

First Refusal to Goldcorp for U.S. $50 million plus other consideration; (2) such a transaction was in breach of the provisions of the Shareholders Agreement restricting transfers of Rights or Interests; (3) Datawave's purported exercise of the Right of First Refusal was invalid; (4) the Right of First Refusal had expired; (5) Datawave's disclosure of confidential El Morro information to Goldcorp under the guise of Datawave selling the New Gold Interest was improper; (6) Xstrata Chile's execution of the Feasibility Study Agreement with New Gold was likely in breach of Xstrata Chile's obligations to Barrick; and (7) all of the Conditions Precedent under the Barrick Agreement had been satisfied. At the time this letter was delivered, Barrick had not yet received a copy of the Goldcorp Agreement. However, Barrick has continued to assert this position throughout these legal proceedings.

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

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

186 On the same day, Xstrata Chile wrote to Barrick to advise that Xstrata Chile was of the view that the Right of First Refusal had been validly exercised by Datawave under section 10.4 of the Shareholders Agreement. Xstrata Chile then stated that, in its view: (1) the Barrick Agreement was frustrated or expired on January 7, 2010 (upon the exercise of the Right of First Refusal by Datawave) as, from that date, the Conditions Precedent in clause 4.1 of the Sale Agreement could not be satisfied; or (2) the Barrick Agreement remained conditional until January 30, 2010 (or such earlier time if terminated by Barrick under clause 4.4 of the Barrick Agreement) but the Condition Precedent in clause 4.1(c) could no longer be satisfied.

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

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

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

190 By letter dated January 28, 2010, Barrick reiterated to Xstrata Chile that Barrick was ready, willing and able to close the Barrick Transaction and that it intended to close the Transaction with

Xstrata Chile on February 3, 2010, being the completion date in the Barrick Agreement.

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

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

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

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

The Structuring and Completion of the Goldcorp Transaction

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

The Goldcorp Agreement

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

197 The Goldcorp Agreement begins with four unconditional obligations of Datawave. Datawave agreed to exercise the Right of First Refusal advising Xstrata of its intention to acquire the Xstrata Interest, confirming its desire to acquire the Fluor Feasibility Study, and offering to acquire the BHP Royalty. Next, Datawave covenanted to settle and execute a form of purchase agreement for

the Xstrata Interest substantially in the form of the Barrick Agreement (the "Datawave Purchase Agreement"), incorporate a new subsidiary (DataSub), and assign to DataSub all of Datawave's rights in the Datawave Purchase Agreement.

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

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

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

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

The Flow of Funds Agreement

202 On February 12, 2010, each of New Gold, Datawave, DataSub, Goldcorp, Goldcorp (Barbados) Inc. ("GBI"), and Goldcorp Tesoro Inc. ("Goldcorp Tesoro") executed a further agreement and direction (the "Flow of Funds Agreement") that described the following sequence of

payments starting on February 12, 2010 and ending on February 17, 2010 that were to be made in connection with Goldcorp's funding of the purchase price payable by DataSub to Xstrata Chile for the purchase of the Xstrata Interest (omitting certain non-material transactions pertaining to the payment of applicable Chilean taxes):

1. Goldcorp would cause Goldcorp Tesoro to be funded via other Goldcorp subsidiaries with U.S. $513,231,516;
2. Goldcorp Tesoro would loan Datawave U.S. $50 million (the "$50 Million Loan") to be evidenced by a promissory note of Datawave payable to Goldcorp Tesoro in the same amount (the "Datawave Promissory Note");
3. Datawave would use the loan proceeds of U.S. $50 million to subscribe for 50 million common shares to be issued by DataSub;
4. DataSub would pay Datawave U.S. $50 million as consideration for the assignment by Datawave to DataSub of the Datawave Purchase Agreement;
5. Goldcorp Tesoro would loan DataSub U.S. $462,981,516 (the "$463 Million Loan") to be evidenced by a promissory note of DataSub in the same amount payable to Goldcorp Tesoro (the "DataSub Promissory Note"); and
6. DataSub would purchase the Xstrata Interest from Xstrata Chile paying Xstrata Chile U.S. $462,999,900 (this amount to be comprised of the $463 Million Loan, which would be paid by Goldcorp directly to Xstrata Chile by way of a written direction from DataSub, plus U.S. $18,384 to come from New Gold via DataSub).

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

Completion of the Goldcorp Transaction

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

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

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

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

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

209 The Goldcorp Transaction was therefore completed in accordance with a structure that was substantially similar to the structure contemplated by the Goldcorp Agreement with one modification that represented the incorporation of an agreed structure for Goldcorp's payment of U.S. $50 million to an entity designated by New Gold. The parties revised the structure of the transaction described in the Goldcorp Agreement to provide for the $50 Million Loan to fund DataSub's acquisition of the Datawave Purchase Agreement for U.S. $50 million, which was presumably its market value for tax and other purposes. As this loan remained outstanding at the end of the transaction by which DataSub purchased the Xstrata Interest, it was repaid by cancellation of the Datawave Promissory Note upon the sale of the 50,000,000 common shares of DataSub acquired as described above.

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

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

Overview of Barrick's Claims

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

212 As mentioned above, in these Reasons, defined terms have the meanings ascribed to them in

the Shareholders Agreement, including in particular the term "Offered Interest" which in this context refers to the subject matter of the Barrick Agreement, the New Gold Notice and the Datawave Purchase Agreement. To be clear, the terms "70% Interest" and "Xstrata Interest" refer to the 70% interest in the El Morro Project that was the subject of the Datawave Purchase Agreement, whether held by Xstrata Chile, DataSub or Goldcorp.

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

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

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

215 As mentioned earlier, the principal issue in this litigation is whether the execution of the Goldcorp Agreement or Datawave's exercise of the Right of First Refusal resulted in a breach of the Shareholders Agreement. Barrick says that the result of these actions was a transfer to Goldcorp of Datawave's "right to purchase the Offered Interest". It says that such Transfer was a prohibited Transfer under Article 10 of the Shareholders Agreement because Datawave failed to Transfer the New Gold Interest at the same time in order to comply with paragraph 10.2(1)(a), which would have given rise to a right of first refusal in favour of Xstrata Chile. Accordingly, Barrick says that the Datawave exercise of the Right of First Refusal was invalid.

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

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

the Goldcorp Agreement - by applying the relevant provisions of the Shareholders Agreement, as so interpreted, to the facts, as established by the court.

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

Preliminary Matters to be Addressed

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

Applicable Law and Applicable Principles of Contractual interpretation

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

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

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

Principles of Contractual Interpretation Under the Laws of Ontario

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

> When interpreting a contract, the court aims to determine the intentions of the parties in accordance with the language used in the written document and presumes that the parties have intended what they have said. The court construes

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

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

Principles of Contractual Interpretation Under the Laws of Chile

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

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

1. Guillermo Morales Errázuriz ("Morales"), Barrick's expert, who provided a report dated April 11, 2011 and a supplementary report dated May 27, 2011 (collectively, the "Morales Report");
2. Carlos Pena González ("Pena"), New Gold's expert, who provided a report dated May 11, 2011 (the Pena Report");
3. Fernando Barros Torconal ("Barros"), Goldcorp's expert, who provided a report dated May 11, 2011 (the "Barros Report"); and
4. Rodrigo Ochagavia ("Ochagavia"), Xstrata's expert, who provided a report dated May 11, 2011, a supplementary report dated May 26, 2011, a report dated September 26, 2011 in relation to issues pertaining to remedies, and a report dated September 30, 2011 in relation to Chilean tax matters. Ochagavia's reports dated May 11, 2011 and May 26, 2011 are collectively referred to as the "Ochagavia Report".

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

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

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

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

229 These rules include: (1) that the clauses of a contract are to be interpreted so as to give the meaning that best suits the entire contract (the "Rule of Intrinsic Harmony") (found in the first paragraph of Article 1564); (2) that the meaning of a clause that can produce a legal effect is to be preferred to those which cannot produce it (the "Rule of Utility") (found in Article 1562); (3) that in cases where no contrary will appears, the interpretation that better suits the nature of the contract shall be preferred (the "Rule of the Nature of the Contract") (found in Article 1563); and (4) that contracts are to be interpreted according to the actual manner of performance of the contract by the parties or by one of them with the approval of the other (the "Authentic Rule") (found in the third paragraph of Article 1564).

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

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

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

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

232 First, Barrick submits that there is a rule that substance prevails over form. The

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

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

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

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

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

237 However, Barrick has contractual rights against Xstrata Chile under the Barrick Agreement that it is entitled to enforce against Xstrata Chile without regard to any amendment agreed to between Xstrata/Chile and Datawave. Accordingly, Xstrata Chile's agreement with New

Gold/Datawave to any amendment to the Shareholders Agreement could, as between itself and Barrick, give rise to a Barrick claim for breach of the Barrick Agreement - for example, by way of a claim for breach of a duty of good faith or breach of the pre-completion obligations in paragraphs 8.6(e) and (g).

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

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

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

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

> in and become the property or claim of such Third Party in Interest. In contrast, the party who created the ostensible or apparent situation, act or contract shall be nevertheless bound by the legal consequences thereof.

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

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

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

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

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

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

245 First, section 10.4 provides for an inchoate or contingent right in favour of each joint venture party to acquire the other party's interest if the first party proposes to accept an offer from a third party for some or all of its Rights and Interests. As described below, this is not a symmetrical right

as New Gold's right would expire if a decision were taken to proceed to Development. I have, however, concluded that there is no legal significance to be inferred from this asymmetry for the purposes of the issues in this action.

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

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

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

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

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

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

252 While the parties may subsequently execute a sale agreement between them, the execution of

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

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

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

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

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

256 I turn now to Barrick's principal claim against Xstrata Chile for breach of contract, which is based on Xstrata Chile's failure to complete the Barrick Transaction in accordance with the Barrick Agreement. This claim turns on Barrick's allegation that Datawave breached the Shareholders Agreement by entering into the Goldcorp Agreement on January 6, 2010 with the result that Datawave's exercise of the Right of First Refusal was invalid and therefore that the Conditions Precedent in the Barrick Agreement were satisfied as of January 7, 2010, making the Barrick Agreement a binding obligation of Xstrata Chile.

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

New Gold/Datawave and Goldcorp, the parties to that Agreement, in order to determine the commitments made by Datawave.

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

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

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

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

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

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

261 In this case, there are two factors that complicate but do not change the ultimate exercise: (1) the alleged breach of the Shareholders Agreement is said to have occurred as a result of the execution of another agreement between one of the parties to the Shareholders Agreement and a third party, i.e., the Goldcorp Agreement; and (2) the Shareholders Agreement is governed by the laws of Chile.

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

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

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

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

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

The Legal Effect of the Goldcorp Agreement

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

Positions of the Parties

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

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

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

Analysis of the Legal Effect of the Goldcorp Agreement

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

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

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

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

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

276 Barrick does not argue that any of the covenants of the Goldcorp Agreement are unenforceable as a matter of the laws of Ontario. It also does not argue that the Goldcorp Transaction is a "sham transaction" as that term is described by Lord Diplock in *Snook* v. *London & West Riding Investments, Ltd.*, [1967] 1 All E.R. 518 (C.A.), i.e., that the actual agreement between the parties differs from the transaction set out in the Goldcorp Agreement.

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

278 Several features of these legal relationships established by the Goldcorp Agreement are relevant to the third step of the process of determining whether a breach of the Shareholders Agreement has occurred. Barrick argues that the covenants in the Goldcorp Agreement constitute, or give rise to, an unconditional sale on January 6, 2010 by Datawave to Goldcorp of the Right of First Refusal, of Datawave's rights under the Datawave Purchase Agreement or of the Offered Interest. Given the approach set out above, I consider these questions to relate to the operation of the Shareholders Agreement under the laws of Chile. However, for the reasons set out below, I also

do not think that the Goldcorp Agreement gave rise to any of these circumstances under the laws of Ontario to the extent this is relevant to the issues in this action.

Alleged Sale of the Right of First Refusal

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

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

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

281 Similarly, on the plain meaning of the Goldcorp Agreement, Datawave did not sell or assign the Datawave Purchase Agreement to Goldcorp. The Agreement deals specifically with the assignment of the Datawave Purchase Agreement to DataSub and completion of the purchase of the Offered Interest by DataSub pursuant to the Datawave Purchase Agreement. In the event that Goldcorp failed to fund the purchase of the Offered Interest for any reason, Datawave remained solely liable to Xstrata Chile to complete the transaction. Further, Goldcorp did not, at any time, become entitled to assert the benefit of the Datawave Purchase Agreement against Xstrata Chile. It could look only to Datawave if the Goldcorp Transaction failed for whatever reason. Conversely, Xstrata Chile had no right to enforce performance of the Datawave Purchase Agreement against Goldcorp.

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

283 On the basis of this principle, Barrick argues that the legal effect of the Goldcorp Agreement

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

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

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

285 It is also necessary to address two other allegations made by Barrick concerning the legal effect of the Goldcorp Transaction as of January 6, 2010 that rely on a consideration of the Goldcorp Agreement as a whole: (1) that, notwithstanding the plain meaning of the Goldcorp Agreement addressed above, the Agreement, interpreted as a whole, constituted an unconditional sale of the Offered Interest to Goldcorp on January 6, 2010; and (2) that the arrangements pertaining to DataSub in the Goldcorp Agreement constituted DataSub a Goldcorp subsidiary at the time that it purchased the Offered Interest under the Datawave Purchase Agreement.

The Goldcorp Agreement Constitutes an Unconditional Sale of the Offered Interest

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

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

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

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

290 This risk to Datawave, while perhaps not high, was nevertheless real. While the risk of an insolvency event pertaining to Goldcorp appears to have been negligible on the facts, it was not eliminated. More significantly, Datawave also assumed the risk of a Goldcorp decision to breach the Agreement voluntarily. There are a number of reasons why this could have occurred. Market reaction to a sharp drop in metal prices and/or a very adverse change in economic conditions might, for example, have required Goldcorp to review the merits of the Goldcorp Transaction and accept the risks of litigation. Market activities including takeover bids or shareholder actions could also have had the same result.

291 Second, under the Goldcorp Agreement, there is a clear separation in time between the $463 Million Loan from Goldcorp to DataSub and the consideration flowing from Goldcorp to Datawave for the DataSub shares (being the payment of U.S. $50 million and the amendments to the Shareholder Agreement and the CFLA in Datawave's favour). While the arrangements pertaining to the U.S. $50 million payment were subsequently revised, the revision was not legally significant

because it retained the principle of subsequent delivery of the consideration. If the Goldcorp Transaction had not closed after the $50 Million Loan had been advanced, Datawave would have remained liable to Goldcorp in respect of this Loan.

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

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

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

295 Under the structure of the Goldcorp Agreement, if either party had breached a covenant under the Agreement, the non-defaulting party's right was to seek damages or other relief in respect of the particular covenant that had been breached. Accordingly, Goldcorp could not have asserted a claim for breach of a contract for the sale of the Offered Interest until after the DataSub Purchase Agreement had been entered into. Whether a claim for breach of a covenant in the Goldcorp Agreement would have entitled Goldcorp to the same damages as a claim for breach of the DataSub Share Purchase Agreement, or a claim for breach of a contract for the sale of the 70% Interest, would have depended on the particular covenant that was breached and the circumstances giving rise to the breach.

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

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

January 6, 2010.

DataSub Should be Considered a Goldcorp Subsidiary

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

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

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

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

302 Moreover, Goldcorp did not acquire rights directly in respect of DataSub. The covenants in sections 4.1 and 4.2 are covenants of Datawave, not DataSub. If the covenants had been breached, it could only have looked to Datawave. Accordingly, I am satisfied that Datawave "controlled" DataSub at all times prior to completion of the sale of the DataSub shares pursuant to the DataSub Share Purchase Agreement as that term is understood under the laws of Ontario.

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

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

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

Operation of the Transfer Restrictions in the Shareholders Agreement

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

307 I propose to address this subject in the following order. I will first set out the definition of "Transfer" and the relevant provisions of Article 10. I will then set out four principal issues respecting the operation of the Transfer restrictions that are disputed by the parties, setting out my conclusions on each matter. The majority of this section then addresses the contractual interpretation of Article 10 in respect of these four issues. I conclude this section with a summary of six significant conclusions regarding the operation of the Transfer restrictions that govern the determination of most of the issues raised by Barrick's breach of contract claims pertaining to the validity of Datawave's exercise of the Right of First Refusal.

The Transfer Restrictions

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

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

direct or indirect sale, grant, assignment, Encumbrance, pledge, conveyance, or other disposition.

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

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

10.1 General

Except as expressly provided in this Article, no Shareholder shall have the right to Transfer all or any portion of its Rights or Interests.

10.2 Limitations on Transferability

(1) Notwithstanding any other provision of this Article, any Transfer of Rights or Interests by a Shareholder permitted by this Article shall be subject to the following limitations:

(a) No Shareholder shall Transfer any Rights or Interests except in conjunction with the Transfer of all, or a proportionate interest in all, of its Rights and Interests.

(b) No Transfer of all or any part of a Shareholder's Rights or Interests shall be completed, and no transferee shall have the rights of a Shareholder unless and until the transferring Shareholder has provided to the other Shareholder notice of the Transfer and the transferee, as of the effective date of the Transfer, has entered into an agreement with and in form satisfactory to the Company and the other Shareholder to become a party to and be bound by this Agreement to the same extent as the transferring Shareholder. ...

(2) The Company shall not register or take any other action to give effect to or recognize any Transfer or purported Transfer of any Rights or Interests unless such transfer fully complies with the

> requirements of this Article or is otherwise specifically authorized pursuant to this Agreement.

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

Four Principal Issues Regarding the Operation of the Transfer Restrictions

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

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

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

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

1. do the provisions of Article 10 apply to a Transfer of a shareholder's Rights and Interests to another shareholder?
2. what is the significance of including a commitment or a promise to convey or otherwise dispose of Rights or Interests in the definition of a "Transfer"? and
3. what is the meaning of an "indirect" transaction for purposes of the definition of a Transfer?

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

1. do the principles governing the operation of Article 10 generally prohibit a shareholder from agreeing to sell Rights or Interests to a third party prior to completion of the transaction with the selling shareholder?
2. if not, do the right of first refusal provisions in section 10.4 impose such a restriction to the extent that the Rights and Interests are being acquired pursuant to the exercise of a right of first refusal?

Applicable Principles of Contractual Interpretation

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

317 First, the Transfer restrictions should be interpreted with a view to the interests that the parties to the Shareholders Agreement sought to protect in agreeing to those provisions. This approach gives effect to the Rule of the Nature of the Contract referred to above. In this regard, I am satisfied that there are two broad interests protected by Article 10.

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

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

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

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

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

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

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

324 In the case of a consensual transaction outside the provisions of section 10.4, the absence of any need for such protections is obvious. Indeed, the parties are free to agree to a Transfer that would otherwise give rise to a prohibited Transfer. In the case of a contract formed on the exercise of a right of first refusal, there is an inherent protection against a proposed Transfer of a non-proportional interest, notwithstanding the fact that the terms of the contract formed on the exercise of the right of first refusal are not subject to negotiation. In such circumstances, as the Barrick Agreement demonstrates, any Third Party Offer must comply with the provisions of paragraph 10.2(1)(a) of the Shareholders Agreement. If it does not, the Third Party Offer would not constitute a permitted Transfer under Article 10, even if the right of first refusal was not exercised.

325 Second, as mentioned above, this provision should be interpreted restrictively as it is a restriction on the freedom of parties to freely trade their interests in the El Morro Project. Consistent

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

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

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

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

329 I would also note that, at points in their written submissions, Xstrata Chile and Goldcorp

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

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

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

Position of the Parties

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

332 The defendants argue that, with respect to an agreement to convey or otherwise dispose of Rights or Interests, a Transfer can only arise when the agreement becomes unconditional. They submit that Datawave's commitment to sell the Offered Interest to Goldcorp only became unconditional at the time the DataSub Share Purchase Agreement was executed. The defendants also say that, in interpreting the operation of the Transfer restrictions, the court should have regard to the interests served by Article 10. They say that, given this consideration, whether or not a proposed Transfer complies with Article 10 should be determined by whether, in the circumstances of the particular transaction, a shareholder is entitled to the benefit of the protections in Article 10. The defendants say that, on this analysis, after Xstrata Chile agreed to sell its entire interest in the El

Morro Project to Barrick, Xstrata Chile no longer had any interest that required, or entitled it to, continuing protection under Article 10.

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

When Does a Transfer Occur?

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

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

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

337 Consistent with these principles, an interpretation of the words "commit or promise to do any of the foregoing" must refer to an unconditional commitment or promise. An interpretation that would result in a Transfer on the date a conditional agreement is executed would impose a restriction on the right of a shareholder to transfer its Rights and Interests in the El Morro Project that is unnecessary for the protection of the interests addressed by Article 10.

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

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

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

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

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

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

344 This interpretation respects the purposes of the Transfer restrictions to the extent that the

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

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

Assessment of Compliance with the Transfer Restrictions

346 The result of including a commitment or promise to convey in the definition of Transfer is that a Transfer may occur prior to the time of completion of the actual conveyance or other disposition that is the subject of the agreement. In the case of an agreement to convey Rights or Interests, a Transfer will arise in accordance with the principle set out above at the point in time when the agreement becomes unconditional. This raises the question of whether, in such circumstances, compliance with the provisions of Article 10 in respect of the Transfer should be assessed as of the date the Transfer arises or as of the time of the proposed conveyance or other disposition.

347 I understand Barrick's position to be that, in such circumstances, the Transfer is to be

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

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

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

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

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

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

352 First, based on the language of the Parent Entities Addendum and the evidence of Morales and Barros, an "indirect" transaction to sell, grant, assign, create an Encumbrance on, pledge or

otherwise convey, or dispose of Rights and Interests includes a sale or other assignment of shares of a corporation holding some or all of a shareholder's Rights or Interests in the El Morro Project. This is specifically addressed in the Parent Entities Addendum in respect of the shares of Finco, Datawave and any corporations upstream in the chain of control between New Gold and those corporations.

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

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

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

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

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

specifically impose a restriction or prohibition on such transactions.

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

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

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

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

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

361 Section 10.1 and the definition of Transfer should be interpreted in accordance with the plain meaning of these provisions. On this basis, however, nothing in the language of section 10.1 or the definition of Transfer, or in the interplay of these provisions, prevents a sale of Rights and Interests to be acquired from a selling shareholder whether before or after the purchase of those Rights and Interests is completed. Similarly, nothing in these provisions requires that such Rights and Interests can only be sold together with the purchasing shareholder's own Rights Interests.

362 The conclusion in this section is also consistent with the nature and purpose of the Transfer restrictions. The Transfer restrictions protect against the imposition of an unwanted party on the other shareholder. As discussed above, a selling shareholder is entitled to the continuing benefit of the Transfer restrictions if it remains a shareholder after the sale of a portion of its Rights and

Interests to the other shareholder is completed. If the purchasing shareholder agrees to sell some or all of the purchased Rights and Interests to a third party, the selling shareholder will be entitled to assert the benefit of Article 10 in respect of the transaction at the point at which the agreement between the purchasing shareholder and the third party becomes unconditional. As this would be expected to occur once the sale of the Rights and Interests of the selling shareholder to the purchasing shareholder is closed, a Transfer would arise at that time which must comply with Article 10. If the agreement between the purchasing shareholder and the third party becomes unconditional earlier, the Transfer that arises at such time would nevertheless be assessed for compliance with Article 10 taking into consideration the legal relationships that will exist at the time of completion of the proposed transaction.

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

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

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

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

367 I would observe that the conclusion in this section does not depend on whether an on-sale

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

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

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

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

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

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

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

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

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

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

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

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

377 The difficulty with Morales' conclusion is its imprecision which, in turn, masks some conceptual difficulties. Insofar as his conclusion means that an exercising shareholder cannot sell the Right of First Refusal to a third party without complying with section 10.2(1)(a) by also selling its other Rights and Interests, there is no dispute between the parties. Similarly, insofar as his

conclusion means that the "other Shareholder" cannot exercise the Right of First Refusal as agent for a third party, there is also no dispute. In each case, at least in respect of circumstances in which the selling shareholder is only selling a portion of its Rights and Interests to the exercising shareholder, such arrangements are likely to give rise to a Transfer of Rights or Interests of the "other Shareholder" which do not comply with the provisions of Article 10. As set out elsewhere in these Reasons, however, there is no factual basis for a determination that either situation has occurred in this case.

378 On the other hand, insofar as Morales suggests that there was an absolute prohibition against the sale of the Rights and Interests of a selling shareholder prior to completion of the purchase of such Rights and Interests, the conclusion is without support in the Shareholders Agreement and, in fact, is more restrictive than Barrick's own position. Morales' opinion that pre-sale arrangements are prohibited under the Shareholders Agreement proceeds from a conclusion that, in such circumstances, the Right of First Refusal is invalidly exercised because it was not exercised for the benefit, account or risk of the exercising shareholder. Morales does not proceed on the alternative theory, upon which Barrick bases its case, that a pre-sale gives rise to a prohibited Transfer because the provisions of section 10.2(1)(a) were not complied with.

379 There is no basis to interpret the plain wording of section 10.4 as saying that the exercise of a right of first refusal in respect of Rights and Interests of the selling shareholder that are pre-sold to a third party is invalid because it is not for the benefit, account and risk of the exercising shareholder. Section 10.4 is totally devoid of any language that can be relied upon to support such a conclusion. Morales acknowledges this difficulty. He suggests, however, that a Chilean court would read these words into section 10.4 by way of elaborating the good faith obligations of the parties. The defendants' experts each considered this opinion to be without foundation.

380 Morales considers that a court would read his proposed requirement into the language of section 10.4 because it is necessarily implied by the "other Shareholder's" good faith obligations. In other words, without such words, the selling shareholder would not receive the benefit of the protections under Article 10 to which it is entitled. I do not think this is correct.

381 It is not clear why, in the context of a conditional transaction for the sale of a selling shareholder's interest, an exercising shareholder must be prevented under all circumstances from selling the interest prior to its acquisition pursuant to the exercise of the right of first refusal. Morales does not explain why the shareholder's good faith obligations would require that the exercise of the right of first refusal must be for the benefit, account and risk of the other Shareholder. Nor does he explain how a pre-sale offends the purposes of the Transfer restrictions such that good faith obligations would be implied to prevent such a transaction.

382 As mentioned above, a restriction on the operation of the right of first refusal in section 10.4 of the nature proposed by Morales is not the only, or even the most appropriate, means of protecting a selling shareholder where it is entitled to the benefit of Article 10. The operation of the general

Transfer restriction in section 10.1 in accordance with the principles described above will also achieve the same result without the need to resort to Morales' interpretation of section 10.4. Provided the purchasing shareholder acquires title to the selling shareholder's Rights and Interests, the selling shareholder remains able to enforce the Transfer restrictions in respect of any sale to a third party purchaser without resort to the requirement addressed by Morales. Conversely, the proposed interpretation of Morales would prevent the exercise of the right of first refusal in circumstances in which the selling shareholder is not entitled to the benefit of the provisions of Article 10. For these reasons, I reject the conclusion that the requirement that a shareholder must exercise the right of first refusal for its "account, benefit and risk" is a necessary feature of the right of first refusal provisions in section 10.4 based on an elaboration of the good faith duties of the exercising shareholder.

383 In summary, Morales' suggested interpretation of section 10.4 is not directed toward furthering the purpose of the Transfer restrictions, as described above. It is directed at prohibiting pre-sales of a selling Shareholder's Rights and Interests without any accompanying support for such an approach in the language of section 10.4 or any rational connection to the purpose of that provision. In the absence of such a rational connection, the language of section 10.4 is insufficient to support Morales' interpretation.

384 In addition, as mentioned above, Morales proceeds on the basis that the legal effect of the Goldcorp Agreement is an irrevocable agreement of Datawave on January 6, 2010 to convey the Offered Interest to Goldcorp, or a designated subsidiary of Goldcorp. Morales did not analyze the Goldcorp Agreement as consisting of two transactions with the second being conditional upon completion of the first, in the manner set out above.

385 As Morales' opinion does not address the legal effect of the Goldcorp Agreement under the laws of Ontario as the court has determined it to be, there is no obvious means of taking the principle underlying the Morales opinion into consideration in determining the operation of section 10.4 in respect of the Goldcorp Agreement.

386 Accordingly, for the two reasons set out above, I have concluded that there is no basis in the evidence for finding that, under the laws of Chile, section 10.4 of the Shareholders Agreement should be interpreted to impose a requirement that a shareholder exercising the right of first refusal must do so for its own "benefit, account and risk" in the manner suggested by Morales.

387 I also note that the defendants assert that Datawave did, in fact, satisfy this interpretation of section 10.4. Given the foregoing interpretation, this is a subsidiary issue which I have therefore addressed later in these Reasons.

Section 10.4 Should be Interpreted Restrictively or Narrowly

388 Barrick's second submission is based on a principle of contractual interpretation that it says should apply in the interpretation of section 10.4. Barrick describes the right of first refusal

provision as an exception to the general prohibition on Transfer set out in section 10.1. It says that, in accordance with Chilean principles of statutory construction, section 10.4 should be interpreted restrictively or narrowly to apply to the least number of possible cases. On this basis, it says that "other Shareholder" should be interpreted in the fashion proposed by Morales so that the right of first refusal would apply to the least number of circumstances.

389 This interpretation of section 10.4 is not supported by the evidence of the Chilean legal experts regarding the operation of the Chilean principles of contractual interpretation. As mentioned, I accept the evidence of Pena and Barros that contractual restrictions on the transfer or alienability of rights are to be interpreted restrictively - that is, so as to apply to the smallest number of circumstances. However, there is no evidence of a general rule in Chilean law that exceptions to a general prohibition on Transfers are also to be interpreted restrictively in the manner proposed by Barrick. Logically, I think the opposite would be expected.

390 Barrick relies, in particular, on testimony of Pena to the effect that the provisions of article 10.4 should be interpreted narrowly. My understanding of this testimony is that Pena was of the opinion that article 10.4 should be interpreted to apply only to the extent necessary to give effect to the nature and purpose of the Transfer restrictions in Article 10, as set out above. Accordingly, Pena's testimony contradicted Barrick's position that the "account, benefit and risk" requirement of Morales was a necessary element of section 10.4.

391 Section 10.4 does not constitute a restriction on Transfer. Accordingly, while the restrictions on Transfer in section 10.1 should be construed on a restrictive basis, there is no basis for adopting a similar approach to the interpretation of the right of first refusal provisions in section 10.4. I conclude, therefore, that under the laws of Chile, section 10.4 should be interpreted according to its plain meaning.

Alleged Commercial Absurdity of the Defendants' Interpretation

392 Lastly, Barrick argues that its interpretation of section 10.4 must be preferred to the defendants' interpretation because the latter would lead to a "commercial absurdity" and is therefore inconsistent with the principles of contractual interpretation in both Chile and Ontario. Ultimately, it is this argument that Barrick asserts to counter the question raised by the defendants as to why an exercising shareholder cannot pre-sell Rights and Interests of a selling shareholder if there is no required hold period for such assets once acquired. In this section, I will address two issues regarding the commercial reasonableness of the defendants' interpretation of section 10.4 - the issue raised by Barrick and a further issue that arose in the trial.

393 Relying on Regent's testimony, Barrick says that the defendants' view of the operation of rights of first refusal would result in a situation in which selling shareholders would not receive the best possible offer because potential purchasers would attempt to make lower offers or would remain out of the initial auction process of the selling joint venture partner altogether, in either case saving their best offers instead for the non-selling joint venture partner having the right to purchase

the joint venture interest. Barrick says that, under this scenario, the party that would realize the profit on the selling joint venture partner's interest would be the non-selling joint venture partner rather than the selling joint venture partner. It says that this is precisely what Goldcorp did, implying that Goldcorp intended to pursue this strategy from the point in June 2009 when Goldcorp decided not to participate in the Xstrata Chile auction process.

394 Before turning to the larger issue, I note that there is no evidence that Goldcorp intentionally pursued a strategy of "lying in the weeds" until the Xstrata Chile auction process was completed in order to acquire the Offered Interest in a transaction with New Gold. It is not necessary to set out the evidence for this conclusion in any detail.

395 However, I would note that the evidence is clear that the conditions that presented the opportunity to Goldcorp were threefold: (1) rising metal prices that increased the value of the El Morro Project in the eyes of market participants; (2) a fixed cash price in the Barrick Transaction; and (3) Barrick's unwillingness to pay a sufficient price to New Gold, or inability to otherwise structure the Barrick Transaction, to obtain New Gold's waiver of the Right of First Refusal either directly or through Xstrata Chile. All of these circumstances arose well after June 2009 independently of any actions of Goldcorp. If any of these three conditions had not occurred, there would have been no opportunity for New Gold to conduct a successful value maximization process and there would have been no opportunity for Goldcorp to outbid Barrick in that process.

396 I would add that I understand the testimony of Jeannes, Greville and Morales to the effect that none of these individuals had seen a transaction similar to the Goldcorp Transaction in their business lives, and that the Goldcorp Transaction was "unusual", in this context. It is the circumstances that made the Goldcorp Transaction economically feasible that appear to be what was truly "unusual" about the present situation. The fact that none of these individuals had seen a similar transaction says nothing probative about whether the defendants' interpretation of section 10.4 would lead to a commercial absurdity.

397 Turning to the larger issue raised by Barrick, I agree that, if there were evidence that the defendants' view of the operation of rights of first refusal would necessarily lead to the commercially absurd result that Barrick describes, there would be a strong, if not conclusive, argument in favour of Barrick's interpretation of section 10.4. It would establish a purpose of the right of first refusal that must be respected in the interpretation and application of the Transfer restrictions in respect of any transaction.

398 In the absence of any evidence of a theoretical nature pertaining to this issue, the court must consider this argument solely on the basis of the facts before it pertaining to this case. I conclude on the basis of such evidence that there is nothing inevitable about the occurrence of the matters that gave rise to the Goldcorp Transaction that would support such an argument.

399 In fact, in more usual circumstances, where there is no reason for the market value of the selling joint venture party's interest to rise during the exercise period of a right of first refusal, there

is a considerable risk that a prospective purchaser who remains out of the selling joint venture party's auction process will not have a second chance to acquire the asset through a transaction with the non-selling party. As an obvious example, the successful purchaser could require the departing joint venture party to obtain a waiver of the right of first refusal at its own cost, or the successful purchaser could purchase a waiver directly. Alternatively, the process could result in 100% of the project being offered to prospective purchasers to maximize value to the joint venture parties, as was contemplated for some time in the Xstrata Chile auction process. Further, the non-selling joint venture party could have, or could subsequently acquire through external transactions, the financial capacity to acquire the asset for its own account rather than with a view to reselling the asset. At the very least, the prospective purchaser would have to bid more than was agreed to by the third party offeror in order to make it worthwhile for the non-selling joint venture party to exercise the right of first refusal. Unless the value of the asset rises during the exercise period of a right of first refusal, Barrick's interpretation requires a willingness on the part of the prospective purchaser to bid a price above market value in the second process - itself a commercial absurdity.

400 I would also observe that Barrick's evidence on the commercial absurdity of the defendants' view of the operation of rights of first refusal was limited to the personal views of Regent, Baker and Morales. In particular, Barrick did not provide any more general evidence from third party participants in the market who are familiar with the use and operation of rights of first refusal, expert or otherwise.

401 In summary, I am not satisfied that Barrick's interpretation necessarily, or even regularly, results in a commercial absurdity that would require adopting Barrick's interpretation of the operation of section 10.4 over that of the defendants. Accordingly, I reject the proposition that this consideration should inform the interpretations of the Transfer restrictions and, in particular, the meaning of an indirect conveyance.

Additional Comment

402 Barrick's interpretation of the right of first refusal provision in section 10.4 prompts an additional observation. Barrick acknowledges that a shareholder could obtain financing from a bank or other financial institution to finance the exercise of a right of first refusal. However, a shareholder would not exercise a right of first refusal in such circumstances without a firm financing commitment from the financing institution. Conversely, the financing institution would not advance funds to complete the transaction without executed loan and security documentation which would be effective conditional upon completion of the transaction. However, by virtue of the definition of Encumbrance, the granting of security over Rights and Interests constitutes a Transfer under the Shareholders Agreement. I can see no distinction in principle in the language of Article 10 between the conditional financing arrangements that would be required to fund a shareholder exercise of the right of first refusal and the conditional sale of the 70% Interest to Goldcorp provided for in the Goldcorp Agreement. The Transfer restrictions apply in the same manner to both transactions because the conditional structure is essentially identical.

403 In my opinion, the treatment of financing arrangements in the context of an exercise of a right of first refusal reinforces the conclusion that there is no basis in the language of Article 10 for the interpretation placed upon it by Barrick. If there is a distinction between these two scenarios that dictates a different result in the case of an on-sale to a third party, it must be grounded in a policy consideration outside the language of Article 10. However, the consideration proposed by Barrick - the commercial absurdity argument - is not supported on the evidence before the court.

Summary of Relevant Principles Pertaining to the Transfer Restrictions

404 Based on the foregoing, the following six general principles regarding the operation of the Transfer restrictions are relevant to the issues in this litigation.

405 First, a sale of Rights and Interests between shareholders is not subject to Article 10 provided the purchasing shareholder acquires such Rights or Interests directly or indirectly in a subsidiary that it controls. Further, there is nothing in the Shareholders Agreement that mandates that the shareholder, or its subsidiary, hold the Rights and Interests to be acquired for any particular period of time upon acquisition before completing a sale of such Rights and Interests to a third party.

406 Second, an unconditional agreement by a shareholder to convey, or otherwise dispose of, Rights and Interests that it owns to a third party gives rise to a Transfer that is subject to the Transfer restrictions in Article 10. However, a Transfer does not arise in respect of an agreement to sell, assign or otherwise dispose of Rights or Interests until such agreement becomes unconditional. Whether or not such Transfer is a prohibited Transfer requires an assessment of the legal relationships among the parties at the time of completion of the proposed transaction.

407 Third, a shareholder may sell Rights and Interests to be acquired from the other shareholder to a third party prior to acquisition of such Rights or Interests. Such a sale is permitted under Chilean law. There is also nothing in the Shareholders Agreement that prevents the shareholder from entering into an agreement with the third party for the sale of such Rights and Interests prior to entering into an agreement for their purchase or prior to exercising a right of first refusal in the shareholder's favour to acquire such Rights and Interests.

408 Fourth, in particular, the right of first refusal provisions in section 10.4 do not impose any such limitation or restriction on the manner in which a shareholder can sell to a third party Rights and Interests to be acquired from the other shareholder. The absence of limitations or restrictions on the exercise of a right of first refusal of the nature suggested by Barrick would not necessarily produce a commercially absurd result.

409 Fifth, a sale by a purchasing shareholder to a third party of its right to purchase Rights or Interests from the other shareholder, including any agreement between the shareholders with respect thereto, as distinct from a sale of the Rights and Interests themselves, could give rise to a Transfer that would be subject to the Transfer restrictions in Article 10.

410 Lastly, inclusion of indirect conveyances within the definition of Transfer has the effect of capturing two different circumstances within the term "Transfer". The first circumstance is a sale of shares in the corporate chain upstream from a party holding Rights or Interests in the El Morro Project. The second circumstance is a transaction resulting in a Transfer of Rights and Interests indirectly that, if done directly, would have given rise to the entitlement of the other shareholder to the protections set out in Article 10. The circumstances in which a transaction constitutes an indirect conveyance for the purposes of the definition of a Transfer are informed by the purposes of Article 10.

Conclusions Regarding Operation of the Transfer Restrictions in Respect of the Goldcorp Agreement

411 In this section, I will address the application of the Transfer provisions to the Goldcorp Transaction in the third step of the analysis to determine whether the Goldcorp Transaction gives rise to a breach of the Shareholders Agreement. Based on the analysis above, I reach the following five conclusions.

412 First, the Goldcorp Agreement contemplates two sale transactions as well as a prior loan transaction. The first sale transaction, pursuant to which Datawave acquired the 70% Interest through DataSub, was not subject to section 10.1 because it was limited to a transaction between shareholders. The second sale transaction, pursuant to which Goldcorp purchased the DataSub shares, was subject to section 10.1.

413 Second, the second sale transaction was conditional upon completion of the Datawave Purchase Agreement. Accordingly, the agreement for the second sale transaction did not become unconditional until completion of the DataSub purchase of the Offered Interest and the execution of the DataSub Share Purchase Agreement immediately thereafter. At that time, Xstrata Chile was no longer a shareholder of the Company.

414 Third, accordingly, the Transfer created by the unconditional agreement to sell the DataSub shares to Goldcorp did not constitute, or give rise to, a prohibited Transfer for the reason that Xstrata Chile was no longer entitled to the benefit of the protections of Article 10 in respect of the transaction contemplated by the DataSub Share Purchase Agreement. As a consequence, the provisions of Article 10 did not require that any sale of the DataSub shares be accompanied by a sale of the New Gold Interest or that Xstrata Chile have the benefit of a "mirror" right of first refusal in its favour. Even if it were held that the DataSub Share Purchase Agreement became unconditional at an earlier date, compliance with the provisions of Article 10 in respect of that transaction would be assessed as of the time of completion of that transaction, at which point Xstrata Chile was no longer entitled to the benefit of such provisions.

415 Fourth, the right of first refusal provisions in section 10.4 of the Shareholders Agreement did not impose any requirements on the manner of Datawave's purchase of the Offered Interest other than the formal requirements pertaining to the notice of exercise expressly set out in section 10.4. In

particular, the provisions of section 10.4 did not prevent Datawave from making a conditional commitment to sell Goldcorp the 70% Interest prior to Datawave's exercise of the Right of First Refusal and acquisition of the Offered Interest from Xstrata Chile.

416 Fifth, for the reasons set out above, under the laws of Ontario, DataSub was a wholly-owned subsidiary of Datawave controlled by Datawave at all times prior to completion of the Datawave Purchase Agreement. There are two consequences that flow from this determination. The more important consequence is that the structure of the Goldcorp Transaction satisfied the requirement that Datawave acquire the 70% Interest directly or indirectly for at least some period of time. I have proceeded on the basis that the Transfer provisions were satisfied if Datawave acquired the 70% Interest in a wholly-owned subsidiary over which it had legal control. However, as addressed below, DataSub also satisfied the requirements of an Affiliate for purposes of the Shareholders Agreement at all relevant times. The other consequence of the determination is that the transfer of the Datawave Purchase Agreement to DataSub did not constitute an indirect Transfer of Rights and Interests to Goldcorp by virtue of arrangements in the Goldcorp Agreement that constituted DataSub as a Goldcorp subsidiary upon its creation.

417 Based on the foregoing conclusions, it necessarily follows that the Goldcorp Agreement did not constitute, or give rise to, a prohibited Transfer under Article 10 of the Shareholders Agreement.

Analysis of the Breaches of Datawave's Obligations Asserted by Barrick

418 Barrick alleges that Datawave's execution of the Goldcorp Agreement had the following consequences under the Shareholders Agreement:

1. that under the Shareholders Agreement, the Goldcorp Agreement constituted, or gave rise to, a Transfer of the Right of First Refusal that did not comply with section 10.1 of the Shareholders Agreement;
2. that under the Shareholders Agreement, the Goldcorp Agreement constituted, or gave rise to, a Transfer of the Offered Interest that did not comply with section 10.1 of the Shareholders Agreement;
3. that under the Shareholders Agreement, the Goldcorp Agreement created, or gave rise to, an Encumbrance in respect of the Right of First Refusal that constituted a Transfer that did not comply with section 10.1 of the Shareholders Agreement;
4. that the purpose and intent of the Goldcorp Agreement was the circumvention of the Transfer restrictions in section 10.1 of the Shareholders Agreement;
5. that the Goldcorp Agreement required Datawave to breach its good faith obligations under the Shareholders Agreement by exercising the Right of First Refusal in a manner that is neither customary nor consistent with the nature of a right of first refusal;

6. that under the Shareholders Agreement, the Goldcorp Agreement constituted, or gave rise to, a breach of certain provisions of the CFLA; and
7. that under the Shareholders Agreement, the Goldcorp Agreement provided for a Datawave exercise of the Right of First Refusal that was a nullity under Chilean law.

419 In reaching the conclusions set out above, I have considered and rejected each of these submissions. The following sections set out my analysis of each of the seven alleged breaches of the Shareholders Agreement that Barrick says resulted from Datawave's execution of the Goldcorp Agreement.

Overview

420 Before examining these alleged breaches in detail, the following summarizes the principle which I believe informs the principal Barrick arguments and sets out my conclusions regarding this principle as it is applied in respect of the Shareholders Agreement.

421 The principal arguments raised by Barrick involve, as a common element, an assertion that the Goldcorp Transaction constituted a sale by Datawave of its "right to purchase the Offered Interest". Each argument addresses a different aspect of the Goldcorp Transaction. By way of overview, the arguments can be divided into allegations that the Goldcorp Transaction gave rise to a direct Transfer of Datawave's "right to purchase the Offered Interest" and allegations that the Transaction gave rise to an indirect Transfer of such right.

422 As mentioned above, Barrick does not dispute that, in the usual case, a party can agree to sell an asset which it has a right to acquire pursuant to an option granted by the owner of the asset. However, Barrick says that, in the present circumstances, such a transaction was prohibited because Datawave's "right to purchase the Offered Interest" was non-transferable. Barrick says that, pursuant to the Transfer restrictions, Datawave could not sell its "right to purchase the Offered Interest" without also selling the New Gold Interest, which would have given rise to a right of first refusal under section 10.4 of the Shareholders Agreement in favour of Xstrata Chile. Accordingly, Barrick argues that any transaction pursuant to which Datawave directly or indirectly sold the 70% Interest constituted a prohibited Transfer of Datawave's "right to purchase the Offered Interest".

423 I have concluded above that, whether or not this is an accurate description of the economic effect of the Goldcorp Agreement, there is no basis to determine that, as a legal matter under the laws of Ontario, the Goldcorp Agreement constitutes an assignment of the benefit of Datawave's "right to purchase the Offered Interest". Instead, I consider that, if there is any basis for this conclusion, it is to be found in the laws of Chile or the contractual interpretation of the Shareholders Agreement.

424 There is no evidence before the court that establishes that, under Chilean law, the legal effect

of the Goldcorp Agreement in this regard is to be interpreted in a manner different from that described above under the laws of Ontario. In particular, there is no evidence from any of the Chilean law experts that Chilean law recognizes the legal proposition upon which Barrick relies. There is, instead, ample evidence that under Chilean law, as under Ontario law, more than one right to purchase the same asset can co-exist - i.e., Datawave's right to purchase the 70% Interest could co-exist with Goldcorp Tesoro's conditional right to purchase that interest from Datawave. Accordingly, I am satisfied that, under the laws of Chile, a party may enter into an agreement for a future sale of an asset with delivery to occur at the point at which the asset becomes part of the seller's patrimony i.e., at the point at which the seller acquires the asset. Based on the foregoing, I conclude Chilean law would treat the two sale transactions under the Goldcorp Agreement as separate and distinct, rather than as a sale or grant by Datawave to Goldcorp of its "right to purchase the Offered Interest".

425 It is my understanding that Barrick does not disagree with this general proposition. Instead, it says that this general principle is displaced in respect of the Shareholders Agreement because Datawave's "right to purchase the Offered Interest" is a non-transferable right under the Shareholders Agreement in the absence of a concurrent sale of the New Gold Interest. Barrick says that this circumstance mandates an interpretation of the provisions of Article 10 that would prohibit transactions that would directly or indirectly result in a Transfer of the Datawave "right to purchase the Offered Interest". In the case of a future sale of Rights and Interests subject to an option in favour of a shareholder, it says that this requires that the future sale be assimilated into, and treated as, a sale of the option to acquire the Rights and Interests.

426 A number of variants of this argument are addressed below focusing on different features of the Goldcorp Transaction that are described as direct or indirect Transfers. In particular, Barrick argues that the definition of Transfer should encompass multi-stage transactions that have the final result that a third party acquires the Offered Interest on the basis that such a transaction constitutes an indirect conveyance of Datawave's "right to purchase the Offered Interest". I conclude that the Goldcorp Agreement did not give rise to any of the breaches of the Shareholders Agreement or the CFLA alleged by Barrick to constitute direct Transfers of the Datawave "right to purchase the Offered Interest". I also conclude that Article 10 of the Shareholders Agreement is not to be interpreted in the manner proposed by Barrick in respect of any of the features of the Goldcorp Transaction identified by Barrick as giving rise to an indirect Transfer of Barrick's "right to purchase the Offered Interest" for the reason that such interpretation does not further any purpose of the Transfer restrictions.

Alleged Transfer of the Right of First Refusal

427 I have previously set out my conclusion that, under the laws of Ontario, as between Datawave and Goldcorp, the Goldcorp Agreement did not constitute a sale by Datawave to Goldcorp of the Right of First Refusal, i.e., the option, on January 6, 2010. The issue in this section is whether, notwithstanding this result under the laws of Ontario, the provisions of the Shareholders

Agreement, in particular Article 10, would treat the commitments of the parties to the Goldcorp Agreement as constituting a sale of the Right of First Refusal. This is a matter of the contractual interpretation of the Shareholders Agreement.

428 Barrick submits that the provisions of the Shareholders Agreement have this result. I have rejected this argument for the following reasons.

429 First, as mentioned above, there is no evidence that the Goldcorp Transaction would be treated as a sale of the Right of First Refusal under general principles of Chilean law.

430 Second, there is also no basis for finding that the language of the Shareholders Agreement would treat the Goldcorp Transaction as constituting a sale of the Right of First Refusal.

431 To succeed on this issue, Barrick must demonstrate that the Goldcorp Agreement constitutes, or gives rise to, a Transfer for the purposes of the Shareholders Agreement. While the definition of Transfer is broad as Barrick points out, its breadth is not relevant for present purposes. The fundamental problem is the fact that, pursuant to the Goldcorp Agreement, Datawave, not Goldcorp, exercised the Right of First Refusal. There is nothing in the definition of Transfer that would characterize or transform the transactions contemplated by the Goldcorp Agreement into an agreement to convey the Right of First Refusal. A covenant to exercise the Right of First Refusal is not a commitment to sell, grant, assign, pledge or otherwise dispose of the Right of First Refusal. Similarly, there is no basis for finding that a commitment to sell the 70% Interest once it is acquired constitutes a Transfer of the Right of First Refusal. This was the evidence of Barros and Pena.

432 Morales' position on this issue is less clear. However, I do not think that it can be relied upon by Barrick for the following reason.

433 Morales appears to conclude in his Report that the Goldcorp Transaction constituted a sale of the Offered Interest rather than a sale of the Right of First Refusal. However, his opinion is essentially that Datawave did not exercise the Right of First Refusal in its own right, for its own benefit and its own account but, instead, for Goldcorp. On this basis, Morales describes the Goldcorp Transaction as "tantamount" to an unlawful Transfer of the Right of First Refusal.

434 It is clear from the Morales Report that this conclusion depends upon this court finding that, under the laws of Ontario, given the terms of the Goldcorp Agreement, Datawave did not exercise the Right of First Refusal in its capacity as the "other Shareholder" but instead acting "on behalf of and for the benefit and the risk of another party - Goldcorp". However, the court has not made this requisite finding. Similarly, the court has not found that Datawave acted as the agent of Goldcorp in exercising the Right of First Refusal nor that it was the "conduit" through which Goldcorp exercised the Right of First Refusal. Instead, the court has concluded above that there is no basis for any such finding under the laws of Ontario. Accordingly, Morales' opinion that the Shareholders Agreement would treat the Goldcorp Agreement as giving rise to a sale of the Right of First Refusal cannot stand.

435 Barrick argues that the testimony of certain of the defendants' witnesses supports the conclusion that Datawave sold the Right of First Refusal pursuant to the Goldcorp Agreement. I do not accept this submission for two reasons.

436 First, it appears that Barrick seeks to rely on statements that acknowledged that Goldcorp acquired the Offered Interest, rather than the 70% Interest, in the hands of DataSub after completion of the purchase of the Offered Interest under the Datawave Purchase Agreement. I am satisfied that this argument rests on a semantic distinction that the witnesses did not have in mind during their respective cross-examinations at trial. In a similar manner, the suggestion that, after the Goldcorp Transaction, Goldcorp became vested by Datawave with the right to purchase the Offered Interest is based on a confusion of the terms "Offered Interest" and "70% Interest". Goldcorp never acquired Datawave's right to purchase the Offered Interest, i.e., the Right of First Refusal. It received a separate right to acquire the 70% Interest conditional upon Datawave completing the purchase of the Offered Interest by completing the Datawave Purchase Agreement.

437 Second, I accept that it is possible to characterize the economic effect of the Goldcorp Transaction in several different ways. One of the characterizations would be a sale of the Right of First Refusal for U.S. $50 million and other El Morro Project-related benefits. However, the issue before the court in this action relates to a legal issue - the operation of the Transfer restrictions in the Shareholders Agreement, given the structure of the Goldcorp Agreement. The economic characterization of the Goldcorp Transaction is an entirely different exercise. It is not a relevant consideration for this issue except to the extent that it informs in some manner the issue of the nature and purpose of the Transfer restrictions in Article 10, which has been addressed above.

438 As there was no Transfer of the Right of First Refusal resulting from the execution of the Goldcorp Agreement, I conclude that the Goldcorp Agreement did not give rise to a prohibited Transfer under the Shareholders Agreement on this basis.

Alleged Prohibited Transfer of the Offered Interest

439 Barrick submits that, if Datawave's commitments under the Goldcorp Agreement do not constitute a sale of the Right of First Refusal for purposes of the Shareholders Agreement, such commitments constituted, or gave rise directly or indirectly to, a Transfer to Goldcorp on January 6, 2010 of Datawave's "right to purchase the Offered Interest" under section 10.4 of the Shareholders Agreement. It says further that, by virtue of the inclusion of a commitment or promise to sell or assign Rights or Interests in the definition of "Transfer", the Goldcorp Agreement constituted a Transfer of Datawave's "right to purchase the Offered Interest" as of January 6, 2010. Accordingly, Barrick says that it follows that Datawave's purported exercise of the Right of First Refusal on January 7, 2010 was invalid for failure to comply with paragraph 10.2(1)(a) of the Shareholders Agreement.

Issues to be Addressed

440 Before addressing this matter, I note one aspect of the Barrick position that requires clarification. As I understand the Barrick argument, Barrick alleges that New Gold granted to Goldcorp either the Right of First Refusal or the Datawave Purchase Agreement but not the Offered Interest itself, despite some language to this effect in its closing submissions and reply submissions. This is also consistent with the treatment of contracts for sale under Chilean law. Under Chilean law, a seller cannot convey ownership of an asset in a sale agreement. It can only agree to deliver or convey the asset that is the subject-matter of the agreement by delivery at the closing of the transaction. Accordingly, Barrick argues that, to the extent the Goldcorp Agreement constituted a sale of the 70% Interest, it was invalid because it was tantamount to a prohibited Transfer of Datawave's "right to purchase the Offered Interest", i.e., a prohibited Transfer of Datawave's Right of First Refusal or of the Datawave Purchase Agreement.

441 This section addresses four different conceptual analyses proposed by Barrick to support its position that the Goldcorp Agreement directly or indirectly gave rise to a Transfer on January 6, 2010 to Goldcorp of Datawave's "right to purchase the Offered Interest" prior to completion of the purchase of the 70% Interest thereunder.

442 First, Barrick argues that the Transfer of the Offered Interest occurred in the form of the transfer of the Datawave Purchase Agreement to DataSub because the effect of the covenants in the Goldcorp Agreement was to establish DataSub as an Affiliate of Goldcorp. Second, Barrick says that, even if DataSub was not a Goldcorp Affiliate, the Transfer was prohibited because the Goldcorp Agreement contemplated both a transfer of the Datawave Purchase Agreement to DataSub and a transfer of the DataSub shares to Goldcorp in the same agreement. Third, Barrick says that the Goldcorp Agreement had the effect of imposing a burden on Datawave's right to purchase the Offered Interest, that is, on the Right of First Refusal, which constituted an Encumbrance, thereby giving rise to a prohibited Transfer. Lastly, Barrick says that the Goldcorp Agreement was entered into with a view to circumventing the Transfer restrictions in the Shareholders Agreement.

443 I propose to deal with each of these submissions in turn.

Alleged Transfer to a Goldcorp Affiliate

444 Barrick submits that, pursuant to the Goldcorp Agreement, Datawave agreed to convey its right to purchase the Offered Interest, in the form of the Datawave Purchase Agreement, to an entity that was to be an Affiliate of Goldcorp at all times after its incorporation and, in particular, at the time of completion of the Datawave Purchase Agreement. Barrick argues that because New Gold did not also agree to sell the New Gold Interest to Goldcorp, the Goldcorp Agreement therefore indirectly gave rise to a Transfer that was prohibited by virtue of non-compliance with section 10.2(1)(a) of the Shareholders Agreement.

445 The definition of an "Affiliate" in the Shareholders Agreement is, with respect to a Shareholder, "any Person, which directly or indirectly Controls, or is Controlled by, or is under

Common Control with, that Shareholder". For this purpose, "Control" means:

> [P]ossession, directly or indirectly, of the power to direct or cause direction of management and policies through ownership of voting shares, interests, or securities, or by contract, voting trust or otherwise. The definition of Control shall be incorporated into such terms as "Controlled" and "Controlling".

446 Barrick argues that DataSub was not, at any time, an Affiliate of Datawave/New Gold because it was not "Controlled by" Datawave/New Gold. It says that DataSub was, instead, an Affiliate of Goldcorp by virtue of the covenants of Datawave in the Goldcorp Agreement pertaining to DataSub.

447 This issue proceeds as a matter of contractual interpretation of the Shareholders Agreement under the laws of Chile. It is similar to, but not the same issue as, the question addressed earlier of whether the Goldcorp Agreement contemplated that DataSub would be established as a subsidiary of Goldcorp.

448 DataSub was incorporated as a Chilean corporation, all of whose shares were registered in the name of, and were held by, Datawave. The affairs of DataSub were directed by an administrator rather than a board of directors. The authority to act as the administrator of DataSub in all matters, including the completion of the Datawave Purchase Agreement, was granted to a Chilean lawyer who acted for Datawave pursuant to a power of attorney executed by Datawave, which retained the power to change the administrator if it so chose. Notwithstanding these arrangements, Barrick argues that the result of Datawave's covenants in the Goldcorp Agreement pertaining to DataSub was that Datawave did not "Control" DataSub, as that concept is defined for the purpose of the Shareholders Agreement, and that, in fact, Goldcorp Controlled DataSub.

449 I do not agree for the following reasons.

450 The principles that govern Transfers to Affiliates in the Shareholders Agreement are clear. A shareholder is entitled to Transfer Rights or Interests on a non-proportional basis to an Affiliate provided (1) the Affiliate agrees to be directly liable under the Shareholders Agreement in respect of the obligations and liabilities associated with the Rights and Interests transferred to it; and (2) the shareholder remains jointly and severally liable in respect of such obligations and liabilities with the Affiliate. In summary, a shareholder has complete freedom to transfer Rights and Interests within its corporate group provided it remains jointly and severally liable. From the perspective of the other shareholder, any Transfer of Rights and Interests of the other Shareholder is permissible, provided the transferring shareholder not only remains jointly and severally liable but also retains the ability to cause the transferee corporation to comply with the obligations and liabilities associated with the Rights and Interests transferred to it.

451 The concept of "Control" should be interpreted for purposes of the definition of Affiliate in terms of whether any particular arrangement satisfies this test. As in the case of the interpretation of

the Transfer restrictions generally, given that the interpretation of this term affects the breadth of the restriction on a shareholder's freedom to transfer its own assets, i.e., affects the breadth of the prohibitions on Transfer under the laws of Chile, this term should not be interpreted more broadly than is necessary to give effect to the purpose of the Transfer restrictions in respect of Affiliates.

452 Based on this approach to the contractual interpretation of "Control", I am satisfied that the arrangements in the Goldcorp Agreement contemplated that Datawave would "Control" DataSub upon its incorporation and thereafter until the transfer to Goldcorp Tesoro of the DataSub shares pursuant to the DataSub Share Purchase Agreement.

453 The covenants in sections 4.1 and 4.2 of the Goldcorp Agreement constituted contractual obligations of Datawave to Goldcorp in respect of the activities of DataSub. They are not covenants of, or on behalf of, DataSub in favour of Goldcorp. Accordingly, Goldcorp had no legal ability to directly cause DataSub to comply with its instructions if Datawave had failed to do so. If Datawave had breached the covenants, Goldcorp's rights were limited to an action against Datawave for breach of contract.

454 Further, Datawave's commitment to these covenants did not extinguish or diminish Datawave's legal control of DataSub, both as the sole shareholder of DataSub and as the party having control over the Chilean lawyer who acted as the administrator of DataSub.

455 More substantively, there is also nothing in these covenants that prevented DataSub from performing or discharging any obligations or liabilities associated with the Rights and Interests transferred to it, namely the Datawave Purchase Agreement, or the 70% Interest to be acquired by it upon the completion thereof. In fact, insofar as the Goldcorp Agreement contained any negative covenants pertaining to such obligations and liabilities, they are incorporated by reference from the Barrick Agreement in paragraph 4.2(g) of the Goldcorp Agreement, which refers to section 8.6 of the Barrick Agreement. As such, the Barrick Agreement itself addresses the intention of Barrick and Xstrata Chile regarding reasonable negative covenants that do not constrain the ability of a shareholder to perform its obligations and liabilities under the Shareholders Agreement. Nor would these covenants be unusual in an institutional financing with a third party.

456 In reaching this conclusion, I have disregarded the voting arrangements that were subsequently agreed to between the parties in the Pledge Agreements. These arrangements contemplated that Datawave would vote the DataSub shares in accordance with the instructions of Goldcorp at any meeting of the shareholders of DataSub. These voting arrangements were not, however, contemplated in the Goldcorp Agreement. I decline to infer that they were always in contemplation in the absence of any evidence to that effect.

457 However, even if it were necessary to take these voting arrangements into consideration, I would reach the same conclusion. A contractual covenant to vote shares in accordance with directions of a third party is not the same as granting the third party the voting rights attached to the shares. That would require an actual registration of the shares in the name of the third party. That

did not occur in this case. Moreover, as Ochagavia noted, Datawave retained the power to change the administrator of DataSub without calling a meeting of shareholders.

458 In summary, Datawave retained the power to direct, or cause the direction of, the management and policies of DataSub through its ownership of the voting shares of DataSub, as well as through its relationship with the Chilean lawyer who, as the administrator of DataSub, had the power to act on its behalf. In particular, Datawave retained the power to cause DataSub to honour its obligations to Xstrata Chile in respect of the Datawave Purchase Agreement. On this basis, I conclude that the Goldcorp Agreement contemplated that DataSub would be established as, and would remain, an Affiliate of Datawave until completion of the DataSub Share Purchase Agreement. I therefore conclude that the Goldcorp Agreement did not create a prohibited Transfer on January 6, 2010 of the Datawave Purchase Agreement to Goldcorp by way of a Transfer to a party that was not an Affiliate of Datawave.

Allegation Based on the Existence of Obligations to Transfer the Datawave Purchase Agreement and the DataSub Shares

459 Barrick submits that the Transfer was a prohibited Transfer because the following two commitments of New Gold existed in the same agreement: (1) a commitment to transfer the Datawave Purchase Agreement to DataSub; and (2) a commitment to transfer the shares of DataSub to Goldcorp. This argument proceeds on the assumption that the effect of these two commitments in the Goldcorp Agreement was an unconditional sale of Datawave's "right to purchase the Offered Interest" from Datawave to Goldcorp. Barrick asserts that, by agreeing to each of these transactions, New Gold indirectly Transferred the Datawave "right to purchase the Offered Interest". This argument can take one of two forms: (1) that the result was to transfer the Datawave Purchase Agreement to Goldcorp prior to DataSub's purchase of the Offered Interest under the Datawave Purchase Agreement; and (2) that the result of the two transactions was an indirect Transfer of the Datawave "right to purchase the Offered Interest" on the basis that there is no substantive structural difference between the theory described above and the structure addressed in respect of this argument. I will address each form of this argument in turn.

460 Under the laws of Ontario, the Goldcorp Agreement could only constitute a transfer of the Datawave Purchase Agreement to Goldcorp before DataSub's purchase of the Offered Interest under the Datawave Purchase Agreement was completed if Datawave's obligation to complete both sale transactions was unconditional as of the date the Goldcorp Agreement was executed or as of the date the Right of First Refusal was exercised. However, as set out above, that was not the case. Under the laws of Ontario, the Goldcorp Agreement contemplated two separate sale transactions - a sale of the Offered Interest to DataSub pursuant to the DataSub Share Purchase Agreement and a sale of the DataSub shares to Goldcorp Tesoro pursuant to the DataSub Share Purchase Agreement. The latter was conditional on the former transaction closing and became unconditional only after the former was concluded.

461 There is no evidence from any of the Chilean legal experts that establishes that the Goldcorp Agreement would be interpreted in a different manner under the laws of Chile. Therefore, the Barrick submission can only be meaningful if the Transfer provisions of the Shareholders Agreement mandate a different result when applied to the transactions contemplated by the Goldcorp Agreement. This issue is therefore a matter of the application of the Shareholders Agreement. There is no basis for such a conclusion for the following reasons.

462 Barrick's argument disregards both the timing and the conditionality of the two sales transactions under the Goldcorp Agreement. Insofar as the Datawave Purchase Agreement constituted Rights and Interests of Datawave, they were transferred to, and held by, an Affiliate of Datawave until the Datawave Purchase Agreement was completed. In addition, based on the interpretation of the Transfer provisions set out above, no Transfer of the DataSub shares arose until the Datawave commitment to sell the DataSub shares to Goldcorp Tesoro became unconditional. This did not occur until after the transaction contemplated by the Datawave Purchase Agreement closed.

463 The second form of this argument reflects the fact that this argument is, in essence, a variant of Barrick's assertion described above that a sale of an asset subject to a non-transferable option constitutes the sale or grant of the option itself, in this case translated to reflect the involvement of DataSub. I have concluded above that there is no legal basis in Chilean law for the legal theory upon which this submission is based. I address the interpretation of the provisions of Article 10 to this argument of Barrick below in considering Barrick's argument that the Goldcorp Transaction should be considered as a whole. I conclude in that discussion that Article 10 of the Shareholders Agreement is not to be interpreted in the manner proposed by Barrick for the reason that it does not further any purpose of the Transfer restrictions. The reasoning in respect of the argument based on a multi-stage transaction is equally applicable to the present argument.

464 Accordingly, I conclude that the existence of the Datawave covenants to assign the Datawave Purchase Agreement to DataSub and to sell the DataSub shares to Goldcorp Tesoro in the same agreement does not give rise to a prohibited Transfer on January 6, 2010 under the terms of the Shareholders Agreement.

Alleged Transfer By Way of Encumbrance

465 Barrick alleges that, by virtue of the breadth of the definition of "Encumbrance" in the Shareholders Agreement, the imposition of a contractual "burden" on a party's Right or Interests constitutes the creation of an Encumbrance on such Rights or Interests and thereby gives rise to a Transfer. It says that the Goldcorp Agreement imposed such a "burden" by limiting the manner and purpose for which Datawave could exercise the Right of First Refusal, and more generally by limiting its rights under the Datawave Purchase Agreement, and thereby limiting Datawave's ability to enjoy such contractual rights. Conceptually, I think that Barrick considers that the granting of this Encumbrance constitutes a direct or indirect Transfer of Datawave's "right to purchase the Offered

Interest" to Goldcorp.

466 I do not agree with this submission. While the definition of an "Encumbrance" in the Shareholders Agreement is framed in broad language, Barrick's position ultimately depends upon a finding that the contractual provisions in the Goldcorp Agreement respecting Datawave's exercise of the Right of First Refusal constituted a "burden". This is exclusively an issue of the contractual interpretation of the Shareholders Agreement. I do not think that such provisions can be so characterized for the following six reasons.

467 First, insofar as there is any evidence as to the meaning of "burden" under Chilean law, it comes from Pena. He testified that there is no "encumbrance" if a party declares in a contract that the party is going to exercise a certain right that arises from a contract. Apart from this evidence, which contradicts the Barrick position, there is no evidence that the concept of a "burden" is recognized under Chilean law.

468 Second, the source of this argument is the Morales Report in which Morales refers to Datawave's covenant in paragraph 4.1(f) of the Goldcorp Agreement and goes on to conclude:

> 122. Therefore, in every single act or contract executed by Datawave under or in connection with or in furtherance of the Acquisition and Funding Agreement Datawave was required to preserve, protect and maintain all the rights of Goldcorp under such agreement.
>
> 123. On January 6, 2010, Datawave's Right of First Refusal was thus effectively and fully Encumbered, or Transferred by way of Encumbrance in the language of the agreement, in favour of Goldcorp. Its exercise would no longer be Datawave's desire but Goldcorp's.

469 Barrick suggests that Pena agreed with this conclusion. However, the questions put to Pena expressly assumed that: (1) the court would find that the Goldcorp Agreement limited Datawave's ability to exercise its rights under section 10.4; and (2) the court would find that the Agreement limited Datawave's ability to "retain the fruit" of the exercise of the Right of First Refusal. In my view, neither of these assumptions is supported by the facts in this case.

470 In oral testimony, Morales described the term "Encumbrance" as extending to a contractual stipulation that completely prohibited the exercise of a right that a party was otherwise free to exercise, rather than merely limiting the circumstances of its exercise. He also described an Encumbrance as addressing the scenario in which a right can only be exercised if a third party gives instructions to do so and/or its consent is required to do so.

471 The New Gold covenants in the Goldcorp Agreement respecting the exercise of the Right of First Refusal are given in the context of a transaction by which New Gold realized the value of its Rights and Interests in the El Morro Project. Rather than limiting Datawave's exercise of its Right of First Refusal, the Agreement reflects Datawave's decision, freely entered into, to exercise such

rights. Rather than limiting its ability to "retain the fruit" of such exercise, it reflects New Gold's realization of the value of the Right of First Refusal.

472 More generally New Gold's decision to enter into the Goldcorp Agreement and to cause Datawave to exercise the Right of First Refusal does not partake of the characteristics identified by Morales set out above that constitute an Encumbrance. To suggest, as Barrick does, that after execution of the Goldcorp Agreement, Datawave no longer had the right to determine whether or not to exercise the Right of First Refusal, i.e., that it could only exercise its right to purchase the Offered Interest such that Goldcorp would become the owner of that interest, does not accurately describe the present circumstances. It ignores both the conditional nature of the two sales transactions in the Goldcorp Agreement, as well as, more importantly, the economic reality of the Goldcorp Transaction and Datawave's voluntary participation in the Transaction. I do not see any basis on which covenants directed toward a party's enjoyment of its Rights and Interests, including realization of their value, can be interpreted to fall within the definition of an "Encumbrance" as a "burden".

473 This general approach is reflected in the opinions of Barros, Pena and Ochagavia, which I prefer to that of Morales for the reason that I consider that they more accurately address the nature of the covenants in the Goldcorp Agreement pertaining to Datawave's exercise of the Right of First Refusal than does Morales' opinion. It was Barros' opinion that, under the Shareholders Agreement, an encumbrance encompasses only acts of disposition or conveyance and does not include acts by which a shareholder uses or enjoys Rights and Interests. Similarly, Pena was of the opinion that the term Encumbrance, as used in the Shareholders Agreement, means the imposition of a "limitative right" over property. According to Pena, a contract imposing a duty to exercise a right of first refusal is not to be considered an encumbrance or burden because it does not devalue or diminish the right of first refusal and therefore does not constitute an Encumbrance. Ochagavia reached the same conclusion in a slightly different manner. He concluded that the Goldcorp Agreement facilitated the exercise of the right of first refusal by Datawave for its benefit by providing the financing necessary to do so and, as such, he was of the opinion that the Goldcorp Agreement did not constitute a burden or an encumbrance.

474 Third, in the absence of evidence regarding the meaning of a "burden" under the laws of Chile, the court can have regard to the meaning under the laws of Ontario. This is reinforced by the fact that the concept of a "burden" appears in an agreement that has been created using North American precedents. The meaning of a "burden" in such jurisdictions, including Ontario, does not extend to covenants of the nature found in the Goldcorp Agreement.

475 The term "burden" is defined in *Black's Law Dictionary*, 7th ed., *s.v.* "burden" as follows:

> n. 1. A duty or responsibility <seller's burden to insure the shipped goods>. 2. Something that is oppressive <a burden on the interstate commerce>. 3. A restriction on the use or value of land; an encumbrance <the easement created a

burden on the estate>

476 Of these uses, only the third is relevant. It suggests, however, that "burden" refers to a restriction on the use or value of land, not a chose in action. I think this correctly reflects the meaning of a "burden" in a legal context in common law jurisdictions.

477 There is no restriction on the use or value of land in the present circumstances. The provisions in the Goldcorp Agreement upon which Barrick relies relate to the exercise of a contractual right, a chose in action, not the enjoyment of, or the use or value of, real property.

478 Fourth, reading the definition of "Encumbrance" in the context of the Transfer provisions, I think the definition of "Encumbrance" is restricted to circumstances that have a comparable economic effect to a conveyance or other disposition, in whole or more likely in part, of a shareholder's Rights and Interests.

479 The purpose of including an Encumbrance in the definition of Transfer is to prevent a shareholder from effecting the economic equivalent of a Transfer in favour of a third party by means of a transaction which is not otherwise subject to the provisions of Article 10 but, in respect of which, the other shareholder is entitled to the benefit of the Transfer restrictions. An obvious example is a financing pursuant to which a shareholder could find itself subject to a financial institution as its joint venture partner after realization proceedings. As a restriction in the right of a shareholder to alienate its assets, however, the term "Encumbrance" should not be defined more broadly than is necessary to address the purposes of the Transfer restrictions. The broader definition of "Encumbrance" proposed by Barrick would restrict the class of permissible Transfers in circumstances where there is no need to provide protections to the shareholder who is exiting the joint venture to further the purposes of the Transfer provisions.

480 Fifth, to the extent Barrick is correct, paragraph 8.6(h) of the Barrick Agreement functions in a similar manner. The fact that Barrick agreed to this provision in the Barrick Agreement is therefore evidence according to the Authentic Rule that Barrick itself held the view that a covenant of this nature did not constitute an Encumbrance. I can see no reasonable distinction for present purposes between the provisions to which Xstrata Chile agreed in the Barrick Agreement relating to its enjoyment of a possible right of first refusal in its favour in the circumstances contemplated by paragraph 8.6(h) and the provisions of the Goldcorp Agreement respecting New Gold's exercise of the Right of First Refusal.

481 An agreement to waive the exercise of a right of first refusal is surely a limitation of the right on Barrick's theory. In addition, the requirement to "use reasonable commercial efforts to co-operate with Barrick" in respect of the exercise or waiver of rights of first refusal can have only one meaning if it is to have substantive content in circumstances where Xstrata Chile was exiting the joint venture. As Ochagavia suggests, Xstrata Chile was effectively bound to implement arrangements whereby Barrick could obtain the New Gold Interest if it so chose via Xstrata Chile's exercise of the right of first refusal. These circumstances are substantially similar to those

contemplated by the Goldcorp Agreement. Accordingly, while the provisions of section 8(h) operated in different circumstances and provided less express protection to Barrick than the provisions of paragraph 4.1(f) of the Goldcorp Agreement, there is no difference in principle that I can discern in the nature and purpose of such provisions.

482 Lastly, I do not think that Barrick's definition of "Encumbrance" accords with commercial reality. The definition proposed by Barrick is not necessary to further any of the purposes of a right of first refusal discussed below and would capture covenants given in other circumstances that Barrick acknowledges are not intended to constitute a Transfer. The Barrick position is also inconsistent with any reasonable financing arrangements that would have been required by lenders to New Gold if New Gold had chosen to finance the acquisition and purchase of the Offered Interest for its own account.

483 Based on the foregoing, I conclude that the Goldcorp Agreement did not give rise to an Encumbrance that resulted in a prohibited Transfer.

Alleged Unsuccessful Attempt to Circumvent the Transfer Restrictions in the El Morro Shareholders Agreement

484 Barrick says that the Goldcorp Transaction was structured as a transaction that was limited to the 70% Interest in order to circumvent the prohibitions on Transfer in the Shareholders Agreement. Specifically, Barrick submits that New Gold/Datawave's purpose and intent in entering into the Goldcorp Agreement was to circumvent the right of first refusal in favour of Xstrata Chile that would have been required under section 10.4 if the New Gold Interest had been conveyed together with Datawave's right to purchase the Offered Interest. Barrick says that the court should disregard the legal effect of the individual transactions contemplated by the Goldcorp Agreement and interpret the Goldcorp Agreement as a whole. It says that, when viewed on this basis, the Agreement constituted an indirect Transfer of the Datawave right to purchase the Offered Interest i.e., Datawave's Right of First Refusal and/or the Datawave Purchase Agreement and therefore required compliance with section 10.2(1)(a). In addition, Barrick also argues that, even if the steps in the Goldcorp Agreement are analyzed separately, the Goldcorp Transaction gives rise to two independent breaches of the Shareholders Agreement. I will address issue each in turn.

Analysis and Conclusions

485 This submission has several aspects. I will address in turn the following issues raised by Barrick in respect of the structure of the Goldcorp Agreement: (1) that the Goldcorp Agreement should be interpreted under the laws of Ontario as a whole, having the objective of a Datawave sale of its "right to purchase the Offered Interest" to Goldcorp; (2) that for the purposes of the Shareholders Agreement, the Goldcorp Agreement should be treated as constituting, or giving rise to, a Transfer of the Offered Interest that was a prohibited Transfer when the Goldcorp Transaction is regarded as a whole; and (3) that DataSub was inserted into the structure to avoid the Transfer restrictions.

The Interpretation of the Goldcorp Agreement Under the Laws of Ontario

486 I have concluded above that, as between Datawave and Goldcorp, the individual covenants in the Goldcorp Agreement were legally enforceable as separate covenants and that the Goldcorp Agreement did not constitute an unconditional sale to Goldcorp of the Right of First Refusal, the Datawave Purchase Agreement or the Offered Interest.

487 Barrick submits, however, that, under certain principles of contractual interpretation in Ontario, the Goldcorp Agreement should instead be viewed as a composite whole in assessing its legal effect, which it says is the sale of the Right of First Refusal or the Datawave Purchase Agreement, in either case in a manner that constituted a prohibited Transfer under the Shareholders Agreement.

488 Before proceeding, I note three important features of this argument. First, the argument in this section proceeds as a matter of interpretation of the Goldcorp Transaction under the laws of Ontario. I have considered the issue under the laws of Chile in the next section. Second, Barrick does not argue that the Goldcorp Agreement constituted an unconditional sale of the 70% Interest from Datawave to Goldcorp except to the extent that the transaction was tantamount to a sale or assignment of Datawave's "right to purchase the Offered Interest". Third, for the purposes of this argument, Barrick appears to accept, in line with the analysis of the legal effect of the Goldcorp Agreement set out above, that if the Goldcorp Agreement is analyzed solely by reference to the individual covenants therein, it does not constitute a prohibited Transfer. However, Barrick argues that the legal effect is different when the Agreement is looked at as a whole.

489 In particular, Barrick relies on a statement of the Court of Appeal in *3869130 Canada Inc. (c.o.b. I.C.B. Distribution 2001)* v. *I.C.B. Distribution Inc.*, 2008 ONCA 396, [2008] O.J. No. 1947, at para. 33, to the effect that, where parties enter into a series of contracts to give effect to a transaction, a court should have regard to the surrounding contracts in the interpretation of a particular contract. Barrick also relies more heavily on the statement in *GATX*, at para. 67, that the effect of the third party agreement in that case must be looked at in its entirety and judged as a whole. Similarly, it relies on *Apex Corp.* v. *Ceco Developments Ltd.*, 2008 ABCA 125, [2008] A.J. No. 325, at para. 35, in which the Alberta Court of Appeal stated that it was necessary to look at "the overall scheme and final result" rather than to adopt a "freeze-frame approach". I do not accept this argument for the following reasons.

490 First, as a general proposition, I think this argument is incorrect insofar as it is cast as a matter of the interpretation of the Goldcorp Agreement.

491 This is illustrated by the approach of the court in *GATX* referred to above. In that decision, the court was required to determine whether a shareholder of a joint venture corporation had breached a right of first refusal provision in a shareholders agreement by entering into an agreement with a third party in respect of a proposed corporate reorganization that would result in a takeover bid being made for the shareholder's shares in the joint venture corporation.

492 To determine the facts to which this test was applied, the court established the legal obligations provided for in the agreement between the shareholder and the third party. There was no suggestion that any of the covenants were unenforceable as a legal matter or that the transaction was a "sham transaction". Therefore, the relevant facts to which the test, i.e., the right of first refusal provision, was applied were constituted by the legal obligations of the parties as set out in the third party agreement.

493 The court then determined the scope of the right of first refusal by applying standard principles of contractual interpretation. The court concluded, at para. 68, that the words "sell or otherwise dispose of" in the shareholders agreement were "intended to encompass all means and methods by which either of them might choose to terminate their interest in the CGTX shares". In other words, it interpreted the definition of "disposition" very broadly.

494 Deciding whether a breach had occurred therefore involved determining whether the facts, i.e., the legal obligations, triggered a breach of the right of first refusal. The court found that there had been a breach because the right of first refusal was to be interpreted broadly and therefore, when applied to the facts, mandated a consideration of whether the result of these legal obligations constituted a termination by one party of its interest in the CGTX shares. The court held that it did and therefore a breach had occurred.

495 The important point is that the requirement to look at the result of performance of the relevant legal obligations was mandated by the scope of the right of first refusal, not the law that governed the third party agreement. In the first step of the exercise, which required finding the facts to which the test was applied, the court did no more than describe the legal relationships established by the third party agreement. The court did not apply any principle of looking at the agreement as a whole in this step. Consideration of the third party agreement as a whole took place in the third step of the exercise - the application of the test, i.e., the right of first refusal provisions, to the facts i.e., the legal obligations. Moreover, the court examined the third party agreement in this manner only because such an exercise was mandated by the test, i.e., the broad language of the right of first refusal, which resulted from the contractual interpretation of that provision. If, for example, the court had concluded that the term "disposition" was intended to be limited to an actual conveyance, no such analysis would have been required.

496 Accordingly, the principle of looking at the result of a third party agreement would only be applied in the present context if the Shareholders Agreement warranted such an approach at the third stage of determining whether a breach had occurred, i.e., in applying the provisions of the Shareholders Agreement to the legal relationships established by the Goldcorp Agreement. Any requirement to consider the effect of the Goldcorp Agreement as a whole to determine whether a breach has occurred must therefore be located in the language of the Shareholders Agreement or the principles of Chilean law. This is addressed below.

497 Second, there are obvious differences in the present circumstances from those in the cases

relied upon by Barrick. In respect of the *GATX* decision, this is addressed in the next section. In respect of *I.C.B. Distributions*, the present circumstances do not involve interpreting the Goldcorp Agreement by reference to any other agreements between Datawave and Goldcorp. While I accept that the Goldcorp Agreement was drafted with a view to avoiding a contravention of the Shareholders Agreement, I do not see how determining the operation of the covenants in the Goldcorp Agreement is affected by the contractual interpretation of the Shareholders Agreement.

498 As a related matter, Barrick also suggests that the interpretation of the Goldcorp Agreement should be informed by certain factual evidence in the form of descriptions of the effect of the Agreement by the parties. In particular, Barrick relies on Jeannes' description of the Goldcorp Transaction as the acquisition of "Datawave's ROFR ... and therefore the 70% from Xstrata" as evidence of this true purpose and intent. In the same vein, it relies on other descriptions of the Goldcorp Transaction by New Gold and Goldcorp representatives who referred to the Goldcorp Transaction as involving the acquisition of the Datawave Right of First Refusal.

499 In addition to the conceptual issue raised above, which excludes the significance of such evidence on a different ground, I do not think this language is useful. There is no suggestion that the parties used the language upon which Barrick relies to describe an understanding of the legal relationships involved. In Jeannes' case, in particular, I am satisfied that his short-form description of the form of transaction being considered at the time as involving the acquisition of Datawave's Right of First Refusal and of Xstrata's 70% interest in the El Morro Project can be explained in terms of his original understanding of a transaction which contemplated Goldcorp's acquisition of 100% of the El Morro Project, which was to be accomplished by the acquisition of the New Gold Interest including the Right of First Refusal followed by an exercise of the Right of First Refusal. More importantly, this is not an evidentiary matter. It is a matter of the scope of the Transfer restrictions in the Shareholders Agreement. In the absence of demonstration of a "sham transaction", which has been addressed and rejected above, I do not think business short-hand for complicated business transactions is a reliable guide to such issue.

500 In summary, the legal effects of the commitments of Datawave and Goldcorp in the Goldcorp Agreement are those determined above. These constitute the facts to which relevant provisions the Shareholders Agreement, as interpreted by the court, are applied to determine whether a breach has occurred. There is no room to interpret the legal effect of the Goldcorp Agreement as a whole under the laws of Ontario in the manner proposed by Barrick.

501 There is a similar problem with a related argument raised by Barrick in respect of the loan arrangements contemplated by the Goldcorp Agreement.

502 Barrick submits that the evidence does not support a finding that the Goldcorp Agreement constituted a *bona fide* financing arrangement. The thrust of Barrick's argument is that, from Goldcorp's perspective, the alleged loan was part of the overall transaction by which it acquired the Offered Interest and had none of the indicia of a commercial loan between third parties.

503 I am of the opinion that whether or not the loan constituted a "financing arrangement" under the laws of Ontario is a semantical argument having no legal significance for the purposes of determining whether the Goldcorp Agreement gave rise to a prohibited Transfer. The loan arrangements under the Goldcorp Agreement are enforceable in accordance with their terms under the laws of Ontario. For purposes of determining the facts to which the provisions of the Shareholders Agreement are to be applied, the loan agreements are fully described by the Goldcorp Agreement - they are what they are. Whether they have any significance in this case depends upon whether the provisions of Article 10 of the Shareholders Agreement would treat such arrangements in a manner that gives rise to a breach thereunder.

The Interpretation of the Shareholders Agreement under the Laws of Chile

504 Given the foregoing conclusion, this argument of Barrick turns on whether the provisions of Article 10 of the Shareholders Agreement require that, for purposes of determining whether a breach of the Shareholders Agreement has occurred, the Goldcorp Agreement should be viewed "as a whole" and, on that basis, constitutes a prohibited Transfer of Datawave's "right to purchase the Offered Interest" based on the theory proposed by Barrick that a future sale of Rights and Interests subject to a non-transferable option should be treated as a sale of the option itself.

505 Barrick has not established that there is any general rule under Chilean law to the effect that a "multi-stage" agreement, as it characterizes the Goldcorp Agreement, should be interpreted under the laws of Chile as a whole, disregarding the individual steps or transactions and addressing only the final result. I have also concluded that Chilean law would not treat the Goldcorp Agreement as a sale or grant by Datawave to Goldcorp of Datawave's "right to purchase the Offered Interest". Accordingly, if the Goldcorp Agreement is to be treated in such a fashion for purposes of determining whether a prohibited Transfer has occurred, the basis for that approach must be found in the terms of the Shareholders Agreement itself.

506 Barrick argues that the use of the term "indirect" in the definition of Transfer provides such a basis. This issue goes to the heart of Barrick's submissions because it brings together the two principal elements of Barrick's position. As mentioned, Barrick argues that the Goldcorp Agreement constituted an indirect sale of Datawave's "right to purchase the Offered Interest" in isolation from the New Gold Interest and therefore contravened section 10.2(1)(a). This is a matter of the contractual interpretation of the provisions of Article 10.

507 In this context, the Canadian authorities relied upon by Barrick, particularly *GATX*, while not directly applicable, are illustrative. However, there is a fundamental difference between the circumstances in *GATX* and in the present proceeding, that, in my opinion, compels a different conclusion.

508 It is always possible to collapse a multi-stage transaction into a single-stage transaction described in terms of the before and after situations. It is not surprising that in simplifying the description of any transaction in this manner, it is possible to describe it in terms that will

contravene particular provisions of a shareholders' agreement. A similar attempt to do so by characterizing the economic effect of the Goldcorp Transaction as a sale of the Right of First Refusal was rejected earlier in these Reasons.

509 Such an approach is only justified, however, if the end result of the transaction offends the nature and purpose of the applicable provisions in the Shareholders Agreement. In the present case, reliance on the "indirect" language in the definition of "Transfer" would only be appropriate if the result of the Goldcorp Transaction were to deprive Xstrata Chile of the benefit of protections in its favour provided for in Article 10. Based on the analysis set out above, this was not the case. The structure of the Goldcorp Transaction addressed and provided for the protections to which a selling shareholder is entitled under Article 10. Characterizing a transaction structured in the form of the Goldcorp Transaction as an indirect conveyance of the Right of First Refusal or the Datawave Purchase Agreement would not further any purpose of the Transfer restrictions.

510 Barrick argues for an interpretation of the Transfer restrictions that differs in several respects from the principles articulated above. This approach is, in turn, based on a fundamentally different view of the nature and extent of a selling shareholder's entitlement to the protections afforded by Article 10. It is based on the premise that it is necessary for the Transfer restrictions to operate in the manner proposed by Barrick to avoid a commercially absurd result.

511 I have rejected this approach to the contractual interpretation of the Transfer restrictions for the following reasons. First, and most important, for the reasons set out above, I am not satisfied that the evidence supports the conclusion that, absent such an interpretation, the result would necessarily be a commercial absurdity. Second, setting aside the commercial absurdity argument, there is no reason for providing a right of first refusal in favour of an exiting shareholder. Put another way, what purpose of the Transfer restrictions, and in particular, of the right of first refusal, is furthered by requiring a sale of the New Gold Interest and a "mirror" right of first refusal? In this scenario, the only possible beneficiary would be the third party offeror who is not a party to the Shareholders Agreement. There is, however, no reason why the parties to the Shareholders Agreement would have intended to favour a third party to the Agreement over the remaining shareholder, unless it is accepted that the Goldcorp Transaction produces a result that would, if permitted, negate the utility of the right of first refusal as a mechanism by which a shareholder can exit the joint venture - the "commercial absurdity" argument rejected above.

512 Accordingly, I conclude that the Shareholders Agreement does not mandate an approach to the Goldcorp Agreement, for purposes of assessing compliance with the Transfer restrictions, that would collapse the two separate sale transactions therein such that the Goldcorp Agreement is considered to constitute a prohibited indirect Transfer of Datawave's right to purchase the Offered Interest.

The Involvement of DataSub

513 I also do not think that there is any merit to the argument that DataSub was inserted into the

structure of the Goldcorp Transaction to circumvent in some manner the Transfer restrictions in the Shareholders Agreement. I reject this argument for two reasons.

514 First, Barrick has failed to demonstrate the precise means by which the use of DataSub had the result of circumventing the Transfer restrictions, apart from the indirect Transfer argument addressed above. Moreover, there are legitimate commercial reasons for the use of a Chilean subsidiary to hold the 70% Interest, including tax considerations that are set out later in these Reasons. Barrick itself intended to cause its own Chilean subsidiary to complete the purchase of the Barrick transaction. In addition, it provided a mechanism for extending the Xstrata Chile representations and warranties to Goldcorp after completion of the sale of the DataSub shares (but not before and therefore is not evidence for Barrick's position that the Goldcorp Transaction gave rise to a transaction directly between Xstrata Chile and Goldcorp as Barrick suggests). There is, therefore, no factual evidence to support Barrick's allegation that there was no legitimate commercial reason for inserting DataSub into the transaction.

515 Second, and more fundamentally, the analysis of the Goldcorp Transaction and Datawave's compliance with the provisions of the Shareholders Agreement set out above does not depend upon the existence or involvement of DataSub in the Goldcorp Transaction. To be clear, I have concluded that the Goldcorp Agreement did not constitute, or give rise to, a prohibited Transfer under the Shareholders Agreement even if the involvement of DataSub is disregarded, that is, even if it is analyzed as a sale transaction to Datawave of the 70% Interest pursuant to the Datawave Purchase Agreement followed by a sale of the 70% Interest to Goldcorp/Goldcorp Tesoro conditional upon completion of the former transaction. The differentiation of the subject-matter under the Datawave Purchase Agreement and under the DataSub Share Purchase Agreement adds an additional dimension to the Goldcorp Transaction that reinforces the conclusion that Datawave did not engage in a prohibited Transfer to Goldcorp. It is not, however, necessary for the conclusions reached above.

Analysis of Particular Steps in the Goldcorp Agreement

516 Barrick's alternative argument is that, independent of the alleged breach of the Transfer restrictions when the Goldcorp Agreement is addressed as a whole, two steps in the transaction described by the Goldcorp Agreement gave rise to independent breaches of the Shareholders Agreement with the result that completion of the Goldcorp Transaction contravened the Transfer restrictions of section 10.1 of the Shareholders Agreement. I think Barrick considers that these issues also involve allegations of attempted circumvention of the provisions of the Shareholders Agreement, given their treatment in Barrick's written submissions. I find that neither allegation of breach of the Shareholders Agreement has merit.

517 The first alleged breach pertains to Goldcorp's wire transfer directly to Xstrata Chile of the funds that Goldcorp Tesoro loaned to DataSub and DataSub used for the purpose of acquiring the Offered Interest. However, the fact that Goldcorp wired the loan proceeds directly to Xstrata Chile

on behalf of DataSub is not sufficient to conclude that the actual purchaser of the Offered Interest was Goldcorp. Nor was it materially inconsistent with the mechanism provided in section 10.4(2) of the Shareholders Agreement. The wire transfer arrangements in the Goldcorp Agreement reflected common commercial practice to protect lenders. Indeed, as Ochagavia notes, section 4.1 of the CFLA contemplates similar arrangements in respect of advances made under that Agreement. This is therefore an argument of form over substance that I reject in the absence of any other evidence regarding the structure of the Goldcorp Transaction that supports the allegation. In my opinion, the payment arrangements neither constitute a breach of the provisions of section 10.4 of the Shareholders Agreement nor evidence of an intended circumvention of the Transfer restrictions in the manner described below.

518 The second alleged breach pertains to the commitment in the Goldcorp Agreement to assign the Datawave Purchase Agreement from Datawave to DataSub.

519 Barrick alleges that this gave rise to a breach of section 10.1 of the Shareholders Agreement. Barrick argues that, based on Morales' testimony, both section 16.1 of the Datawave Purchase Agreement and section 10.3 of the Shareholders Agreement applied to the assignment of the Datawave Purchase Agreement to DataSub. Barrick argues that the Goldcorp Agreement contemplated that DataSub, when incorporated, would not constitute a wholly-owned subsidiary of Datawave for purposes of section 16.1 and, as mentioned, would not satisfy the requirements of an Affiliate of Datawave for purposes of section 10.3 of the Shareholders Agreement.

520 The defendants differ on their approach to this issue. Xstrata Chile maintains that DataSub was at all relevant times an Affiliate of Datawave and that the assignment of the Datawave Purchase Agreement to DataSub satisfied section 10.3 of the Shareholders Agreement. New Gold and Goldcorp, while initially taking this position, appear to place more reliance on the position that the governing assignment provision for the Datawave Purchase Agreement was section 16.1 of that Agreement. They say this provision was satisfied because, whether or not DataSub was also an Affiliate of Datawave, it was clearly a wholly-owned subsidiary of Datawave.

521 I have concluded above that the Goldcorp Agreement did not contemplate that DataSub would be established as an Affiliate of Goldcorp before the Offered Interest was acquired and DataSub's shares were sold to Goldcorp Tesoro. For the reasons set out above, I am satisfied that DataSub was an Affiliate of Datawave at the time it acquired the Datawave Purchase Agreement and at the time it acquired the Offered Interest.

522 In addition, insofar as it is also relevant, I conclude that DataSub was a "wholly-owned" subsidiary" of Datawave at such time for the purpose of section 16.1 of the Datawave Purchase Agreement. On this issue, I accept Barros' evidence that, under Chilean law, the concept of a wholly-owned subsidiary is a matter of ownership alone. This is consistent with the fact that the concept is a recent import from North American agreements where the concept is typically regarded as addressing *de jure* rather than *de facto* control. Further, a company that is otherwise a

wholly-owned subsidiary may be subject to contractual constraints in favour of a third party, such as, for example, a financial institution, without losing that status. Barros was clear in his evidence to this effect. It also accords with commercial reality. While Morales testified that, in his opinion, a wholly-owned subsidiary connoted "ownership, benefit and control", he provided no authority for this proposition. For these reasons, I find that DataSub satisfied the definition of a "wholly-owned subsidiary" for the purposes of section 16.1 of the DataSub Purchase Agreement.

523 Given these conclusions, it is not necessary to address the issue of which provision or provisions governed the assignment of the Datawave Purchase Agreement to DataSub. The assignment of the Datawave Purchase Agreement to DataSub satisfied both section 10.3 of the Shareholders Agreement and section 16.1 of the Datawave Purchase Agreement. Therefore, the assignment did not give rise to a breach of the Shareholders Agreement.

Alleged Breach of Good Faith Obligations Under the El Morro Shareholders Agreement

524 As mentioned above, Datawave was required to exercise the Right of First Refusal in accordance with its good faith obligations under Chilean law. Barrick says this required Datawave to exercise the Right of First Refusal in accordance with the common business practice and understanding regarding rights of first refusal. Barrick argues that Datawave's exercise of the Right of First Refusal did not respect this requirement and therefore breached its good faith obligations to Xstrata Chile, even if the contractual provisions of the Shareholders Agreement did not prevent or prohibit pre-sales of the 70% Interest by Datawave prior to the exercise of the Right of First Refusal.

525 There is a threshold difficulty with this argument. As mentioned above, the good faith obligations of Datawave under Chilean law do not create or impose obligations where the law or the Shareholders Agreement did not otherwise do so. To the extent that Barrick's submissions in this section rely on such good faith obligations for this purpose, given the determination above regarding the operation of the Transfer restrictions, including in particular article 10.4, there is no evidence to support such a finding.

526 In addition, for completeness, it should be noted that Barrick did not seek or receive any assurance or representation from New Gold/Datawave or from Xstrata Chile regarding the manner in which the provisions of Article 10 were interpreted by the parties to the Shareholders Agreement, the manner in which Datawave was entitled to exercise the Right of First Refusal and resell the 70% Interest, or the nature of any restrictions or limitations on Datawave's exercise of the Right of First Refusal. There is, therefore, no basis for the existence of good faith obligations based on misrepresentations made by any of the defendants.

527 For these reasons, I find that, under the laws of Chile, there is no basis for a finding that Datawave breached its obligations of good faith by exercising the Right of First Refusal in a manner contrary to common business practice and/or understanding regarding rights of first refusal.

528 I propose, however, to address the two principal submissions of Barrick in this regard because I am also of the opinion that, even if such good faith obligations could operate, Barrick has failed to establish the evidence that would support a finding that Datawave did, in fact, breach a common business practice or understanding. I will also address a related factual defence asserted by the defendants that, to the extent it is relevant, Datawave has established that it exercised the Right of First Refusal for its "benefit, account and risk".

Common Business Practice Pertaining to the Operation of Rights of First Refusal

529 Barrick submits that Datawave exercised the Right of First Refusal for a purpose that is contrary to common business practice and, as such, breached its good faith obligations, even if it did not breach the strict wording of the Shareholders Agreement. It says that the common business practice and understanding in respect of rights of first refusal is that a non-selling joint venture partner must first acquire, or "consolidate", the selling joint venture partner's interest for its own account before it can enter into an agreement to sell some or all of that interest to a third party. To be clear, while similar to the issues raised regarding the contractual interpretation of section 10.4, this is a separate argument to the effect that Datawave breached its obligations of good faith in exercising the Right of First Refusal in a manner that was contrary to common business practice and understanding regarding rights of first refusal.

530 There is no evidence specific to the common business practice and understanding of the operation of rights of first refusal under the laws of Chile, whether related to the performance of obligations of good faith or otherwise, apart from the personal views of the Chilean legal experts and disputed testimony concerning a recent Chilean corporate transaction involving a right of first offer. In this section, I therefore consider the evidence regarding (1) the purposes for which rights of first refusal are commonly exercised in the mining industry; and (2) the economic effects of the exercise of a right of first refusal.

531 The issue of the purpose of a right of first refusal was addressed in the testimony of both the lay witnesses and the Chilean expert witnesses. I propose to summarize the testimony of certain of the witnesses to provide an indication of the divergence of both opinion and perspective among the witnesses and the parties.

The Testimony of Certain Witnesses

532 Morales testified that, in his opinion, a right of first refusal was designed to allow a selling shareholder to exit a company or a joint venture and achieve the best possible price. However, it should be pointed out that none of the other Barrick witnesses suggested this purpose for a right of first refusal. I think it is manifestly incorrect. In fact, it is contradicted by Regent's testimony discussed below.

533 In Regent's view, the purpose of a right of first refusal was to allow a joint venture party, implicitly the majority party, to consolidate its interest in a mining project after the commencement

of production, when presumably the minority partner would want to monetize its position to fund new exploration activities. As mentioned, Regent also testified that a right in favour of a non-selling shareholder to exercise a right of first refusal and to re-sell a departing shareholder's interest would result in a "chilling effect" on the selling shareholder's ability to maximize the value of its interest.

534 Baker did not testify regarding the purpose of a right of first refusal. Instead, he testified as to his general understanding of the operation of rights of first refusal. Baker says that he understood that Datawave could exercise the Right of First Refusal if it found a partner to invest sufficient funds in Datawave, by a loan or an equity investment, to permit the exercise. He understood that Datawave could resell any portion of the project, but only after it had consolidated 100% of the interests in the project. In his view, the purchase of the Offered Interest and the sale of a portion of the consolidated interest, whether 70% or otherwise, had to be undertaken in two separate transactions, without any clarity as to the time required between the two transactions. Baker did not, however, base his understanding on any specific language of the Shareholders Agreement.

535 Jeannes testified that the purpose of a right of first refusal was to give the non-selling party the opportunity to acquire the departing party's interest to prevent an undesirable stranger from entering the joint venture. As such, he considered that a junior joint venture partner was usually more interested in a right of first refusal inasmuch as the asset would be relatively more significant to a junior mining company and, accordingly, the identify of its joint venture partner and its development plans for the asset would be relatively more important to it than to senior mining companies.

536 Jeannes also testified that, in his view, a right of first refusal prevents a departing joint venture party from maximizing the value of its interest. In the first instance, it prevents an auction from developing between the third party and the non-selling joint venture partner. More generally, he considered that parties wishing to maximize the value of an asset would not put any restrictions on the ability to sell that asset. He also testified that parties can draft provisions in a joint venture agreement to avoid the negative effect on price created by a right of first refusal. He referred specifically to a "right of first offer" as an alternative to a right of first refusal and to an exercise price for the right of first refusal in excess of the third party offer price to fund a "break fee" that could be paid to an unsuccessful third party.

Conclusions Regarding the Manner in Which Rights of First Refusal are Commonly Exercised

537 From the foregoing, I draw the following conclusions regarding the nature and purpose, and the economic effects, of rights of first refusal in the mining industry.

538 First, the purpose for exercising a right of first refusal, and the circumstances of exercise, may well differ as between senior and junior mining companies.

539 Senior mining companies may consider the principal purpose to be to allow them to consolidate 100% of the interests in a producing asset after development has been completed, as

Barrick asserts. As addressed elsewhere, there may also be circumstances in which a majority partner may have an interest in preventing the introduction of an undesirable minority joint venture party in substitution for an exiting party.

540 That is not, however, exhaustive of the purposes for which a right of first refusal may be exercised, insofar as it ignores the reality that a junior mining company or an intermediate producer may have very different objectives. These parties typically regard the principal purpose of a right of first refusal to be to give them control over the identity of a new joint venture partner if the proposed purchaser is unacceptable to it as a majority partner. As the present circumstances illustrate, from the perspective of a junior or intermediate mining company, whose interests lie in seeing development occur as quickly as possible on the most attractive financial terms possible to it, some prospective majority purchasers are more attractive than others.

541 There is nothing in the concept of a right of first refusal that prevents the exercise of a right of first refusal for any of the purposes described above. A central feature of a right of first refusal is the departing party's decision that it is prepared to sell its interest at a fixed price. Provided that the terms and conditions of the departing party's proposed sale, including but not limited to price, and the contractual provisions of the right of first refusal itself, are respected in the exercise of a right of first refusal, I do not see any basis in the concept of a right of first refusal for restricting the purposes for which a remaining shareholder may exercise a right of first refusal in its favour.

542 Instead, I think it is more important that any interpretation of right of first refusal provisions, and of the scope of any good faith obligations pertaining to the exercise of such provisions, reflect the variety of purposes for which such rights may be used. Accordingly, in the absence of contractual provisions that contemplate restrictions on either the purposes for which a right of first refusal may be exercised, or the manner of exercise, such provisions and good faith obligations should be interpreted with a view to permitting the exercise of any such right of first refusal for any such purposes.

543 Second, there are two economic effects of a right of first refusal. The first economic effect is to guarantee a price to the selling party, being the amount offered by the third party. Accordingly, in terms of the outcome, the selling party should be neutral as between an eventual purchase by the third party and a purchase by the non-selling party, apart from the "commercial absurdity" argument that has been rejected. The other economic effect is to potentially inhibit the ability of the selling party to maximize the value of its interest. The extent to which this will actually occur in any given situation will, however, depend upon a number of factors. A few possibilities have been suggested by the witnesses in this case. One possibility is that a right of first refusal may prevent an auction between the third party offeror and a non-selling joint venture partner who is able to purchase the selling party's interest. Another possibility is that the risk of loss of the transaction to the non-selling joint venture partner may deter potential purchasers.

544 Third, as a related matter, there is no scenario under which a right of first refusal is directed

toward maximizing the value of a selling party's interest. As a constraint on the freedom of such party to sell its interest in the manner it chooses, a right of first refusal can only reduce the value of the departing party's interest. Being a creation of the contract between joint venture parties rather than a statutory creation, however, the parties can also address, although probably not eliminate entirely, the risk that the seller's interest will not be maximized, among other things, by introducing contractual arrangements or by agreeing to a joint sale of 100% of the interests in the asset.

545 Fourth, to the extent that one of the purposes of a right of first refusal is to enable a remaining shareholder to have some ability to prevent imposition of an unwanted shareholder, there is nothing inconsistent with the evidence of the nature or use of rights of first refusal to allow a pre-arranged sale to a more desirable party, provided the selling shareholder is not prejudiced and receives the benefit of the protections under the shareholder agreement to which it is entitled. Put another way, there is no obvious principle that distinguishes between "consolidation" and "pre-sales" based on the nature and purpose, or the economic effects, of rights of first refusal.

546 Fifth, while it is more likely that a majority joint venture partner will have the financial resources to exercise a right of first refusal than a minority partner, when the minority partner is a junior mining company, there are many situations in which that is not the case. Among other circumstances, rights of first refusal clauses are also present in joint venture agreements between two joint venture partners that each possess the financial capacity to exercise the right of first refusal. Further, the financial capacity of joint venture partners can change over the life of a joint venture. A partner that lacked the financial capacity to acquire its partner's interest at the time of formation of the joint venture may acquire the means to exercise a right of first refusal later when it arises. Accordingly, there is no implicit assumption regarding the financial circumstances of the joint venture parties than can inform a common business understanding regarding the exercise of rights of first refusal.

547 Sixth, similarly, there is nothing in the foregoing discussion of rights of first refusal that suggests that there is any common practice or understanding to the effect that third parties have any control or other rights in respect of the determination of the identity of the new shareholder or joint venture partner. Provided the selling shareholder receives the purchase price bargained for in the third party agreement on the terms and conditions provided for in that agreement, it has no right to determine the identity of the ultimate purchaser. There is no obvious principle that would grant such a right to the third party who derives whatever rights it has through its contract with the selling shareholder.

548 Based on the foregoing, I conclude that there is no evidence upon which the court can find that Datawave exercised the Right of First Refusal in a manner that was contrary to common business practice. There is nothing in either the purposes for which a right of first refusal may be exercised or in the economic effects of the exercise of a right of first refusal that suggests or implies any restrictions of the nature proposed by Barrick in this action. Accordingly, there is no basis for a finding that Datawave breached its good faith obligations to Xstrata Chile in entering into, and

implementing, the Goldcorp Agreement.

Canadian Case Law Relied on by Barrick

549 Barrick also submits that, in the absence of Chilean authorities on this issue, Datawave's good faith obligations should be informed by the approach of Canadian courts to the customary operation of rights of first refusal. While such decisions are not determinative of such obligations, it is Barrick's position that they should be persuasive as being reflective of a common understanding regarding the purpose of rights of refusal.

550 The principal decision relied upon by Barrick is *GATX*, in which rights of first refusal were described in the following manner at paras. 36 and 37:

> The general purpose of this Right of First Refusal, it seems to me, is evident. It is to protect the parties' respective interests by ensuring that if one party decides to dispose of all or a portion of its shares to a third party the other party has the pre-emptive right to acquire those shares first, on the same terms and conditions, including price, as that being offered by the third party. In this way, a party is protected against having an unwanted co-shareholder foisted upon it.
>
> This interpretation, which I believe to be clear from the face of the document itself, is consistent with the legal characteristics attributed to a right of first refusal by the Supreme Court of Canada. It is also consistent with the views of the parties here, as expressed in the evidence.

Barrick submits that this statement demonstrates that the nature and purpose of a right of first refusal is limited to allowing a non-selling joint venture partner to pre-empt a new partner by acquiring "full ownership" of the departing joint venture partner.

551 I think it is clear, however, that *GATX*, and the other Canadian decisions to which Barrick points, do not purport to be a complete description of the nature and purposes of rights of first refusal. They are specific to the facts in the particular decisions. They therefore cannot be relied upon as judicial guidance as to the existence of a common business understanding or practice regarding the only purposes for which, and the only manner in which, rights of first refusal may be exercised.

552 *GATX*, for example, did not involve the acquisition of a departing joint venture party's interest, let alone a resale. While the passage relied on by Barrick confirms that a right of first refusal permits a non-selling shareholder to avoid imposition of an unwanted new partner by acquiring the departing partner's interest, it does not address in any manner the issue of whether a non-selling partner can sell the selling partner's interest before completion of its acquisition of that interest.

553 Accordingly, I conclude that the Canadian law relied upon by Barrick does not support the conclusion that a joint venture party proposing to sell an interest in the joint venture to be acquired by the exercise of a right of first refusal cannot enter into an agreement for the sale of that interest prior to the exercise of the right of first refusal. In my opinion, there is nothing in the case law relied upon by Barrick that is inconsistent with the conclusions set out above regarding the purposes for which, and the manner in which, rights of first refusal may be exercised.

The Datawave Exercise of the Right of First Refusal Was Not For its Benefit, Account and Risk

554 I have previously determined that the Shareholders Agreement did not require that a shareholder must exercise a right of first refusal for its own "benefit, account and risk". As mentioned, Morales was of the opinion that a Chilean court would read this restriction into section 10.4 of the Shareholders Agreement based on Datawave's good faith obligations. For the sake of completeness, this section addresses the defendants' alternative argument that, even if section 10.4 were interpreted in the manner proposed by Morales, or Datawave's good faith obligations imposed such a requirement on its exercise of the Right of First Refusal, New Gold/Datawave complied with its obligations in this respect.

555 This is a factual issue which Morales formulates for the court in two different ways.

556 First, in the Morales Report, Morales says that, for all intents and purposes, Datawave was actually carrying out Goldcorp's desire (will or volition) to exercise the Right of First Refusal to purchase the Offered Interest. In this sense, according to Morales, Datawave had effectively ceased to be the "other Shareholder" acting in its own right, account, benefit and risk for the purpose of exercising the Right of First Refusal. If this submission were established, it would be unnecessary to resort to a breach of Xstrata Chile's good faith obligations to ground a Barrick claim. Such a determination would probably support a finding of a prohibited Transfer on the basis of one of the other theories proposed by Barrick.

557 However, there is no basis in the evidence for such a finding. In particular, as addressed elsewhere in these Reasons, there is no basis for a finding that Datawave sold Goldcorp the Right of First Refusal, that it acted as an agent for Goldcorp in exercising the Right of First Refusal, or that it held the Right of First Refusal as the trustee for Goldcorp.

558 Elsewhere in the Morales Report and in his oral testimony, Morales defined the question for the court to be the following: did Datawave notify Xstrata Chile of its (i.e., Datawave's) desire or willingness to purchase the Offered Interest and therefore complete the transaction of purchase and sale acting its own right, for its own benefit, account and risk? He also expresses the view that the payment arrangements in the Goldcorp Transaction demonstrate that the exercise of the Right of First Refusal was for the benefit, account and risk of Goldcorp.

559 This raises a factual issue pertaining to the nature of the legal rights and obligations created by the Goldcorp Agreement under the laws of Ontario. If it were necessary to address this factual

issue, I would find, contrary to Morales, that Datawave satisfied this requirement. When Datawave exercised the Right of First Refusal, it assumed the risk that Goldcorp would not complete the Goldcorp Transaction. Further, the exercise of the Right of First Refusal was clearly for the benefit of Datawave in the form of the consideration received for the 70% Interest upon its sale to Goldcorp. On this basis, I agree with the defendants that the structure of the Goldcorp Transaction, as set out in the Goldcorp Agreement, satisfied the "benefit, account and risk" test that Morales believes should be understood to govern the exercise of the right of first refusal in section 10.4.

560 Based on the foregoing, I conclude that, even if one were to accept Morales' reading of section 10.4 to require that the "other Shareholder" must exercise the right of first refusal for its "benefit, account and risk", Barrick has failed to demonstrate that Datawave breached the provisions of section 10.4 or its good faith obligations to Xstrata Chile in the manner of its exercise of the Right of First Refusal.

561 For the sake of completeness, Barrick also raised, but did not rely principally upon, an argument of agency under the laws of Chile. Barrick argued that the Goldcorp Agreement has all of the indicia of an agency relationship under Chilean law. Insofar as this argument ultimately depends upon a finding of an agency relationship by virtue of the provisions of the Goldcorp Agreement, this is a matter of Ontario law that has been addressed above. Insofar as Chilean law is somehow relevant, the evidence does not support a finding that, under Chilean law, the relationship between Goldcorp and Datawave would be characterized as that of principal and agent. Morales does not express his "account, benefit and risk" principle as creating an agency relationship. Barros and Ochagavia both testified that the requirements of agency were not established under Chilean law. I therefore accept their evidence on this issue.

Alleged Breach of the Carried Funding Loan Agreement

562 Barrick also alleges that Datawave breached the CFLA by entering into the Goldcorp Agreement. In doing so, Barrick says that Xstrata Chile breached paragraphs 8.6(e) and 8.6(i) of the Barrick Agreement, which obligated Xstrata Chile not to waive or release any breaches of the CFLA or modify or amend the CFLA. Barrick makes two submissions.

563 First, it says that, if the court finds that a breach occurred under the Shareholders Agreement that resulted in a Transfer of Rights and Interests in contravention of the provisions of Article 10, such Transfer would also constitute a "Default Event" under paragraph 12.6(c) of the CFLA. That provision establishes a Default Event if Datawave or Finco transferred all or a portion of their Rights and Interests to a non-Affiliate. In view of the determination that DataSub remained an Affiliate of Datawave until the sale of the DataSub shares to Goldcorp, the assignment of the Datawave Purchase Agreement to DataSub did not constitute a Transfer that contravened paragraph 12.6(c).

564 Second, Barrick argues that the Goldcorp Agreement created a Lien (as defined in the CFLA) in favour of Goldcorp on Datawave's Collateral (as defined therein) which was not a

Permitted Encumbrance (as defined therein). It says that the obligation in paragraph 2.1.3(e) of the Goldcorp Agreement to pledge the shares of DataSub to secure Datawave's obligations in respect of the $463 Million Loan required the creation of Liens that were not subordinate to the Liens granted in favour of Xstrata Chile pursuant to the Loan Documents (as defined therein) and therefore were not Permitted Encumbrances under the CFLA.

565 Barrick says that the creation of these Liens resulted in a Default Event pursuant to paragraph 12.1(g) of the CFLA, which prohibited any Liens on any part of the Collateral, other than Liens in favour of Xstrata and Permitted Encumbrances. Barrick further alleges that Xstrata Chile became entitled to terminate the CFLA, to declare all amounts outstanding under the CFLA to be due and payable, and to demand repayment of all amounts owing thereunder by Finco. Xstrata Chile did none of these things in breach of its obligations to Barrick.

566 For this purpose, "Collateral" includes the Rights and Interests of Datawave and Finco, the rights of Finco in respect of any Finco Loans made to the Company, and the shares and any other securities in Finco. Goldcorp argues that the shares of DataSub were not Rights or Interests under the Shareholders Agreement or the CFLA and, as such, did not constitute "Collateral" for the purposes of the CFLA. Therefore, Goldcorp submits that no Event Default occurred under paragraph 12.1(g) of the CFLA.

567 For the following four reasons, I am of the opinion that the pledge of shares of DataSub did not give rise to a Default Event under the CFLA as a result of the creation of a Lien over the assets of DataSub.

568 First, the Goldcorp Agreement did not, by itself, create any pledge or, for purposes of the CFLA, any Lien in either the shares or assets of DataSub. The Pledge Agreements were created by documents executed after the Barrick Agreement terminated. It should also be noted that, despite the reference to a pledge of the assets of DataSub in paragraph 2.1.3(e) of the Goldcorp Agreement, DataSub did not execute a pledge of this description. The only pledge agreements granted were the Pledge Agreements delivered by Datawave, which pertained to the DataSub shares.

569 Second, and most important, I am not satisfied that the Datawave Purchase Agreement constituted "Rights and Interests" for the purposes of the definition of "Collateral" in the CFLA, despite language that is capable of such an interpretation. The "Loan Documents" in the CFLA are all directed toward providing Xstrata Chile with security over all securities of the Company and over all distributions from the Company, in whatever form they may be made. The purpose of the covenants in sections 8.3 and 9.1 of the CFLA, despite broader language, is clearly to maintain a first priority over such assets. Inclusion of Datawave's interest in the Datawave Purchase Agreement in the Collateral does not further protect Xstrata Chile's security over such assets and distributions.

570 Third, as a related matter, it is certainly arguable that any security interest in the DataSub shares constituted by the Pledge Agreements in fact ranks subsequent to any interest that Xstrata Chile may have had in respect of the Datawave Purchase Agreement. As mentioned, DataSub did

not grant Goldcorp Tesoro any security interest, by pledge or otherwise, over its assets. The Pledge Agreements granted Goldcorp Tesoro an interest in the assets of DataSub that was therefore subordinate to any claim that Xstrata Chile might have against DataSub for breach of the Datawave Purchase Agreement.

571 Lastly, and in any event, any breach of the Shareholders Agreement is at best a highly technical one for several reasons. The Pledge Agreements were in existence for a very short period of time. But for the mechanics of transferring the funds in respect of the $50 Million Loan, the Pledge Agreements could have been executed substantially concurrently with the completion of the Datawave Purchase Agreement. In addition, despite the existence of the Pledge Agreements, DataSub had no equity value at any time prior to the closing of the Datawave Purchase Agreement. Further, there is no basis for finding a substantive default given the determination that the Goldcorp Agreement did not constitute, or give rise to, a prohibited Transfer that would result in a companion Default Event under the CFLA. Lastly, as Pena testified, the substantive commitments in the Goldcorp Agreement do not constitute, or give rise to, rights *in rem* over the Collateral and therefore do not constitute a Lien for purposes of the CFLA.

Alleged Illicit Clause

572 Barrick also alleges that the Datawave notice of its desire to acquire the Offered Interest on January 7, 2010 was unlawful and therefore of no force and effect. Barrick submits that, accordingly, Datawave's exercise of the Right of First Refusal, or the completion of the Goldcorp Transaction, can be invalidated pursuant to Article 1683 of the Chilean Code as an "act affected with nullity".

573 There are a number of grounds upon which an act or contract may be nullified under this Article of the Chilean Code. Barrick submits that the requirements for a declaration of nullity are satisfied in this case on the grounds of "illicit cause". Article 1467 of the Chilean Code addresses the concept of illicit cause in the following manner: "Cause is the motive that induces to the act or contract and illicit cause is the one prohibited by law, or contrary to *bonos mores* or public order".

574 *Bonos mores* is a concept that is not defined under Chilean law even if it is often used. Ochagavia referred to the definition proposed by a leading Chilean author, Alessandri, who describes it as "rules of external human behaviour which, being in conformity with morality, are accepted by the general consciousness of a nation in a determinate time" or "traditional and common behaviour of the members of a society pursuant to the prevailing morality". Ochagavia also refers to the definition proposed by another leading author, Claro, who states that *bonos mores* are "the rules of social morality considered being fundamental for the ordering of society".

575 Ochagavia testified that it would be open to a Chilean court to grant a declaration of nullity if it found that the purpose of the Datawave Purchase Agreement, and associated agreements, was to cause loss or harm to Barrick, and that such purpose is contrary to *bonos mores* or public order under Chilean law. Barrick says that Datawave delivered the notice with the intended purpose and

effect of causing loss or harm to Barrick in the form of depriving Barrick of the Xstrata Interest and of interfering with and undermining the rights and interests of Barrick under the Barrick Agreement. On this basis, it says that delivery of the notice was "essentially contrary to the concepts of *bonos mores* or public order".

576 I am satisfied that Datawave's exercise of the Right of First Refusal is not subject to invalidation under Article 1683 of the Chilean Code as an "act affected with nullity" for two interrelated reasons.

577 First, to succeed on this ground, Barrick must demonstrate that a Chilean court would invalidate the impugned actions based on a finding of an action or a contract contrary to *bonos mores* or public order and therefore constituting an illicit cause. There is no evidence before the court to support a conclusion that the mere exercise of a right of first refusal, which by definition must deprive a third party of the benefits of its contract with a selling joint venture party, is an action that is contrary to *bonos mores* under the laws of Chile.

578 There is, in fact, some disagreement among the experts as to the existence of this principle of Chilean law, as evidenced by the statements in the Pena Report at paragraph 357 and the Barros Report at paragraph 223(c). In any event, however, none of Ochagavia, Pena or Barros suggested that the principle was operative in the present circumstances and Pena expressly stated that the requirements for a declaration of nullity were not present. Ochagavia further testified that, while in his opinion, a Chilean court could apply the doctrine in the present circumstances as a matter of law, he had not found any instance in which a Chilean court had done so.

579 Second, the only evidence in support of Barrick's position was provided by Morales who acknowledged that his view was debatable and, more significantly, expressed his conclusion to be based on an understanding that the Goldcorp Agreement was "meant only to derail the Xstrata Barrick sale process". However, **t** he record does not support Barrick's position that the purpose of the Goldcorp Agreement, or of Datawave's exercise of the Right of First Refusal, was solely to cause loss or harm to Barrick.

580 There is no evidence that either New Gold's or Goldcorp's "intended purpose" in entering into the Goldcorp Agreement was to cause harm to Barrick. The Goldcorp Transaction was a negotiated agreement between two commercial entitles that had benefits to both New Gold/Datawave and Goldcorp. It was inevitable in the context of a right of first refusal that Datawave's exercise would result in Barrick losing the benefit of the Barrick Agreement. However, while that was a consequence of Datawave's actions, it was not a purpose, let alone the sole purpose. The intended purpose was to realize the benefits of the Goldcorp Transaction to each of them respectively. Furthermore, I think the determination above that the Goldcorp Agreement did not give rise to any breach of the Shareholders Agreement necessarily excludes the possibility of a finding that the sole purpose of that Agreement, or of Datawave's exercise of the Right of First Refusal, was to cause loss or harm to Barrick.

581 Based on the foregoing, I do not accept Barrick's submission that a Chilean court would invalidate the Goldcorp Agreement under Article 1683 of the Chilean Code on the basis that the Agreement constituted, or gave rise to, an "act affected with nullity" by virtue of being contrary to *bonos mores* under the laws of Chile.

582 Further, I would observe that a declaration of nullity would appear to require a determination that the Goldcorp Agreement, or Datawave's exercise of the Right of First Refusal, breached the Shareholders Agreement. Accordingly, the significance of this allegation, outside the context of remedies, is unclear. I am not certain that this claim constitutes an independent actionable claim by Barrick.

Conclusion Regarding Barrick's Claims Based on a Failure to Complete the Barrick Transaction

583 Based on the foregoing, the Barrick claims against Xstrata Chile for breach of contract relating to its failure to complete the Barrick Transaction are dismissed. Barrick has failed to demonstrate that the Datawave exercise of the Right of First Refusal was invalid by virtue of a breach of the Shareholders Agreement. Accordingly, it cannot demonstrate that the Conditions Precedent were satisfied on January 7, 2010 and, therefore, it cannot demonstrate that Xstrata Chile was obligated to complete the Barrick Transaction. As Xstrata Chile terminated the Barrick Agreement effective January 31, 2010, its obligation to complete the Barrick Transaction terminated, at the latest, on that date.

PART IIB - BARRICK'S REMAINING CLAIMS

584 In this Part of the Reasons, I propose to deal with the remainder of Barrick's claims against the defendants. These comprise in order: (1) additional claims against Xstrata Chile for breach of contract; (2) tortious claims against all of the defendants for inducing breach of contract, interference with contractual relations, and conspiracy; (3) common law claims against New Gold and Goldcorp for breach of confidence involving the misuse of confidential information; and (4) an unjust enrichment claim against Goldcorp.

The Barrick Claim Against Xstrata Chile Based on Breaches of Certain Obligations Under the Barrick Agreement

585 Barrick submits that Xstrata Chile breached certain other obligations under the Barrick Agreement both before and after Datawave's exercise of the Right of First Refusal. I will first set out the obligations relied upon by Barrick and will then address the alleged breaches by Xstrata Chile. For clarity, these claims are in addition to the claims for breach of contract based on Xstrata Chile's failure to complete the Barrick Transaction.

Principles of Chilean Law Governing the Performance of Contractual Obligations

586 There are two principles of Chilean law that govern the operation of contractual obligations that are relevant to the nature and extent of the liability of Xstrata Chile under the Barrick Agreement.

The "Reasonable Standard"

587 Under Chilean law, Xstrata Chile was obligated to perform its obligations under the Barrick Agreement according to the standard of the "Good Family Father". This standard required Xstrata Chile to act with the ordinary or common diligence that a person would use in managing his or her own business affairs. Both Xstrata Chile and Barrick agree that this standard equates to the "reasonable person" standard under Ontario law. In these Reasons, I will refer to it as the "reasonable" standard.

588 I am also satisfied that, under Chilean law, contractual obligations are obligations of "means" rather than obligations of "result". As Ochagavia states in his report, under an obligation of "means", the obligated party is required to perform in a diligent manner to satisfy the relevant covenant but "there is no actual and legally enforceable commitment to obtain the result". In other words, in respect of obligations of means, there can be no strict liability unless the parties expressly agree otherwise. The obligated party commits only to do what could reasonably be expected of it, subject to the applicable standard of care, in order to obtain that result. It is not the failure to obtain the result but negligence, i.e., the failure to do what could reasonably be expected given the applicable covenant, that constitutes non-performance. This principle of Chilean law has two main consequences for this action.

589 First, the covenants of Xstrata Chile, upon which Barrick bases its claims for breach of contract, are obligations of means. Therefore, to obtain a damage award, Barrick must demonstrate not only a breach of the relevant covenants but also negligent performance of such covenants by Xstrata Chile.

590 Second, because contractual obligations are obligations of means, damages may only be awarded if a court finds that a party has breached an obligation in a negligent manner. However, a court may award specific performance where it is satisfied that a covenant has not been performed by one of the parties, even if negligence has not been established.

Good Faith Obligations

591 Under Chilean law, as mentioned above, Xstrata Chile was obligated to perform its obligations under the Agreement in good faith. Chilean law presumes that parties to a contract are acting in good faith and, unless the law expressly provides for the opposite presumption, requires that bad faith be proven. There are, however, four important qualifications regarding the operation of good faith under Chilean law.

592 First, as mentioned, good faith is not the source of material obligations that have not been

negotiated and accepted by the parties. Rather, as Ochagavia stated in his report, to the extent good faith gives rise to unexpressed duties, it imposes only those duties that can be reasonably expected in order to fulfill the objectives of the contract. Second, good faith obligations are reciprocal. Third, good faith does not alter the applicable standard of diligence required under Chilean law in the performance of any particular contract - in this case, the reasonable standard. Lastly, good faith does not prevent a party from acting in its own legitimate self-interest. It does not subject one party completely to the interests of the other such that it must disregard its own self-interest.

The Breaches Alleged by Barrick

593 Barrick alleges breaches of Xstrata Chile's obligations to it based on two general grounds.

594 First, pursuant to the Shareholders Agreement, Xstrata Chile was obligated not waive or acquiesce in any breaches of the Shareholders Agreement, including in particular the Transfer restrictions in section 10.1 or the CFLA, to the extent that any such breach might cause a failure of the Conditions Precedent in the Barrick Agreement. For this purpose, Barrick relies in particular on section 4.2 of the Barrick Agreement - the obligation to use reasonable endeavours to obtain the satisfaction of the Conditions Precedent - in combination with the obligations in paragraphs 8.6(e), (f), (g) and (i), of which the most important are the obligations not to waive, release or assign any Claims (paragraph 8.6(e)) and not to modify, amend or terminate any Loan Document (which, as defined therein, includes the Shareholders Agreement) (paragraph 8.6(g)).

595 Barrick says that, given this obligation, the standard of the Good Family Father - the reasonable standard - required Xstrata Chile to investigate whether the Datawave exercise of the Right of First Refusal was valid. Barrick says that Xstrata Chile either knew, or reasonably ought to have known, that the exercise of the Right of First Refusal was invalid. On this basis, it says Xstrata Chile breached its obligations to Barrick either because it acted negligently in acquiescing in the Datawave exercise of the Right of First Refusal when it knew the exercise to be invalid, or in failing to conduct a reasonable investigation that would have resulted in such knowledge. Barrick attributes Xstrata Chile's actions, which it characterizes as careless and self-interested, to the value of its interest in the BHP Royalty that it retained as a result of completing the Goldcorp Transaction

596 Second, Barrick says that Xstrata Chile's good faith obligations informed several other duties directed toward satisfying the Conditions Precedent and, thereby, completing the Barrick Transaction. Xstrata Chile was required to keep Barrick informed at all times of any circumstance that might create the risk that one or more of the Conditions Precedent might fail. It should be noted that these obligations also flow from the specific wording in sections 4.2 and 8.6 (paragraphs (e) and (g) in particular) of the Barrick Agreement. In addition, Xstrata Chile was obligated to forego taking actions that would frustrate completion of the Barrick Transaction and/or assist the Datawave exercise of the Right of First Refusal.

597 I would note that Barrick also relies on the further assurances clause in section 17.11 of the Barrick Agreement to support each of the foregoing claims. Under both Chilean law and Ontario

law, this provision does not create material obligations that are relevant to the foregoing issues. Accordingly, it has been disregarded in reaching the conclusions below.

Analysis of Barrick's Allegations of Breaches of the Barrick Agreement

598 Barrick's specific claims are addressed in this section under two categories: (1) breaches that occurred in respect of Xstrata Chile's acquiescence in the Datawave exercise of the Right of First Refusal, which are based on Xstrata Chile's obligations not to waive or acquiesce in breaches of the Shareholders Agreement; and (2) breaches that occurred prior to the Datawave exercise of the Right of First Refusal, which are based on Xstrata Chile's good faith obligations and the other contractual obligations referred to above.

Alleged Breaches in Respect of the Datawave Exercise of the Right of First Refusal

599 As described above, these claims are based on Xstrata Chile's alleged failure to properly investigate and assess the validity of Datawave's exercise of its Right of First Refusal. Given the determination that Datawave validly exercised the Right of First Refusal, these claims cannot succeed, as discussed below. However, they raise an important question of the extent of Xstrata Chile's duty to investigate and assess the validity of the exercise of the Right of First Refusal. As this was argued in considerable detail, I have set out my views on this issue before addressing the treatment of Barrick's associated claims in these Reasons.

Conclusions Regarding the Scope of Xstrata Chile's Duty to Investigate

Definition of the Issue

600 Barrick does not dispute that the New Gold Notice satisfied the formal requirement of section 10.4(2) of the Shareholders Agreement regarding the notice of exercise of the Right of First Refusal. However, Barrick argues that the Datawave exercise of the Right of First Refusal would be invalid if it contravened the Transfer restrictions in section 10.1 of the Shareholders Agreement even if the New Gold Notice was valid on its face.

601 Barrick alleges that Xstrata Chile had a duty to conduct a reasonable investigation before "accepting" the New Gold Notice. It argues that this duty required it to persist in seeking details of the Goldcorp Transaction and a copy of the Goldcorp Agreement. Barrick argues that Xstrata Chile failed to discharge this obligation. Xstrata Chile submits that its only obligation was to review any publicly available information and any information made available to it by Barrick.

602 I would note that Xstrata Chile has also argued that there is, in fact, no room under the Shareholders Agreement for an invalid exercise of the Right of First Refusal if the New Gold Notice was delivered in the manner required by the provisions of section 10.4, in particular section 10.4(2). This conclusion proceeds from the fact that there is no concept of an action or step of "acceptance" by Xstrata Chile. Either the exercise of the Right of First Refusal was valid and an

agreement was formed or it was not. This is a matter of interpretation of the scope of Xstrata Chile's obligations under the Barrick Agreement and, as such, is a matter of Chilean law.

603 I am satisfied that Chilean law did impose an obligation on Xstrata Chile in the circumstances of this case to consider the validity of Datawave's exercise of the Right of First Refusal. Ochagavia states in his report that Xstrata Chile had an obligation not to accept an invalid exercise of the Right of First Refusal. He grounds this obligation in section 4.2 of the Barrick Agreement and Xstrata Chile's good faith obligations. Moreover, Ochagavia defined the scope of this duty to extend beyond mere examination of the New Gold Notice to include taking into account all of the information that Xstrata Chile had received at the time of its assessment. Accordingly, the issue in this section is not the existence of a duty to investigate but the extent of the investigation that such duty required of Xstrata Chile in order to honour its obligations to Barrick.

Analysis and Conclusions Regarding the Scope of Xstrata Chile's Duty

604 I conclude that Xstrata Chile's obligation to consider the validity of Datawave's exercise of the Right of First Refusal was limited to a review and assessment of information pertaining to the Goldcorp Transaction that was publicly available or was otherwise provided to it by third parties, including Barrick. I also conclude that Xstrata Chile was obligated to sell the Offered Interest to Datawave unless such evidence clearly demonstrated a breach of the Shareholders Agreement. I reach this conclusion on the following basis.

605 The starting point for an analysis of Xstrata Chile's duty to conduct an investigation and assessment are the contractual obligations in sections 4.2 and 8.6 of the Barrick Agreement as supplemented by Xstrata Chile's good faith obligations. In particular, under the obligation in paragraph 8.6(g), Xstrata Chile agreed not to amend the Shareholders Agreement and not to waive any breaches of that Agreement. As a result, Xstrata Chile had an obligation to consider whether Datawave breached any of the Transfer restrictions by entering into the Goldcorp Transaction or by exercising the Right of First Refusal. The standard of performance required of Xstrata Chile in regard to this obligation is the reasonable standard. Similarly, although this did not occur, Xstrata Chile would have been required to consider whether any other actions of Datawave prior to January 31, 2010 in furtherance of the Goldcorp Agreement breached any terms of the Shareholders Agreement or the CFLA. I would note, however, that any such breach must have occurred prior to January 31, 2010, by virtue of the terms of the Barrick Agreement.

606 However, in drafting these provisions of the Barrick Agreement, Xstrata Chile and Barrick were aware of the provisions of the Shareholders Agreement. Absent express language to the contrary, I think it is reasonable to proceed on the basis that the parties intended the Barrick Agreement to function harmoniously with the Shareholders Agreement. It was not intended that Xstrata Chile would obligate itself to perform covenants requiring Datawave's assistance in the absence of a right under the Shareholders Agreement allowing Xstrata Chile to require such assistance. I am also satisfied, on the evidence of Chilean law, that Xstrata Chile's good faith

obligations would not impose any such covenants in the absence of an express intention in the Barrick Agreement.

607 Accordingly, the scope of Xstrata Chile's duty to investigate must be defined having regard to Xstrata Chile's rights under the Shareholders Agreement. In the present circumstances, Xstrata Chile's ability to conduct the investigation contemplated by Barrick was limited by the terms of the Shareholders Agreement. Section 10.4(2) required simply that Datawave deliver a notice of its desire to exercise the Right of First Refusal. Datawave had no obligation in that Agreement to provide any documentation or other information respecting the Goldcorp Transaction in order to exercise the Right of First Refusal. Nor did it have any obligation to respond to Xstrata Chile's requests for information and documentation subsequent to the exercise. Moreover, there is no evidence that Datawave's good faith obligations required it to provide such information if requested either pursuant to section 10.4 of the Shareholders Agreement or otherwise.

608 This conclusion is reinforced by another principle of Chilean law. As Morales acknowledged in his cross-examination, Xstrata Chile was entitled to assume that Datawave was acting in good faith in its exercise of the Right of First Refusal absent proof to the contrary.

609 Lastly, as a practical matter, I think that a duty to investigate beyond considering information that is publically available or otherwise provided to Xstrata Chile does not make commercial sense. It inevitably raises the question of how much review is sufficient to discharge the alleged obligation without providing a principled answer to the question. Even receipt of the Goldcorp Agreement would not necessarily answer the question of the validity of the Datawave exercise of the Right of First Refusal. In many circumstances, such an agreement might be so general in its terms - leaving the structure to be worked out before closing - that it would provide no guidance as to whether the provisions of a right of first refusal had been complied with. In other circumstances, the structure might be significantly altered or supplemented between the date of exercise and the date of closing. In this case, for example, the contractual voting arrangements pertaining to the DataSub shares were not agreed to between the parties until the Pledge Agreements were executed in the last few days leading up to the closing of the Goldcorp Transaction.

Alleged Breach of Xstrata Chile's Duty at Time of Receipt of the New Gold Notice

610 It is agreed that, at the time Xstrata Chile received the New Gold Notice, Xstrata Chile had an obligation to review the Notice in accordance with the reasonable standard and determine whether it complied with the Shareholders Agreement. In that review, Xstrata Chile was required to consider not only the language of the New Gold Notice but also any other information that it had received from New Gold or Barrick concerning the proposed transaction.

611 Barrick says that Xstrata Chile had sufficient information on January 6, 2010, when it received the New Gold Notice, to conclude that Datawave's exercise of the Right of First Refusal was invalid. Essentially, Barrick says Xstrata Chile should reasonably have known that Datawave's actions would result in a breach of the Transfer restrictions in the Shareholders Agreement from the

fact that Datawave's exercise of the Right of First Refusal pursuant to an agreement between New Gold and Goldcorp would result in Goldcorp acquiring the Offered Interest.

612 Given the conclusion above that the Goldcorp Agreement did not give rise to a breach of the Shareholders Agreement, this claim cannot succeed. In these circumstances, by definition, Xstrata Chile could never have been in possession of information establishing that Datawave invalidly exercised the Right of First Refusal at the time it received the New Gold Notice. Accordingly, Barrick cannot assert a claim for damages even if a breach of duty were established.

Alleged Failure to Take Steps to Determine the Validity of the Datawave Exercise of the Right of First Refusal Subsequent to Receipt of the New Gold Notice

613 The evidence indicates that neither Xstrata Chile nor Barrick had any knowledge of the structure of the Goldcorp Transaction until Baker watched the Jeannes television interview on January 7, 2010 after the Goldcorp Transaction was publicly announced. Even then, knowledge of the actual structure was not available to Barrick until it obtained a copy of the Goldcorp Agreement on or about January 19, 2010, when it became publicly available, and, in the case of Xstrata Chile, until January 26, 2010, when it received a copy of the Agreement from Barrick.

614 Barrick alleges that, if Xstrata Chile did not have sufficient information to conclude that the Datawave exercise was invalid at the time it received the New Gold Notice, it was obligated to make inquiries in order to determine the substantive validity of the purported exercise. Specifically, it says that Xstrata Chile was under an obligation to inquire into the details of the Goldcorp Transaction and to request from Datawave any information that could reasonably be relevant to determining whether the New Gold Notice was delivered in respect of a valid exercise of the Right of First Refusal. It says this duty extended to insisting on a substantive response to its request for more information regarding the Goldcorp Transaction, including insisting on receipt of a copy of the Goldcorp Agreement and contacting New Gold to discuss the concerns raised by Barrick.

615 The record indicates that, in an e-mail dated January 7, 2010, McConnachy did request details and an explanation of the specifics of the Goldcorp Transaction to assist in Xstrata's analysis of Xstrata Chile's "ability to accept the exercise of the Right of First Refusal". However, McConnachy never received any response to his e-mail and did not make any further inquiries or request a copy of the Goldcorp Agreement. Barrick alleges that this inactivity constituted a breach of Xstrata Chile's obligations to conduct a reasonable review of the validity of Datawave's exercise of the Right of First Refusal and, as such, constituted a breach of the Barrick Agreement.

616 As with the previous claim, given the determination above, this claim cannot be actionable. Even if it is assumed for this purpose that Xstrata Chile breached its obligations to Barrick by failing to conduct a reasonable review of the validity of the Right of First Refusal, the breach does not give rise to a claim for damages.

617 However, given the finding above regarding the scope of Xstrata Chile's duty to investigate, I

also conclude that, on the evidence before the court, Xstrata Chile satisfied the standard required of it in respect of this duty.

618 There is no evidence that Xstrata Chile failed to consider the Goldcorp press release; the Jeannes interview; Garver's letter to Xstrata Chile dated January 11, 2010 advising of Barrick's position; the Original Barrick Claim, a copy of which Barrick received from Garver on January 13, 2010; or the Goldcorp Agreement, when it received a copy on January 26, 2010. Given the absence of any right to documentation under the Shareholders Agreement and the absence of evidence of any other right to documentation under any other provision of Chilean law, Xstrata Chile did not breach this obligation by failing to insist upon receiving further details of the Goldcorp Transaction or a copy of the Goldcorp Agreement from New Gold after having made the request of Datawave. In addition, while Xstrata Chile benefitted from the failure to close the Barrick Transaction by retaining its 70% interest in the BHP Royalty, that fact alone does not support the assertion that Xstrata Chile breached its good faith obligations to Barrick in the present circumstances.

Breaches Alleged to have Occurred Prior to the Datawave Exercise of the Right of First Refusal

619 Barrick also alleges that Xstrata Chile failed to honour its contractual and good faith obligations to take positive actions in two respects that would have resulted in satisfaction of the Conditions Precedent. It submits that, but for these breaches of Xstrata Chile's obligations, Barrick would have obtained the Xstrata Interest pursuant to the Barrick Agreement. These claims are independent of Barrick's claims based on its assertion that Datawave breached the Shareholders Agreement in entering into the Goldcorp Agreement or in exercising its Right of First Refusal.

Failure to Inform Barrick of the New Gold Inquiries into the Mechanics of Exercise of the Right of First Refusal

620 The record indicates that Xstrata Chile did not inform Barrick of either the December 2, 2009 conference call with New Gold representatives, in which questions about the mechanics of the Right of First Refusal were first raised by New Gold, or the New Gold e-mail of the same day that dealt with the same issue. Xstrata Chile also did not inform Barrick of its e-mail response on December 4, 2009, or the further question raised by New Gold's external counsel in a telephone call on December 8, 2009 that also dealt with the exercise of the Right of First Refusal.

621 Barrick alleges that, in failing to do so, Xstrata Chile breached its obligations under section 4.2 of the Barrick Agreement to keep Barrick informed "of any circumstances which may result in any Condition Precedent not being satisfied in accordance with its terms".

622 This claim is dismissed for the following reasons.

623 First, the obligation in section 4.2 was to keep Barrick informed of facts, not speculation. The questions regarding the mechanics of the exercise of the Right of First Refusal did not constitute evidence of an established intention, or even a serious likelihood of an intention, to

exercise the Right of First Refusal. Indeed, Barrick, as well as Xstrata Chile, regarded the limited information received regarding the New Gold value maximization process as more likely to be planted "disinformation" directed at Barrick. Given that this exchange occurred in early December 2009, before there was a serious possibility of completing a transaction with Goldcorp, it may well be that New Gold's actions were at least partly motivated by this purpose.

624 Further, the materiality of information of this nature was demonstrated by Barrick's own actions. Barrick learned independently of New Gold's possible exercise of the Right of First Refusal in a conversation between Baker and a Mitsui & Co. representative in early December. Barrick did not consider this conversation worthy of disclosure to Xstrata Chile. Nor did Barrick advise Xstrata Chile of Garver's communication with the Vancouver law firm on December 18, 2009 regarding its retainer to advise New Gold about a possible exercise of the Right of First Refusal.

625 Second, as a related matter, section 4.2 of the Barrick Agreement required disclosure of any circumstance that may result in any Condition Precedent not being satisfied. This covenant required disclosure of information pertaining to a potential exercise of the Right of First Refusal only if the information revealed a serious possibility of the exercise occurring. As mentioned above, the questions regarding the manner of exercise did not reveal a serious possibility of an exercise.

626 Third, as mentioned above, Barrick must demonstrate that Xstrata Chile acted negligently in performing its obligations in order to find that Xstrata Chile breached its obligations to Barrick. Given the speculative rather than factual nature of this information and the materiality of this information, as reflected in Barrick's reaction upon receipt of similar information from Matsui & Co., the evidence does not support a finding that Xstrata Chile acted negligently in failing to disclose this information, even if it were determined that it had an obligation to make such disclosure.

627 In summary, Xstrata Chile's failure to inform Barrick of the communications described above did not constitute the failure to inform Barrick "of circumstances which may result in any Conditions Precedent not being satisfied in accordance with its terms".

628 In addition to the foregoing findings, I would also conclude, if it were necessary, that breach of this covenant was not causally related to the damages asserted by Barrick in this action. There is no direct connection between the alleged failure to disclose this information and the execution of the Goldcorp Agreement. Put another way, there is no evidence that Barrick's knowledge in early December 2009 that New Gold was inquiring into the mechanics of the exercise of the Right of First Refusal would have altered the course of events in a manner that necessarily would have resulted in the Barrick Transaction being completed rather than the Goldcorp Transaction.

Execution of the Feasibility Study

629 Barrick also alleges that Xstrata Chile's execution of the Feasibility Study Agreement without Barrick's knowledge or consent breached an obligation of Xstrata Chile not to facilitate a

competing transaction, being the Goldcorp Transaction.

630 In asserting this claim, Barrick relies upon the facts, among others, that Xstrata Chile told Barrick that it was the owner of the Feasibility Study Agreement and advised Barrick that New Gold's claims were "spurious" and would go away when it heard of them. Barrick says that Xstrata Chile then surreptitiously entered into the Feasibility Study Agreement out of self-interest, knowing that it would facilitate the exercise of the Right of First Refusal by New Gold.

631 Barrick does not specify which provision of the Barrick Agreement it alleges Xstrata Chile breached in entering into the Feasibility Study Agreement. It says only that there was no reason for Xstrata Chile not to have disclosed the situation to Barrick and consulted with Barrick on its decision to enter into the Feasibility Study Agreement. In the absence of a specific covenant in the Shareholders Agreement that addresses these circumstances, I assume for this purpose that Xstrata Chile's good faith obligations created an obligation not to facilitate the Goldcorp Transaction.

632 There are two preliminary issues to be addressed before considering this submission.

633 First, Barrick attributes Xstrata Chile's conduct to self-interest - in this case, being its interest in booking the Barrick Transaction by December 31, 2009. I do not see this as relevant to the issue of whether a breach occurred for the reason that I do not think a court can infer that Xstrata Chile breached any obligation to Barrick in entering into the Feasibility Study Agreement from this fact, either alone or together with the other facts upon which Barrick relies. Good faith obligations under Chilean law do not prevent a party from acting in its own self-interest, provided such actions do not breach the relevant agreement.

634 Second, Barrick emphasizes the fact that Xstrata Chile did not inform Barrick of the negotiation of the Fluor Feasibility Study ownership issue and did not obtain its consent before entering to the Feasibility Study Agreement. I also do not see this as relevant to the issue of whether a breach of an obligation not to facilitate the Goldcorp Transaction occurred. In asserting this claim, Barrick does not invoke the obligation to disclose in section 4.2 of the Barrick Agreement. I consider that it does not apply to the present circumstances given the factual findings below. I see nothing in the Barrick Agreement that imposes an obligation on Xstrata Chile to consult with Barrick before entering into the Feasibility Study Agreement even if it were held that Xstrata Chile was obligated not to enter into that Agreement because it facilitated Datawave's exercise of the Right of First Refusal. Similarly, Barrick has not demonstrated any provision of the Barrick Agreement that obligated Xstrata Chile to obtain Barrick's consent prior to entering into the Feasibility Study Agreement.

635 Turning to the substantive issue, there are two factual issues raised by Barrick's claim:

(1) Did the Feasibility Study Agreement "facilitate" the Goldcorp Transaction?
(2) If so, did Xstrata Chile know, or ought Xstrata Chile reasonably to have

known, that the Feasibility Study Agreement would have this effect?

I conclude that the answer to each is in the negative for the following reasons.

636 The evidence does not establish that the Feasibility Study Agreement facilitated the Goldcorp Transaction. To do so, Barrick would have to establish that Goldcorp would not have entered into the Goldcorp Transaction unless the Company obtained ownership of the Fluor Feasibility Study. The evidence before the court does not support this conclusion. Even if Goldcorp indicated to New Gold that it desired this result, there is no evidence that this was an absolute requirement for the Goldcorp Transaction to proceed. Moreover, it is unclear why Goldcorp would have made it a requirement given that the information in the Fluor Feasibility Study had become historical. New Gold was entitled to provide Goldcorp with a copy of the Fluor Feasibility Study to use in conducting its financial due diligence prior to making the Goldcorp Offer. Goldcorp then engaged its own mining engineering firm to review the Fluor Feasibility Study in connection with its acquisition of the 70% Interest and has subsequently commissioned an entirely new feasibility study.

637 The evidence also does not establish that Xstrata Chile knew, or reasonably should have known, that entering into the Feasibility Study Agreement would have facilitated the Goldcorp Transaction.

638 I am satisfied on the evidence that Xstrata entered into the Feasibility Study Agreement for two principal purposes: (1) by doing so, Xstrata received New Gold's agreement to Xstrata's form of the Assignment Agreements and was thereby able to book the sale of the Xstrata Interest in 2009 as soon as it received the comfort requested from Barrick as well as obtain New Gold's agreement to the release of Xstrata Chile from the Shareholders Agreement and the CFLA; and (2) Xstrata wished to avoid any possibility of arbitration of the ownership issue, which could have re-set the Exercise Period as mentioned above and/or delayed or upset the Barrick Transaction, depending upon Barrick's view of the significance of the Fluor Feasibility Study. Accordingly, Xstrata thought it was furthering fulfillment of the Conditions Precedent, and therefore completion of the Barrick Transaction, in entering into the Feasibility Study Agreement. Further, I am satisfied that Xstrata did not disclose the Feasibility Study Agreement to Barrick because, at the time, having no knowledge of the discussions between Goldcorp and New Gold, there was no reason to suspect that the execution of such agreement might create a circumstance that would result in the failure of the Condition Precedent in section 4.1(c) of the Barrick Agreement.

639 Further, the evidence is that, as of December 31, 2009, neither Barrick nor Xstrata believed that there was a serious possibility that New Gold would be in a position to complete a transaction with any third party before the Right of First Refusal expired. Both parties believed that the limited information that they had received pointed to an effort by New Gold to obtain a higher price from Barrick. In addition, for the reasons stated above, even if Xstrata Chile had been aware of a potential transaction, there was no information from which it ought reasonably to have known that a

failure to agree to the Feasibility Study Agreement would have prevented the Goldcorp Transaction.

640 I would add that it is also unclear on the evidence whether Barrick would have closed the Barrick Transaction in accordance with the Barrick Agreement if the Feasibility Study Agreement had not been entered into. Whether Xstrata Chile would have been prepared to warrant title to the Fluor Feasibility Study to Barrick is unclear given New Gold's position on the ownership issue, which arose after the Barrick Agreement was executed. Whether Barrick would have accepted such a warranty, or been prepared to waive the requirement altogether if none was forthcoming, is also unclear.

641 Given these findings, Barrick cannot assert a viable claim for breach of Xstrata Chile's good faith obligations, or breach of contractual obligations in the Barrick Agreement, based on Xstrata Chile's execution of the Feasibility Study Agreement. The finding that execution of the Feasibility Study Agreement did not facilitate the Goldcorp Transaction removes the necessary element of causation. The finding that Xstrata Chile did not know, and could not reasonably have known, that the Feasibility Study Agreement would have this effect excludes any finding that Xstrata Chile breached any duty it might otherwise have had based on its good faith obligations. Further, the absence of constructive knowledge precludes a finding of negligence even if Xstrata Chile were found to have breached a duty to Barrick, contractual or otherwise, by executing the Feasibility Study Agreement.

642 Based on the foregoing, this claim is dismissed.

Conclusion Regarding Barrick's Claims Based on Allegations of Breaches of the Barrick Agreement

643 Based on the foregoing, Barrick's claims against Xstrata Chile for breach of contract based on alleged breaches of Xstrata Chile's obligations under the Barrick Agreement are also dismissed.

Liability of the Defendants in Tort

644 Barrick also asserts the following tort claims against New Gold, Goldcorp and the Xstrata Parent Entities: (1) inducing Xstrata Chile to breach its contractual obligations to Barrick under the Barrick Agreement; (2) intentionally interfering with Barrick's economic relations with Xstrata Chile; and (3) conspiring with the effect of depriving Barrick of the Xstrata Interest and Xstrata's 70% interest in the BHP Royalty. I will address each of these claims after addressing the applicable law governing these tort claims.

Governing Law

Applicable Legal Standard

645 The Supreme Court ruled in *Tolofson* v. *Jensen; Lucas (Litigation Guardian of)* v. *Gagnon*,

[1994] 3 S.C.R. 1022, [1994] S.C.J. No. 110, that tort liability is governed by the law of the place where the tort occurred - the *lex loci delicti*. The principle is set out at pp. 1049-51 where it is expressed in terms of the place where the activity occurred and, where the consequences constitute the wrong, the place where the consequences are directly felt:

> From the general principle that a state has exclusive jurisdiction within its own territories and that other states must under principles of comity respect the exercise of its jurisdiction within its own territory, it seems axiomatic to me that, at least as a general rule, the law to be applied in torts is the law of the place where the activity occurred, i.e., the *lex loci delicti*. There are situations, of course, notably where an act occurs in one place but the consequences are directly felt elsewhere, when the issue of where the tort takes place itself raises thorny issues. In such a case, it may well be that the consequences would be held to constitute the wrong.
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> ...
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> [T]he approach responds to a number of sound practical considerations. The rule has the advantage of certainty, ease of application and predictability. Moreover, it would seem to meet normal expectations. Ordinarily people expect their activities to be governed by the law of the place where they happen to be and expect that concomitant legal benefits and responsibilities will be defined accordingly. The government of that place is the only one with power to deal with these activities. The same expectation is ordinarily shared by other states and by people outside the place where an activity occurs. If other states routinely applied their laws to activities taking place elsewhere, confusion would be the result. In our modern world of easy travel and with the emergence of a global economic order, chaotic situations would often result if the principle of territorial jurisdiction were not, at least generally, respected. Stability of transactions and well grounded legal expectations must be respected. Many activities within one state necessarily have impact in another, but a multiplicity of competing exercises of state power in respect of such activities must be avoided.

646 In the absence of a physical event causing injury, the determination of the *lex loci delicti* in respect of the torts of inducing breach of contract, interference with contractual relations and conspiracy is not straightforward.

Conclusion Regarding the Applicable Law of the Tort Claims Against New Gold and Goldcorp

647 In respect of the tort claims against New Gold and Goldcorp, Barrick submits that, using either the "defining activity" test or the "consequences felt" test, the *lex loci delicti* in respect of the torts alleged against these defendants should be Ontario or British Columbia.

648 I agree with Barrick's submission that the defining activities of the parties giving rise to the tort claims consist of the negotiation and execution of the Goldcorp Agreement. This activity occurred entirely in Ontario and British Columbia where the principal offices of New Gold and Goldcorp are located. The actions of the principal officers, and the external advisors, of these defendants in respect of such negotiations and the actions of their respective boards of directors approving the Goldcorp Transaction occurred almost exclusively in these provinces. Insofar as it is also relevant, the Goldcorp Agreement is governed by the laws of Ontario.

649 I find that the foregoing considerations outweigh the following matters raised by New Gold and Goldcorp in support of their position that the laws of Chile should apply to these claims.

650 First, I do not think the governing law of the Shareholders Agreement, the CFLA and the Barrick Agreement is determinative. Insofar as the law of the applicable contracts is relevant, I consider that the Goldcorp Agreement is more significant in this context as that is the agreement that committed Datawave and Goldcorp to the course of action alleged to be tortious.

651 Similarly, the actions that occurred in Chile in furtherance of the alleged torts are also not determinative. The defendants rely on the fact that the delivery of the New Gold Notice to Xstrata Chile, the closing of the sale of the Offered Interest to DataSub, and the closing of the sale of the DataSub shares to Goldcorp Tesoro, took place in Chile. However, extensive activity in respect of each of these actions also occurred in Ontario and British Columbia.

652 Third, I do not think it is correct to say that Barrick's loss should be treated as having occurred only in Chile because Barrick intended to cause a Chilean subsidiary to acquire the Offered Interest and would have retained all profits in Chile. This is an argument that, applying the "consequences felt" test, the loss was suffered by the Barrick subsidiary in Chile. At the time the actions occurred, Barrick, not its proposed Chilean subsidiary, was the party to the Barrick Agreement. Accordingly, it is Barrick that has suffered the alleged loss and has asserted the claims in this action. Barrick is not located in Chile but is located in Ontario. Moreover, the intention that distributions from the El Morro Project would be retained in Chile is not determinative. Any loss was also suffered by Barrick at a corporate level as a reduction in the aggregate value of its assets which, in turn, affected its aggregate market value.

653 Lastly, I do not think that either the registration of the Company's shares in Chile or the location of the El Morro Project is of any real significance for purposes of either the "defining activity" test or the "consequences felt" test in respect of the alleged torts.

654 Accordingly, I conclude that either Ontario or British Columbia law is applicable to Barrick's tort claims. The parties have agreed that there is no evidence that the laws of British Columbia differ in any respect from the laws of Ontario in respect of these torts and, that, accordingly, to the extent that the laws of either province would govern the tort claims, the laws of Ontario shall govern these claims.

655 Therefore, I conclude that the Barrick tort claims are governed by the laws of Ontario as the *lex loci delicti*. Given this determination, I have not addressed Barrick's alternative claims against New Gold and Goldcorp for extra-contractual liability under the laws of Chile.

Conclusion Regarding the Tort Claims Asserted Against the Xstrata Parent Entities

656 Barrick submits that, in respect of the tort claims against the Xstrata Parent Entities, the evidence indicates that the tortious conduct occurred only in Australia and Canada because all of the relevant Xstrata representatives were based in, and communicated from, Australia, apart from Greville who was in British Columbia during the first week of 2010 on a ski vacation. Xstrata has not led any evidence to suggest that the applicable laws of Australia regarding the alleged tortious conduct of the Xstrata Parent Entities would differ in any respect from the laws of Ontario. Further, neither of the Xstrata Parent Entities has pleaded that Chilean law applies to any of Barrick's tort claims.

657 Accordingly, I conclude that the Barrick tort claims against the Xstrata Parent Entities are also governed by the laws of Ontario. It is therefore also unnecessary to address Barrick's alternative claims against the Xstrata Parent Entities based on extra-contractual liability under the laws of Chile.

<u>Inducing Breach of Contract</u>

658 Barrick asserts that each of New Gold, Goldcorp and the Xstrata Parent Entities are liable for inducing Xstrata Chile to breach the Barrick Agreement. The specific breach giving rise to this claim is the sale of the Offered Interest to DataSub on February 16, 2010 but it proceeds from Barrick's position that Datawave did not validly exercise the Right of First Refusal.

659 The elements of the tort of inducing breach of contract have been set out in *Correia* v. *Canac Kitchens*, 2008 ONCA 506, [2008] O.J. No. 2497, at para. 99, referring to the decision of the House of Lords in *OBG* v. *Allan*, [2007] UKHL 21, [2008] A.C. 1 (H.L.):

> The Lords defined the elements of the tort of inducing breach of contract as follows: (1) the defendant had knowledge of the contract between the plaintiff and the third party; (2) the defendant's conduct was intended to cause the third party to breach the contract; (3) the defendant's conduct caused the third party to breach the contract; (4) the plaintiff suffered damage as a result of the breach (see *OBG* at paras. 39-44 (Hoffman L.)). The Lords confined the tort to cases where the defendant actually knew that its conduct would cause the third party to breach (it is not enough that the defendant ought reasonably to have known that its conduct would cause the third party to breach); the defendant must have intended the breach (it is not enough that a breach was merely a foreseeable consequence of the defendant's conduct); and there must be an actual breach (it is not enough for the conduct to merely hinder full performance of the contract).

660 I will consider the elements of the tort to the extent possible in respect of New Gold and Goldcorp first and then in respect of the Xstrata Parent Entities.

Claims Against New Gold and Goldcorp

661 Barrick has established that New Gold and Goldcorp were aware of the terms of the Barrick Agreement. Xstrata Chile provided New Gold with a copy of the form of the Agreement on October 11, 2009, when it delivered the Xstrata Chile Notice. In turn, as contemplated by the December 18 New Gold Letter, New Gold provided Goldcorp with a copy of the form of the Agreement on or about December 23, 2009.

662 The main difficulty with Barrick's claim lies in the third requirement - that the defendants' conduct caused Xstrata Chile to breach the Barrick Agreement. This turns on whether the Goldcorp Transaction, in particular Datawave's exercise of its Right of First Refusal, caused a breach under the Shareholders Agreement or the CFLA. I have concluded above that it did not.

663 Tort liability for inducing breach of contract is accessory liability. It requires a finding of primary liability by Xstrata Chile for breach of the Barrick Agreement. As set out above, without a breach of the Shareholders Agreement, there is no basis for finding that New Gold's or Goldcorp's conduct caused Xstrata Chile to breach the Barrick Agreement. The Barrick Agreement terminated on either January 8, 2010 or January 31, 2010. Barrick is, therefore, unable to establish a valid and enforceable agreement between Xstrata Chile and Barrick as of the date on which the sale of the Offered Interest to DataSub was completed, being February 16, 2010.

664 For this reason, the Barrick claim against New Gold and Goldcorp for inducing a breach of the Barrick Agreement is dismissed.

665 The second requirement of the tort of inducing a breach of contract requires Barrick to demonstrate that New Gold's and Goldcorp's conduct was intended to cause Xstrata Chile to breach the Barrick Agreement. Because considerable time was spent in the parties' submissions on whether this requirement of this tort claim has been demonstrated, I will also set out my observations with respect to this issue.

666 In *Correia* at para. 98, the Court of Appeal addressed the intention requirement for the tort of inducing breach of contract and the tort of interference with economic relations as follows:

> In defining the two torts, the Lords emphasized that both are intentional torts that aim to give redress in the context of deliberate commercial wrongdoing: see *OBG* at paras. 141-143, 145, 191 (Nicholls L.). Where the impugned conduct is merely negligent, then it must be actionable using negligence principles, and if it is not, it cannot be made actionable by recharacterizing it as wrongful commercial interference.

667 To the same effect is the following statement of Lord Hoffmann in *OBG*, at para. 39, which makes it clear that actual knowledge is required and that neither constructive knowledge nor an unreasonable mistaken belief is sufficient:

> To be liable for inducing breach of contract, you must know that you are inducing a breach of contract. It is not enough that you know that you are procuring an act which, as a matter of law or construction of the contract, is a breach. You must actually realize that it will have this effect. Nor does it matter that you ought reasonably to have done so. This proposition is most strikingly illustrated by the decision of this House in *British Industrial Plastics Ltd.* v. *Ferguson*, [1940] 1 All ER 479, in which the plaintiff's former employee offered the defendant information about one of the plaintiff's secret processes which he, as an employee, had invented. The defendant knew that the employee had a contractual obligation not to reveal trade secrets but held the eccentric opinion that if the process was patentable, it would be the exclusive property of the employee. He took the information in the honest belief that the employee would not be in breach of contract. In the Court of Appeal McKinnon LJ observed tartly ([1938] 4 All ER 504, 513) that in accepting this evidence the judge had "vindicated [his] honesty ... at the expense of his intelligence" but he and the House of Lords agreed that he could not be held liable for inducing a breach of contract.

668 To establish this element of the claim, Barrick must therefore demonstrate two separate factual matters. It must establish that New Gold and Goldcorp knew that implementing the Goldcorp Transaction would result in, or did result in, a breach of the Shareholders Agreement or the CFLA, thereby rendering the Datawave exercise of the Right of First Refusal invalid. Barrick must also prove that, in taking the position that implementation of the Goldcorp Transaction complied with the Shareholders Agreement and the CFLA, New Gold and Goldcorp intended to "procure" Xstrata Chile's breach of the Barrick Agreement, which requires more than demonstration that the breach was a foreseeable consequence of the defendants' conduct.

669 There is no evidence before the court that either New Gold or Goldcorp believed that implementing the Goldcorp Agreement would result in any such breach. The only evidence before the court on this issue was adduced by New Gold and Goldcorp. Each of these parties say that they believed that the Goldcorp Transaction did not breach the Shareholders Agreement or the CFLA. Each also says that it relied on a contractual representation from the other party that the Goldcorp Transaction did not breach any applicable agreement - in the case of Goldcorp, from New Gold pursuant to paragraph 5.1(e) of the Goldcorp Agreement and, in the case of New Gold, from Xstrata Chile pursuant to the Datawave Purchase Agreement, although the latter is less probative as it was delivered after the exercise of the Right of First Refusal.

670 Barrick suggests that the court should infer the requisite intent from a number of different

circumstances: (1) New Gold's failure to advise Barrick that it was marketing 100% of the El Morro Project, or 70% of the Project, in addition to the New Gold Interest; (2) an alleged deliberate misdescription of the transaction under consideration with Goldcorp in the December 18 New Gold Letter; (3) the multi-staged transaction structure of the Goldcorp Transaction, which Barrick alleges is evidence of a deliberate attempt to effect a prohibited Transfer indirectly; (4) the provisions in the second paragraph of section 2.4 of the Goldcorp Agreement, which Barrick says would have been unnecessary if the parties truly believed the Datawave exercise of the Right of First Refusal did not violate the Shareholders Agreement; (5) New Gold's decision not to provide Xstrata Chile with a copy of the Goldcorp Agreement when McConnachy requested a copy on January 7, 2010; and (6) the absence of contemporary evidence of the state of mind of New Gold and Goldcorp in entering into the Goldcorp Agreement, and, in particular regarding Goldcorp's state of mind after having put the issue in play in its affirmation of its honest belief in its Statement of Defence.

671 I have considered whether it is possible for the court to address the issue of intention in case I have erred in concluding that Datawave did not breach the Shareholders Agreement by entering into the Goldcorp Agreement and implementing the Goldcorp Transaction. However, to do so requires considering the intention of Datawave and Goldcorp in the scenario in which the formal requirements of section 10.4 regarding the New Gold Notice would have been satisfied but the substantive requirements of the Shareholders Agreement pertaining to the proposed Transfer would have been breached. In such event, the parties' knowledge of the existence and nature of Datawave's breach(es) as well as their respective intentions would be issues to be assessed in respect of this claim.

672 In order to address this issue, it would be necessary to make assumptions regarding the nature of the breach of the Shareholders Agreement, the nature and extent of Datawave's and Goldcorp's knowledge of such breach, and their intentions in asserting that no such breach had occurred. It would also be necessary to make similar assumptions in respect of Xstrata Chile's actions in accepting the Datawave exercise of the Right of First Refusal notwithstanding that it was invalidly exercised by virtue of a breach of the Shareholders Agreement. Any such assumptions would necessarily be hypothetical in the circumstances and therefore arbitrary. Even then, the relevance of the matters from which Barrick urges the court to draw an inference of the requisite intention will depend upon the particular assumptions made by the court. I consider that it would be inappropriate for the court to address this issue on this basis and therefore decline to do so.

673 I would also note that I have not addressed the fourth requirement of the tort of inducing breach of contract, being the demonstration of damage to Barrick flowing from the breach of contract. Given the conclusion above with respect to the Barrick claim against New Gold and Goldcorp for inducing breach of contract, it is unnecessary to address this issue. For the same reason, I have declined to address this issue below in respect of the claims for inducing breach of contract against the Xstrata Parent Entities and in respect of the claims for interference with economic relations and conspiracy asserted against each of the defendants.

Claim Against the Xstrata Parent Entities

674 The claims against each of the Xstrata Parent Entities will be addressed in turn.

Claim Against Xstrata Queensland

675 In the case of Xstrata Queensland, the claim appears to be one of vicarious liability based principally on the relationship among Xstrata Chile, Xstrata Queensland, Greville and McConnachy. It is agreed that Greville and McConnachy were senior officers and employees of Xstrata Queensland who also acted on behalf of Xstrata Chile. Greville acted pursuant to a power of attorney given by Xstrata Chile to him, and McConnachy acted pursuant to a delegation to him by Greville of the authority that Greville received pursuant to that power of attorney. To the extent that the claim is also based on the actions of Charles Sartain, ("Sartain"), Louis Irvine ("Irvine") and Neal O'Connor ("O'Connor"), the analysis below is also applicable, as each acted on behalf of Xstrata Chile pursuant to a power of attorney given to him by Xstrata Chile.

676 Barrick alleges that, through these officers, Xstrata Queensland induced Xstrata Chile's breach of the Barrick Agreement by causing Xstrata Chile to acquiesce in New Gold's breach of the Shareholders Agreement in the manner described above. This caused Xstrata Chile to close the Goldcorp Transaction without undertaking an appropriate investigation and assessment of Datawave's exercise of the Right of First Refusal.

Claim Against Xstrata Canada

677 In the case of Xstrata Canada, there is no evidence of any action by or on behalf of the corporation in respect of Xstrata Chile's breach of the Barrick Agreement that would ground a claim of vicarious liability for an alleged breach of the contract.

678 The Barrick claim therefore relies on the Parent Entities Addendum to which Xstrata Canada was a party. Barrick says that Xstrata Canada was obliged to ensure that Datawave complied with the Shareholders Agreement, that it failed to enforce the Addendum against New Gold in this respect, and that this failure resulted in Datawave's exercise of the Right of First Refusal and ultimately Xstrata Chile's breach of the Barrick Agreement. Barrick also alleges that Xstrata Canada failed to cause Xstrata Chile to enforce the Shareholders Agreement in respect of Datawave's Right of First Refusal, which resulted in Xstrata Chile's alleged breach of the Barrick Agreement.

Analysis and Conclusions Regarding the Claims Against the Xstrata Parent Entities

679 Barrick has demonstrated two of the requirements of the tort of inducing breach of contract in respect of these claims: that a valid and enforceable agreement existed between Xstrata Chile and Barrick and that the Xstrata Parent Entities knew that the Agreement existed. There can be no issue that the Xstrata Parent Entities either had the Agreement or had the "means of knowledge" required to satisfy this requirement.

680 However, for the reasons set out above, I have concluded that the Conditions Precedent were not satisfied on or before January 7, 2010, and accordingly, that the Barrick Agreement was validly terminated no later than January 31, 2010. I have also concluded that Xstrata Chile did not breach its other obligations to Barrick under the Sale Agreement. Given these findings, neither of the Xstrata Parent Entities can be liable on any theory proposed by Barrick for inducing Xstrata Chile to breach the Barrick Agreement.

681 Given this determination, it is also unnecessary to address the particular requirements of Barrick's claim against the Xstrata Parent Entities for inducing breach of contract. I have, however, set out certain conclusions on the issues raised by Barrick in respect of the Xstrata Parent Entities in case I have erred in concluding that Xstrata Chile did not breach obligations to Barrick under the Barrick Agreement in failing to close the Barrick Transaction.

682 In this regard, I conclude that Barrick's claim against the Xstrata Parent Entities would also fail for the following two additional reasons specific to each of the Entities.

Claim Against Xstrata Queensland

683 Barrick's claim against Xstrata Queensland requires some clarification. Barrick submits that Xstrata Chile ceded control over its operations and affairs to Xstrata Queensland, which directed the actions of Xstrata Chile, primarily through the actions of Greville and McConnachy but also through the actions of Sartain, Irvine and O'Connor (collectively, the "Xstrata Personnel"). This suggests that Barrick's claim is that Xstrata Queensland procured Xstrata Chile's alleged breach of the Barrick Agreement by causing it to breach the Agreement. However, there is no evidence that Xstrata Queensland directed the Xstrata Personnel to cause Xstrata Chile to breach the Barrick Agreement.

684 The Xstrata Personnel were authorized by Xstrata Chile to act on its behalf. At all times, the Xstrata Personnel purported to act on behalf of Xstrata Chile in respect of the matters giving rise to Barrick's claim even if, at the same time, they were also employees of Xstrata Queensland. There is no evidence that the powers of attorney had the result under the laws of Chile that the actions of these individuals constituted the actions of Xstrata Queensland.

685 Therefore, I have approached Barrick's claim against Xstrata Queensland as a claim that the Xstrata Personnel caused Xstrata Chile to breach the Barrick Agreement and that Xstrata Queensland is vicariously liable for such actions.

686 There are two difficulties with this claim in addition to the determination that the Xstrata Personnel did not cause Xstrata Chile to breach the Barrick Agreement.

687 First, the actions of the Xstrata Personnel in the present circumstances are subject to the rule in *Said* v. *Butt*, [1920] 3 K.B. 497 (K.B.D.) under which a managing director or officer of a corporation is not liable for inducing a breach of contract by the corporation if he or she acted *bona*

fide within the scope of his or her authority. This rule has been extended to the case of an employee of a parent company acting on behalf of a subsidiary: see *1175777 Ontario Ltd.* v. *Magna International Inc.* (2001), 200 D.L.R. (4th) 521, [2001] O.J. No.1621 (C.A.), at para. 23. To avoid the operation of the rule in *Said* v. *Butt*, Barrick must demonstrate that Greville, McConnachy, Sartain, Irvine and O'Connor did not act *bona fide* and in the best interests of Xstrata Chile, even if it were found that Xstrata Chile breached the Barrick Agreement. There is, however, no evidence of any fraud or personal interest on the part of any of these individuals that would satisfy this requirement.

688 Second, to succeed in such a claim, Barrick must establish that, in taking the tortious actions, the Xstrata Personnel were acting on behalf of Xstrata Queensland rather than Xstrata Chile. This has not been established in this case. Courts have recognized that the same individuals can function in responsible positions for two different entities at different times without attracting liability to both entities for their actions: see, e.g., *Charlebois* v. *Commission*, [1994] N.B.J. No. 38 (Q.B.), at paras. 1 and 47, aff'd by [1995] N.B.J. No. 239 (C.A.). Accordingly, the evidence could not support a finding of vicarious liability against Xstrata Queensland even if tortious actions had been established.

Claim Against Xstrata Canada

689 The claim against Xstrata Canada also fails for several different reasons. Barrick argues that Xstrata Canada failed to enforce its rights under the Parent Entities Addendum to require that New Gold compel Datawave to comply with the Shareholders Agreement. In addition, Barrick argues that Xstrata Canada failed to assert its rights as a shareholder of Xstrata Chile to prevent Xstrata Chile from breaching the Barrick Agreement. The claim against Xstrata Canada is therefore based on its failure to act as a party to the Parent Entities Addendum in respect of New Gold and as a shareholder in respect of Xstrata Chile.

690 While the Addendum included a covenant of New Gold in favour of Xstrata Canada to ensure that Datawave complied with its obligations under the Shareholders Agreement, there was no contractual relationship between Xstrata Canada and Barrick that required Xstrata Canada to enforce such covenant. There is no evidence of any of the Chilean legal experts to the effect that Barrick was entitled to assert a claim against Xstrata Canada for failure to enforce the Parent Entities Addendum. Nor have I been provided with any principle of law under the laws of Chile or Ontario that would impose such a duty on Xstrata Canada in favour of Barrick on a non-contractual basis.

691 Similarly, Xstrata Canada cannot attract liability, in its capacity as a shareholder of Xstrata Chile, solely by failing to assert its limited rights as a shareholder to prevent Xstrata Chile from breaching the Barrick Agreement. Barrick asserts that Xstrata Canada owed a duty to Barrick to prevent Xstrata Chile from breaching the Barrick Agreement. However, there is no evidence that such an obligation exists under the laws of Chile in the present circumstances. Nor is there any such

obligation imposed on a shareholder of a corporation under the laws of Ontario, absent special circumstances that are not present in this action.

Intentional Interference with Barrick's Economic Relations

692 Barrick also asserts that each of New Gold, Goldcorp and the Xstrata Parent Entities intentionally interfered with Barrick's economic relations with Xstrata Chile, causing an actionable loss to Barrick.

693 The elements of the tort of intentional interference with economic relations are set out in *Reach M.D. Inc.* v. *Pharmaceutical Manufacturers' Association of Canada* (2003), 65 O.R. (3d) 30, [2003] O.J. No. 2062 (C.A.), at para. 44, as follows: (1) an intention to injure Barrick; (2) an interference made by unlawful means; and (3) economic loss resulting from the interference.

694 To substantially the same effect is the definition proposed by Lord Hoffman at para. 51 of *OBG*:

> Unlawful means therefore consists of acts intended to cause loss to the claimant by interfering with the freedom of a third party in a way which is unlawful as against that third party and which is intended to cause loss to the claimant. It does not in my opinion include acts which may be unlawful against a third party but which do not affect his freedom to deal with the claimant.

The same definition of unlawful means was also approved by the Court of Appeal in *Correia,* at para. 102.

695 This definition has the merit of identifying the volitional or intentional element of this tort - there must be a demonstrated interference with the third party's freedom.

696 This is consistent with the origin of the tort of interference with economic relations as described by Lord Hoffmann, at para. 6, which in England at least is now assimilated into the more general tort of causing loss by unlawful means:

> It starts with cases like *Garret* v. *Taylor* (1620) Cro Jac 567 , in which the defendant was held liable because he drove away customers of Headington Quarry by threatening them with mayhem and vexatious suits. Likewise, in *Tarleton* v *M'Gawley* (1794) Peake 270 Lord Kenyon held the master of the *Othello*, anchored off the coast of West Africa, liable in tort for depriving a rival British ship of trade by the expedient of using his cannon to drive away a canoe which was approaching from the shore. In such cases, there is no other wrong for which the defendant is liable as accessory. Although the immediate cause of the loss is the decision of the potential customer or trader to submit to the threat and not buy stones or sell palm oil, he thereby commits no wrong. The defendant's

> liability is primary, for intentionally causing the plaintiff loss by unlawfully interfering with the liberty of others.

697 Before proceeding to consider each of these three requirements in turn, I note the following distinction between the tort of inducing breach of contract and the tort of intentional interference in economic relations set out in *Alleslev-Krofchak* v. *Valcom Ltd.*, 2010 ONCA 557, [2010] O.J. No. 3548 (C.A.), at paras. 97, leave to appeal to S.C.C. refused [2010] S.C.C.A. No. 403:

> If the defendant induces a third party to breach its contract with the plaintiff, the defendant ought to be liable to the plaintiff as an accessory to the unlawful conduct, namely the breach of contract, suffered by the plaintiff. That is the role of the inducement tort. If the third party does not breach a contract with the plaintiff, but instead interferes with the plaintiff's economic relations as a result of unlawful means used by the defendant against that third party, the defendant ought to be liable to the plaintiff because unlawful means were employed by the defendant to intentionally harm the plaintiff. That is the role of the intentional interference tort.

I propose to consider these claims first against New Gold and Goldcorp and then against the Xstrata Parent Entities.

Claims Against New Gold and Goldcorp

698 Barrick argues that New Gold's and Goldcorp's conduct in entering into the Goldcorp Agreement breached the Shareholders Agreement and the CFLA and that this conduct was directed at causing Xstrata Chile to terminate the Barrick Agreement and to transfer the 70% Interest to Goldcorp under the Goldcorp Agreement. It says these actions were therefore directed towards restricting Xstrata Chile's "freedom" or ability to deal with Barrick, which caused harm to Barrick. As a result, Xstrata Chile became the vehicle through which harm was caused to Barrick in a manner contemplated by *Valcom*, at para. 60. Therefore, Barrick says that, if the court does not find the defendants liable for the tort of inducing breach of contract, it should find that their actions attract liability for the tort of intentional interference.

699 A significant requirement of the tort is demonstration of "unlawful means". In *Valcom* at para. 54, Goudge J.A. adopted the following statements of Lord Hoffman in *OBG* regarding the requirements of the tort, which make it clear that the conduct of the defendants must be actionable by the third party:

> In my opinion, and subject to one qualification, acts against a third party count as unlawful means only if they are actionable by that third party. The qualification is that they will also be unlawful means if the only reason why they are not actionable is because the third party has suffered no loss. In the case of intimidation, for example, the threat will usually give rise to no cause of action

> by the third party because he will have suffered no loss. If he submits to the threat, then, as the defendant intended, the claimant will have suffered loss instead. It is nevertheless unlawful means. But the threat must be to do something which *would* have been actionable if the third party had suffered loss.

700 Barrick argues that New Gold's and Goldcorp's conduct in entering into the Goldcorp Agreement constituted "unlawful means" by causing, or giving rise to, breaches of the Shareholders Agreement and the CFLA by Datawave. Barrick submits that this conduct was directed at restricting Xstrata Chile's "freedom" to deal with Barrick and thereby caused it harm.

701 I conclude that Barrick has failed to establish "unlawful means" for two reasons.

702 First, and most obviously, given the determinations above that Datawave did not breach the Shareholders Agreement or the CFLA by entering into the Goldcorp Agreement and that Datawave's exercise of the Right of First Refusal was valid, Barrick cannot demonstrate any breach of contract that constituted "unlawful means". In the absence of any other actions alleged to constitute "unlawful means", Barrick cannot establish this requirement of the tort. Put in the language of this tort, because the Conditions Precedent were satisfied, Xstrata Chile was obligated to close the transaction contemplated by the Datawave Purchase Agreement. It had no freedom that could have been interfered with by New Gold or Goldcorp. The only circumstances in which this tort could be alleged would be the case in which Datawave and/or Goldcorp sought to compel Xstrata Chile to accept an invalidly exercised Right of First Refusal by unlawful means (the nature of which in such a scenario has not been addressed by the court).

703 Second, even in such circumstances, I do not think that Barrick can establish interference with economic relations on its own theory of this case.

704 This question must be considered in the context of the alleged invalidity of Datawave's exercise of its Right of First Refusal. For this purpose, it is assumed that the underlying exercise of the Right of First Refusal was invalid even if the New Gold Notice complied with the formal requirements of section 10.4. As mentioned above, Barrick says that Xstrata Chile breached its obligations to Barrick by failing to conduct a reasonable investigation. It says that, if Xstrata Chile had performed such obligations to the reasonable standard, it would have discovered the invalidity of the exercise of the Right of First Refusal.

705 I do not think that Barrick could logically establish that New Gold and Goldcorp interfered with Xstrata Chile's freedom to deal with Barrick in this situation. In the circumstances assumed in Barrick's submission, Xstrata Chile was not only free but also obligated to reach its own conclusion regarding the validity of the exercise of the Right of First Refusal. Barrick says any investigation by Xstrata Chile would have revealed the invalidity of the exercise of the Right of First Refusal. In such circumstances, Xstrata Chile's conclusion as to the validity of the exercise of the Right of First Refusal, and its decision to terminate the Barrick Agreement, would be an independent act on the part of Xstrata Chile that would exclude any finding of interference on the party of New Gold or

Goldcorp.

706 For the sake of completeness, the second requirement of the tort of interference with economic relations is demonstration of an intention to injure Barrick. I have concluded that, given the determination above, the court cannot address the issue of intention of any of the defendants in respect of this tort for the same reason that I declined to address the similar requirement for the tort of inducing breach of contract.

Claims Against the Xstrata Parent Entities

707 I propose to deal separately with the claims for interference with economic relations against Xstrata Queensland and Xstrata Chile.

The Claim Against Xstrata Queensland

708 Barrick submits that Xstrata Queensland interfered with Xstrata Chile's economic relations by causing it to: (1) acquiesce in the alleged breaches of the Shareholders Agreement and the CFLA rather than permitting Xstrata Chile to assert those breaches and complete the Barrick Transaction; (2) fail to carry out an appropriate investigation and review of Datawave's exercise of the Right of First Refusal, thereby causing Xstrata Chile to breach its obligations to Barrick under the Barrick Agreement; (3) participate in the closing of the Goldcorp Transaction in which it conveyed the Xstrata Interest to DataSub rather than to Barrick as required under the Barrick Agreement; and (4) enter into, and complete, the Feasibility Study Agreement.

709 This claim fails for the following reasons.

710 First, given the determinations above that Xstrata Chile did not breach the Barrick Agreement, the Barrick claim against Xstrata Queensland must fail on the ground that there was no interference with Xstrata Chile's economic relations. As mentioned, Xstrata Chile had no freedom to forego completion of the sale of the 70% Interest to DataSub.

711 Second, there is no evidence that Xstrata Queensland caused the Xstrata Personnel to take, or forego, the actions alleged to give rise to this claim. Therefore, Barrick must establish tortious actions on the part of the Xstrata Personnel for which Xstrata Queensland is vicariously liable. Barrick alleges that the Xstrata Personnel had a duty to Xstrata Chile to act in its best interests and to refrain from causing it to breach material agreements. However, there is no basis for such a claim for the same reasons as there is no basis for the similar claim in respect of the tort of inducing breach of contract.

712 Third, I do not think that Barrick has established any "unlawful means". Barrick alleges that the unlawful means in respect of this claim are breaches of the duty of the Xstrata Personnel to act in Xstrata Chile's best interests and not to cause it to breach material agreements. This issue is rolled up into the reasons for dismissing the vicarious liability claim against Xstrata Queensland. As

mentioned above, there is no basis for excluding the operation of the rule in *Said* v. *Butt* in respect of the Xstrata Personnel in the present case. This determination also excludes the finding of unlawful means in the form of the alleged breaches of duty to Xstrata Chile on the part of these parties. I would add that I have a serious doubt regarding whether the alleged breach of duty could constitute unlawful means in any event.

The Claim Against Xstrata Canada

713 Barrick submits that Xstrata Canada interfered with Xstrata Chile's economic relations by: (1) failing to ensure that Datawave complied with the Shareholders Agreement by enforcing the Parent Entities Addendum against New Gold; and (2) failing to cause Xstrata Chile to enforce the Shareholders Agreement against Datawave in respect of its exercise of the Right of First Refusal. Barrick says Xstrata Canada had voting control over the shares of Xstrata Chile and had a duty, which it breached, to simply refrain from standing by and acquiescing in the conduct of Xstrata Queensland and its officers.

714 This claim fails for the following reasons.

715 First, given the determination that Datawave did not breach the Shareholders Agreement, Barrick's claim cannot succeed for the reason that Xstrata Canada cannot have breached either of its alleged obligations.

716 Second, there is no legal principle under the laws of Chile or Ontario which imposes an obligation on a shareholder to refrain from standing by and acquiescing in conduct of the nature described above in respect of the claim against Xstrata Chile. Therefore, Barrick's allegation that breach of such duty constituted the "illegal means" for this tort claim cannot succeed.

717 Lastly, the Xstrata Personnel had no relationship to Xstrata Canada. There is, therefore, no basis for asserting this claim by way of vicarious liability against this defendant.

<u>Conspiracy to Injure</u>

718 Barrick also asserts that each of the defendants is liable in tort for unlawful conduct conspiracy as described by Estey J. in *Canada Cement LaFarge Ltd.* v. *British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452 at pp. 471-72: "where the conduct of the defendants is unlawful, the conduct is directed towards the plaintiff (alone or together with others), and the defendants should know in the circumstances that injury to the plaintiff is likely to and does result".

719 Before proceeding, it is necessary to describe the involvement of each of the defendants in the conspiracy alleged by Barrick.

720 Barrick says that New Gold and Goldcorp acted in combination commencing December 4,

2009, with a common intention and objective that Goldcorp would acquire either 70% or 100% of the El Morro Project, never 30%. Barrick says this common objective can be inferred from the "surreptitious nature of their plan to keep their conduct secret from both Xstrata Chile and Barrick". It points to: (1) actively misleading Barrick into thinking the New Gold value maximization process was limited to the New Gold Interest and failing to disclose that New Gold was actively marketing the 70% Interest and a 100% interest in the El Morro Project; (2) actively misleading Xstrata Chile into believing that New Gold was marketing only its 30% interest by means of the disclosure notices, knowing Barrick would receive those notices; (3) using misleading language in the December 18 New Gold Notice to obfuscate the nature of the proposed transaction; and (4) executing and implementing the Goldcorp Agreement.

721 Barrick says Xstrata Chile joined this conspiracy no later than early January "as it became aware of the common plan of New Gold and Goldcorp". Barrick says Xstrata Chile's interest was to retain its 70% interest in the BHP Royalty. It says Xstrata Chile actively participated in and facilitated the Goldcorp scheme, under the direction of Xstrata Queensland and with the "apparent acquiescence" of Xstrata Canada. Xstrata Chile's active participation was demonstrated by, among other actions: (1) determining to "accept" the New Gold Notice and not inquiring adequately into the details of the Goldcorp Transaction; (2) failing to object to Datawave's purported exercise of the Right of First Refusal, notwithstanding knowledge that it was invalid; (3) actively participating in the closing of the transactions contemplated by the Goldcorp Agreement; and (4) knowingly transferring the 70% Interest to an entity within Goldcorp's control.

722 Barrick alleges that the Xstrata Parent Entities also participated in the conspiracy. In the case of Xstrata Queensland, such participation took the form of directing Xstrata Chile to take the actions it did. In the case of Xstrata Canada, such participation took the form of acquiescing to Xstrata Queensland's alleged control of Xstrata Chile.

Legal Requirements of the Conspiracy Claim

723 The elements of this tort have been set out by the Court of Appeal in *Agribrands Purina Canada Inc.* v. *Kasamekas*, 2011 ONCA 460, [2011] O.J. No. 2786 (C.A.), at para. 26, as follows:

> For the appellants to be liable for the tort of unlawful conduct conspiracy, the following elements must therefore be present:
>
> (a) they act in combination, that is, in concert, by agreement or with a common design;
> (b) their conduct is unlawful;
> (c) their conduct is directed towards the respondents;
> (d) the appellants should know that, in the circumstances, injury to the respondents is likely to result; and
> (e) their conduct causes injury to the respondents.

Analysis of the Claims Asserted Against New Gold, Goldcorp and Xstrata Chile

724 There are three principal difficulties with this claim - demonstration of unlawful conduct, demonstration of actions in combination, and demonstration that the defendants' conduct was directed towards Barrick. I will address each in turn.

Unlawful Means

725 To succeed in this claim, Barrick must establish among other things, that each of the alleged conspirators engaged in unlawful conduct. The case law indicates that unlawful conduct can include both breach of contract and tortious conduct.

726 In this proceeding, Barrick alleges that the unlawful conduct of New Gold and Goldcorp consists of: (1) breach of contract, including breaches of the Transfer restrictions and the confidentiality provisions of the Shareholders Agreement, and a breach of the CFLA; and (2) the tortious conduct addressed above (inducing breach of contract and interference with economic relations).

727 I have concluded above that the implementation of the Goldcorp Agreement did not cause a breach of the Transfer restrictions of the Shareholders Agreement. I have also concluded that the actions of New Gold and Goldcorp do not support either of the tortious claims asserted against New Gold and Goldcorp for inducing breach of contract or interference with economic relations. I conclude below that neither New Gold nor Goldcorp breached the confidentiality provisions of the Shareholders Agreement and, in any event, that Barrick has no common law claim in its own right for breach of confidence involving misuse of confidential information. Accordingly, Barrick cannot establish the use of any unlawful means directed against Barrick by New Gold or Goldcorp.

728 In the case of Xstrata Chile, the alleged unlawful conduct consists of: (1) a breach of its obligations to Barrick under the Barrick Agreement, as supplemented by its good faith obligations, to undertake a reasonable investigation and assessment of the validity of Datawave's exercise of the Right of First Refusal; (2) actively participating in the closing of the Goldcorp Transaction, including execution of the Datawave Purchase Agreement; and (3) breaching the Barrick Agreement and closing the sale of the Offered Interest to an entity fully within Goldcorp's control. All of this alleged unlawful conduct is premised on a finding that Datawave breached the Shareholders Agreement by entering into the Goldcorp Agreement and exercising the Right of First Refusal

729 I have concluded above, however, that Xstrata Chile did not breach the Barrick Agreement by completing the sale of the 70% Interest to DataSub pursuant to the Datawave Purchase Agreement because Datawave validly exercised the Right of First Refusal. Accordingly, Barrick cannot demonstrate the use of any unlawful means directed against Barrick by Xstrata Chile.

730 Given these determinations, the unlawful purpose conspiracy claims asserted against each of

New Gold, Goldcorp and Xstrata Chile must fail.

Alleged Action in Combination

731 Barrick's claims against New Gold and Goldcorp are, in substance, claims that these parties agreed on a common design on or about December 4, 2009, and used a number of unlawful means to achieve that purpose.

732 Given the determination above, it is not necessary to address this issue and, subject to the comments below, I decline to do so. I would, however, make the following observations with respect to this requirement of the conspiracy claim.

733 First, insofar as the claim against New Gold and Goldcorp is based on the existence of alleged action in combination prior to the execution of the Goldcorp Agreement, the evidence for such a combination is lacking.

734 In effect, Barrick seeks to convert the relationship of negotiations between the parties regarding a possible transaction into a conspiratorial combination. For Barrick to succeed in this claim, it must establish that New Gold and Goldcorp formed a common intention that Goldcorp would acquire 70% or 100% of the El Morro Project, but never 30%, as Barrick suggests on or about December 4, 2009. The facts do not support this conclusion.

735 There was no certainty that New Gold would accept a transaction with Goldcorp until the New Gold board of directors accepted the Goldcorp Offer on January 6, 2010. Despite the intensive negotiations in early January 2010, New Gold not only retained the option of accepting a better offer from Barrick but it solicited one. Further, the structure of the Goldcorp Transaction was not established until late December 2009. Until shortly before Christmas, there was also a possibility that the third party who conducted due diligence at the El Morro Project on or about December 21, 2009 might also be interested. Moreover, the evidence indicates that the possibility that Goldcorp might acquire the New Gold Interest in exchange for a producing asset, as part of the transaction under consideration, was not definitively ruled out by the parties until late December 2009. These matters are addressed further below in respect of the Barrick claim that Datawave breached the confidentiality provisions of the Shareholders Agreement in providing disclosure to Goldcorp in December 2009.

736 Accordingly, the only agreement upon which Barrick can rely in asserting this claim is the Goldcorp Agreement. The court must therefore analyze the alleged conspiracy as having occurred on and after January 6, 2011. However, the only unlawful means identified by Barrick during the period from that date to February 16, 2011 is the exercise of the Right of First Refusal, which the court has concluded did not constitute, or give rise to, breaches of the Shareholders Agreement or the CFLA.

737 There is a similar problem of proof with regard to the claim against Xstrata Chile. Barrick

claims that Xstrata Chile joined the conspiracy in early January in order to further its own interest of retaining its 70% Interest in the BHP Royalty and assisted the conspiracy by facilitating, rather than opposing, completion of the Goldcorp Transaction, although it knew that the Transaction involved a prohibited Transfer under the Shareholders Agreement.

738 However, the only agreement to which Barrick can point is the Datawave Purchase Agreement. This agreement, and the other actions of Xstrata Chile in facilitating the completion of the Goldcorp Transaction, do not demonstrate a conspiratorial combination with New Gold and/or Goldcorp. Nor does the fact that Xstrata Chile benefitted from completion of the Goldcorp Transaction by retaining its interest in the BHP Royalty. Instead, these facts reflect the operation of the provisions of section 10.4 of the Shareholders Agreement, by which Xstrata Chile became bound to complete the sale of the Offered Interest to Datawave without the exercise of any will on its part. In the case of Xstrata Chile, the requirement of an action in combination is excluded by the determination that Datawave's exercise of the Right of First Refusal was valid.

Conduct Directed Towards Barrick and Knowledge that Injury will Result

739 With regard to the requirement that the conduct be directed towards the plaintiff, Barrick says that, on the facts of this case, there could have been no doubt that Barrick alone would suffer loss as a result of the defendants' conduct. Because this case involves the exercise of a right of first refusal, the defendants could not achieve their respective objectives of having Goldcorp acquire the Offered Interest and Xstrata Chile retain the BHP Royalty without causing Barrick to suffer damage in the form of the loss of those assets. Barrick says that New Gold, Goldcorp and Xstrata Chile therefore knew that injury to Barrick would likely result from their actions, in particular from Datawave's exercise of the Right of First Refusal. Barrick says that it does not matter that the defendants' conduct may have been motivated by self-interest or some other cause.

740 This issue is only significant in the circumstances where a court finds that Datawave breached its obligations under the Shareholders Agreement in exercising the Right of First Refusal and completing the Goldcorp Transaction. Given the determination that Datawave validly exercised the Right of First Refusal, it is not meaningful to characterize the actions of any of New Gold, Goldcorp or Xstrata Chile as having been either directed towards Barrick or taken with the knowledge that injury to Barrick was likely to result, in each case in the sense required to assert a claim in conspiracy.

741 While there is no doubt that New Gold and Goldcorp intended the natural consequences of their actions, their conduct was directed towards realization of their own interests in compliance with the Shareholders Agreement and the Barrick Agreement. While Barrick's deprivation of the benefit of the Barrick Agreement was an inevitable result of the exercise of the Right of First Refusal, the conduct of New Gold and Goldcorp was not specifically directed toward that end. In the case of Xstrata Chile, it was obligated to complete the Datawave Purchase Agreement pursuant to the Shareholders Agreement on the valid exercise of the Right of First Refusal. Its actions were

directed towards complying with its obligations under the Shareholders Agreement. These facts are a consequence of the more fundamental finding that the defendants' actions were taken legitimately in the furtherance of their respective self-interests in compliance with the Shareholders Agreement, the CFLA and the Barrick Agreement, as the case may be.

Claims Asserted Against the Xstrata Parent Entities

742 The claims against the Xstrata Parent Entities cannot succeed given the determination above that the claim of conspiracy against Xstrata Chile has not been established. In this sense, the claims against Xstrata Queensland and Xstrata Canada are dependent upon, and derivative of, a viable claim against Xstrata Chile. The comments above in respect of the claim of conspiracy against Xstrata Chile are also applicable to the claims against each of the Xstrata Parent Entities.

Alleged Misuse of Confidential Information

743 In addition to the foregoing claims, Barrick asserts a common law claim against New Gold and Goldcorp for breach of confidence in the form of the misuse of confidential information, which it says entitles it to a restitutionary remedy in the form of a constructive trust. Barrick alleges that New Gold and Goldcorp misused confidential information pertaining to the El Morro Project in two respects that led directly to Goldcorp's gain and Barrick's loss of the Xstrata Interest. I will address these claims separately in turn.

Barrick's Common Law Claim Against New Gold and Goldcorp Respecting Disclosure Contemplated by the December 8 New Gold Letter and the December 18 New Gold Letter

744 The principal claims of breach of confidence and misuse of confidential information against New Gold and Goldcorp relate to the New Gold disclosure of confidential information to Goldcorp made as contemplated by the December 8 New Gold Letter and the December 18 New Gold Letter. After describing these claims in greater detail, I will address the claims first by dealing with the scope of the confidentiality provisions in the Shareholders Agreement, then with the applicable law of Barrick's common law claims, and finally with Barrick's entitlement to a common law claim under the laws of Ontario.

745 Section 12.11(2) of the Shareholders Agreement governed disclosure of confidential information pertaining to the El Morro Project. Barrick's principal claim for misuse of confidential information pertains to Datawave's disclosure to Goldcorp in December 2009 of confidential information in furtherance of a transaction for the Xstrata Interest. Barrick says Datawave breached section 12.11(2) in making such disclosure to Goldcorp. New Gold and Goldcorp submit that Datawave was permitted to disclose confidential information to Goldcorp pursuant to paragraphs 12.11(2)(d) and 12.11(2)(e) of the Shareholders Agreement.

746 There is no question that Datawave provided Goldcorp with access to confidential information pertaining to the El Morro Project in December 2009, after Goldcorp signed a

confidentiality agreement with New Gold. There is also no issue that Goldcorp used this information in making its decision to enter into the Goldcorp Transaction. The information disclosed comprised information in a data room established by New Gold and information received on a site visit to the El Morro Project on December 21 and 22, 2009. After the December 18 New Gold Letter, Goldcorp also received a copy of the form of the Barrick Agreement that New Gold had received in October 2009 together with the Xstrata Chile Notice.

747 Barrick submits that the December 8 New Gold Letter misrepresented the purpose of the disclosure to Goldcorp in describing the purpose to be a possible sale of the New Gold Interest and a possible financing described by paragraph 12.11(2)(d) of the Shareholders Agreement. Barrick says that, by December 8, 2009, New Gold and Goldcorp were focused entirely on a transaction involving the Xstrata Interest and not the New Gold Interest. Barrick says the disclosure was therefore for the purpose of a sale involving either 100% or 70% of the El Morro Project. Accordingly, Barrick submits that the disclosure of confidential information pertaining to the El Morro Project and the Company pursuant to the December 8 New Gold Letter, including disclosure in the course of the site visit of the El Morro Project on December 21 and 22, 2009, violated New Gold's duty of confidentiality, as well as its duty of good faith. In addition, Barrick says that the further disclosure of confidential information made pursuant to the December 18 New Gold Letter, principally the form of the Barrick Agreement, also violated New Gold's duty of confidentiality as well as its duty of good faith.

Did the Disclosure Breach the Provisions of Section 12.11(2) of the Shareholders Agreement?

748 Barrick does not suggest that it is entitled to enforce the confidentiality provisions of the Shareholders Agreement that it says Datawave breached by providing confidential information to Goldcorp. Instead, it asserts a common law claim that is addressed later. However, the scope of that common law claim is defined by the extent to which Datawave was entitled, as a contractual matter, to make such disclosure under the Shareholders Agreement. This is a matter of the contractual interpretation of section 12.11(2) of the Shareholders Agreement. In view of the conclusion reached below, it is only necessary to consider the operation of paragraph 12.11(2)(e). In addition, Barrick's argument turns on a finding that Datawave made its disclosure to Goldcorp in respect of a sale of the 70% Interest rather than the New Gold Interest by virtue of a commitment to such a transaction by Datawave and Goldcorp prior to the December 8 New Gold Letter.

749 I propose to address these issues in the following order. First, I will address the contractual interpretation of paragraph 12.11(2)(e). I will then address Barrick's common law claim dealing in order with the proper law of the claim, the issue of standing, the factual pre-condition of Barrick's claim and the specific claim in respect of disclosure of the Barrick Agreement.

Preliminary Matters

750 Before proceeding to address the issue in this section, there are two preliminary matters raised by Barrick pertaining to the December 8 New Gold Letter and the December 18 New Gold

Letter.

751 First, Barrick seeks to limit the extent of Datawave's right to disclose confidential information to the statements of intended purpose in the December 8 New Gold Letter and the December 18 New Gold Letter, the text of which has been set out above. This position amounts to an argument that the parties to the Shareholders Agreement amended the Agreement to narrow the permissible disclosure to whatever was communicated by Datawave to Xstrata Chile in these Letters.

752 There is no basis for such a conclusion in the evidence before the court. There is no language in the Shareholders Agreement that would limit a shareholder's use of confidential information given to the use disclosed to the other shareholder under paragraph (iii) to the proviso in section 12.11(2) even if such a discrepancy could be established. There is also no evidence that Chilean law would require such an approach to the contractual interpretation of paragraph 12.11(2)(e).

753 Second, Barrick asserts that the December 8 New Gold Letter and the December 18 New Gold Letter were misleading in their description of the use for which the confidential information was to be disclosed to the prospective purchasers. Because the text of these Letters does not affect the interpretation of the confidentiality provisions in the Shareholders Agreement, this is an entirely separate issue. In this section, I address only the issue of whether the disclosure of the confidential information to Goldcorp was permitted under section 12.11(2) of the Shareholders Agreement.

Analysis and Conclusions Respecting Contractual Interpretation of Paragraph 12.11(2)(e)

754 Paragraph 12.11(2)(e) of the Shareholders Agreement provides that, notwithstanding section 12.11(1), a shareholder may disclose such confidential information as may be reasonably required by a third party in connection with the negotiation and due diligence relating to a Transfer of any Rights and Interests to the extent permitted by the Shareholders Agreement. The issue in this section is therefore whether paragraph 12.11(2)(e) permitted disclosure in furtherance of the Goldcorp Transaction.

755 The Shareholders Agreement, including the provisions of paragraph 12.11(2)(e), is governed by the laws of Chile. None of the Chilean legal experts has suggested that any specific principles of contractual interpretation are particularly applicable for this exercise. However, the Chilean experts did provide their opinions regarding the manner in which they believe paragraph 12.11(2)(e) should be interpreted.

756 Morales' opinion is that Datawave was not permitted under paragraph 12.11(2)(e) to disclose confidential information in furtherance of its value maximization process insofar as that process contemplated the sale of 70% or 100% of the El Morro Project. I will address the basis for this opinion below.

757 Ochagavia was of the opinion that the disclosure was authorized pursuant to paragraph

12.11(2)(e) on the basis that such provision was not limited to disclosure in connection with a sale by a shareholder of its own Rights and Interests. In his view, therefore, disclosure of confidential information regarding a possible transaction involving the sale of the 70% Interest after it was acquired by DataSub was not prohibited by paragraph 12.11(2)(e).

758 Pena was also of the opinion that paragraph 12.11(2)(e) permitted disclosure in connection with the sale of the 70% Interest, not merely the New Gold Interest. In Pena's opinion, a Transfer of the 70% Interest was permitted under Chilean law and was not subject to the provisions of section 10.1 of the Shareholders Agreement (because section 10.1 only addressed sales of a shareholder's own Rights and Interests). Accordingly, while not expressly stated, Pena's opinion is that a sale of the 70% Interest without a concurrent sale of the New Gold Interest was permitted by the Shareholders Agreement and, therefore, disclosure was permitted in furtherance of such a transaction.

759 Barros also disagreed with the position taken by Morales. The basis of his position is, however, somewhat unclear. Insofar as he based his position on Xstrata Chile's failure to oppose such disclosure, I have not relied upon his opinion. However, Barros also makes it clear that his opinion is based on, or is a consequence of, his conclusion that there were no grounds in the Shareholders Agreement for prohibiting Datawave's exercise of the Right of First Refusal and the sale of the 70% Interest to a third party.

760 I think that the wording of paragraph 12.11(2)(e) of the Shareholders Agreement, as well as common sense, mandates an interpretation of that provision in the present circumstances that permitted Datawave to disclose confidential information to Goldcorp in furtherance of a sale of the 70% Interest to Goldcorp conditional on DataSub's purchase of the Offered Interest. I reach this conclusion for the following three reasons.

761 First, the language of paragraph 12.11(2)(e) is clear. It permits disclosure in connection with negotiations and due diligence relating to a Transfer of any Rights and Interests to the extent permitted by this Agreement. It was not limited in Datawave's case to a sale of the New Gold Interest. Accordingly, paragraph 12.11(2)(e) permitted disclosure in respect of both (1) the Transfer of the Offered Interest to Datawave pursuant to the exercise of the Right of Refusal and (2) the Transfer of the 70% Interest from Datawave to Goldcorp pursuant to the sale of the DataSub shares pursuant to the DataSub Share Purchase Agreement, in each case provided the Transfer was "permitted by the Shareholders Agreement".

762 Unlike the phrase "permitted by this Article" used in Section 10.2, which is descriptive of the circumstances addressed in sections 10.3 and 10.4, the phrase "permitted by this Agreement" is very general in nature. I am satisfied on the evidence of Ochagavia, Pena and Barros that the reference in paragraph 12.11(2)(e) to Transfers of any Rights and Interests "permitted by this Agreement" is a reference to any Transfers of Rights and Interests that comply with the Agreement in any manner. Accordingly, it includes all transactions in which the other shareholder will receive the benefit of

the provisions in Article 10 to which it is entitled in accordance with the principles set out above. In this manner, paragraph 12.11(2)(e) complements and reinforces the Transfer restrictions to the extent, but only to the extent, that such restrictions would apply to a proposed Transfer.

763 Accordingly, I conclude that the disclosure made by New Gold to Goldcorp did not breach paragraph 12.11(2)(e) because it was made in respect of a Transfer of Rights and Interests that was permitted by the Shareholders Agreement.

764 Second, whether or not Datawave complied with paragraph 12.11(2)(e) should, as a matter of common sense and logic, parallel the issue of whether the underlying transaction gave rise to a Transfer that was permitted or prohibited under the Shareholders Agreement.

765 Barrick urges the court to interpret the Shareholders Agreement in a manner that would prevent disclosure of information to a prospective purchaser that it would require to conduct due diligence in furtherance of a transaction that was permitted by the Agreement. I think this submission should be rejected as contrary to commercial sense.

766 The parties to the Shareholders Agreement cannot have intended to restrict a shareholder's options in exercising a right of first refusal under section 10.4 by means of the confidentiality provisions. Such an interpretation goes well beyond the purposes for which parties require confidentiality provisions in shareholders agreements and would require more explicit support elsewhere in the provisions of the Shareholders Agreement. Such evidence is absent in the present circumstances.

767 Third, the Morales opinion is expressly based upon his conclusion that:

> ... Datawave was not permitted under the El Morro Shareholders Agreement to Transfer anything other than its own Rights or Interests and seek offers that it would have to submit to the Right of First Refusal process established in Section 10.4. In no event Datawave was permitted under the El Morro Shareholders Agreement to offer its Right of First Refusal against Xstrata Chile for its 70% Participating Interest. That right could only be exercised by no one other than New Gold as the "other Shareholder" in the language of Section 10.4. Recipients of this proposal were not an "other Shareholder" in the language of Section 10.4 and could not be validly offered the right to exercise Datawave's Right of First Refusal against Xstrata for its 70% Participating Interest because it was a "Right or Interest" that could not be disposed of by any of the parties to the El Morro Shareholders Agreement ...

768 I think it is clear that, as a corollary of Morales' opinion regarding Datawave's exercise of the Right of First Refusal, his conclusion regarding the operation of paragraph 12.11(2)(e) is only applicable if the underlying conclusion is validated. In other words, Morales' opinion is dependent upon a prior finding that Datawave's exercise of the Right of First Refusal was invalid. However, I

have rejected the conclusion that the Goldcorp Agreement gave rise to a prohibited Transfer. In these circumstances, the basis for Morales' opinion regarding the operation of paragraph 12.11(2)(e) does not exist. I would note, however, that Morales' approach, while reaching a contrary conclusion, also reflects a congruence between the operation of the Transfer restrictions and the operation of the disclosure provisions of the Shareholders Agreement .

769 This conclusion is determinative of Barrick's common law claim for misuse of confidential information, apart from its claim with respect to disclosure of the form of the Barrick Agreement, which is dismissed below on other grounds. I have, however, addressed the remaining issues regarding Barrick's common law claim in case I have erred in reaching the foregoing conclusion.

Proper Law of the Obligation in Respect of Barrick's Common Law Claim of Misuse of Confidential Information

770 The parties agree that the choice of law rule for a common law claim for breach of confidence is the proper law of the obligation. In Dicey and Morris, *The Conflict of Laws*, 12th ed. (London: Sweet & Maxwell, 1993) at p. 1471, the authors state that the proper law of the obligation is to be determined according to the following rules:

(a) If the obligation arises in connection with a contract, its proper law is the law applicable to the contract;
(b) If it arises in connection with a transaction concerning an immovable (land) its proper law is the law of the country where the immovable is situated (*lex situs*); and
(c) If it arises in any other circumstances, its proper law is the law of the country where the enrichment occurs.

771 Goldcorp argues that the restitutionary obligation is based on a breach of the Shareholders Agreement, as the contract that governs the scope of the obligation of confidentiality, and therefore the proper law of the obligation should be Chile.

772 Barrick says that the confidentiality agreement between New Gold and Goldcorp, or the Goldcorp Agreement, are equally relevant or that a "web of duties" is owed by the parties to one another. It says that the court should apply the principled approach illustrated in *Minera Aquiline Argentina SA* v. *IMA Exploration Inc.*, 2006 BCSC 1102, [2006] B.C.J. No. 1626 (S.C.) at para. 200, aff'd 2007 BCCA 319, [2007] B.C.J. No. 1232 (C.A) to find that the proper law of the obligation is Ontario law based on a number of factors including: (1) the New Gold employees who were involved in delivering the New Gold Letters were in Ontario and British Columbia; (2) the Goldcorp employees who received and reviewed the confidential information were in Ontario and British Columbia; (3) Goldcorp received and reviewed the confidential information without any knowledge of the applicable laws of any particular jurisdiction and without any knowledge of any applicable contractual obligations, including the Shareholders Agreement; and (4) Goldcorp was enriched in British Columbia.

773 Applying the principled approach described in *Minerva Aquiline*, I am of the opinion that the laws of Chile govern this claim for the following reasons.

774 First, and most importantly, the scope of the claim is defined by the Shareholders Agreement, which is governed by the laws of Chile.

775 Second, insofar as New Gold or Goldcorp turned their minds to the question of whether New Gold's disclosure of confidential information to Goldcorp would attract liability to either or both of these defendants, I think it is reasonable to conclude that they would therefore have expected that, at a minimum, their obligations would be governed by the laws of Chile.

776 Third, Barrick did not own any of the confidential information, apart from the Barrick Agreement which was owned jointly with Xstrata Chile. Nor did Barrick furnish any of the confidential information. The confidential information was owned by Xstrata Chile and Datawave, neither of which is a Canadian corporation and neither of which operates in Canada.

777 Fourth, as Goldcorp points out, if Xstrata Chile had enforced the confidentiality provisions of the Shareholders Agreement, it would have been expected that the laws of Chile would govern its claims against both Datawave, as the confider of the information, and Goldcorp, as the recipient. I see no basis for distinguishing the circumstances of Xstrata Chile from those of Barrick in this action, particularly as any claim for breach of confidence would, in all probability, have been asserted by both Xstrata Chile and Barrick.

778 However, none of the parties have pleaded the laws of Chile in respect of Barrick's breach of confidence claims. In addition, none of the Chilean legal experts provided evidence in their written reports or in oral testimony regarding the Chilean law of breach of confidence, other than in respect of the interpretation of the relevant provisions of the Shareholders Agreement as discussed above.

779 In such circumstances, the court is required to assume that the laws of Chile in respect of Barrick's common law claims for breach of confidence involving the misuse of information are the same as the laws of Ontario.

Is Barrick Entitled to Assert this Breach of Confidence Claim Under Ontario Law?

The Issue

780 As mentioned above, Barrick asserts that Datawave's disclosure to Goldcorp of confidential information pertaining to the El Morro Project in December 2009 breached a common law duty of confidence owed by each of Datawave and Goldcorp to Barrick directly.

Positions of the Parties

781 The defendants argue that Barrick has no standing to assert this common law claim in the present circumstances because it was neither the owner of the confidential information disclosed by

New Gold to Goldcorp, the confider of the confidential information, nor a party to the Shareholders Agreement.

782 Barrick says that it was entitled to a duty of confidence in its favour. As a participant in the Xstrata Chile auction process and successful bidder, it says it had a reasonable expectation that the confidential information respecting the El Morro Project would remain confidential. It also says that it obtained from Xstrata Chile a contractual right to confidentiality respecting the El Morro Project pursuant to sections 8.6(e) (by virtue of Xstrata Chile's obligation to enforce the confidentiality provisions of the Shareholders Agreement) and 12.1 (the confidentiality agreement) of the Barrick Agreement. Barrick says that, in the present circumstances, neither Xstrata Chile nor the Company, the other two parties to the Shareholders Agreement, could be expected to enforce the confidentiality of such information, particularly as Xstrata Chile benefitted from the Goldcorp Transaction. It argues that, therefore, it should be entitled to assert a common law claim on the basis that it was only as a result of New Gold's and Goldcorp's breaches of confidence that it was deprived of the benefit of the Barrick Agreement. Otherwise, it says, New Gold and Goldcorp will be able to rely on a lack of standing to shield themselves from liability for their breaches of confidence.

Applicable Law

783 The elements of a common law claim in tort for breach of confidence have been confirmed by the Supreme Court of Canada as follows in *Lac Minerals Ltd.* v. *International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, at pp. 635-36:

1. the information conveyed was confidential;
2. the information was communicated in confidence; and
3. the information was misused by the party to whom it was communicated to the detriment of the party communicating it.

784 This position was affirmed by the Court of Appeal in *Free Trade Medical Network Inc.* v. *RBC Travel Insurance Co.*, [2006] O.J. No. 3636 (C.A.), at para. 8. In that decision, the court went on to state, at para. 11, that:

> We accept that it may not be accurate in all cases of breach of confidence to say that the person seeking to rely upon a confidence must be the owner of the confidential information. As Lord Denning said in *Fraser v. Evans*, [1968] Q.B. 349, however,
>
> > ... the party complaining must be the person who is entitled to the confidence and to have it respected. He must be a person to whom the duty of good faith is owed.

785 The Supreme Court also confirmed that a third party who receives information with the knowledge that it was communicated in breach of confidence may be subject to equitable remedies: see *Cadbury Schweppes Inc.* v. *FBI Foods Ltd*., [1999] 1 S.C.R. 142, at para. 19.

786 Barrick submits that the flexibility demonstrated by courts in upholding confidentiality supports the conclusion that defendants need not owe a duty of confidence directly to a plaintiff in order to be liable for breach of confidence. For this proposition, it relies specifically on the decision in *Minera Aquiline.*

Analysis and Conclusions

787 I agree with the defendants that Barrick cannot assert its common law claim for breach of confidence for the following reasons.

788 First, while I accept that equity is to be applied flexibly to render justice, there is no authority for imposing a duty of confidence in favour of a third party to a contract who is neither the owner of the confidential information nor a confider of the confidential information.

789 In particular, I am not persuaded that either *Minera Aquiline* or *Cadbury Schweppes* support Barrick's position on this issue. In *Cadbury Schweppes*, the plaintiff was the legal successor-in-interest to the original confider of the confidential information. *Minera Aquiline* was decided on the basis of a contractual claim. The plaintiff was a contracting party to the confidentiality agreement by its terms so the issue in the present circumstances did not present itself. Neither the trial decision nor the appellate decision addressed the issue in the present action directly and the comments of the trial judge in *Minera Aquiline* respecting the common law claim are entirely *obiter dicta*. I am therefore of the opinion that there is nothing in that decision that can be relied on to find that a duty of confidence could be owed to an unrelated third party, i.e., a party who neither owns the confidential information nor provides it to a party in circumstances establishing a duty of confidence.

790 Second, I do not see a compelling reason in equity to impose such a duty. This claim is only significant in the circumstances in which the transaction, in furtherance of which disclosure was made, otherwise complied with the Shareholders Agreement. If it did not, Barrick would have more direct means of asserting a claim against the defendants. I do not think it is reasonable to provide a right in equity to prevent an otherwise permitted transaction by restricting the disclosure of confidential information.

791 Third, Barrick cannot assert a reasonable expectation based on its participation in the Xstrata Chile auction process. Goldcorp did not participate in that process and, therefore, never signed a confidentiality agreement. Further, Barrick never took an assignment of the benefit of the executed confidentiality agreements, or otherwise received the benefit of such agreements, from Xstrata Chile.

792 Based on the foregoing, I conclude that Barrick has no standing to assert its common law claims for breach of confidence based on misuse of information because neither New Gold nor Goldcorp owed a duty of confidence to it. It follows that any claim that Barrick might have arising out of a breach of the disclosure provisions of the Shareholders Agreement would be limited to a claim against Xstrata Chile based on disclosure of the Barrick Agreement, which is discussed below.

Factual Pre-Condition to Barrick's Claim

793 There is also a factual difficulty with Barrick's common law claims even if it were assumed that paragraph 12.11(2)(e) limited permissible disclosure in furtherance of a sale of the New Gold Interest.

794 I do not think that it is disputed that the information required by a prospective purchaser of the New Gold Interest would not differ from the information required by a prospective purchaser of the Xstrata Interest. Therefore, because New Gold was marketing the options of a 30% interest, a 70% interest and a 100% interest in the El Morro Project, the Barrick argument can only succeed if Barrick can establish that New Gold disclosed information to Goldcorp after the parties had resolved to pursue a transaction limited to the 70% Interest. Otherwise, to the extent confidential information was provided to Goldcorp in connection with a *bona fide* negotiation of a possible purchase of the New Gold Interest alone or in contemplation of a purchase of 100% of the Project, the provisions of paragraph 12.11(2)(e) were satisfied, even if the parties ultimately agreed on a transaction that involved only the 70% Interest.

795 However, the evidence does not support this assertion. Barrick alleges that New Gold and Goldcorp were focused entirely on a transaction involving the Xstrata Interest and not the New Gold Interest by December 8, 2009. The last of the confidential information was delivered no later than the Goldcorp site visit of El Morro on December 22, 2009, with the exception of the copy of the Barrick Agreement which is addressed below. The evidence establishes that New Gold and Goldcorp did not resolve to pursue a transaction limited to Goldcorp's purchase of the Offered Interest until December 24, 2009 at the earliest. This occurred after delivery of both the December 8 New Gold Letter and the December 18 New Gold Letter and the disclosure contemplated by these Letters. This conclusion is based on two principal considerations that, collectively, indicate that New Gold and Goldcorp kept open for as long as possible the option of an exchange of an operating asset of Goldcorp for the New Gold Interest.

796 First, an asset swap was New Gold's preferred option. Goldcorp was prepared to consider such a transaction with New Gold as it understood that Barrick was unwilling to do so. An asset swap, if feasible, would therefore have made any Goldcorp offer more attractive to New Gold than any Barrick offer for the New Gold Interest. Accordingly, New Gold pursued that possibility, and Goldcorp was responsive to such a transaction, until December 24, 2009, when New Gold advised, after completing a site visit and other due diligence on or about December 22, 2009, that the San

Dimas mine was not acceptable to New Gold.

797 Further, while Bianchini mentioned to Jeannes that it might not be possible for Goldcorp to acquire the New Gold Interest without triggering a right of first refusal in favour of Xstrata, this was not firmly established until shortly before Christmas 2009. Bianchini was not a lawyer. He relayed the information with the qualification that the lawyers were still looking at the issue, which implied that a different result might still be possible. For legal advice on this issue, Jeannes relied on his internal general counsel, who was not available at the time of the conversation with Bianchini and who only looked at the issue later. More importantly, until there was a real possibility of an asset exchange transaction with New Gold, there was no reason to research this issue. It could only bring a halt to negotiations for New Gold's preferred option to Goldcorp's disadvantage. For this reason, it is not surprising that there is no evidence of an opinion of legal counsel for either Goldcorp or New Gold on this matter.

Claim for Breach of Confidence in Respect of the Barrick Agreement

798 I agree with Barrick that it had an ownership interest in the Barrick Agreement and, as such, was entitled to a duty of confidence in its favour respecting disclosure of this Agreement. However, I think Barrick waived any right it might otherwise have had to prevent disclosure of the Barrick Agreement by its acquiescence to such disclosure.

799 Barrick received a copy of the December 18 New Gold Letter on December 21, 2009. Barrick had notice from that letter that New Gold was proposing to disclose the Barrick Agreement to at least one of the parties named in the earlier New Gold disclosure letters. Moreover, it is understood that the parties named in the earlier disclosure letters comprised only mining companies and trading companies. As Goldcorp was named in the December 8 New Gold Letter, it therefore knew, or should have known, that Goldcorp was a potential recipient of the Agreement.

800 Barrick did not raise any issue concerning the disclosure to Goldcorp of the Barrick Agreement until after Datawave exercised the Right of First Refusal. Its only reaction, upon receiving this correspondence on December 21, 2009, was to inquire about an entirely separate issue pertaining to a possible exercise of the Right of First Refusal by Datawave.

801 I accept Ochagavia's uncontradicted evidence on the consequences of such inaction under Chilean law. It was Ochagavia's opinion that Xstrata Chile could rely on Barrick's failure to object to such disclosure based on the Authentic Rule of contractual interpretation, as well as the principle of estoppel, which he says is part of the duty of good faith under Chilean law.

802 For the same reasons, I think Barrick's acquiescence should be interpreted under the law of Ontario as an acknowledgment that such disclosure was permissible in the context of a prospective purchase of the 70% Interest or, alternatively, as a waiver of any claim it might otherwise have had. Whether or not Barrick considered that such a transaction could only occur after New Gold had "consolidated" 100% of the El Morro Project is irrelevant for this issue.

Conclusion Regarding Barrick's Common Law Claim for Breach of Confidence

803 Based on the foregoing, I conclude, for three reasons, that Datawave did not breach the provisions of section 12.11 of the Shareholders Agreement in providing confidential disclosure to Goldcorp in furtherance of the Goldcorp Transaction. Barrick had no standing to assert such a claim for the reasons stated above. Disclosure of the confidential information to Goldcorp was permitted under paragraph 12.11(2)(e) of the Shareholders Agreement. Insofar as disclosure of the form of the Barrick Agreement was subject to a duty of confidentiality of Datawave in favour of Barrick, Barrick's acquiescence precludes the assertion of any right in respect of such disclosure.

Claims Against Goldcorp in Respect of Alleged Breach of Confidentiality by Director

804 Barrick also asserts two common law claims for breach of confidence pertaining to Telfer. I will first describe the factual background to each of these claims. I will then address, in turn, the issues of the proper law of these claims, Barrick's entitlement to assert these claims under the laws of Ontario, and the merits of these claims.

Disclosure of Information Regarding the Xstrata Auction Process

805 In June 2009, in his capacity as a director of New Gold, Telfer received certain confidential information provided by Xstrata Chile to New Gold in connection with the Xstrata Chile auction process. This information included the Xstrata Confidential Information Memorandum, the identities of the bidders in the Xstrata Chile auction process, and a letter of Xstrata Chile to the bidders describing that auction process. It also included a confidential New Gold memorandum discussing New Gold's strategic options regarding the El Morro Project. Both New Gold and Xstrata Chile considered this information to be confidential information that was not to be disclosed to third parties.

806 Telfer received the information by email on June 17, 2009 in anticipation of a conference call with Oliphant, Gallagher, Portmann and another director to discuss New Gold's options in respect of the Xstrata Chile auction process. That call took place on June 19, 2009.

807 On the following day, June 20, 2009, Telfer forwarded the documentation by email as an attachment to Jeannes who, in turn, forwarded it to Timo Jauristo, the head of the Goldcorp corporate development department ("Jauristo"). Jeannes did not open the attachment to the email to read the documentation. However, Jauristo and several other Goldcorp corporate development employees read the documentation at or about that time.

Disclosure of Information Respecting the New Gold Value Maximization Process

808 On or about November 3, 2009, in his capacity as a director of New Gold, Telfer received a corporate development update prepared by Portmann that was forwarded to all New Gold directors in connection with a meeting of the New Gold board of directors held on that date. At that meeting,

among other things, the proposed New Gold value maximization process was discussed. Telfer attended and participated in that meeting, including the discussion of the proposed New Gold process.

809 On December 1, 2009, Telfer received a further corporate development update from Portmann in his capacity as a New Gold director. That update included a discussion of New Gold's primary objectives for its value maximization process, including the criteria of its preferred partner and a summary of the negotiations with three interested parties, including Barrick. It is acknowledged that this information was also confidential to New Gold.

The Proper Law of These Claims

810 Barrick's claim regarding the confidential information disclosed in June 2009 is based on the confidentiality provisions of the Shareholders Agreement. Accordingly, I consider that the conclusions regarding the proper law of this claim should be the same as the conclusions regarding Barrick's common law claims in respect of the disclosure made by New Gold to Goldcorp in December 2009.

811 With respect to Barrick's common law claim for breach of confidence in regard to the confidential information delivered to Telfer in November and early December 2009, I conclude that the proper law is the law of Ontario. That information was prepared by New Gold in its offices in Ontario and/or British Columbia. It was forwarded to Telfer, who received it in one of these jurisdictions or in California which has no connection with this action. The information was related to the status of New Gold's value maximization process and New Gold's objectives in that process rather than to the El Morro Project directly.

812 Accordingly, the proper law of this claim should be the law of British Columbia, which it is agreed is the same as the law of Ontario for this purpose, or the law of Ontario, which it is agreed shall apply in such circumstances.

Barrick's Entitlement to Assert its Breach of Confidence Claims Under Ontario Law

813 Barrick's ability to assert these common law claims under Ontario law is, however, subject to the same disability as was addressed above.

814 The issue regarding the alleged use of confidential information in June 2009 is identical, being based on an alleged breach of the Shareholders Agreement.

815 While the facts are different in respect of the claim based on the alleged use of the information received by Telfer in November and early December 2009, I see no difference in principle that would give Barrick a right to assert this claim. In particular, Barrick was not a participant in the New Gold value maximization process by its own choice. It therefore could have had no expectation of confidentiality between New Gold and any of the participants in that process.

New Gold would have been free to reveal its corporate objectives, and/or its assessment of the other prospective bidders, to one or more of the participants in that process if it chose to do so. Its decision not to enforce the alleged breach of confidentiality is tantamount to a decision to make such disclosure.

816 Accordingly, if it were necessary to reach a conclusion on the issue, I would conclude that Barrick was not entitled to assert either of these common law claims under the law of Ontario. There are also, however, fundamental factual problems with these claims that go to their merit. These issues are addressed in the following section.

Analysis and Conclusions Respecting the Claims Based on the Alleged Use of Confidential Information Received by Director

817 New Gold and Goldcorp do not deny that Goldcorp received the confidential information regarding the Xstrata Chile auction process in June 2009 in breach of New Gold's confidentiality obligations to Xstrata Chile under the Shareholders Agreement. Similarly, they do not deny that, later in 2009, Telfer received confidential information regarding New Gold's value maximization process in his capacity as a New Gold director when he was, concurrently, the chairman of the board of Goldcorp. They deny, however, that Goldcorp misused the information to Barrick's detriment.

Alleged Use of Information Respecting the Xstrata Chile Auction Process

818 Barrick alleges that Goldcorp made the decision not to participate in the Xstrata Chile auction process as a result of its review of the documentation received via Telfer in June 2009. In doing so, it says Goldcorp misused confidential information.

819 Insofar as this decision resulted in one less competitor for the Xstrata Interest, it would appear to have benefitted rather than harmed Barrick. However, Barrick alleges that a significant consequence of this decision was that Goldcorp did not sign a confidentiality agreement with Xstrata Chile as a result of its decision. Barrick argues that, had it done so, Goldcorp would never have been able to participate in the New Gold value maximization process; New Gold and Goldcorp would never have agreed upon the Goldcorp Transaction; Datawave would never have exercised the Right of First Refusal; and Barrick would have acquired the Xstrata Interest.

820 This claim requires that Barrick demonstrate that Goldcorp made the decision not to participate in the Xstrata Chile auction process on the basis of the confidential information. The record does not support such a conclusion.

821 Jeannes says that the decision had already been made before he received the information. There is no evidence that contradicts this statement and several considerations that support it.

822 There is no evidence that Goldcorp was considering making an indicative bid prior to receipt

of the confidential information. In particular, there is no evidence that Goldcorp had conducted any assessment or due diligence regarding the El Morro Project prior to receiving the confidential information, notwithstanding that, under the Xstrata Chile auction process, indicative bids were to be made by June 28, 2009. There is also no evidence of internal Goldcorp activity after Jeanne's receipt of the information that casts doubt on Jeannes' testimony. In particular, there are no emails or other communications after the information was received that evidence any decision-making by Goldcorp regarding the Xstrata Chile auction process.

823 Further, I have no reason to doubt Jeannes' evidence that Goldcorp knew that Barrick was interested in the El Morro Project as this was public knowledge in the mining industry at the time. I accept his evidence that Goldcorp did not consider that it could be competitive on price with Barrick, given the potential for the synergies to Barrick, as such evidence is consistent with the absence of any Goldcorp involvement in Chile at the time. More significantly, there is ample evidence that Goldcorp was fully occupied pursuing other projects that it believed it had a greater chance of acquiring.

824 In summary, these factors strongly support Jeannes' evidence that Goldcorp had decided not to participate in the auction process prior to receiving the confidential materials from Telfer on or about June 20, 2009. In any event, the facts do not support a conclusion that Goldcorp used the information regarding the Xstrata Chile auction process to decide not to participate in it, much less a decision to stay out of Xstrata Chile's sale process and pursue a purchase of the 70% Interest via New Gold after that process had ended.

Alleged Use of Information in December 2009

825 Barrick also alleges that Goldcorp used all of the information described above in early December 2009 in deciding to participate in the New Gold value maximization process.

826 For this purpose, the following factual background is relevant. BMO contacted Goldcorp on November 12, 2009 regarding the New Gold process and sent it a "teaser" letter and confidentiality agreement the next day. Goldcorp expressed no interest at the time. Subsequently, Telfer raised the opportunity at a Goldcorp board meeting on December 2, 2009. As a result of a discussion prompted by Telfer's comments, the Goldcorp board resolved to participate in the New Gold process and Jeannes initiated that participation by writing an email to Oliphant on December 4, 2009.

827 Barrick says that the court should infer that the December 1, 2009 confidential New Gold update that Telfer received in his capacity as a New Gold director "acted as the catalyst" for raising the El Morro Project at the Goldcorp board meeting. Barrick says the court should also infer that Telfer was aware of New Gold's strategy regarding the El Morro Project when he raised the opportunity with the Goldcorp board and that he shared this information with other individuals at Goldcorp in connection with Goldcorp's decision to "get back into the El Morro process". Barrick says that the court should infer that Goldcorp therefore misused the information that it received in

June 2009 regarding the Xstrata Chile auction process and the information regarding the New Gold value maximization process that it received between November 13, 2009 and December 2009. It says such misuse directly resulted in Goldcorp and New Gold entering into discussions and ultimately executing the Goldcorp Agreement.

828 I am not satisfied that Barrick has demonstrated that Goldcorp used any of the confidential information that Telfer received in reaching its decision to participate in the New Gold value maximization process.

829 There is no evidence that any of the information received in June 2009 respecting the El Morro Project was used in the Goldcorp board discussions in early December 2009. Nor is there any evidence that any of the information was used in any material way by its corporate development team in its analysis of a prospective transaction in December 2009. To the contrary, Goldcorp appears to have relied upon the information furnished to it directly by New Gold that was contemplated by the December 8 New Gold Letter and the December 18 New Gold Letter.

830 In particular, there is also no evidence that any of the confidential information respecting New Gold's objectives in its value maximization process was relevant to Goldcorp's decision to approach New Gold. Instead, what was relevant was the existence of an opportunity that resulted from increasing metal prices and the fixed cash price in the Barrick Transaction, all of which was public information. Moreover, New Gold had been quite open about its preferred options through Bianchini and in its direct conversations with Barrick.

831 Barrick's argument comes down to its suggestion that Telfer's receipt of the New Gold corporate development update on December 1, 2009 acted as a "catalyst" for raising the New Gold value maximization process with the Goldcorp board. That is, Telfer would never have been reminded of, and therefore would never have raised, the opportunity to invest in the El Morro Project with the Goldcorp board if he had not received this New Gold document.

832 There is, however, no evidence to this effect. It is at least as likely to have been the case that Telfer, as an experienced participant in the mining business, was aware of the opportunity independently, given that the status and principal details of the Barrick Transaction were public information. Barrick asks the court to draw an adverse inference from his failure to testify. I decline to do so for the reason that, given the other difficulties with this argument, it was unnecessary for Goldcorp to produce evidence on the factual issues pertaining to this claim.

833 In any event, even if it were the case that receipt of the New Gold memorandum reminded Telfer of the El Morro Project and prompted his suggestion to the Goldcorp board that Goldcorp should consider this opportunity, such limited actions do not constitute misuse of confidential information. Being reminded of an investment opportunity that is public knowledge upon receipt of a memorandum containing confidential information pertaining to that opportunity is not the same as using the confidential information contained in it. Barrick has not demonstrated use by Goldcorp of the confidential information in the memorandum in any part of its decision to participate in the New

Gold value maximization process. Given the lack of any supporting evidence and the absence of any detailed discussion of the El Morro "opportunity" at the Goldcorp board meetings, I decline to draw the inference that such use occurred.

Conclusion Regarding Barrick's Claim for Breach of Confidence Based on Information Received by Telfer

834 Based on the foregoing, I conclude that Barrick has failed to assert a viable common law claim for breach of confidence in respect of the confidential information received by Telfer.

Unjust Enrichment Claim

835 Lastly, Barrick submits that Goldcorp was unjustly enriched by its unlawful and tortious conduct in executing the Goldcorp Agreement and completing the Goldcorp Transaction. It says that the principles of unjust enrichment permit a claim in restitution for which the appropriate remedy is a proprietary remedy in the form of a constructive trust directed against Goldcorp.

836 This claim addresses several different circumstances. The principal purpose of this claim is to provide a remedy if the court finds that the New Gold Notice complied with the formal requirements of section 10.4 of the Shareholder Agreement but the Goldcorp Agreement constituted, or gave rise to, a prohibited Transfer under the Shareholders Agreement. In addition, Barrick asserts this claim as an alternative proprietary remedy to specific performance in the circumstances in which the court finds that Xstrata Chile breached the Barrick Agreement but is not liable for damages under the laws of Chile by reason of a failure to establish negligence in respect of the breach. In addition, Barrick asserts a constructive trust claim based on breach of confidence to the extent that the substantive elements of Barrick's common law claim for breach of confidence are established but Barrick is otherwise prevented from asserting such a claim, for example, on the grounds of standing.

837 To the extent that Barrick's claim for unjust enrichment addresses only the foregoing circumstances, it cannot succeed given the court's determination above that none of these circumstances occurred. I have set out my views on this claim in greater detail, however, on the understanding that Barrick also asserts this claim as an alternative cause of action generally.

838 I will deal first with the applicable law pertaining to this claim and then with the disposition of the substantive issues regarding this claim.

Applicable Law

839 The three requirements of an unjust enrichment claim are set out in *Garland* v. *Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629, at para. 30, as follows:

> As a general matter, the test for unjust enrichment is well established in Canada.

> The cause of action has three elements: (1) an enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) an absence of juristic reason for the enrichment (*Pettkus v. Becker*, [1980] 2 S.C.R. 834, at p. 848; *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762, at p. 784).

840 There is no dispute that the choice of law rule for unjust enrichment claims is the proper law of the obligation. However, the parties disagree as to what the proper law is in the circumstances of this case.

841 The traditional rules governing the proper law of the obligation, as articulated by Dicey and Morris, have been set out above. As mentioned above, in recent years, courts have determined which of these rules applies to any particular circumstances by taking a principled approach to the choice of law issue. The issue is decided by asking which legal system has the closest and most real connection to the obligation. This approach is supported in Castel and Walker, *Canadian Conflict of Laws*, 6th ed., looseleaf (Markham: LexisNexis Canada, 2005), which was cited with approval by Koenigsberg J. in the trial decision in *Minerva Aquiline* at para. 195:

> In my view, any difficulty arising from the apparent clash of the first two subrules can be resolved by taking a principled rather than a categorical approach to the choice of law issue. The essential question to be answered in choosing the appropriate law to govern a claim is, "what legal system has the closest and most real connection to the obligation?" This principle is supported by the comments of Castel & Walker at s. 32.1:
>
>> Since choice of law rules tend to be based on the elements of a cause of action and not on the appropriate consequences of seeking relief, the law governing a claim for unjust enrichment will depend on the nature of the wrong giving rise to the claim. For instance, where the obligation arises in connection with a pre-existing contractual relationship either actual or intended, the obligation is <u>most closely connected with</u> 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 <u>closest and most real connection with</u> 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 <u>more closely connected with</u> the law of the place where the immediate or ultimate enrichment occurred since the enrichment is at the heart of the action and "the law of the place of the defendant's enrichment is more closely connected with the defendant than

> the law of the place of the plaintiff's impoverishment."

842 In *Minera Aquiline*, the court had to consider a situation in which the relevant contract was governed by the laws of British Columbia but the issue concerned confidential information pertaining to mining properties located in Argentina. The trial judge approached the issue in the following manner, at para. 200:

> In my view, a more principled approach to a case such as this one, where the obligation arises in connection with both a pre-existing contractual relationship and a transaction involving foreign land, would be to examine all the factors that could be relevant to the strength of the connection between the obligation and the competing legal systems. Such factors should be given weight according to a reasonable view of the evidence and their relative importance to the issues at stake. Thus, each of the factors listed by Dicey and Morris would be considered and weighed along with the following non-exhaustive list of factors to determine which set of laws has the closest and most substantial connection to the obligation.
>
> * Where the transaction underlying the obligation occurred or was intended to occur;
> * Where the transaction underlying the obligation was or was intended to be carried out;
> * where the parties are resident;
> * where the parties carry on business;
> * what the expectations of the parties were with respect to governing law at the time the obligation arose; and
> * whether the application of a particular law would cause an injustice to either of the parties.

843 The trial judge concluded in *Minera Aquiline*, at para. 206, that, although the enrichment occurred in Argentina, "the legal system that informed and guarded the perceptions and actions of the key players at the time the breach of confidence occurred was Canadian and American law". On this basis, the court concluded that British Columbia law had the closest and most real connection to the obligation between these parties and therefore applied to determine liability of the common law claim asserted for breach of confidence.

844 Goldcorp argues that the court should have regard to the following factors in determining that the law governing the obligation to make restitution for an unjust enrichment should be Chile: (1) the subject matter of the dispute is either shares or real property, in either case situated in Chile; (2) the entity that acquired the Offered Interest, DataSub, is a Chilean company, so the enrichment occurred in Chile; (3) the entity that would have acquired the Offered Interest would have been a

Barrick subsidiary incorporated in Chile, so the deprivation would have occurred in Chile; and (4) the juristic reason for the enrichment is the Datawave Purchase Agreement, which was governed by the laws of Chile.

845 I conclude that, in the present circumstances, the laws of Ontario should govern Barrick's unjust enrichment claim. I reach this conclusion on the basis of the following factors.

846 I agree with New Gold and Goldcorp that the alleged juristic reason for the enrichment is the Goldcorp Transaction. The Goldcorp Agreement and the actions taken under it by New Gold and Goldcorp are central to this claim. The occurrence of the alleged enrichment and deprivation flowed naturally from Datawave's exercise of the Right of First Refusal. That action occurred pursuant to the mutual covenants of New Gold and Goldcorp in the Goldcorp Agreement that collectively constitute the Goldcorp Transaction.

847 The Goldcorp Agreement is governed by the laws of Ontario. It was negotiated and executed in Ontario and British Columbia (which, for this purpose, is understood to have the same law as Ontario). For the reasons discussed above in respect of the proper law of the tort claims, I also think that the enrichment and corresponding deprivation should be regarded as having occurred both in British Columbia and Ontario at the corporate level of Goldcorp and Barrick, as well as in Chile for the reasons asserted by Goldcorp. As in *Minerva Aquiline*, there is no evidence that any of the principal actors were aware of the Chilean law pertaining to unjust enrichment. As in that case, the laws of British Columbia and Ontario informed and guided the perceptions and actions of the key players in respect of the actions giving rise to the unjust enrichment claim.

848 Accordingly, I find that the law of Ontario has the closest and most real connection between the parties to the unjust enrichment claim and therefore applies to the determination of this claim.

Analysis and Conclusions Respecting the Unjust Enrichment Claim

849 The nature of Barrick's unjust enrichment claim has been described above.

850 With respect to the first and second requirements of the unjust enrichment claim, Barrick says that Goldcorp was enriched by acquiring the Offered Interest and Barrick suffered a corresponding deprivation by losing the Offered Interest. It submits that a plaintiff can obtain recovery against a defendant who acquires a benefit unjustly from a third party where the plaintiff can demonstrate that it would have obtained the benefit from the third party but for the conduct of the defendant.

851 It relies for this proposition on the statement of LaForest J. (for the majority) in *Lac Minerals Ltd.* at pp. 669-70:

> In my view the facts present in this case make out a restitutionary claim, or what is the same thing, a claim for unjust enrichment ... [T]here are concurrent

> findings below that but for its interception by Lac, Corona would have acquired the property. In *Air Canada* v. *British Columbia*, [1989] 1 S.C.R. 1161, at pp. 1202-03, I said that the function of the law of restitution "is to ensure that where a plaintiff has been deprived of wealth that is either in his possession or would have accrued for his benefit, it is restored to him. The measure of restitutionary recovery is the gain the [defendant] made at the [plaintiff's] expense." [Emphasis added.] In my view the fact that Corona never owned the property should not preclude it from the pursuing a restitutionary claim: see Birks, *An Introduction to the Law of Restitution*, at pp. 133-39. Lac has therefore been enriched at the expense of Corona.

Barrick says that, in the present case, but for Goldcorp's conduct, Xstrata Chile would have completed the Barrick Agreement and obtained the Offered Interest so that Goldcorp obtained the Offered Interest at Barrick's expense. Goldcorp does not take issue with this analysis, which is assumed for the purposes of these Reasons.

852 Barrick submits that, as a matter of equity, it would be unjust for Goldcorp to rely on the Goldcorp Agreement as a juristic reason for its acquisition/enrichment and thereby retain the 70% Interest at Barrick's expense if the court found that New Gold breached the Shareholders Agreement. It says that, in such circumstances, Barrick has the superior claim because it participated in the Xstrata Chile auction process in good faith, complied with the rules of that process and complied with its duties of confidentiality. In addition, Barrick says it became the Third Party Offeror in reliance on "a good faith and customary interpretation" of section 10.4 of the Shareholders Agreement. In contrast, it says Goldcorp stayed out of the Xstrata Chile auction process after concluding it could not win it and then tried to make an end-run around that process in a manner prohibited by the Shareholders Agreement, as well as by misusing confidential information.

853 The principal difficulty with this claim pertains to the third requirement - the absence of a juristic reason for the enrichment. As mentioned, Barrick submits that there would be no juristic reason for Goldcorp's enrichment if the court were to find any of the following circumstances: (1) the Goldcorp Agreement resulted in a breach of the Shareholders Agreement, whether or not the tort claims or the breach of confidence claims are established; (2) Goldcorp committed any one of the three torts alleged against it; or (3) Goldcorp committed a breach of confidence by way of misuse of confidential information.

854 In view of the findings above that (1) the Goldcorp Agreement did not constitute a prohibited Transfer under the Shareholders Agreement; (2) the actions of New Gold and Goldcorp did not constitute the tortious acts of inducing breach of contract, interference with economic relations or conspiracy; and (3) Barrick has not established the substantive elements of a claim for breach of confidence based on misuse of confidential information, Barrick's unjust enrichment claim cannot succeed.

855 In addition, as mentioned above, there is no basis in the evidence for a finding that Goldcorp entered into the Goldcorp Agreement with the sole, or principal, purpose of harming Barrick. Nor is there any evidence that Goldcorp stayed out of the Xstrata Chile auction process with a view to circumventing that process by dealing directly with New Gold. Therefore, given the other circumstances in this litigation, I would not conclude that the equities of the situation favoured Barrick as it suggests. In the present circumstances, each party acted principally, if not solely, with a view to furthering their respective self-interests in a competitive environment, and in compliance with their respective legal and contractual obligations.

PART III - EVIDENCE PERTAINING TO REMEDIES SOUGHT BY BARRICK

856 The parties also tendered evidence with respect to a number of matters bearing on the appropriate remedy if Barrick were successful in its claims against the defendants. This evidence falls into two categories described and dealt with in these Reasons as described below.

857 First, the parties tendered considerable factual evidence pertaining to the quantification of Barrick's loss and to the companion issues of the appropriate remedy in the circumstances of this action. Barrick calculated its loss to be Cdn. $747 million, as set out in a report referred to as the "Duff & Phelps Report", which is described below. The Duff & Phelps Report is based on a number of sources that fall into two categories: (1) reports on the El Morro Project prepared for Xstrata Chile, New Gold (and its predecessor companies) and Goldcorp between 2008 and February 2011; and (2) reports prepared by Barrick in connection with this litigation. In response to the latter reports, Xstrata Chile also caused two expert reports to be prepared for this trial.

858 The reports prepared by or for Xstrata Chile, New Gold and Goldcorp between 2008 and 2011 are described below. The expert evidence presented at the trial by Barrick and Xstrata Chile is summarized in some detail, together with certain conclusions regarding issues raised pertaining to this evidence, in case it becomes relevant. In addition, the nature of this evidence, the principal matters in dispute between the parties, and the difficulties involved in making findings regarding the issues raised in respect of this evidence, inform the conclusions below as to the appropriate remedy for Barrick's claims.

859 Second, the parties also addressed a number of legal issues regarding Barrick's entitlement to damages under Chilean law. Among other matters, the evidence at trial addressed the operation of the limitation of liability provisions in sections 9.10 and 9.11 of the Barrick Agreement. If applicable, the manner in which these provisions operate would depend upon findings of the presence or absence of willful misconduct (or *dolo*) or gross negligence on the part of Xstrata Chile. It would also require a finding as to whether Barrick's claim for the replacement value of the Xstrata Interest and its 70% interest in the BHP Royalty would constitute damages characterized as *dano emergente* or as *lucro cessante* under Chilean law. A determination on these issues would therefore require a finding, or a hypothetical assumption, regarding the nature of Xstrata Chile's breach of the Barrick Agreement. Given the conclusions above regarding the absence of any such breach, I have

not addressed the legal issues pertaining to the extent to which Barrick would be entitled to damages under the laws of Chile and the Barrick Agreement.

Sources of Information Prepared Between 2008 and 2011

860 Between 2008 and 2011, a number of parties reviewed the technical and financial estimates for El Morro. The principal reports of this nature are the following:

1. the Fluor Feasibility Report;
2. an audit dated 2008 by AMEC Americas Limited (the "AMEC Report") of an Xstrata Chile estimate of the mineral resources contained in the La Fortuna deposit, that was used in the Fluor Feasibility Study;
3. an independent review of the Fluor Feasibility Study dated May 9, 2008, prepared for Metallica Resources, Inc., a predecessor corporation of New Gold, by Pincock & Allen & Holt (the "PAH Report") in the form of a technical report in compliance with National Instrument 43-101;
4. a report prepared on behalf of Goldcorp, which was completed in March 2010 but is dated February 16, 2010 (the "Goldcorp Report"), addressing the Fluor Feasibility Study, including recommendations for additional work, in the form of a technical report in compliance with National Instrument 43-101; and
5. a press release of Goldcorp dated February 9, 2011, announcing updated reserve and resource estimates for its mineral property interests, including the El Morro Project (the "Goldcorp 2011 Press Release").

Draft Hatch Feasibility Study

861 In addition, since the Goldcorp 2011 Press Release, Goldcorp has engaged Hatch Chile ("Hatch"), an affiliate of Hatch & Associates, a major international engineering firm, to prepare an updated feasibility study of El Morro. The Hatch feasibility study had not been completed by the trial date and was therefore not in evidence. However, certain technical and cost estimates, and certain draft chapters, prepared for the draft feasibility study, were available prior to trial and are discussed below.

Overview of the Proposed El Morro Project

862 By way of overview, the Fluor Feasibility Study, and these other reports, contemplated a stand-alone open pit mine to extract ore to a depth of 700 metres over a 15 year period from an ore-body referred to as the "La Fortuna" ore-body, with the potential to transition to underground mining to extend the life of the mine. The Fluor Feasibility Study envisaged a processing plant at the El Morro site producing a copper-gold concentrate having a throughput of 90,000 tonnes of ore per day.

863 The process design envisaged the following components: (1) a primary crushing of

run-of-mine ore in a gyratory crusher; (2) a 1,000 metre long belt conveyor that would deliver the crushed ore to a stockpile; (3) a grinding circuit consisting of a single semi-autogenous grinding mill and two ball mills, operating in parallel, to further reduce the ore in size; (4) a rougher floatation circuit; (5) a regrinding circuit, in which the concentrate from the rougher floatation circuit is further reduced in size; (6) a cleaner and scavenger floatation circuit, from which the product is the final, saleable concentrate in the form of a slurry; (7) two thickeners to increase the density of the slurry; (8) a concentrate slurry pipeline to transport the concentrate to a filtration plant; and (9) the concentrate filtration plant, in which the moisture content of the concentrate is reduced, rendering it transportable by truck to a port near Huasco, Chile where it is to be loaded on board a ship for transport to a smelter. The processing plant also includes a dammed tailings storage facility that would ultimately cover an area of 450 hectares.

864 This plan envisaged the construction of substantial new infrastructure including: (1) a 125 km access road from the Pan-American highway to the Project; (2) a new power substation on the Chilean national power grid at an external site and overhead transmission lines to the Project; (3) a desalination plant located at an external site to convert sea water to fresh water, electric transmission lines to this plant and a 200 km pipeline to pump the water from the plant to the Project; (4) the pipeline to take the concentrate slurry to the filter plant off-site; (5) a new port facility on the Chilean coast; and (6) the on-site infrastructure.

865 There has been no significant change in the components or configuration of the mine facilities on-site and off-site since these reports, apart from an adjustment to the location of some of this infrastructure.

The Barrick 2011 Mine Plan

866 As mentioned above, on May 28, 2009, after signing a confidentiality agreement, Barrick received the Xstrata Confidential Information memorandum as well as a financial model of the El Morro Project created by Xstrata. In the second stage of the Xstrata Chile auction process, Barrick also received copies of the Fluor Feasibility Study and the PAH Report, together with a copy of an earlier report concerning geotechnical studies conducted by Piteau Associates.

Creation of the Barrick 2009 Mine Plan

867 In connection with its assessment of the El Morro Project during the Xstrata Chile auction process, Barrick developed a "2009 Mine Plan" as a high level estimate of the value of the El Morro Project based on, but incorporating less detail from, the Fluor Feasibility Study. The 2009 Mine Plan was used by Barrick to assess the attractiveness of the El Morro Project as an investment opportunity relative to Barrick's existing assets and other potential investments. It was also used as a basis for assessing the value, or range of values, of the El Morro Project as described below.

868 Given the short time available to conduct due diligence and prepare an offer, Barrick relied on the Xstrata financial model including, in particular, the Fluor Feasibility Study resource block

model based on drilling to-date that was used for such financial model. For this purpose, Barrick also used the metallurgical process contemplated by the Fluor Feasibility Study, including the average gold and copper recovery rates determined in the Feasibility Study. Barrick also assumed construction of all of the infrastructure contemplated by the Fluor Feasibility Study.

869 In developing the Barrick 2009 Mine Plan, Barrick verified the mineral resource estimate for the Project, based on the resource block model, the pit design and the production schedule in the Fluor Feasibility Study. In estimating the mineral resources at the El Morro Project, important variables are estimated copper and gold prices, estimated metal recovery rates from the mined ore and the estimated costs of production. It is important to note that higher metal prices not only increase revenue but also lower the cut-off grade of mined ore, thereby increasing reserves. From this data, Barrick developed detailed estimates of a production schedule and equipment fleet from which, using a commercial software program, it derived estimates of (1) capital expenditures; (2) process costs; (3) operations costs; and (4) equipment costs.

870 In its 2009 Mine Plan, Barrick estimated in-pit reserves to be 459 metric tonnes of ore containing 0.57% copper and 0.44 grams per tonne of gold amounting to 5,744 million pounds of contained copper and 6.5 million ounces of contained gold. Barrick did not materially increase these reserves in the 2011 Mine Plan described below. However, in the Goldcorp 2011 Press Release, Goldcorp reported materially higher reserves that are currently being used by Hatch in its preparation of the Hatch feasibility study. The 2009 Mine Plan envisaged a through-put capacity of the processing plant of 92,500 tonnes of ore per day.

871 Barrick developed its capital cost estimate using the Fluor Feasibility Study estimate as a baseline, adjusted to reflect Barrick's own estimates based on three principal factors: (1) first principles for the pre-stripping and mining operation; (2) escalation factors for costs related to the processing plant and infrastructure; and (3) particular cost increases for costs that were considered to be underestimated in the Fluor Feasibility Study. Barrick also added a 10% contingency factor to the total capital cost estimate to accommodate unforeseen developments.

872 Barrick developed its operating cost estimate by updating the Fluor Feasibility Study costs by applying then-current Chilean rates for wages, salaries and other costs. Because it did not develop its estimate of processing costs from first principles, Barrick considered its estimate of these costs to have a greater than normal possibility of error and chose to include a 5% contingency for estimated processing costs.

873 In addition, Barrick made certain assumptions regarding the treatment and refining costs to be charged by smelters for producing and refining the metal content in the concentrate to be produced by the El Morro Project. Barrick also assumed that Chilean income tax would be payable at a rate of 17%.

874 By way of overview, both the capital cost and the operating cost estimates developed by Barrick were materially higher than the estimates in the Fluor Feasibility Study. On the other hand,

Barrick also used higher metal prices than the Fluor Feasibility Study in its estimate of future revenues. For this purpose, it used long-term copper and gold prices of U.S. $2.25/lb and U.S. $900/oz, respectively.

875 Barrick then derived an estimated net cash flow from the project for each year of the projected 14-year life, assuming that production commenced in mid-2014. Using this estimate, Barrick calculated a net present value for the Xstrata Interest. This amount was equal to 70% of the present value calculation of the estimated net after-tax cash flows from the El Morro Project less 70% of the present value of the estimated initial and sustaining capital costs. The use of a 70% factor reflected the Xstrata Interest. In this calculation, Barrick used both a 5% and an 8% discount rate to produce a range of values. The discount rates of 5% and 8% reflect Barrick's understanding of the discount rates typically used by other mining companies and equity research analysts as measures of the cost of capital for gold and base metal mining companies, respectively. The issue of the appropriate discount rate for a net present value calculation of the Xstrata Interest is addressed further below. A similar discounted after-tax cash flow estimate was derived for 70% of the BHP Royalty, which was also discounted using a 5% and an 8% discount factor.

Creation of the Barrick 2011 Mine Plan

876 In December 2010, Barrick updated the 2009 Mine Plan for use in this litigation. The updated mine plan was completed on January 11, 2011, and will be referred to as the "2011 Mine Plan". The 2011 Mine Plan assumes that the Barrick Transaction had closed in February 2010 in accordance with the Barrick Agreement and that mine production would commence in mid-2014.

877 The 2011 Mine Plan used the 2009 Mine Plan as the base case and was updated to reflect Barrick's then-current information on estimates regarding metal prices, costs, the rate of inflation and the Chilean-U.S. dollar exchange rate. In particular, Barrick says that it incorporated its experience with cost escalation at its Pascua-Lama and Cerro Casala projects. The 2011 Mine Plan otherwise used the same methodologies and key assumptions as were used in the 2009 Mine Plan.

878 In its 2011 Mine Plan, Barrick estimated in-pit reserves to be 464 million tonnes of ore containing 0.57% copper and 0.44 grams per tonne of gold, amounting to 5,830 million pounds of contained copper and 6.56 million ounces of contained gold. This is not materially different from the reserves in the 2009 Mine Plan.

879 Overall, the higher gold price used in the 2011 Mine Plan was largely offset by higher capital and operating costs. In particular, costs increased as a result of a stronger Chilean peso, inflation, and increased costs for labour, consumables, commodities, and mining equipment. Operating costs were increased by 18%, mainly as a result of higher costs for labour and consumables. Similarly, capital costs increased by 15%, primarily due to increases in the costs of labour, materials and equipment. These costs were addressed in the BDO Report discussed below.

880 It should be noted that, in developing the 2009 Mine Plan and the 2011 Mine Plan, Barrick

did not revise the project details set out in the Fluor Feasibility Study with a view to optimizing the mine plan or other aspects of the Project, as either action would have required further testing and studies. It also did not evaluate potential synergies with its two other mining projects in the area or attempt to quantify any upside potential for additional resources at depth or within the El Morro Project area beyond the La Fortuna ore-body. The value of the potential benefits associated with these features of the El Morro Project was therefore not addressed in the Duff & Phelps Report, which calculated Barrick's damages, or in the BDO Report described below.

The Micon Report

881 In 2011, Micon International Limited ("Micon"), an internationally recognized mining industry consultant, was retained by Barrick to review the technical and cost estimates used in the Barrick 2011 Mine Plan. Micon's conclusions are set out in a report dated August 25, 2011, which was supplemented by a supplemental report dated October 7, 2011 (collectively, the "Micon Report"). A principal of Micon, Christopher Lattanzi ("Lattanzi"), testified at trial regarding the conclusions in the Micon Report.

882 Micon compared the significant technical and cost estimates in the Fluor Feasibility Study and the Barrick 2011 Mine Plan. It noted that there was substantial agreement between the two with respect to technical estimates but that the Barrick cost estimates were materially higher as would be expected due to the lapse of time between the estimates.

Conclusions in the Micon Report Concerning the Barrick 2011 Mine Plan

883 Micon concluded that the technical and cost estimates in the Barrick 2011 Mine Plan were based on appropriate engineering estimating methodologies and that the estimates were reasonable and appropriate, other than with respect to the following five matters which Lattanzi characterized as "relatively minor".

884 First, based on its own metallurgical testing of representative samples of mineralization from the La Fortuna deposit, Micon developed its own computerized simulation of the metallurgical process proposed for El Morro, from which it predicted likely recoveries of copper and gold from the mined ore. In Micon's estimation, the average copper recovery projection of 89.5% used by Barrick should be reduced to 88.1%. Conversely, in Micon's estimation, the average gold recovery projection of 66.1% used by Barrick should be increased to 67.1%.

885 Second, Micon concluded that Barrick had inadvertently omitted the cost of road haulage of the concentrate from the filtration plant to port. It estimated this cost at between U.S. $15 and U.S. $20 per wet tonne of concentrate.

886 Third, Micon considered that Barrick marginally overstated the smelter "payability factor" representing the percentage of contained copper in the concentrate for which smelters are typically prepared to pay. Micon concluded that the factor should be 96.2% rather than 96.5%.

887 Fourth, Micon considered that Barrick had underestimated the rate of consumption of steel balls used in the grinding circuit in the processing plant. Micon estimated the additional process operating cost to reflect its estimate of usage would be approximately U.S. $0.50 per tonne of ore processed.

888 Fifth, Micon recommended removing the 5% contingency allowance that Barrick had included in the operating cost estimates but which Micon considered unusual.

Micon Comments on the Draft Hatch Feasibility Study

889 In its supplemental report dated October 7, 2011, Micon provided its conclusions regarding the technical and cost estimates developed by Hatch for use in the draft Hatch feasibility study. Micon noted that the Hatch feasibility study, when completed, will represent the most up-to-date and comprehensive analysis of the technical and cost parameters associated with production of the La Fortuna ore-body.

890 Micon noted that the principal difference between the Barrick 2011 Mine Plan and the Hatch estimates relates to the mining plan. In the Goldcorp 2011 Press Release, Goldcorp announced a new reserve estimate for El Morro, based on updated metal prices, of 531 million tonnes grading 0.52% copper and 0.48 grams per tonne of gold. Consistent with this higher reserve, the draft Hatch feasibility study provides for a mine plan producing 537 million tonnes at an average copper grade of 0.52% and average gold grade of 0.49 grams per tonne. The Hatch mine plan also has a lower stripping ratio of 2.87:1 than the Barrick 2011 Mine Plan ratio of 3.26:1, which results in a lower cost per tonne of ore processed. Micon assumes this lower ratio reflects the conversion of some material formerly considered to be waste to ore as a result of the higher metal prices used in the draft Hatch feasibility study.

891 Micon further observed that the draft Hatch feasibility study provides for a lower estimate of copper recovery, a higher estimate of gold recovery, and a 30% higher quantity of gold recovered, all of which are consistent with the difference in grades between the Hatch and Barrick estimates. Micon also observed that the Hatch estimates would negate two of Micon's conclusions: (1) that Barrick had marginally overestimated the payability factor for copper; and (2) that Barrick had underestimated the transportation cost by U.S. $15 to U.S. $20 per tonne. If a loss calculation were mandated, the Duff & Phelps Report would therefore be adjusted accordingly.

892 More generally, Micon concluded that there is a significant level of agreement between the Hatch and Barrick estimates. In particular, there is essential agreement between the Barrick and Hatch estimates of initial capital expenditures and average operating costs. Overall, Micon considered the Hatch projections to be economically somewhat more favourable than the Barrick projections. The other estimates, particularly regarding the quantity of gold to be produced and the lower smelting and refining charges, were more favourable in the Hatch projections than in the Barrick estimates. However, in the absence of the completed Hatch feasibility study, it is not possible to quantify the additional value of El Morro that results from the Goldcorp reserves and

revised mine plan.

893 Micon did note a significant difference between the Hatch and Barrick estimates pertaining to the life-of-mine sustaining capital expenditures for the processing plant off site infrastructure, the tailings facility and replacement of the equipment fleet. Micon noted that the Hatch estimate is materially higher than the Barrick estimate. It is, however, not possible to explain the difference based on the record before the court.

The Duff & Phelps Report

894 As mentioned, the Barrick claim for damages is based upon a quantification of its loss calculated by Duff & Phelps in a report dated August 26, 2011, which was supplemented by a reply report dated October 10, 2011 (collectively, the "Duff & Phelps Report"). The partner at Duff & Phelps responsible for the preparation of the Duff & Phelps Report, Scott Davidson ("Davidson"), testified at the trial.

Conclusion

895 The Duff & Phelps Report calculates Barrick's loss in this action to be between U.S. $853 million and U.S. $711 million, with a mid-point of U.S. $782 million, which equates to Cdn. $747 million at the exchange rate in effect on the calculation date, being July 31, 2011. The following summarizes the approach and principal conclusions of the Duff & Phelps Report.

Definition of Loss and Approach Adopted for Calculation of the Loss

896 The Duff & Phelps Report defines loss as that amount which, if paid to Barrick, would put Barrick in the same financial position that it would have been in had Barrick been able to complete its purchase of the Xstrata Interest and Xstrata's 70% interest in the BHP Royalty for U.S. $465 million in February 2010 and to develop the El Morro mine thereafter.

897 Barrick's loss was calculated as the amount by which the foregone net cash flows that Barrick would have earned from the Xstrata Interest and Xstrata's 70% interest in the BHP Royalty, discounted to a capital sum or present value at a discount rate that Duff & Phelps considers to be appropriate, exceeds the purchase price in the Barrick Transaction, less the estimated return earned by Barrick on the purchase price funds not expended.

Adjustments to the Barrick 2011 Mine Plan Cash Flows

898 The anticipated future net cash flows from El Morro used for this calculation were the net cash flows set out in the Barrick 2011 Mine Plan adjusted to reflect the issues raised in the Micon Report and to reflect the net impact of the carried loans under the CFLA.

899 Duff & Phelps adjusted the long-term copper and gold prices used in the calculation of revenues from the number mandated by Barrick's treasury group for long-term planning purposes to

U.S. $3.00/lb and $1,270/oz, respectively. In reaching its conclusion to use these prices, Duff & Phelps relied primarily on the Gulley Report described below, although it did consider current market-based indicia of price forecasts, including forward prices and consensus estimates of analysts as well as the price forecasts used by the parties to this litigation.

900 Duff & Phelps acknowledged that it is not expert in mining engineering and therefore it relied on Micon's opinion regarding the Barrick mineral reserve estimate, grades, recoveries, mine schedule, capital costs and operating costs. Duff & Phelps made the following adjustments to the technical and cost assumptions used by Barrick in its 2011 Mine Plan after discussions with representatives of Barrick and Micon: (1) expected copper recovery was reduced to the average of the Barrick and Micon estimates, being 88.8%; (2) expected gold recovery was increased to the average of the Barrick and Micon estimates, being 66.6%; (3) the expected payability factor for contained copper was reduced to the Micon estimate; (4) projected transportation costs were increased to the midpoint of Micon's estimated range, being $17.50 per wet tonne of concentrate; (5) projected processing costs were increased by Micon's estimate in respect of grinding costs; and (6) the 5% contingency factor included in the projected processing costs was removed based on Micon's opinion. Duff & Phelps calculated that, in aggregate, these adjustments represented a reduction in the net present value of the aggregate interest of Xstrata Chile in the El Morro Project of approximately U.S. $100 million. In addition, the estimated cost of diesel fuel was increased from $0.70 per litre to $0.80 per litre to reflect updated cost estimates used in planning for Cerro Casala that became available after completion of the Barrick 2011 Mine Plan.

901 It is important to note that Duff & Phelps did not, however, take into account the additional reserves announced by Goldcorp in February 2011 or the revised mine plan on the basis of which the draft Hatch feasibility study is being developed.

Weighted Average Cost of Capital/Discount Rates

902 To arrive at a discount rate that Duff & Phelps considered appropriate, Duff & Phelps developed a weighted average cost of capital based on the capital asset pricing model. Conceptually, the discount rate developed using this model consists of a risk-free rate of return and an additional rate of return for the business risks of the particular project reflecting the rates of return on alternative investments.

903 For this purpose, Duff & Phelps undertook three weighted average cost of capital calculations for, respectively, a junior copper mining company (9% - 10%), a senior gold producer (5% - 6%) and a senior base metal producer (8% - 9%).

904 Because the debt to total capital ratio was low in each case, ranging from 10% for a junior copper company to 20% for a senior base metal producer, the debt contribution to the weighted average cost of capital was modest in each case. The principal difference between the calculations was the unlevered beta applied to the equity risk premium, which ranged from 1.5 for a junior copper company to 0.6 for a senior gold producer.

905 The beta is a measure of the volatility of an asset or class of assets relative to the market as a whole. It is a function of the excess expected return on an individual security (i.e. the return over and above the return available on a risk-free investment) relative to the excess expected return on the market index. As such, it is a measure of systematic risk and, accordingly, application of the beta derived for each category of company to the risk-free rate of return provides an equity risk premium that is proportionate to the systematic risk of each such category of company relative to the market as a whole. The higher the volatility, the higher the systematic risk and therefore the higher the cost of equity capital. Securities that have betas greater than 1.0 are expected to have a positive excess return that exceeds that of the market index when the market return exceeds the risk-free rate. Conversely, securities that have betas greater than 1.0 are also expected to have a negative excess return that exceeds that of the market when the market return is less than the risk-free rate. Accordingly, systematic risk relates to the uncertainty of future returns due to uncontrollable movements in the market as a whole and generally comprises external factors that affect all economic assets within the market as a whole. Unsystematic risk relates to risks that are investment specific. The capital asset pricing model assumes that unsystematic risk does not exist because rational actors in the market eliminate it by holding well diversified portfolios of assets that are not perfectly correlated.

906 In determining the appropriate discount rate within the range presented by the three weighted average cost of capital calculations that it developed, Duff & Phelps says it assessed a number of factors including the resource risk inherent in the anticipated future cash flows, the metals price risk, geopolitical risk and project-specific risks, including in particular permitting and production delays and higher than anticipated capital or operating costs.

907 As discussed further below, Davidson did not disagree with the principle emphasized in the BDO Report that the appropriate weighed average cost of capital, and therefore the appropriate discount rate, is a function of the particular investment and not the investor. However, he considered that the market for the El Morro Project included senior gold companies and senior diversified base metal companies but did not include junior copper or gold companies, based on the parties who participated in the Xstrata Chile auction process and the New Gold value maximization process. Davidson attributed this largely to the size of the asset, including the size of the reserves, and the associated capital expenditures required to develop the asset relative to the size of junior mining companies.

908 On this basis, Duff & Phelps considered that the appropriate discount rate should fall within the range of rates established by the weighted average cost of capital for senior gold producers and for senior diversified base metal producers. It selected a range between 6% and 7% with a midpoint of 6.5%, giving greater weight to the weighted average cost of capital for senior gold producers and less weight to the cost of capital for diversified senior base metal producers and taking into consideration the other market-based indicia of value described below. Duff & Phelps also considers that the premium of 1.6% over its weighted average cost of capital calculation for senior gold producers represents an appropriate adjustment for the stage of development of El Morro as

well as the copper/gold mix of the proposed mine.

909 Applying a narrower range of discount rates of 6 1/4% to 6 3/4% to 70% of the anticipated net cash flows from El Morro results in a range of U.S. $1,183 million to U.S. $1,329 million for the aggregate Xstrata interest in the El Morro Project. Deducting the Barrick purchase price of U.S. $465 million and adding back the expected return earned by Barrick on the purchase funds, which is not material, results in a calculated loss to Barrick ranging between U.S. $711 million and U.S. $853 million, with a midpoint of U.S. $782 million, or Cdn. $747 million at the exchange rate on July 31, 2011.

910 Duff & Phelps considers that its conclusion regarding the appropriate range for a weighted average cost of capital is also supported by market-based indicia of value. Among other market-based data to which Duff & Phelps points in support of its position are: (1) the internal rates of return of 6.4% and 7.1% derived from the price in the Barrick Transaction and the Goldcorp Transaction, respectively, upon which it places considerable reliance; (2) discount rates used by mining analysts; and (3) discount rates used by the financial advisors to New Gold and Goldcorp. All of these rates fall within a range between 5% and 8%.

911 In regard to the internal rates of return derived in respect of the Barrick Transaction and the Goldcorp Transaction, I would note that these calculations are based on the 2009 Mine Plan, in the case of Barrick, and on a Goldcorp financial model in 2009, in the case of Goldcorp, which was made available to Duff & Phelps but was not in evidence at trial. The court was not provided with any detail regarding either of those calculations. From a reference in the Duff & Phelps Report, it appears the Goldcorp financial model differed from the Barrick 2009 Mine Plan in that it assumed larger quantities of payable copper and gold, a lower gold price, and payment of the U.S. $50 million payment to New Gold. However, in Duff & Phelps' view, it is significant that its choice of discount factor results in value to each of Barrick and Goldcorp reflected in the difference between the internal rate of return and the likely cost of capital of each of these parties.

912 The Duff & Phelps Report states that the Barrick loss was expressed as a range to reflect the difficulty in deriving, with certainty, a specific point estimate conclusion for each of the variables impacting the calculations, including but not limited to, future metal prices and the production profile. More generally, Davidson acknowledged that arriving at the discount rate, or the range of discount rates, involved a significant element of subjective judgment after calculation of the cost of capital for the three classes of market participants.

913 Duff & Phelps also points out that there are other factors that could result in a higher loss that are not easily quantified and, therefore, are not included in the loss calculation. These include the possibility of higher than estimated metal prices. Duff & Phelps also did not attempt to quantify any possible returns from mineral resources at depth in the planned mine pit, any synergies available to Barrick from its other mines in the area, or the exploration potential of the remainder of the El Morro Project beyond the La Fortuna deposit.

Issues Regarding the Copper Price Assumption

914 There is, however, an unresolved difficulty with the metal price assumptions used in the Duff & Phelps Report that was addressed on Davidson's cross-examination. The Duff & Phelps Report calculated Barrick's loss by reference to the fair market value of the aggregate Xstrata interest in the El Morro Project which can be viewed, alternatively, as the replacement cost of a theoretically identical asset in the market at the loss quantification date. Duff & Phelps accepted that, consistent with the definition of fair market value, the present value of the aggregate Xstrata interest in the El Morro Project was the highest price available in an open competition, i.e., the price at which the next most competitive bidder would fall away.

915 In arriving at the present value of the Xstrata Interest in the El Morro Project, it is therefore necessary to use the forecast copper prices that the successful bidder in such an auction would use in making its final bid. Duff & Phelps relied on the Gulley Report for this purpose. The Gulley Report appears to propose the Market Sentiment Price (as described below) as the appropriate price for a fair market value determination of this nature. However, in choosing a copper price of U.S. $3.00/lb, Duff & Phelps used Gulley's Single Reference Price (as described below) for copper, rather than his Market Sentiment Price. Using a copper price of U.S. $2.50, being Gulley's Market Sentiment Price, would result in a present value calculation of the aggregate interest of Xstrata in the El Morro Project that is approximately equal to the purchase price in the Barrick Transaction.

<u>The BDO Report</u>

916 At the request of Xstrata Chile, BDO LLP ("BDO") provided comments on the Duff & Phelps report in an affidavit sworn October 5, 2011 by Spencer Cotton ("Cotton"), the BDO partner responsible for the preparation of the report (the "BDO Report").

Approach and Conclusions of the BDO Report

917 The BDO Report defined Barrick's loss in the same manner as the Duff & Phelps Report and approached the calculation of the loss on the same basis. However, the BDO Report calculated Barrick's loss in this action based on the Barrick 2011 Mine Plan to be between U.S. $102 million and (U.S. $104 million) with a midpoint of effectively nil. The following summarizes the BDO Report comments on the Duff & Phelps Report.

Weighted Average Cost of Capital/Discount Rate

918 BDO noted that virtually the entire difference in the loss calculations of Duff & Phelps and BDO arises from the selection of different discount rates used in the present value calculation of the foregone future cash flows. Subject to three matters dealt with below in respect of which BDO ran sensitivity analyses, BDO considered the forecast cash flows relied on in the Duff & Phelps Report

to be reasonable as a basis for use in the quantification of Barrick's loss.

919 However, BDO considered that Duff & Phelps misapplied generally accepted valuation principles resulting in the use of an inappropriately low cost of capital in the calculation of Barrick's loss. BDO makes two criticisms of the Duff & Phelps approach.

920 First, as mentioned, BDO emphasizes that the appropriate cost of capital to be used in present value calculations of future cash flows is a function of the investment, not the investor. This is consistent with the fact that the weighted average of capital addresses the risks associated with the projected cash flows from the property itself. In this case, BDO considered that Duff & Phelps failed to take into account the fact that the investment, El Morro, is at a pre-production stage of development and that the cash flows should be assessed accordingly. BDO considered that it was not appropriate to have regard to the cost of capital of senior gold mining companies, whose assets are predominantly producing assets and therefore do not have development risk, in determining the weighted average cost of capital for discounting purposes.

921 Second, BDO considered that the market prices the risk of companies with gold reserves differently from the risk of companies with copper reserves. Accordingly, BDO says the appropriate discount rate should take into account the fact that El Morro's forecast cash flows are mostly to be derived from expected copper production. It says that weighting in favour of senior gold companies results in a failure to take into account the risk profile of El Morro, given the composition of its reserves, and therefore the risk differentials inherent in the asset.

922 BDO says that, effectively, Duff & Phelps applied a cost of capital more reflective of the way a senior gold producer could finance El Morro than the way a discount rate should be determined for a development stage copper-gold project. It says that the calculation of loss in accordance with generally accepted valuation theory should not involve the application of the cost of capital of Barrick, or of similar companies, to the subject investment. Instead, the cost of capital must take into consideration the inherent risks of achieving the projected cash flows over and above those risks faced by a senior gold company.

923 In arriving at a range of discount rates that BDO considered appropriate, BDO therefore focused on the junior copper and junior gold segments of the mining industry. Given the anticipated split of forecast revenues from El Morro between copper and gold production, BDO prorated its estimate of an overall beta for use in calculating the weighted average cost of capital by 74% for copper and 26% for gold. On the basis of this approach, BDO concluded that the appropriate weighted average unlevered beta for use in this calculation was 1.42. In reaching this conclusion, BDO started with the unlevered betas of junior copper and gold mining companies owning pre-production stage development properties, as it considered that the market assessment of the risks associated with these companies reflected the market assessment of the risks of El Morro. BDO converted this unlevered beta into a levered beta assuming a debt/equity ratio of 1:9, representing the leverage that would be available in respect of El Morro over the life of the mine,

which resulted in a beta of 1.55. Duff & Phelps did not make this latter adjustment in its calculation. However, BDO also used a slightly higher assumed inflation rate of 2.6% compared to the 2% rate used by Duff & Phelps.

924 Based on the foregoing, BDO estimated the appropriate weighted average cost of capital for El Morro to be in the range of 9% to 10%, with a midpoint of 9.5%. In its view, this range of rates results in a cost of capital that a market participant would require to compensate it for the risks of the El Morro cash flows. BDO says it considers this range of discount rates to be appropriate given a number of factors including: (1) the forecast cash flows reflect the unadjusted Barrick 2011 Mine Plan, including the risk associated with the price assumptions therein; (2) capital and operating expenses may not materialize as forecast; (3) operating effectiveness in the processing operations may not realize the forecast levels; (4) tax rates may not remain as forecast; (5) metal prices may not be as forecast; and (6) the planned commencement of production may be delayed.

925 When applied to the Duff & Phelps cash flows, this resulted in a net present value of Xstrata's aggregate interest in the El Morro Project that was approximately equal to the purchase price of U.S. $465 million in the Barrick Transaction and, accordingly, a negligible loss to Barrick as set out above.

Additional Conclusions of BDO

Sensitivity Analyses Requested by Xstrata Chile

926 BDO conducted requested sensitivity analyses on three items. Xstrata Chile raised each of these items in its submissions on damages as reasons for a reduction in the quantum of Barrick's damages.

927 First, BDO adjusted the Duff & Phelps cash flow projection to incorporate the schedule of long term copper prices set out in the Hunt Report described below. This adjustment reduced the net present value of the Xstrata Interest, on its own, to between (U.S. $950 million) and (U.S. $1,030 million). Cotton acknowledged, however, that BDO did not attempt to quantify the downward effect on operating costs that BDO would also expect to occur, likely on a lagged basis, in the economic environment that would see the price declines anticipated in the Hunt Report. Therefore, it would not be possible to simply adjust for the price schedule in the Hunt Report by a simple reduction of the amount calculated by BDO.

928 Second, BDO adjusted the commencement of initial production from the mid-2014 date assumed in the 2011 Barrick Mine Plan to the milestone date set out in the July 2011 monthly report of the Company. BDO calculated that the effect of such a deferral of the initial production date was a reduction in the net present value calculated by Duff & Phelps of U.S. $90 million.

929 Lastly, at Xstrata's request, BDO adjusted the Duff & Phelps cash flow projections to assume tax rates of (1) 35%, which assumes that none of the cash flows from El Morro would have been

reinvested in Chile; and (2) 26%, which assumes that effectively 50% of such cash flows would have been reinvested in Chile. On these alternate assumptions, BDO calculated that the net present value calculated by Duff & Phelps would be reduced by U.S. $450 million if the 35% tax rate were applicable and by U.S. $230 million if the 26% effective tax rate were applicable. The issue of the appropriate tax rate for purposes of the net present value calculation is addressed below.

BDO Comments on the Duff & Phelps Cash Flows

930 BDO was also requested by Xstrata to review and comment on the reasonableness of the Duff & Phelps cash flows. The following summarizes issues raised by BDO and the court's assessment of their relevance for the issues in this proceeding.

931 First, BDO observed that the Duff & Phelps estimate of pre-production capital expenditures was approximately 41% higher than the estimate in the Fluor Feasibility Study. It also observed that the estimated pre-production costs of Barrick's Pascua-Lama and Cerro Casala projects had risen by approximately 68% and 43%, respectively, over a shorter time frame, from 2009 to the second quarter of 2011. BDO expressed the opinion that, as an advanced stage development project with initial production scheduled for 2013, the Pascua-Lama cash flow projections, in particular the cost estimates included therein, would be relevant to a determination of the reasonableness of the Duff & Phelps cash flow projections. It calculated that a 68% increase in the initial capital expenditures contemplated by the Fluor Feasibility Study would reduce the net present value calculated by Duff & Phelps by U.S. $380 million.

932 BDO raised the same concern regarding the level of sustaining capital expenditures estimated in the Duff & Phelps Report to be U.S. $361 million over the life of the mine, representing a 33% increase over the estimate in the Fluor Feasibility Study. BDO calculated the impact of a 68% increase in the estimate set out in the Fluor Feasibility Study on the net present value calculation in the Duff & Phelps Report to be U.S. $25 million.

933 However, I am satisfied on the evidence before the court that Pascua-Lama is not a comparable project in terms of both pre-production capital costs and sustaining capital expenditures for at least three principal reasons. First, Pascua-Lama is located at a substantially higher altitude than the El Morro Project. The elevation of Pascua-Lama involves significantly thinner air, resulting in substantially higher construction and operating costs for the mine. Second, the Pascua-Lama project involves facilities on both sides of the Argentine-Chilean border. This has also resulted in considerably higher development costs of the project than would be expected for El Morro. Third, the nature of the product and therefore the scale of operations is materially different from that proposed for El Morro. Moreover, there is no necessary reason why the proportionate cost increases in initial capital costs would approximate the proportionate cost increases in sustaining capital costs. Accordingly, in any loss calculation in this action, I consider that it would not be appropriate to increase the cost estimates by the factor, and for the reasons, proposed by BDO. As mentioned below, the draft Hatch feasibility study cost estimates, which BDO did not rely on, provide the most

current and reliable estimate of costs for El Morro.

934 Second, BDO raised two issues pertaining to the mining costs estimated in the Duff & Phelps Report that would result in a life of mine increase of U.S. $118 million - an appreciation in the Chilean peso against the U.S. dollar by approximately 5.5% in the six months between the completion of the Barrick 2011 Mine Plan and the loss calculation date, and increased diesel fuel prices in Chile for July 2011 compared to the prices used in the Duff & Phelps Report. The combined effect of these items on the net present value calculated by Duff & Phelps is only U.S. $35 million. In any event, it is not clear that the forecast long-term exchange rate and diesel fuel price used in the Duff & Phelps Report, which are more relevant than short-term rates and prices, are materially incorrect.

935 Lastly, BDO questions why the Barrick 2011 Mine Plan indicated increases in both quantities/usage as well as unit increases in respect of mining costs, as compared to the Barrick 2009 Mine Plan, but only unit cost increases in respect of processing costs. This was satisfactorily explained by Darren Dell, the Barrick director of technical evaluations, who was responsible for the creation of the Barrick 2009 Mine Plan and the preparation of the Barrick 2011 Mine Plan.

Comparison of the Approach of Duff & Phelps and BDO to Determination of the Appropriate Discount Factor

936 As set out above, there is a significant difference between the Duff & Phelps and the BDO approaches to the calculation of the appropriate discount factor to use in determining the net present value of the anticipated cash flows from El Morro, for the purposes of quantifying Barrick's loss.

937 The difference between Duff & Phelps and BDO is perhaps best expressed in the following manner. Both parties agree that the cost of capital must be determined as the rate of return that the market would require in respect of the risk of receipt of the projected cash flows from the particular asset. Duff & Phelps believes that, for this purpose, the market is the universe of companies interested in acquiring the particular asset, in this case senior gold companies and senior diversified base metal companies. It does not include junior companies because such companies could not afford either the acquisition cost or the capital expenditures required to develop El Morro. Accordingly, it says the cost of capital should be the cost of capital required by senior gold and diversified base metal companies. Whether or not using discount rates of 5% for gold and 8% for copper properly values the risks of a development project in such circumstances, Duff & Phelps considers that these rates should be applied because these companies would price mining development projects on this basis in the present market.

938 BDO takes the position that the fact that junior companies were not, or could not be, potential purchasers of the El Morro Project is irrelevant because the exercise of determining a cost of capital requires a pricing of the underlying asset by reference to comparable projects. Implicit, but never made explicit, is a broader concept of the market for this purpose, which includes other potential investors beyond the senior companies assumed by Duff & Phelps. In valuing senior gold

and diversified base metal companies, the market should only attribute value to an investment in a pre-development property such as the El Morro Project using a weighted average cost of capital that is appropriate for the risk associated with the particular property.

939 There is no empirical evidence before the court that directly addresses the correct approach. Nor is there any evidence regarding the market impact on Barrick or Goldcorp following the announcement of the Goldcorp Transaction, which might also assist in quantifying the market's perception of Barrick's loss. It is therefore necessary to address the difference between Duff & Phelps and BDO on a more theoretical basis. I think it is fair to distinguish the two approaches in the following manner.

940 Broadly, BDO believes that the weighted average cost of capital that is appropriate, and that it has identified, addresses the risks of El Morro as a pre-development property in isolation, without regard to ownership of the Project by Goldcorp or Barrick. As BDO notes, this approach quantifies the cost of capital that a direct investor in the El Morro Project on a stand-alone basis would require. BDO considers that it has identified a cost of capital that more closely reflects the risks of El Morro in isolation. However, it does so at the cost of any compatibility with market-based indicia of value.

941 As evidence supporting its approach, BDO refers to the value of the Casino Project owned by Western Gold and Copper Corporation, a junior mining company. This mining project, located in the Yukon, is at the pre-feasibility stage. BDO calculated the internal rate of return implied by the current market capitalization of this company of approximately $200 million to be 13.6%. However, without considerably more detailed expert analysis of this project compared to El Morro, the court cannot rely on this evidence to support the BDO conclusion concerning the appropriate weighted average cost of capital for El Morro.

942 Conversely, the weighted average cost of capital derived by Duff & Phelps more likely reflects the cost of capital of a senior gold producer proposing to develop El Morro. That is, it reflects the risks of development in the hands of a senior gold producer. This approach is closer to a quantification of the cost of capital that an investor in Barrick would expect Barrick to require in respect of its investment in the El Morro Project given the market valuation of Barrick. It is more consistent with market-based indicia of value.

943 More generally, the more market-based approach of Duff & Phelps assumes that the market prices risk correctly using these cost of capital calculations. That is by no means certain in all instances, as recent market developments have demonstrated. The Duff & Phelps cost of capital calculation and the market-based indicia referred to by Duff & Phelps may be, but are not necessarily, evidence that the Duff & Phelps approach is correct. On the other hand, BDO's approach to identifying the appropriate risk profile for El Morro by reference to junior gold and copper mining companies not only has little compatibility with current market indicia but also results in somewhat surprising conclusions.

944 As mentioned, using the 2011 Mine Plan, the mid-point of the range of the net present values

of El Morro calculated by BDO using the Duff & Phelps cash flow results in a negligible loss to Barrick. Essentially, BDO calculates the value of the Xstrata Interest at the time of the trial to be approximately equal to the purchase price that Barrick would have paid for the Xstrata Interest under the Barrick Agreement had the Barrick Transaction closed.

945 Perhaps more surprisingly, using the Barrick 2009 Mine Plan, including forecast metal prices and costs at the time of the Barrick Agreement, and the weighted average cost of capital BDO considers appropriate, the BDO conclusion is that Barrick significantly overbid for the Xstrata Interest and was spared a loss when Goldcorp agreed to the Goldcorp Transaction. BDO agrees with Duff & Phelps that the value of the El Morro Project rose between 2009 and 2011 due, in part, to rising metal prices. Similarly, while BDO did not analyze the Goldcorp Transaction from this perspective, the Duff & Phelps calculation of the internal rate of return for that transaction implies that BDO would also consider that Goldcorp overpaid for the Xstrata Interest, even at the higher metal prices prevailing at the time of that transaction. Similarly, the BDO Report implicitly concludes that, insofar as market analysts and financial advisors to the parties used a lower weighted average cost of capital in valuing El Morro, they also failed, and continue to fail, to assess the risks of El Morro correctly.

946 The difference of approach between Duff & Phelps and BDO is also reflected in a difference of opinion as to what constitutes fair market value in the present circumstances. Duff & Phelps suggests that, for valuation purposes, the price contracted for by Barrick and the price paid by Goldcorp, which it considers to be U.S. $513 million, are indicative of fair market value for the Xstrata Interest, being the highest price in the market based on actual transactions. BDO, on the other hand, does not consider that the prices bid by Barrick and Goldcorp represent fair market value as defined for the purposes of the applicable valuation standards. BDO considers that these prices exceeded fair market value, yielding an implicit rate of return that is less than the cost of capital to each of Barrick and Goldcorp for the development of El Morro. In particular, BDO considers that Barrick offered a price in the Barrick Transaction that exceeded the fair market value. BDO considers that Barrick did so because, in common with other large mining companies at the time, it was under a compulsion to transact based on a market-driven need to maximize cash flow per share and its receipt of unprecedented cash flows due to high metal prices during the past few years.

947 In other words, in BDO's opinion, the outcome of the Xstrata Chile auction process was not a price that represented the fair market value of the Xstrata Interest but a price that exceeded the fair market value. This conclusion is surprising given the traditional definition of fair market value.

948 Given the conclusion reached below regarding the appropriate remedy in this action, it may not be necessary to reach a determination regarding the preferable approach to the weighted average cost of capital. However, to the extent it is necessary to do so, I conclude that the appropriate discount rate is more closely reflected in the Duff & Phelps approach than in the BDO approach. The disconnect between the market value and the results generated by the BDO approach suggests

(1) that the particular risks associated with El Morro in the hands of a senior gold producer are not the same as the risks associated with a junior mining company holding a single pre-production development property; and (2) as the evidence in this proceeding indicates, the risks of a property at the stage of development of El Morro are materially less than the risks associated with the properties of the junior mining companies upon which BDO relied, which it acknowledges are at an earlier stage of pre-development.

949 I would note that a considerable amount of time was also spent at trial on the issue of whether the Duff & Phelps use of unlevered betas, rather than relevered betas, in its weighted average cost of capital calculations for the three categories of market participants understated the results. This is more of a technical issue than a substantive issue in the present action, given the level of materiality, which is approximately equal to the difference in the offsetting inflation assumptions used by the parties in their respective calculations.

The Gulley Report

950 At the request of Barrick, David Gulley ("Gulley"), a senior managing director of Mescrow Financial Consulting, LLC, a diversified financial services firm, provided a report regarding the appropriate range of copper and gold prices for use in computing damages in this case (the "Gulley Report"). The following summarizes the approach and conclusions of Gulley.

Methodological Approach

951 Gulley provided three different price levels for copper and gold for the period 2011 to 2027, being to the end of the projected life of the La Fortuna pit, which he termed the "Reference Period" for the purposes of his report. For each of copper and gold, he provided a Reference Range of prices, being the range of prices historically observed during periods with market conditions similar to those expected during the Reference Period. He also provided a "Market Sentiment Price", which Gulley recommends for use in a traditional net present value approach to fair market value. Finally, Gulley provided a "Single Reference Price", which he believes to be the single best price for use in damage calculations.

952 The Reference Prices established by Gulley for both copper and gold assume the following global economic trends: (1) a continuation of trade liberalization and industrial development in Asia, South America and elsewhere with growth rates varying from year to year and geographically but remaining within or near the range of historical experience; (2) a continuation in the decline in purchasing power of the U.S. dollar, also in or near the range of historical experience; (3) a continuation of the historical long-term nature of base metal prices, which has been characterized by a very long-term secular trend, mid-term price cycles and short-term market volatility, with principles driven by an income-elastic, price-elastic nature of copper markets; and (4) the absence of any fundamental change in technology, outright failure of industrialization in Asia, radical change in the international financial system or prolonged global calamities, natural or manmade. Gulley did, however, consider in his conclusion that it was more likely than not that a temporary

period of gold and copper price consolidation would occur at some point in the near future. I note that this economic scenario differs significantly from the scenario upon which the Hunt Report, described below, is based.

953 An important aspect of Gulley's approach is the distinction between the Market Sentiment Price and the Single Reference Price. Gulley's conception of the Market Sentiment Price is the risk-averse price at which the most competitive alternative buyer in a competitive auction would drop out of the auction. Gulley considered the Market Sentiment Price to be a conservative price. In his approach, the Market Sentiment Price is the fair market value price but not the price that would make Barrick whole as the successful bidder, as it does not yield a calculation of the expected full value of the asset to Barrick.

954 The expected full value of an asset is calculated by application of the Single Reference Price, which is the price that balances equally the upside and downside uncertainty regarding price. According to Gulley, the expected full value, or intrinsic value, of an asset can exceed the price necessary to acquire the asset in an auction for a number of reasons. The principal reasons expressed by Gulley include additional resource potential, strategic considerations, such as the need to replace depleting assets or superior knowledge of the local geology, economic considerations, such as lower tax rates or a lower effective cost of capital, and "optionality" of the property associated with higher than expected prices. Gulley suggests that evidence for this concept of a higher expected full value of an asset is to be found in the net asset value multiples applied to mining assets by the market.

955 In this case, Gulley recommended a Single Reference Price for gold of U.S. $1,270 per troy ounce and for copper of U.S. $3.00/lb. In the Gulley Report, all prices are adjusted to real prices as of January 1, 2011. Gulley did not, however, provide an express forecast of prices over the Reference Period. The following describes Gulley's approach in respect of each of copper and gold in greater detail.

Copper Prices

956 Gulley recommended that the Reference Range of Prices for copper should be between U.S. $2.50/lb and U.S. $3.75/lb. He arrived at this range by examining copper prices during the period 2002 to 2011. He considers that this period, which experienced strong economic growth in the developing world and periods of global financial crisis, exhibits a market experience that will continue to occur during the Reference Period. The copper market in the 1990s had been characterized as being in a long bear market. Dr. Gulley considers the main drivers for the resurgence in copper prices since 2002 to be the demand from China, in particular, and Asia in general, on the demand side and stagnant supply as result of depletion of mines and underinvestment during the bear market on the supply side.

957 Gulley selected the prices during this period to be the Reference Range of Prices after excluding the bottom 10th percentile of spot prices during this period, as Gulley does not expect

these prices, which were experienced in 2002 and 2003, to be indicative of future average market conditions. Gulley believes the growth rate in demand for copper during the period 2001 to 2009 averaged 2.4%. He expects this growth rate to continue during the Reference Period with the mining industry having a hard time meeting this demand.

958 Gulley considers that the floor price within this Reference Range of Prices reflected the industry's long-run marginal cost of production. In his estimation, at 80% capacity utilization, the long-run marginal cost of production is approximately U.S. $2.50/lb. Below this price, Gulley considers mining production to be unsustainable over an extended period of time. Because Gulley does not anticipate market conditions will be characterized by chronic over-capacity during the Reference Period, he considers a price of U.S. $2.50/lb to be too low to be the Single Reference Price for copper during the Reference Period. He considered it highly unlikely, as well as unprecedented, that market conditions would push the copper price down to the mining industry's breakeven point throughout the entire Reference Period. In this connection, he considered that a forecast published by Brook Hunt, a recognized copper consultancy, supported his conclusion. That forecast, which he regarded as deliberately conservative, envisaged a long-term average price of U.S. $2.79/lb through 2021 with a "floor price" of U.S. $2.50/lb.

959 Gulley recommended a Market Sentiment Price of U.S. $2.50/lb for copper. He arrived at this price by studying the five copper price forecasts published by market analysts between December 2010 and February 2011. Considering only the 25% to 75% price range (which involved dropping the highest and lowest forecast), the remaining forecasts fall between U.S. $2.00/lb and U.S. $2.49/lb. He considered it reasonable to adopt a price close to the top of this range as indicative of fair market value given the inherently conservative nature of such published price forecasts.

960 However, in Gulley's opinion, the Market Sentiment Price is not a reliable forecast of future prices and is too conservative for several reasons. He noted that this price falls below the midpoint of the Reference Range of Prices, which was U.S. $2.73/lb. In addition, it falls at or below various estimates of the industry's long-run marginal cost of production, which, as discussed above, he considers to be U.S. $2.50/lb.

961 Gulley therefore recommended a Single Reference Price of U.S. $3.00/lb for copper as the single best price to use in the calculation of Barrick's actual financial loss. Gulley says he arrived at this price by considering market fundamentals, which he concluded would be supportive of strong copper prices for most of the Reference Period. He considers it significant that copper prices equalled or exceeded U.S. $3.00/lb for over 70% of the past five years, despite the occurrence within that period of a global financial crisis and ensuing recession as well as the incomplete recovery in the United States and the other developed economies. As a result, he considered it possible that copper prices could rise as high as U.S. $5.00/lb in the current market cycle. This established a reasonable range, in Gulley's view, of U.S. $2.50/lb to U.S. $5.00/lb, within which a Single Reference Price of U.S. $3.00/lb should be considered very reasonable.

Gold Prices

962 With respect to gold prices, Gulley concluded that the Reference Range of Prices should be between U.S. $378 and U.S. $2,155 per troy ounce. This represents the price of gold in 2011 dollars during the periods January 1974 to December 1983 and January 2002 to June 2011, adjusted such that the peak is 10% below the highest spot price during these periods and the bottom is 10% above the lowest spot price. Gulley considered these prices to have occurred under economic conditions that he expects to continue in force during the Reference Period.

963 Gulley recommended a Market Sentiment Price for gold of U.S. $1,225 per troy ounce and a Single Reference Price for gold of U.S. $1,270 per troy ounce. The Single Reference Price represents the approximate average of the Reference Range of Prices.

964 The defendants did not challenge Gulley's recommendations regarding gold prices. It is therefore unnecessary to set out his rationale for his Single Reference Price for gold in greater detail.

The Hunt Report

965 At the request of Xstrata Chile, Simon Hunt Strategic Services Ltd. provided an opinion on the future of the copper industry and a schedule of projected copper prices in nominal dollars for each year through to 2034, based on a view as to the future of the copper industry during that period. The report is contained in an affidavit of Simon Hunt ("Hunt"), the author of the report, dated September 30, 2011 (the "Hunt Report").

966 Hunt suggested that average copper prices in 2010 dollars would range between U.S. $2.31/lb and U.S. $1.85/lb in the period 2014 to 2027. In a revised table to the Hunt Report, using a constant 2% deflator for the years after 2010, Hunt's schedule of prices averaged $2.37/lb for the years 2011 to 2034 and $2.14/lb for the years 2011 to 2027.

967 The Hunt Report sets out three principal reasons for this conclusion, which, collectively, contemplate both a very different general economic environment and very different market fundamentals for the copper market from those envisaged in the Gulley Report.

968 First, the Hunt Report proceeds on the basis that the period from 2011 to 2034 will differ substantially from the past twenty years for two main reasons. Hunt assumes that the events of 2008-2009 were the "first rumblings" of a global balance depression, by which Hunt intends a period of rolling recessions, not a business cycle recession. The Hunt Report anticipates that the next six to seven years will be characterized by a substantial deleveraging of debt resulting in an increased savings rate, decreased consumption and a lower growth rate. More generally, the Hunt Report anticipates a lower long-term growth rate as the combination of accumulated debt during the last generation, increasing public debt associated with an aging population, and political issues in the U.S., European and Chinese economies that will depress growth and potentially result in asset

deflation. This will translate into lower global industrial production levels, which Hunt estimates will average 0.4% annually between 2011 and 2020. This reduced level of industrial production will directly impact the demand for, and consumption of, copper, which is an industrial input in a number of industries, principally electricity transmission and construction.

969 Second, the Hunt Report predicts that the amount of copper used per unit of industrial production (the copper intensity) will fall significantly during this period for two principal reasons. Hunt suggests that the recent high prices for copper, driven to a significant extent by financial sector purchasers as discussed below, are forcing substitution of aluminum, steel, plastics and other materials for copper-based alloys and of lower copper alloys for higher copper alloys. In addition, Hunt predicts that technological innovation in several areas will significantly reduce the demand for copper.

970 Third, the Hunt Report argues that, since 2004 and in particular commencing in 2008, world refined copper consumption has been overstated because demand is being mistakenly equated with consumption. The Report suggests that during this period, the financial sector, both in the developed countries and in China, has purchased and warehoused, largely outside the reporting system of the world's metal exchanges, large stocks of copper that represent the difference between the total demand for copper and fabricator consumption of copper in these years. Hunt believes that these misunderstood purchases have masked the reality of the copper market, which is that, as a result of a number of factors including the effects of substitution, the supply of copper has exceeded fabricator demand for some time and, accordingly, the market price of copper since 2002 is not sustainable.

971 Based on these considerations, the Hunt Report sets out the following conclusions.

972 First, Hunt suggests that real consumption of copper by fabricators is much lower that is generally assumed and, therefore, at some point the financial sector will be unable to absorb more copper stocks and will begin to liquidate the copper stocks held outside the reporting system.

973 Second, Hunt suggests that the copper prices experienced since 2004 are not a reliable guide to future price levels by virtue of the financial sector involvement in the copper market and that the anticipated decline in copper prices will be exacerbated by the liquidation of financial stocks for a period of time resulting in a sharp decline in prices. He suggests that this will commence with a new credit crisis in 2012-2013 and continue with copper prices not reaching their lows until 2016-2018, which will be associated with a period of general asset deflation. More generally, Hunt expects a world depression from 2013 to 2018-2020 with asset deflation, further depressed in the case of copper by the enforced sales of copper inventory by financial holders of copper outside the reporting system.

974 Third, the Hunt Report envisages a decline in the growth rate of global copper consumption from 2.2% over the period 1990 to 2010 (adjusted for Hunt's estimate of financial purchases of copper stocks during this period) to 1.5% over the period 2014 to 2020, which Hunt foresees as a

period characterized by more surplus production than surplus demand. As a consequence, Hunt foresees falling prices during this period to the point where high-cost production is eventually closed. Finally, Hunt foresees a long period of sustainable growth after 2020 but at a reduced growth rate for world refined copper consumption, in particular as the impact of new technologies begins to operate.

Chilean Tax Issues

975 In response to the position of the defendants that the use of a 17% tax rate under the Chilean tax regime is unrealistic, Barrick tendered an affidavit and a supplementary affidavit of John Giakoumakis, a vice-president, tax, of Barrick ("Giakoumakis"), and an expert report dated October 20, 2011 (the "Baraona Report") of Juan Manuel Baraona ("Baraona"), a Chilean tax lawyer, which reviewed and commented on these affidavits.

976 Baraona testified that Chile has established a two-stage, integrated taxation system under the Chilean Income Tax Law. Under this regime, enterprises pay a general corporate income tax (referred to as the "Tier 1 tax") at the rate of 17%, which has been increased to 20% for 2011 and 18.5% for 2012. Dividends and other forms of profit distributions made by an enterprise to a shareholder or a partner are not subject to tax if paid to other local Chilean entities, to avoid double taxation, but are subject to an additional tax at the rate of 35% (the "Tier 2 tax") if paid to entities not domiciled in Chile. By virtue of a credit mechanism pertaining to Tier 1 tax, the total tax rate applicable to income earned by the Chilean entity is 18% in such circumstances.

977 Giakoumakis testified at trial that he advised Barrick that a 17% rate should be used in the preparation of the Barrick 2009 Mine Plan for two main reasons. He considered that the funds generated by El Morro would be redeployed within that country, given Barrick's level of existing exploration and development activities as well as its corporate development focus on Chile. He also considered that, even if such funds were not utilized in Chile, there were sufficient means of investing them outside Chile that would not attract the Tier 2 tax. Giakoumakis did not provide specific details of the anticipated use of the funds that would have been generated by the El Morro Project together with anticipated funds from Barrick's other current projects in Chile. On the other hand, Barrick's policy since entering Chile has been to retain any funds generated by mining projects in that country.

978 In paragraph 13 of the Giakoumakis affidavit sworn September 1, 2011 (the "First Giakoumakis Affidavit"), Giakoumakis stated that the Tier 2 tax can be deferred as long as the dividends are reinvested by the recipient corporation in another Chilean corporation or otherwise remain in Chile. He also stated that Barrick structures its business in Chile to allow it to take advantage of tax provisions that provide Barrick with the ability to defer the Tier 2 tax on profits. In paragraph 7 of the Giakoumakis supplementary affidavit sworn October 13, 2011 (the "Second Giakoumakis Affidavit"), Giakoumakis set out a number of options, on a non-exhaustive basis, that he considered to be available to Barrick to defer the Tier 2 tax. These options included investing in

mining projects in Chile or outside of Chile using a Chilean company as the investing vehicle, as well as lending money to non-Chilean entities.

979 The Baraona Report states that the options set out in paragraph 7 of the Second Giakoumakis Affidavit could be used by an operating entity or by the recipient entity of distributions from the operating entity to defer Tier 2 tax, in the latter case, by utilizing a further provision of the Chilean Income Tax Law that allows for postponement of the Tier 2 tax if dividends are reinvested in a Chilean company. Such a company may then use the funds in a variety of ways including those described by Giakoumakis. While Baraona identified certain requirements that must be satisfied to qualify for this exemption, there is no suggestion that these requirements are onerous in any respect. The Baraona Report states that this provision of the Chilean Income Tax Law is widely used when investors desire to undertake new investment projects using other legal vehicles and that there are no legal limitations on the type or location of investments that the recipient vehicle can undertake.

980 Based on Baraona's testimony, which was not contradicted, I am satisfied that a 17% tax rate should be used in any loss calculation in this action for the following reasons. First, and most important, the evidence indicates that, provided certain requirements are met, the Chilean Income Tax Law currently allows Barrick to structure its affairs in a manner that avoids the payment of Tier 2 tax on profits from its Chilean mining operations even if those profits are ultimately redeployed outside of Chile. Second, Barrick has a continuing focus on mining projects in Chile in addition to the El Morro Project. Based on the exploration history of Chile, and the favourable economic environment, there is reason to believe that additional investment opportunities will be identified over the life of El Morro within Chile. Third, in the present circumstances, the risk that the Chilean tax regime will change in a manner that significantly affects the net present value of El Morro, or that additional investment opportunities will not become available to Barrick, while not negligible, does not require separate treatment in the loss calculation. Instead, these risks are of the order of magnitude that are typically considered to be included in the risks addressed by the discount factor in a net present value calculation of damages.

PART IV - CONCLUSIONS REGARDING REMEDIES SOUGHT BY BARRICK

981 The primary relief sought by Barrick in this action is an order for specific performance directed against Goldcorp, requiring it to deliver up the El Morro Project, and against Xstrata Chile, requiring it to deliver up Xstrata's 70% interest in the BHP Royalty, subject to payment by Barrick of U.S. $465 million (less $100 as it does not seek delivery of the Fluor Feasibility Study). A variant of this requested relief would impose a constructive trust of the El Morro Project in favour of Barrick. In either event, Barrick suggests that the relief should include an order that New Gold enter into agreements in the form of the Assignment Agreements and any other relevant documentation entered into among Xstrata Chile, New Gold and Goldcorp at the closing of the Goldcorp Transaction. While not expressly acknowledged, I think it is also understood that any such relief would require Barrick to compensate Goldcorp for the development activities conducted in respect of the El Morro Project since February 16, 2010. As an alternative remedy, Barrick seeks

damages against Xstrata Chile for breach of the Barrick Agreement, which it calculates at $747 million as described above.

982 In view of the determinations above regarding the absence of any breach of the Barrick Agreement by Xstrata Chile, and the absence of any tortious conduct by New Gold or Goldcorp, I propose to limit the discussion in this Part of the Reasons to certain issues raised relative to the requested relief of specific performance. For the purposes of this discussion, it is assumed, contrary to the conclusions set out above, that Datawave's exercise of the Right of First Refusal as contemplated by the Goldcorp Agreement breached the Shareholders Agreement to the knowledge of each of the defendants.

Availability of the Remedy of Specific Performance

983 The availability of the remedy of specific performance in the present action depends firstly upon whether the remedy is available to Barrick under the laws of Chile; secondly, if not, whether the laws of Chile or the laws of Ontario govern the availability of specific performance; and thirdly, whether the circumstances assumed for this Part of the Reasons justify such an order of specific performance against Goldcorp. I will address each issue in turn.

Availability of Specific Performance under Chilean Law

984 It is agreed that specific performance is available under the laws of Chile in favour of a non-defaulting party to a contract directed against the defaulting party. However, the parties dispute the availability of an order for specific performance directed against a third party who has acquired an asset that was the subject of the contract that was breached.

985 New Gold and Goldcorp submit that the evidence before the court demonstrates that Barrick would not be entitled to specific performance against such a third party. They rely on Barros' testimony that specific performance would not be available to Barrick as a result of the transfer of the Xstrata Interest to a third party and that, in these circumstances, Barrick's only remedy would be a claim for the damages it suffered as a result of the breach of the Barrick Agreement. I note that Barros does not suggest that the result would be different if Goldcorp had knowledge of the breach of the Barrick Agreement at the time it received the Xstrata Interest. This evidence was not contradicted by other testimony. I accept it as determinative of the operation of Chilean law in the circumstances addressed in this Part.

986 Barrick argues, however, that the transactions effected pursuant to the Goldcorp Agreement could be annulled pursuant to Article 1683 of the Chilean Code. The principles upon which a contract can be nullified under Article 1683 have been set out above in addressing the issue of whether a Chilean court would invalidate the Goldcorp Agreement.

987 Even in the hypothetical circumstances assumed in this Part of the Reasons, Barrick has not demonstrated that an order of nullity would be available under Article 1683. Each of Barros, Pena

and Ochagavia considered that such an order would require demonstration of immoral behaviour beyond mere knowledge of a breach of contract to justify such relief. To obtain a declaration that the Goldcorp Agreement was a nullity, Barrick would have to demonstrate that the purpose of the Datawave Purchase Agreement, and the agreements associated with it, was to cause loss or harm to Barrick and that such purpose is contrary to *bonos mores* or public order under Chilean law. I am not persuaded that the evidence before the court would satisfy this requirement for nullification of the Datawave Purchase Agreement even in the circumstances assumed for this Part of the Reasons.

988 Accordingly, I conclude that, if a court were to find the hypothetical circumstances assumed for the purposes of this Part, an order of specific performance directed against Xstrata Chile would be available under the laws of Chile but an order of specific performance directed against Goldcorp would not be available.

Applicable Jurisdiction in Respect of Remedies for Xstrata Chile's Alleged Breach of Contract

989 Accordingly, the court must determine whether the *lex fori* or the *lex causae* governs the entitlement of Barrick to an order for specific performance.

990 The majority of the Supreme Court in *Tolofson*, at paras. 76-77 stated that, under the laws of Canada, the substantive right of a party may be governed by a foreign law but all matters pertaining to procedure are governed by the law of the forum. As a general rule, the nature of a plaintiff's remedy, including whether a plaintiff is entitled to an order for specific performance or imposition of a constructive trust, is treated as a procedural rather than a substantive issue and is therefore governed by the law of the forum: see e.g. *National Gypsum Co.* v. *Northern Sales Ltd.*, [1964] S.C.R. 144, 1963 CarswellNat 401, at para. 8, in which Fauteux J. stated "... how a right might be enforced is a matter of procedure"; and *Somers* v. *Fournier*, [2002] O.J. No. 2543 (C.A.), at para. 14, quoting *Sutt* v. *Sutt*, [1969] 1 O.R. 169 (C.A.), at p. 175 per Schroeder J.A.

991 Accordingly, I conclude that, in the present proceedings, the availability of specific performance is governed by the law of Ontario. In reaching this conclusion, I would note that I have rejected the following two submissions made by New Gold and Goldcorp.

992 First, New Gold and Goldcorp rely on the principle that where right and remedy are indissolubly connected, both should be considered to be substantive and governed by the appropriate law irrespective of the *lex fori* characterization for domestic purposes: see *Castel & Walker*, Vol. 1, at 6-6 where it is stated that this principle is applicable where the remedy is predicated on, and serves to vindicate, a substantive right and the granting or denial of the remedy affects the recognition of the right. New Gold and Goldcorp argue that this principle is applicable in the present circumstances because, in their view, the remedies available to Barrick are provided in the Barrick Agreement as matters of Chilean law. I do not accept this submission for three reasons.

993 First, insofar as it is relevant to this issue, the provisions of the Barrick Agreement do not

evidence an intention that Chilean law will apply to the remedies available to Barrick in the event of a breach of the Agreement. To the contrary, section 17.6 of the Barrick Agreement, which provides that the rights and remedies provided in the Agreement are in addition to other rights and remedies given by law independent of the Agreement, evidences an intention not to restrict Barrick's remedies to the remedies provided in the Barrick Agreement or under Chilean law. For this purpose, it is relevant that "Law" is defined to include "any law ... otherwise applicable to Seller, Buyer or entities that Control the Seller or the Buyer, as the case may be".

994 Second, in circumstances where the parties have stipulated that a non-defaulting party would be entitled to equitable relief without specifying the applicable law in the event such relief were sought, Canadian courts will apply the *lexi fori* in determining entitlement to such relief: see *Telesis Technologies, Inc.* v. *Sure Controls Systems Inc.*, 2010 ONSC 5288, [2010] O.J. No 4875 (S.C.), at paras. 8 and 9, where L.B. Roberts J. held as follows:

> The Agreement does not expressly stipulate that the law of Ohio applies to any interlocutory remedy sought by the plaintiff. Further, pursuant to subsection 17(f) of the Agreement, the plaintiff may seek any provisional remedy, such as an injunction, from a court of its choosing.
>
> In the present motion, the plaintiff seeks an equitable remedy in the form of an interlocutory injunction. Absent any express agreement by the parties that Ohio law will apply to procedural matters, which is absent in the present case, this is a procedural matter that is governed by the *lex fori* or Ontario law, notwithstanding that the merits of this proceeding are governed by Ohio law. In my view, the fact that the Agreement allows the plaintiff to seek an injunction in a court of its choosing implies that the parties at least tacitly agreed that the procedural laws of the chosen court would apply to applications for any provisional remedies.

995 More generally, in this case, it cannot be said that the remedy of specific performance is either predicated on, or serves to vindicate, Barrick's claims against the defendants. Proof of these claims is entirely distinct from the issue of the determination of the appropriate remedy in respect thereof.

996 Goldcorp also led evidence at trial from Barros to support an argument that the court should apply the doctrine of *renvoi* and give effect to the provisions of Chilean private international law, which by virtue of Article 169 of the Private International Law Code considers remedies to be substantive. However, absent certain exceptions that are not applicable in the present circumstances, Canadian courts treat a choice of law provision in a contract as a reference to the internal law of the chosen foreign jurisdiction but not to the private international law of that jurisdiction: see e.g. *Rosencrantz* v. *Union Contractors Ltd. and Thornton*, [1960] B.C.J. No. 91 (S.C.), at paras. 19-21. Accordingly, the characterization of remedies as substantive rules in Chilean private international

law is irrelevant in this court for purposes of determining the applicable law respecting Barrick's remedies for breach of the Barrick Agreement.

Specific Performance Against Goldcorp

997 Barrick, supported by Xstrata Chile, submits that specific performance can be ordered against Goldcorp as the subsequent purchaser of the Xstrata Interest given Goldcorp's active participation in the events that resulted in Barrick's loss of the Xstrata Interest as well as notice of Barrick's claim at the time it acquired the Xstrata Interest. New Gold and Goldcorp argue that specific performance is not available in the particular circumstances.

998 Barrick, supported by Xstrata Chile, also submits that damages are inadequate to compensate it for its loss of the Xstrata Interest for two reasons: (1) the subject matter of the Barrick Agreement is something unique or highly distinctive, such that it cannot be readily replaced; and (2) it will be extremely difficult to calculate Barrick's damages accurately for the breach of contract. New Gold and Goldcorp argue that damages are an adequate remedy. They also argue, among other things, that Barrick has failed to establish any actual loss. I will address each issue in turn.

Specific Performance Against a Subsequent Purchaser

999 Barrick submits that specific performance can be awarded against a subsequent purchaser of an asset where the subsequent purchaser had notice of the plaintiff's claim when it acquired the asset. It relies on the decisions of the Supreme Court in *Irving Industries (Irving Wire Products Division) Ltd.* v. *Canadian Long Island Petroleums Ltd.*, [1975] 2 S.C.R. 715 and of Spence J. in *I.M.P. Group Ltd.* v. *Dobbin*, [2008] O.J. No. 3572 (S.C.). In addition, Barrick submits that courts have also found specific performance to be the appropriate remedy for the tort of inducing breach of contract where the property at issue is unique and damages would be inadequate. For this principle, it relies on *Oceanaire Investments Ltd.* v. *Redman*, [1988] B.C.J. No. 2071 (S.C.).

1000 In each of these cases, the principle applied by the courts is that a party who takes the subject matter of a contract as a subsequent purchaser with notice of an existing agreement governing the subject property becomes a party to the action because, in the circumstances, equity considers the party's conscience as having been affected by the notice. This is clear from the following passage of Spence J. in the *I.M.P.* decision, at paras. 144 and 145:

> Generally, specific performance is a claim by and against the parties to a contract. However, when a claim for specific performance relates to the conveyance of property, and the property in question has subsequently been conveyed to a third party, that third party can properly be made a party to an action for specific performance. As Martland J. observed in the Supreme Court of Canada, adopting a passage from *Fry on Specific Performance*, 6th ed., p. 90, in *Canadian Long Island v. Irving Wire Products*, [1975] 2 S.C.R. 715 at 737:

> If a stranger to the contract gets possession of the subject-matter of the contract with notice of it, he is or may be liable to be made a party to an action for specific performance of the contract upon the equitable grounds of his conscience being affected by the notice.
>
> Thus, a third party who is alleged to have taken the subject matter of the contract with notice becomes a party to the action because equity considers his conscience as having been affected by the notice.

1001 Further, it is clear from *I.M.P.* that there need be no actionable wrong in the usual sense for specific performance to be ordered. In that decision, the court specifically stated at para. 147 that no actionable wrong, contractual, tortious or restitutionary, was alleged against the third party. Nor is it necessary to establish actual knowledge, or willful blindness, of the contract in a way that gives rise to a constructive trust: see *I.M.P.*, at para. 149.

1002 In the present circumstances, there can be no doubt that Goldcorp was aware of the Barrick Agreement. The Barrick Transaction had been publically announced on October 12, 2009. Goldcorp received a copy of the form of the Barrick Agreement from New Gold on or about December 23, 2009. This is sufficient notice of Barrick's adverse claim to justify an order of specific performance provided Barrick is able to establish circumstances justifying such an award. In any event, Goldcorp was served with the Original Barrick Claim on or about January 13, 2010.

1003 Goldcorp argues that the principle in *IMP* is dependent upon the plaintiff demonstrating that it had an equitable interest in the property that is the subject of the agreement of which the third party had notice. It says that Barrick cannot satisfy this requirement in the present circumstances because equitable interests do not exist under the laws of Chile. As described above, under Chilean law, a contract for the sale of a property grants the purchaser no more than a right to take delivery at closing against payment of the purchase price.

1004 I accept that in *IMP* the purchaser had an equitable interest in the shares that were the subject of the dispute: see para. 150. However, I am not persuaded that such a requirement exists in respect of property situated in a jurisdiction that does not recognize equitable interests in property. I see no reason, apart from a technical application of the principle, why a party should not be entitled to obtain a remedy for specific performance under the laws of Ontario if it can establish that it would stand in the position of an equitable owner if the applicable agreement were governed by the laws of Ontario.

1005 More significantly, I do not think that it is correct, as a matter of law, that a plaintiff must demonstrate an equitable interest in an asset to obtain relief by way of specific performance against a third party purchaser of the asset. In *Canadian Long Island Petroleums*, the Supreme Court awarded specific performance in respect of a breach of a right of first refusal. In doing so, the Supreme Court addressed, for other purposes, whether a right of first refusal created an interest in

land and concluded that it did not. In fact, Maitland J. indicated at p. 736 that it had been contended that, if the respondents did not have a property interest in the property acquired by the third party, they had no rights enforceable as against the third party. Maitland J. proceeded on the basis that, in that decision, the respondents had the benefit of a restrictive covenant in their favour but did not have an equitable interest in the relevant land. The Supreme Court nevertheless upheld the lower court decisions awarding specific performance.

1006 This conclusion is reinforced by the principle that underlies the result in *Canadian Long Island Petroleums*. Maitland J. based the decision on the plaintiff's entitlement to an injunctive remedy if it had brought an action to prevent a breach of the right of first refusal prior to the transfer of the property. An equitable interest in land would not have been a prerequisite for obtaining such relief.

1007 In the present circumstances, I see no principled reason for departing from the reasoning in *Canadian Long Island Petroleums* merely because, under the laws of Chile, Barrick did not have an equitable interest in the land. It did have an interest akin to a restrictive covenant in the Barrick Agreement. Such an interest would, in my opinion, be sufficient to bind the conscience of a third party in the circumstances assumed for the purposes of this Part.

1008 Goldcorp relies on a number of cases in which courts have granted relief based on the fact that a holder of a right of first refusal has an option in the land after the right of first refusal is triggered. However, I do not think that they support Goldcorp's position that an equitable interest in land is required to obtain an order of specific performance against a third party purchaser with knowledge.

1009 In particular, in *McFarland* v. *Hauser*, [1979] 1 S.C.R. 337, it is clear from the discussion at pp. 357-58 that the availability of a remedy of specific performance against the third party was not at issue as the relevant land had not been transferred to the third party. The issue in that decision was, instead, the priority as between competing equitable interests in the property. The circumstances in *Faris* v. *Eftimorski*, [2004] O.J. No. 3407 (S.C.), were similar to those in *McFarland*. In *Harris* v. *McNeely*, [2000] O.J. No. 472 (C.A.), the court denied a request for specific performance on the grounds of laches, as ten years had elapsed since the original transfer of land that contravened the right of first refusal. While the Court of Appeal referred to the existence of an option in favour of the holder of the right of first refusal, there is nothing in the decision that suggests this finding was a necessary pre-condition to the relief sought.

1010 Based on the foregoing, I conclude that, in the circumstances assumed for the purposes of this Part, the remedy of specific performance directed against Goldcorp would be available to Barrick if it could demonstrate that such relief was appropriate in the circumstances.

<u>Damages an Inadequate Remedy</u>

1011 As mentioned, Barrick submits that damages would be an inadequate remedy for Xstrata

Chile's breach of the Barrick Agreement and of the tortious conduct of New Gold and Goldcorp that deprived it of the Xstrata Interest. I agree that specific performance would be the appropriate remedy in the circumstances assumed for the purposes of this Part of the Reasons, both because of the uniqueness of the Xstrata Interest and because of the difficulty in accurately calculating Barrick's damages. I will address each consideration in turn.

Uniqueness of the Xstrata Interest

1012 In *Semelhago* v. *Paramadevan*, [1996] 2 S.C.R. 415, at para. 22, the Supreme Court held that specific performance should not be granted absent evidence that the property in dispute is "unique to the extent its substitute would not be readily available". In the present circumstances, however, the Xstrata Interest is intrinsically unique and, although unnecessary for this conclusion, also arguably unique in the hands of Barrick.

1013 In *Inmet Mining Corp*. v. *Homestake Canada Inc.*, 2002 BCSC 61, 99 B.C.L.R. (3d) 93, at para. 402, aff'd 2003 BCCA 610, 24 B.C.L.R. (4th) 1, Satanove J. found the Troilus gold mine to be a unique property for three reasons:

> I find Troilus mine to be a unique property. Firstly, cases dealing with gold mines seem to treat them as having a peculiar and special value (see *Lac Minerals Ltd. v. International Corona Resources Ltd.* (1989), 61 D.L.R. (4th) 14 (S.C.C.)). Secondly, it is apparent that Troilus is unique amongst gold mines because it is the lowest grade, gold producing mine in North America. Thirdly, the nature of the ore body and its peculiar nugget effect creates a greater than usual challenge in estimating the ore reserve and extracting it from the earth. In fact, it is fair to say that it is the unique nature of this mine that created the reconciliation problem between mine and mill which lead in turn to many of the unfounded allegations against the plaintiff.

There is ample evidence for a similar conclusion in the present circumstances.

1014 The El Morro Project demonstrates similarly unique characteristics. It includes a high quality copper-gold mineral deposit in the La Fortuna ore-body that contains large reserves and significant mineral resources. It also exhibits significant exploration potential both at pit depth and elsewhere on the El Morro Project site. There is no evidence of available comparable assets that Barrick could have purchased at the date of the alleged breach or at the date of the trial. It is also significant that the Xstrata Interest represented the majority interest in the El Morro Project and, therefore, carried the right to control the development of El Morro.

1015 While BDO proposed that the Casino project referred to above was a potentially comparable property, the evidence regarding this property is not sufficient for the court to reach this conclusion. Among other things, the Casino project is at an earlier stage of development, is a smaller project, and is located in the Yukon, rather than Chile. Nor is there evidence that the project,

or 70% of the shares of the company, were for sale even if the shares were traded publicly.

1016 Further, as set out above, the potential existed for Barrick to realize considerable synergies from its acquisition of the Xstrata Interest that would not exist in respect of purchases of other mining assets outside the Atacama region of Chile.

1017 New Gold argues that Barrick's purchase of an additional 25% interest in the Cerro Casala project, which was announced on February 18, 2010 and completed on March 21, 2010, constituted the purchase of a similar property to the Xstrata Interest. Among other things, it argues that the availability of this investment demonstrates that the El Morro Project was not unique and that the court should find that Barrick avoided any loss by its purchase of this interest. I do not agree for three reasons.

1018 First, apart from the similarity in the purchase price, which was apparently U.S. $475 million, there is no other evidence to establish the similarity of Cerro Casala and El Morro in terms of the fundamental characteristics of the mining project, including but not limited to the ore grades, the quantity of the reserves, the metallurgical processes involved, or the exploration potential.

1019 Second, even if the contemplated Cerro Casala and El Morro mines were similar, there is no evidence that Cerro Casala had additional potential comparable to that of the El Morro Project, which is acknowledged.

1020 Third, and in any event, the evidence establishes that Barrick would have acquired the additional interest in Cerro Casala even if it had completed its purchase of the Xstrata Interest. It had sufficient cash resources to do so and had identified Chile as a country in which it wished to expand its portfolio of producing assets. Barrick advised Xstrata Chile on both February 5, 2010 and February 12, 2010 that it was ready, willing and able to complete the Barrick Transaction. There is no evidence that Barrick was unable financially to complete both the Barrick Transaction and the Cerro Casala transaction at the same time.

Difficulty in Quantifying Damages

1021 Courts have also found specific performance to be an appropriate remedy where an accurate calculation of damages would otherwise be extremely difficult on the rationale that, in such circumstances, there is a real risk of under-compensating the innocent party: see e.g. *Neighbourhoods of Cornell Inc.* v. *1440106 Ontario Inc.*, [2003] O.J. No. 2919 (S.C.) at paras. 112-14, aff'd [2004] O.J. No. 2350 (C.A.), leave to appeal to S.C.C. refused, [2004] S.C.C.A. No. 390.

1022 The evidence adduced at trial relative to Barrick's damage claim amply supports the conclusion that a monetary award in this case cannot adequately compensate Barrick for the loss of the Xstrata Interest with any reasonable degree of certainty. There are six broad categories of difficulty presented in this case regarding the determination of Barrick's damages: (1) the

determination of the appropriate metal prices for forecast purposes; (2) the determination of the appropriate reserves for development of the mine plan underlying the net present value calculation of the project; (3) certain issues regarding the technical and cost estimates; (4) the determination of the appropriate discount factor for purposes of the present value calculation of the projected cash flows from El Morro; (5) the inability to value the potential additional value in the El Morro Project; and (6) the changing nature of certain significant elements of the mine. The significance of each of these considerations for the conclusion that a damage award would not be an appropriate remedy in the present circumstances is summarized below.

1023 First, a very significant variable in the value of the El Morro Project, and therefore of the quantum of Barrick's damages, is the price of copper that is assumed for forecasting purposes, as copper revenues are estimated to approximate three-quarters of total revenues from El Morro. Similarly, the forecast price for gold that is assumed, even if it was not disputed in this trial, is a significant variable for the value of the Project. At the U.S. $3.00/lb price for copper recommended by Gulley and used by Duff & Phelps, El Morro is very profitable. At the U.S. $2.50/lb price level used by BDO, the value of Xstrata Chile's aggregate interest in the El Morro Project approximates the purchase price in the Barrick Transaction.

1024 However, copper prices cannot be forecast in a vacuum. Historically, prices have been tied to levels of industrial production. It is necessary to base any finding regarding long-term prices on a conclusion regarding the anticipated level of economic activity in both the developed as well as the developing world over the life of the mine, which is expected to commence in or after 2014 and run for approximately 14 years.

1025 The evidence on copper prices consists of the Gulley Report and the Hunt Report. As the discussion of these reports indicates, Gulley and Hunt have radically different views regarding the likely global economic environment over this period and regarding the market fundamentals for the copper market. This results in significantly different views as to the appropriate copper price or prices to use for forecasting purposes. Moreover, on the evidence before the court, it is difficult to assess the particular issue raised by Hunt of the impact of financial purchases of copper on the reliability of current copper prices as a reference for future prices.

1026 Another significant variable is the quantity of ore produced by El Morro over the life of the mine. There are at least three principal variables that can impact this amount. First, despite extensive drilling and the sophistication of the models used, there is always a risk that the ore-body will exhibit different characteristics from those modelled, in particular, in terms of grades. Second, and very significantly, copper and gold prices affect the size of the reserves, i.e., the amount of ore that can be profitably mined, and therefore the pit dimensions and design. Third, there is always a risk that metallurgical recoveries will not equal the recoveries modelled for the mine. The draft Hatch feasibility study materials appear to reflect the influence of all three of these factors.

1027 Third, as described above, there are a number of issues pertaining to the technical and cost

estimates of El Morro that arise out of the Micon Report and the Hatch feasibility study. For the most part, these issues can be resolved on a balance of probabilities standard. In addition, based on the draft Hatch feasibility study, it would appear that the date of commencement of commercial production assumed in the Duff & Phelps Report has been adjusted by Goldcorp. Although Barrick suggests that its experience with permitting in the Atacama region of Chile, and its relationship with local authorities, would have allowed it to keep to the schedule contemplated by the 2011 Mine Plan, this is certainly less probable given the generally more difficult permitting environment since 2009 in respect of mining projects in Chile. There is also a significant discrepancy in the evidence between the Barrick 2011 Mine Plan (including its antecedents) and the draft Hatch feasibility study regarding the appropriate level of sustaining capital expenditures. Micon has stated that it is unable to resolve this discrepancy based on the information it has received. The difference is sufficiently great to have a material impact on the net present value of the El Morro Project.

1028 Fourth, the use of a discounted cash flow analysis to quantify Barrick's damages raises the issue of the appropriate capitalization rate for discounting purposes. The difference in approach between the Duff & Phelps Report and the BDO Report has been set out above. The choice of capitalization rate has a very significant influence on whether the value of El Morro is determined to be material or negligible. There is, however, no theoretically correct weighted average cost of capital for the El Morro that has been identified for the court. While I would be inclined to accept a discount rate that is broadly consistent with other market-based indicia if it were necessary to make a determination on this issue, a court should have reservations about doing so if there is an alternative. Markets do not always price risk appropriately, and, accordingly, the BDO conclusion that Barrick and Goldcorp may have overpriced the Xstrata Interest cannot be entirely disregarded. The capital asset pricing model is a useful but not always reliable means of assessing the value of assets that do not trade on their own in a public market. Moreover, the choice of discount factor and the choice of metal prices for forecast purposes are inevitably related and their determination involves a significant subjective element.

1029 Fifth, there is a significant opportunity for additional value to be derived from the El Morro Project that has not been valued by Duff & Phelps and is not susceptible of quantification. There is a reasonable possibility that mining could continue underground after the life of the open pit mine. In addition, there is the possibility that further exploratory drilling on the Project site may discover other economic ore bodies, whether in respect of anomalies already identified or otherwise. Further, Goldcorp and New Gold acknowledged the fact that, as the owner of the Xstrata Interest, there would be a real potential for Barrick to obtain synergies in respect of the construction and the operation of El Morro that would add value to its interest in the El Morro Project beyond the value addressed in the calculations of the net present value of the projected cash flows set out in the 2011 Mine Plan. In the absence of any means of reliably quantifying such additional value, any valuation of the Project that is based solely on these net cash flows from the Project necessarily undervalues Barrick's loss.

1030 Lastly, for a number of reasons set out above, the net present value of the El Morro Project

is a moving target. As mentioned, in the Goldcorp 2011 Press Release, Goldcorp has announced materially higher reserves for El Morro based on updated prices and further drilling activity. On the basis of these reserves, Hatch was engaged at the time of the trial in developing an updated feasibility study based on a revised mine plan, with certain other revisions to the proposed infrastructure. The projected net cash flows to be developed in connection with this feasibility study would provide a substantially clearer picture of the value of El Morro, and of Barrick's corresponding loss, as of the date of trial. As Micon noted in its supplemental report, the Hatch feasibility study, when completed, will represent the most up-to-date and comprehensive analysis of the technical and cost parameters associated with the actual project to be developed to exploit the La Fortuna ore-body.

1031 However, the estimates provided to Micon by Hatch did not include a projection of the net present value of the after-tax cash flows from El Morro comparable to those upon which Duff & Phelps and BDO calculated the value of the Xstrata Interest and corresponding loss to Barrick. Accordingly, even if it were possible to address with some confidence the other considerations set out above, the evidence before the court for purposes of calculating Barrick's damages is, by definition, out-of-date and therefore, at best, an imperfect basis for making such a determination.

1032 In summary, while it is possible to make findings regarding each of the foregoing issues on a probability standard, I do not think that such an exercise would be meaningful in the present circumstances. It is certain that the scenario resulting from such findings would not occur. The real imponderable is whether the deviation from such scenario would be material or immaterial. There can be no certainty on this issue.

1033 Investors are prepared to accept considerable uncertainty regarding the foregoing factors in order to evaluate investment opportunities because there is no other reasonable alternative. However, that level of uncertainty is not compatible with a damage calculation, where the purpose is to put the injured party in the position it would have been in if the breach had not occurred. If there is an alternative remedy that avoids the high degree of uncertainty that is inherent in the discounted present value approach to the quantification of damages in the present circumstances, I think the court should adopt it, absent considerations that disentitle the injured party to such relief. The alternative of specific performance addresses this concern and provides substantial certainty of the outcome to Barrick. Accordingly, the remedy of specific performance in respect of the 70% Interest is highly preferable in the circumstances assumed for this Part of the reasons in the absence of factors militating against such relief. As discussed in the following section, Goldcorp has not identified any such considerations.

Other Considerations Relevant to an Order of Specific Performance

1034 Goldcorp has raised several considerations which it submits militate against an order of specific performance. I have rejected these arguments for the reasons set out below.

1035 First, Goldcorp argues that, in order to obtain an order of specific performance against a

subsequent purchaser, the party seeking the relief must have an equitable interest or proprietary claim in the subject property or asset, which it says Barrick is unable to establish in the present circumstances because Chilean law does not recognize equitable interests. This issue has been addressed above.

1036 Second, Goldcorp argues that Barrick does not come before the court with 'clean hands'. It points to Blasutti's offer of an increased purchase price to Xstrata Chile on the evening of January 6, 2010, which it describes as a flagrant attempt to induce Xstrata Chile to breach its obligations under the Shareholders Agreement. As set out above, given the complete lack of understanding of the nature and structure of the Goldcorp Transaction on the part of Barrick and Xstrata Chile at the time, and the commercial reality that Blasutti's offer addressed, I do not find that this offer is properly characterized as an attempt to induce a breach of contract by Xstrata Chile.

1037 Third, Goldcorp argues that Barrick could have sought injunctive relief in the Original Barrick Claim to prevent completion of the Goldcorp Transaction. It says this factor should weigh against its entitlement to an order of specific performance after completion of the Goldcorp Transaction. While this may be a relevant consideration as Goldcorp suggests, I am not persuaded that, on its own, it is determinative in the present circumstances in the face of the other factors described above that weigh in favour of an order of specific performance.

1038 Fourth, Goldcorp argues that the subject matter of the Barrick Transaction is not unique. It says that the fact that there may be challenges in calculating damages does not mean that damages cannot be quantified, nor that an award of damages would be inadequate. In support of this argument, it relies on the "voluminous expert evidence" in respect of quantification of damages filed by Barrick, including the specific quantification of loss calculation of Duff & Phelps.

1039 In many circumstances, damages can be calculated with reasonable certainty even if there is a difficulty in arriving at such a calculation. However, for the reasons set out above, I think that the present circumstances are much more extreme - to the point where reasonable certainty is not a possibility. In addition, as Barrick points out, a court is less likely to award specific performance where the transactional objective was a purely monetary one. In the present circumstances, the transactional objective of the Barrick Agreement was Xstrata Chile's interest in the El Morro Project, rather than a strictly monetary one.

1040 Fifth, I would note that both New Gold and Goldcorp also argue that Barrick has failed to establish the existence of damages with reasonable certainty. I acknowledge that under at least two scenarios - the higher discount rate proposed by BDO or the lower copper prices based on Gulley's Market Sentiment Price - the evidence would suggest that Barrick did not suffer any damages. I have addressed each of these issues above. In my opinion, however, Barrick has adduced sufficient evidence of the real possibility of loss to warrant an order of specific performance in the present circumstances.

1041 Lastly, in connection with the requested relief of specific performance, Barrick also seeks

an order requiring New Gold to enter into the Shareholders Agreement and the CFLA with Barrick on the terms of the Assignment Agreements, as finalized in or about December 31, 2009. New Gold argues that there is no authority for such an order. However, New Gold/Datawave agreed to the Assignment Agreements in contemplation of the closing of the Barrick Transaction and received consideration for such agreement in the form of Xstrata Chile's consent to the Feasibility Study Agreement. Given these arrangements, I conclude that such an order would be appropriate if an order of specific performance were made in the circumstances assumed for the purpose of this Part of these Reasons.

Specific Performance in Respect of Xstrata Chile's 70% Interest in the BHP Royalty

1042 The foregoing discussion has focused on the appropriateness of the remedy of specific performance in respect of the 70% Interest held by Goldcorp in Goldcorp Tesoro.

1043 However, the same considerations would apply in respect of Barrick's claim for an order directed against Xstrata Chile in respect of its 70% interest in the BHP Royalty. I note that, in its submissions, Xstrata Chile did not oppose such an order.

1044 Accordingly, in the circumstances assumed for the purposes of this Part of the Reasons, I would also conclude that an order for specific performance directed against Xstrata Chile in respect of its 70% interest in the BHP Royalty would be more appropriate than an award of damages.

PART V - CONCLUSION

1045 Based on the foregoing, the Barrick claims against the defendants in this action are dismissed in their entirety.

1046 The parties should contact my office to arrange a meeting of counsel to address cost submissions regarding this matter.

H.J. WILTON-SIEGEL J.

* * * * *

SCHEDULE A

The El Morro Shareholders Agreement

The following definitions in section 1.1 are relevant:

> **"Affiliate"** means, with respect to a Shareholder, any Person which directly or indirectly Controls, or is Controlled by, or is under common Control with, that Shareholder.

"Control" means possession, directly or indirectly, of the power to direct or cause direction of management and policies through ownership of voting shares, interests, or securities, or by contract, voting trust or otherwise. The definition of Control shall be incorporated into such terms as **"Controlled"** and **"Controlling"**.

"Encumbrances" means mortgages, charges, deeds of trust, security interests, pledges, liens, royalties, overriding royalty interests, preferential purchase rights, or other encumbrances or burdens of any nature whether imposed by contract or operation of law (other than a Permitted Encumbrance).

"Rights or Interests" means, with respect to any Shareholder, that Shareholder's Participating Interest together with all of its other rights, interests, entitlements, obligations and liabilities under this Agreement, including all Shares and Shareholder Loans held by such Shareholder, any entitlement to Distributions or to the Withdrawal NSR Royalty and any Carried Funding Loans.

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

1.2 Interpretation

(1) This Agreement is the result of negotiations between the parties and the terms and provisions hereof (except where otherwise defined or the context otherwise requires) shall be construed in accordance with their usual and customary meaning.

9.1 Carried Funding

(1) Datawave shall have a one time right to elect to have Xstrata fund seventy percent (70%) of all Program Funding Commitments of Datawave from the effective date of such election until the commencement of Commercial Production ("Carried Funding"). By way of example only, if the Participating

Interests of Xstrata and Datawave are 70% and 30% respectively at the time of such election and there is no Project Financing, then after giving effect to such election and using the example of a Program and Budget requiring a total Program Funding Commitment of $1,000, Xstrata will contribute $910 (comprised of $700 in respect of its own Program Funding Commitment plus $210 as Carried Funding (representing 70% of Datawave's $300 Program Funding Commitments)) and Datawave will contribute the remaining $90. Applying the same example, but assuming in addition that 60% of Program Funding Commitments are funded by Project Financing, then $600 will be funded by Project Financing and of the remaining required $400 of Program Funding Commitments Xstrata will contribute $364 (comprised of $280 in respect of its own Program Funding Commitment plus $84 as Carried Funding) and Datawave will contribute the remaining $36.

9.4 Non-Assignment

(1) The obligations of Xstrata pursuant to this Article 9 provide Carried Funding or a Completion Guarantee are personal to Datawave and cannot be assigned by Datawave to any unaffiliated third party and shall cease upon Datawave or Finco ceasing to be an Affiliate of Datawave Public Parent.

(2) If at any time after Datawave has made a Carried Funding Election or Xstrata has provided the Completion Guarantee, either of the Datawave Participants Transfers to a third party (other than a Transfer to another Affiliate of Datawave Public Parent) all or any portion of its Rights and Interests (to the extent permitted under Article 10) or ceases to be an Affiliate of Datawave Public Parent, Xstrata shall not have any obligations to provide further Carried Funding and any such Transfer, or transaction by which either Datawave Participant ceases to be an Affiliate of Datawave Public Parent, shall be conditional on:

(i) the then outstanding balance (including all principal and interest) of the Carried Funding Loans being repaid in full, and

(ii) Xstrata being released from, in the case of such Transfer, that portion of the Completion Guarantee relating to the Rights and Interests being Transferred or, in the case of either Datawave Participant ceasing to be an Affiliate of Datawave Public Parent, the entire portion of the Completion Guarantee relating to the Datawave Participants' Participating Interest.

10.1 General

Except as expressly provided in this Article, no Shareholder shall have the right to Transfer all or any portion of its Rights or Interests.

10.2 Limitations on Transferability

(1) Notwithstanding any other provision of this Article, any Transfer of Rights or Interests by a Shareholder permitted by this Article shall be subject to the following limitations:

(a) No Shareholder shall Transfer any Rights or Interests except in conjunction with the Transfer of all, or a proportionate interest in all, of its Rights and Interests.

(b) No Transfer of all or any part of a Shareholder's Rights or Interests shall be completed, and no transferee shall have the rights of a Shareholder unless and until the transferring Shareholder has provided to the other Shareholder notice of the Transfer and the transferee, as of the effective date of the Transfer, has entered into an agreement with and in form satisfactory to the Company and the other Shareholder to become a party to and be bound by this Agreement to the same extent as the transferring Shareholder.

(c) No Shareholder shall make a Transfer that would (i) violate or is prohibited by any Applicable Laws or by the terms of any agreement or other instrument affecting the Company, the Shareholders or the Property, (ii) result in the cancellation of any Governmental Authorization, (iii) result in the other Shareholder or the Company becoming subject to any governmental controls or regulations or any taxation or additional taxation to which they were not subject prior to the proposed Transfer, by reason of the nationality or residence of the proposed transferee.

(d) No Shareholder shall make a Transfer that would, after giving effect thereto, result in (i) such Shareholder and its Affiliates holding in the aggregate 10% or less of the Participating Interests unless such Transfer results in such Shareholder and its Affiliates holding no Participating Interest or (ii) the Transferee and its Affiliates holding in the aggregate 10% or less of the Participating Interests.

(e) The requirements of Section 9.4 in the case of a Transfer by either of the Datawave Entities to a non-Affiliate.

(2) The Company shall not register or take any other action to give effect to or recognize any Transfer or purported Transfer of any Rights or Interests unless such transfer fully complies with the requirements of this Article or is otherwise specifically authorized pursuant to this Agreement.

10.3 Transfer to an Affiliate

(1) A Shareholder may Transfer all or any portion of its Rights and Interest to an Affiliate. Any such Transfer shall be subject to the requirements of Section 10.2 (other than paragraphs (a) and (e) thereof) but shall not be subject to the right of first refusal imposed by Section 10.4. ...

10.4 Right of First Refusal

(1) If either Shareholder (or former Shareholder in the case of the Withdrawal NSR Royalty) (in either case a "Selling Shareholder") receives a *bona fide* written offer (a "Third Party Offer") from any person dealing at arm's length with the Selling Shareholder to purchase all, or any part of its Rights and Interests (the "Offered Interest"), which the Selling Shareholder wishes to accept, the Selling Shareholder must promptly give notice of the Third Party Offer (the "Notice of Offer") to the Company and to the other Shareholder and comply with this Section 10.4. The Notice of Offer must contain a copy of the Third Party Offer, disclose the identity of the person making the Third Party Offer (the "Third Party Offeror") and provide evidence sufficient to establish that the Third Party Offeror has the power and capacity, including the financial capacity, to complete the purchase of the Offered Interest and that the conditions set out in Section 10.2 will be satisfied. If the Third Party Offer provides for any non-cash consideration to be paid to the Selling Shareholder in respect of the Offered Interest, the Notice of Offer must specify the Selling Shareholder's good faith estimate of the cash equivalent value of such non-cash consideration. If the Offered Interest is being offered for sale to the Third Party Offeror together with or in conjunction with other unrelated assets of the Selling Shareholder, the other Shareholder will in accordance with Section 10.4(2) be entitled to purchase only the Offered Interest and, the Notice of Offer must specify the Selling Shareholder's good faith estimate of the cash equivalent value being offered by the Third Party Offeror for the Offered Interest. If the other Shareholder does not agree with any one or more

of the foregoing estimates, as applicable, such disagreement, if not resolved, will constitute a dispute which may be submitted directly to arbitration by either Shareholder for final determination pursuant to Section 12.2, in which case all time periods referred to in this Section 10.4 shall be extended by the time taken to obtain such final determination. Upon the Notice of Offer being given, the other Shareholder will have the right to purchase all, but not less than all, of the Offered Interest at the same price and upon the same terms and conditions as are contained in the Third Party Offer, subject to paying the aforesaid cash equivalent in lieu of any non-cash consideration.

(2) If the other Shareholder desires to purchase all the Offered Interest it will give notice of such desire to the Selling Shareholder and to the Company within 60 Business Days of having been given the Notice of Offer, in which case the transaction of purchase and sale will be completed in accordance with the terms set out in the Third Party Offer (subject to paying the aforesaid cash equivalent in lieu of any non-cash consideration) by delivery of the Offered Interest by the Selling Shareholder with good title, free and clear of all Encumbrances against payment by certified cheque or bank draft by the other Shareholder. If, at the time of completion, any portion of the Offered Interest is subject to any Encumbrance, the other Shareholder will be entitled to deduct from the purchase money to be paid to the Selling Shareholder the amount required to discharge such Encumbrance and will apply such amount to discharge such Encumbrance, on behalf of the Selling Shareholder. Concurrently with such completion, the other Shareholder shall assume, and shall indemnify and obtain the release of the Selling Shareholder from, all of the Offeror's obligations under any Financial Assurance.

...

(4) If the other Shareholder does not give notice in accordance with the provisions of Section 10.4(2) that it is willing to purchase all the Offered Interest, the right of the other Shareholder, except as hereinafter provided, to purchase the Offered Interest will terminate and the Selling Shareholder may sell all, but not less than all, of the Offered Interest to the Third Party Offeror in accordance with the terms of the Third Party Offer at any time within 120 Business Days after the expiry of the 60 Business Day period specified in Section 10.4(2). If the Offered Interest is not so sold within such 120 Business Day period on such terms, the rights of the Parties pursuant to this Section 10.4 will again take effect with respect thereto. [emphasis added]

10.5 Exceptions to First Right of Refusal

Section 10.4 shall not apply to the following:

(a) any Transfer by Xstrata or its Affiliates (other than a Transfer of the Withdrawal NSR Royalty) at any time after a decision to proceed with Development, unless immediately before giving effect to such Transfer the Participating Interests held by Xstrata and its Affiliates, in aggregate, are less than 50% of all Participating Interests;

12.5 Further Assurances

The Shareholders agree to do all such further things, take all such further actions and execute and deliver all such further documents and instruments as may be reasonably necessary or convenient to carry out the intent, purposes and provisions referenced in this Agreement.

12.11 Confidentiality

(2) Notwithstanding Section 12.11(1), any Party may disclose confidential information:

...

(d) as may reasonably be required by a *financial institution or other similar entity* in connection with any financing required by a Party for purposes of [the El Morro Shareholders Agreement] or otherwise;

(e) as may be reasonably required by a third party or parties in connection with the negotiation and due diligence relating to a Transfer of any Rights and Interests to the extent permitted by [the El Morro Shareholders Agreement].

(f) information which is or becomes part of the public domain other than through a breach of this Agreement; and

provided that:

(i) in the event of disclosure as contemplated in item (b) above, the

Party making such required disclosure shall first deliver a copy thereof to the other Parties on a timely basis to permit the other Parties to comment thereon prior to such disclosure,

(ii) in the event of disclosure as contemplated in items (d) and (e) above, the person receiving the disclosure agrees to be bound by and observe the provisions of this Section, and

(iii) in the event of disclosure as contemplated in items (c), (d) and (e) above the disclosing Party notifies the other Parties in advance of such disclosure, indicating in such notice the nature of the information being disclosed and the name(s) of the proposed recipient(s) of that information.

The Parent Entities' Addendum

(1) Each of the undersigned acknowledges that the intended result of the restrictions contained in Article 10 of the Agreement concerning Transfer of Rights and Interests (including Transfer of Shares of the Company) and the related right of first refusal could be avoided by the Transfer, directly or indirectly, of the shares of the Shareholders and accordingly (i) each of the undersigned agrees that the provisions of Article 10 of the Agreement shall apply, *mutatis mutandis*, to any Transfer of any shares of the Shareholders or any shares of any entity (other than Datawave Parent, Xstrata Parent or any entity that controls Xstrata Parent) holding, directly or indirectly, shares of the Shareholders and (ii) each of the undersigned undertakes to ensure compliance with the foregoing by any of its respective Affiliates that may from time to time own, directly or indirectly, any shares of the Shareholders. For greater certainty, in applying the provisions of the right of first refusal in Article 10 in the foregoing context, such right of first refusal shall be implemented by applying it to the Rights and Interests held by the Shareholder of the shares of which are, directly or indirectly, proposed to be Transferred, rather than to such shares themselves.

...

(3) Xstrata Parent shall take all steps necessary to ensure that Xstrata duly, timely and fully performs all of its obligations under the Agreement, including compliance with any arbitration award pursuant to Section 12.2 thereof.

(4) Datawave Parent shall take all steps necessary to ensure that Datawave duly, timely and fully performs all of its obligations under the Agreement, including

compliance with any arbitration award pursuant to Section 12.2 thereof.

The Carried Funding Loan Agreement

Under the CFLA, "Rights and Interests" and "Permitted Transfers" are defined as follows:

> "**Rights and Interests**" means, with respect to any Shareholder, all of its rights, interests, entitlements, obligations and liabilities under the Company's bylaws as Shareholder, or under this Agreement, the [El Morro] Shareholders Agreement, or any other agreement between the Shareholders, including all shares and shareholder loans held by such Shareholder, any entitlement to Distributions or to the Withdrawal NSR Royalty and any Carried Funding Loans.
>
> "**Permitted Transfer**" means any transfer by any Datawave Participant of all or any portion of their Rights and Interests to an Affiliate, as long as (i) the Datawave Participant remains jointly and severally liable with its Affiliate for all of the obligations and liabilities associated with the Rights and Interests transferred to its Affiliate, ...; (ii) the Datawave Participant and its Affiliate effecting such transfer execute any documents, guarantees and agreements reasonably required by Xstrata to record such joint and several liability; and (iii) such transfer satisfies the requirements of clauses (b), (c) and (d) of Section 10.2(1) of the [El Morro] Shareholders Agreement.

4. Total Carried Funding Facility

4.1 By means of this instrument and always subject to the fulfillment of each and all of the condition precedent provided for in Section 5 below, Xstrata will make, in one or more advances, a non revolving carried funding loan to Finco up to the total principal amount of 600.000.000 Dollars or such greater amount as may be required to fund 70% of the combined Program Funding Commitments of the Datawave Participants until commencement of Commercial Production ("Total Carried Funding Facility").

A Loan Advance shall be disbursed by Xstrata directly to the Company who shall receive such Loan on behalf of Finco, in an amount equivalent to 70% of the combined Program Funding Commitments of the Datawave Participants related to each Cash Call made by the Company pursuant to an Approved Expenditure (the "Disbursement Request Amount") provided however that each and every one of the conditions precedent indicated in section 5 below have been fulfilled.

For the above program, Finco shall grant an irrevocable power of attorney in the form contained in the Exhibit 11 named "Power of Attorney from Finco" or "Poder Irrevocable de Finco", in favour of the Company, so the Company can validly request and receive, on behalf of Finco, the pertinent Loan Advance directly from Xstrata, who within the next 10 Business Days after making the Loan Advance, shall notify the Company and the Datawave Participants of the account thereof and date on which such advance was made (the Disbursement Date").

8. Affirmative Covenants

8.3 Other Loan Documents and Additional Security Agreements: In case either Datawave Participant acquires one or more shares in the Company, or becomes by any way entitled to acquire shares in the Company then it shall, within 10 (ten) Business Days as of the date such acquisition takes place, grant a commercial pledge over all such shares to Xstrata in the terms and conditions set out in Exhibit 5 herein.

9. Negative Covenants

Starting on the date hereof and until such date as the obligation of Xstrata to make Loan Advances has terminated and the Carried Funding Loan and any secured interest thereon has been paid in full each and every one of the Obligations contained herein have been completely and totally fulfilled, each of Finco and Datawave, as applicable, undertakes the following negative covenants:

9.1 Neither Finco nor Datawave shall furnish, create, grant or permit the existence of any Lien over all or any part of any Collateral, other than Liens in favour of Xstrata and Permitted Encumbrances.

9.2 Finco shall conduct no business or corporate activity different from the finance of the Company.

10.A Assignment by Datawave Participants

Datawave Participants may make Permitted Transfers. In the event that a Permitted Transfer is made of any of the Rights and Interests of the Datawave Participants under this Agreement, the Parties will execute and deliver all such further agreements and documents and do all such further acts and things as may be required to give effect to such transfer and to maintain and preserve the priority of the [Xstrata Chile Security Interests]. ...

12. Default Events and Acceleration:

A. Default.

The following events constitute Default Events of the Carried Funding Loan:

12.1 If (a) Finco or Datawave is in default of its obligations under Sections 5.2 or 5.3; (b) Finco fails to reimburse Xstrata for any stamp taxes paid or payable by Xstrata in accordance with section 8.1; (c) Finco fails to fulfill any other necessary requirement within its power or control in order to have any Notes and/or any Acknowledgment of Debt signed by Xstrata pursuant to the Power of Attorney for other Loan Documents be "executive titles" or "titulo ejecutivo" against Finco and such failure remains unremedied 10 Business Days after written notice thereof is given by Xstrata to Finco; (d) Finco or Datawave defaults in the payment of an increased amount payable to Xstrata pursuant to Section 8.2 and such default continues unremedied 10 Business Days after written notice of such default is given to the Datawave Participants; (e) Finco or Datawave fail to execute or deliver any such further agreements or to do any such further acts or things as Xstrata may reasonably require pursuant to Section 8.3 and such default continues unremedied 10 Business Days after written notice of such default is given to the Datawave Participants; (f) a Material Adverse Change occurs and Section 5.3 has ceased to apply; (g) any Lien exists on all or any part of the Collateral, other than the Liens in favour of Xstrata and the Permitted Encumbrance, and in the case of a Lien arising by operation of law such Lien is not discharged or subordinated to the Xstrata Security within 10

Business Days of Datawave first becoming aware of its existence;

...

12.6 If (a) either of the Datawave Participants ceased to be an Affiliate of Datawave Parent Company, (b) Datawave shall cease to have direct ownership of at least 99% of Finco's equity rights and capital and indirect ownership through an Affiliate or employee of the remaining 1% or (c) Datawave or Finco shall transfer all or portion of their Rights and Interests to a non-Affiliate.

The Xstrata/Barrick Sale Agreement

4.1 Conditions Precedent

This agreement is conditional on:

(a) (**Shareholders' Agreement**) each of Datawave, Finco, the Company and the Seller and Buyer agreeing to amend the Shareholders' Agreement in form and substance satisfactory to the Buyer and the Seller, acknowledging and agreeing to:

i. the assignment to the Buyer of Seller's rights under the Shareholders' Agreement; and ii. the assumption by the Buyer and the release of the Seller of all of the Seller's obligations and undertakings (including personal obligations to Datawave in relation to shareholder loans, carried funding to Finco and any completion guarantee) under the Shareholders' Agreement, to be incorporated in a deed of assignment, assumption and release delivered by the Seller to the Buyer on Completion pursuant to clause 5.2(c) and executed by the Buyer on Completion pursuant to clause 5.3(d);

(b) **Loan Documents**) each of Datawave, Finco, the Company and the Seller and Buyer agreeing to amend the Loan Documents, in form and substance satisfactory to the Buyer and the Seller, acknowledging and

agreeing to:

iii. the assignment to the Buyer of Seller's rights under the Loan Documents, including the transfer to the Buyer of the Carried Funding Loans and the Shareholder Loans; and iv. the assumption by the Buyer and the release of the Seller of all of the Seller's obligations and undertakings under the Loan Documents, to be incorporated in a deed of assignment, assumption and release delivered by the Seller to the Buyer on Completion pursuant to clause 5.2(h) and executed by the Buyer on Completion pursuant to clause 5.3(g); and

(c) **(Right of First Refusal)** the first to occur of the following:

i. Datawave delivering to the Seller a letter addressed to theSeller, in form and substance satisfactory to the Buyer and the Seller, confirming that the Right of First Refusal has rexpired in accordance with the terms and conditions of the Shareholders' Agreement;
ii. Datawave delivering to the Seller a letter addressed to the Seller in form and substance satisfactory to the Buyer and the Seller, waiving the Right of First Refusal; or
iii. Datawave failing to exercise the Right of First Refusal within the time period set forth in the Shareholders' Agreement.

4.2 Reasonable Endeavours

Each party must use its reasonable endeavours to obtain the satisfaction of the Conditions Precedent, including procuring performance by a third party. The parties must keep each other informed of any circumstances which may result in any Condition Precedent not being satisfied in accordance with its terms.

4.4 Termination of agreement by either party

If any of the Conditions Precedent are not satisfied, and have not been waived by the parties in accordance with clause 4.3, by January 30, 2010 (or such other date

as the Seller and Buyer agree), then either party may terminate this agreement by notice in writing to the other party, provided, that if Datawave exercises or purports to exercise its Right of First Refusal, then the Buyer may terminate this agreement by notice in writing to the Seller at any time.

8.6 Pre-Completion Conduct

During the period from the date of this agreement to Completion, except as consented to in writing by Buyer (which consent of Buyer shall not be unreasonably withheld), Seller shall:

...

(e) not, except in the Ordinary Course of Business, waive, release, or assign any rights or Claims, or modify, amend, or terminate any contract in respect of the Business and to which the Company is a party or by which the Company or any of its assets is bound;
(f) not enter into any merger or capital restructuring of the Company, or amendment of the Constitution;
(g) not waive, release, or assign any rights or Claims, or modify, amend, or terminate any Loan Document as it exists on the date of this agreement;
(h) if the Seller or the Company receives a Notice of Offer (as defined in the Shareholders' Agreement), the Seller, to the extent that it reasonably can, shall itself, or shall cause the Company to, promptly notify the Buyer and the Seller shall promptly waive (in writing) any rights (including, without limitation, any rights of first refusal) associated with such a transaction if such Notice of Offer relates to a transaction involving the Buyer or a Related Body Corporate of the Buyer or, if such Notice of Offer does not relate to a transaction involving the Buyer or a Related Body Corporate of the Buyer, the Seller shall use reasonable commercial efforts to cooperate with the Buyer in the consideration of the exercise or waiver (including timing related thereto) of any rights (including, without limitation, any rights of first refusal) associated with such transaction; and
(i) not authorize or commit or agree to do any of the foregoing.

12.1 Confidential Information

Each party agrees that it will treat in confidence all documents, materials and other information which it shall have obtained regarding the other party or the Company (and, in the case of the Seller, provided to the Buyer and its Representatives) during the course of the negotiations leading to the consummation of the transactions contemplated hereby (whether obtained before or after the date of this agreement), the preparation of this agreement and its terms and conditions, and other related documents, and, if the transactions contemplated hereby are not consummated, each party will return to the other party all copies of non-public documents and materials which have been furnished in connection therewith. Such documents, materials and information shall not be communicated to any third person (other than to a party's Representatives who have a need to know about such documents, materials and information). No other party shall use any confidential information in any manner whatsoever except solely for the purpose of evaluating the transactions contemplated hereby; provided, however, that after the Completion Date, Buyer may use or disclose any confidential information with respect to or about the Company or otherwise (reasonably related to the Business). The obligation of each party to treat such documents, materials and other information in confidence shall not apply to any information which (i) is or becomes available to such party from a source other than the other party, (ii) is or becomes available to the public other than as a result of disclosure by such party or its Representatives, (iii) is required to be disclosed under applicable Law or judicial process, but only to the extent it must be disclosed, or (iv) such party reasonably deems necessary to disclose to obtain any of the consents or approvals contemplated hereby. Further, Seller shall treat in confidence, and shall cause its Representatives to treat in confidence, all documents, materials and other information with respect to or about the Company or otherwise (reasonably related to the Business) unless any such information is or becomes available to the public other than as a result of disclosure by Seller or its Representative, or is required to be disclosed under applicable Law or judicial process, but only to the extent it must be disclosed.

16.1 No assignment

Except as otherwise provided in the next sentence, no party may assign or otherwise deal with its rights under this agreement or allow any interest in them to arise or be varied in each case without the express written consent of the other party, which consent must not be unreasonably withheld or delayed. Prior to Completion, the Buyer (but not any assignee of the Buyer) may transfer its rights and obligations under this agreement to any wholly-owned subsidiary upon written notice to the Seller, provided that any such assignment shall not release

the Buyer of its obligation under clause 5.3(b) of this agreement.

17.11 Further Steps

Each party agrees, at its own expense, to do anything the other party asks (such as obtaining consents, signing and producing documents and getting documents completed and signed) as may be necessary or desirable to give full effect to the provisions of [the Xstrata/Barrick Sale Agreement] and the transactions contemplated by it.

<u>The New Gold/Goldcorp Agreement</u>

2.1 Xstrata Transaction

2.1.1 Datawave

Immediately upon execution of this Agreement, Datawave agrees to proceed as follows:

(a) Datawave will exercise the Datawave ROFR by delivering to Xstrata, on or prior to the ROFR Expiry Date, an exercise notice in accordance with the provisions of Section 10.4(2) of the Shareholders Agreement in the form set out as Schedule "A" (the "Datawave Notice") advising Xstrata of Datawave's intention to acquire the Xstrata Rights and confirming its desire that the Company acquire the Feasibility Study as set out in the Side Letter and offering to purchase Xstrata's 70% interest in the BHP Royalty (the "70% BPH Royalty") all on the terms and conditions set out in the Offer. The Xstrata Rights, the Feasibility Study, and, if and only if the foregoing offer to purchase is accepted by Xstrata, the 70% BHP Royalty, are referred to collectively as the "Xstrata Interest";

(b) as soon as practicable after delivery of the Datawave Notice, Datawave shall settle the form of sale agreement for the Xstrata Interest, substantially on the terms of the draft agreement appended to the Offer, and enter into such agreement (the "Datawave Purchase Agreement") with Xstrata;

(c) Datawave will incorporate a new subsidiary ("Data Sub") in Chile or such other jurisdiction requested by Goldcorp and approved by Datawave;

(d) immediately following the execution of the Datawave Purchase Agreement by Datawave and the incorporation of Data Sub, Datawave shall assign to Data Sub, and shall cause Data Sub to acquire and assume, all Datawave's right and interest in and to the Datawave Purchase Agreement and shall provide written notice of such assignment to Xstrata in accordance with the provisions of the Datawave Purchase Agreement;

(e) as soon as practicable after delivery of the notice of assignment to Xstrata as provided in paragraph (d) above, (i) Datawave shall request that Xstrata enter into a restated Datawave Purchase Agreement in order to incorporate Data Sub as the buyer under the Datawave Purchase Agreement, or (ii) alternatively at the request of Goldcorp, Datawave shall make such other requests as Goldcorp and Datawave agree may be necessary or desirable in connection with such assignment;

(f) upon satisfaction by Goldcorp of its obligations under subsection 2.1.2 below and the satisfaction of the conditions set out in subsection 2.1.3, Datawave will cause Data Sub to complete the acquisition of the Xstrata Interest in accordance with the provisions of the Datawave Purchase Agreement (the "Xstrata Transaction").

2.1.2 Goldcorp Committed to Advance the Loan Amount

Subject to the satisfaction of the conditions precedent set out in subsection 2.1.3 below, Goldcorp will loan to Data Sub the amount of US$465,000,000 less US$2,000,000 in the event the 70% BHP Royalty is not included in the Xstrata Interest, (the "Loan Amount") immediately prior to the completion of the Xstrata Transaction. Data Sub will use the Loan Amount exclusively for the purpose of completing the Xstrata Transaction. Goldcorp shall, unless otherwise agreed in writing by Datawave and Goldcorp, pursuant to a written direction from Data Sub, pay the Loan Amount directly to Xstrata in accordance with the payment procedures and at the time and date required for the payment of the purchase price set out in the Datawave Purchase Agreement.

2.1.3 Conditions precedent for the Advance of the Loan Amount

The obligation of Goldcorp to advance the Loan Amount is subject to the following conditions precedent:

(a) Datawave shall have incorporated Data Sub and exercised the Datawave ROFR;

(b) Datawave and Xstrata shall have entered into, executed and delivered the Datawave Purchase Agreement and Datawave shall have assigned to Data Sub the Datawave Purchase Agreement and provided written notice of such assignment to Xstrata in accordance with Datawave Purchase Agreement and shall have delivered an executed copy of such agreement and the assignment to Goldcorp;

(c) Datawave shall provide to Goldcorp the payment instructions received by Datawave from Xstrata in connection with the payment of the Purchase Price under the Datawave Purchase Agreement, as soon as possible following receipt thereof by Datawave and shall notify Goldcorp of the date of closing under the Datawave Purchase Agreement at least two (2) Business Days prior to such date;

(d) Data Sub shall have delivered a demand promissory note (the "Note") in favour of Goldcorp in the form attached to this Agreement as Schedule "B" evidencing the Loan Amount;

(e) Datawave shall have executed and delivered to Goldcorp a guarantee of the obligations of Data Sub under the Note, together with a pledge of all of the issue and outstanding shares of Data Sub (the "Pledge"), which creates a first priority security interest in such shares with recourse under the guarantee limited to realization under the Pledge, and such steps, as may reasonably be taken, shall have been taken to cause Data Sub to grant a first priority security interest in all of Data Sub's assets, each in form and substance satisfactory to Goldcorp and its counsel, acting reasonably and all steps necessary or desirable to register such documents or actions necessary to ensure the priority and the enforceability of such documents and in respect of the security in the assets of Data Sub, such steps as may be reasonably taken, shall have been effected; and

(f) each New Gold Entity shall have delivered a certificate of an officer of such New Gold Entity, respectively, certifying that their respective resignations and warranties set forth in this Agreement and the Datawave Purchase Agreement, as applicable, are true, accurate, and correct as of the date of the advance of the Loan Amount and that each New Gold Entity has fulfilled and/or performed, when required, all of its obligations contained in this Agreement to be fulfilled and/or performed on or before the date of the advance of the Loan Amount.

2.2 Data Sub Share Transaction

2.2.1 Acquisition of Data Sub by Goldcorp

Subject to the terms and conditions of this Agreement, conditional on and forthwith upon completion of the Xstrata Transaction and the registration pursuant to Chilean law of the Xstrata Shares in favour of Data Sub, Datawave and Goldcorp shall enter into an agreement substantially in the form set out as Schedule "C" (the "Data Sub Share Purchase Agreement") pursuant to which Datawave shall transfer and assign to Goldcorp (or a subsidiary of Goldcorp designated by Goldcorp), and Goldcorp (or a subsidiary of Goldcorp designated by Goldcorp) shall purchase and acquire from Datawave, all of the issued and outstanding shares in the capital of Data Sub (the "Data Sub Shares"), together with all intercompany indebtedness of Data Sub with any other entity in the New Gold group of companies, if any, free and clear of all encumbrances, other than encumbrances in favour of Goldcorp (the "Data Sub Share Transaction"). The purchase price for the Data Sub Shares and the intercompany debt, if any, shall be the amount of US $100 (the "Purchase Price") and shall be satisfied by Goldcorp as set out in the Data Sub Share Purchase Agreement.

2.2.2 Payment

Contemporaneously with the Closing of the Data Sub Share Transaction, Goldcorp shall pay an entity to be determined by New Gold, the sum of US $50,000,000, the structuring of such payment to be mutually agreed by Goldcorp and New Gold.

2.3 Structure

The parties agree that the structure set out herein may be amended at the request of Goldcorp or New Gold (i) in order to facilitate tax planning; or (ii) if it is necessary to ensure that the benefit of the representations and warranties made by Xstrata in the Datawave Purchase Agreement is retained by Data Sub following the closing of the Data Sub Share Transaction provided in each case that such restructuring is consented to by the other party, such consent not to be unreasonably withheld.

2.4 Completion

For the avoidance of doubt, the completion of the Xstrata Transaction and the Data Sub Share Transaction shall, to the extent possible, be consecutive

transactions with closing the Data Sub Share Transaction to take place immediately following the closing of the Xstrata Transaction on the same Business Day. The closing of the Xstrata Transaction and the Data Sub Share Transaction is expected to occur no later than February 15, 2010, or such other date as mutually agreed in writing between the New Gold Entities and Goldcorp and, in respect of the Xstrata Transaction, as is acceptable to Xstrata.

The parties agree that in the event that Xstrata defaults on its obligations pursuant to the Datawave Purchase Agreement, in a manner which either expressly or as a result of the effect of such default prevents the closing of the Xstrata Transaction, or in the event that a court order or similar prohibition from a governmental authority in a relevant jurisdiction is in place which prohibits the closing of the Xstrata Transaction, Data Sub shall not be required to close the Xstrata Transaction, nor shall Goldcorp be required to fund the Loan Amount until such time as the default is remedied or such court order or prohibition is removed in order that the closing can take place. In such event, the obligations of the parties set out in this Agreement shall continue in full force and effect and the parties agree to co-operate with one another to facilitate closing of the Xstrata Transaction in an expeditious manner; provided that if the closing of the Xstrata Transaction has not occurred on or before twelve months before the occurrence of the relevant event and Datawave is able to terminate the Datawave Purchase Agreement, then either New Gold or Goldcorp may terminate this Agreement upon written notice to the other.

4.1 Positive Covenants

From and after the date of this Agreement, Datawave covenants and agrees until completion of the Transactions as contemplated in subsection 2.4 as follows:

(a) **Keep Proper Books**. It shall keep accurate and complete books of account and records in which full and current entries shall be made of all financial transactions, assets and business of Data Sub and permit representatives of Goldcorp access thereto at all reasonable times to inspect such books and records and to make extracts therefrom or copies thereof;

(b) **Use of Proceeds.** It shall use the Loan Amount exclusively for the purpose and in the manner set out in Section 2.1.2 and shall obtain such releases from existing security holders and other third parties as may be

necessary or desirable for this purpose;

(c) **Maintain Corporate Existence.** It shall preserve and maintain its corporate existence and that of Data Sub and all of their respective rights, privileges and other authority necessary for the conduct of its business;

(d) **Comply with Agreements.** It shall and shall cause Data Sub to comply in all material respects with the Shareholders Agreement, the Datawave Purchase Agreement, the Carried Funding Loan Agreement, the Shareholders Loans, the Side Letter and all other obligations required to implement the Transactions;

(e) **Comply with Laws.** It shall cause Data Sub to comply in all material respects with all laws, regulations and orders applicable to Data Sub and its properties and assets and duly observe all material requirements of governmental authorities and all statutes and regulations, relating to its business and affairs;

(f) **Perform All Obligations.** It shall observe and perform all of its obligations and cause all matters and things necessary or expedient to be done, in order to preserve, protect and maintain all the rights of Goldcorp under this Agreement; and

(g) **Notify Goldcorp**. It shall notify Goldcorp promptly in writing of:

i. any proceeding or litigation against New Gold, Datawave or Data Sub which could have a material and adverse effect on the Transactions;

ii. any material adverse change in the financial position or operations of the Company; and iii. a breach of, or non-compliance with, any term, condition or covenant contained in this Agreement or any other document required or referred to hereunder.

4.2 Negative Covenants

From and after the date of this Agreement, until the completion of the Transactions as contemplated in subsection 2.4, Datawave shall not do any of the following, without the prior written consent of Goldcorp:

(a) **Issue Interests**. From and after the incorporation of Data Sub, issue any interest in Data Sub or its capital or any rights, warrants or options to acquire any interest in Data Sub or its capital or enter into any agreement

to do any of the foregoing other than Datawave capitalizing the Loan Agreement for the purpose of enabling Data Sub to fulfill its obligations under the Datawave Purchase Agreement;

(b) **Create Security Interest**. Make any assignment, create, assume or suffer to exist any security interest, mortgage, pledge, encumbrance, assignment, lien or charge of any kind upon the Data Sub Shares or any property of Data Sub, except as contemplated in subsection 2.1.3(e);

(c) **Consolidate, Merge, etc**. Take any step, act or proceeding, including, but not limited to, any sale or disposition of any property or assets of Datawave or Data Sub, for the purposes of or leading to the consolidation, amalgamation, merger, liquidation, dissolution or winding-up of Datawave or Data Sub;

(d) **File Changes to Constating Documents**. Amend or revoke the constating documents or by-laws of Datawave or Data Sub in whole or in part or enact any additional by-law if the result of such activity will have an adverse or detrimental effect on Goldcorp or the transactions contemplated by this Agreement;

(e) **Affiliate of New Gold**. Cease to be an affiliate of New Gold;

(f) **No Liabilities or Assets**. From and after the incorporation of Data Sub, it shall cause Data Sub not to incur, assume or acquire any liabilities or assets, other than the Xstrata Interest and the borrowing of the Loan Amount and grant of security in connection therewith, as contemplated by this Agreement; or

(g) **Operations of the Company**. It shall not vote for or agree in any manner whatsoever to do, or cause to be done, any of the matters prohibited by Section 8.6 of the Xstrata Sale Agreement.

5.1 Representations and Warranties of New Gold Entities

Each of the New Gold Entities hereby represents and warrants to Goldcorp as follows and acknowledges that Goldcorp is relying on such representations and warranties without independent inquiry in entering into this Agreement.

...

(e) The execution, delivery and performance of this Agreement by it and the consummation of the transactions contemplated hereby will not (i) violate any provision of its constating or governance documents; (ii) except as

> otherwise set forth in this Agreement, require it to obtain any consent, approval or action of, or make any filing with or give any notice to, any governmental authority having jurisdiction or any other person pursuant to any instrument, contract or other agreement to which it is a party or by which it is bound; (iii) conflict with, result in any material breach or violation of any of the terms and conditions of, or constitute (whether with notice or lapse of time or both) a default under, any instrument, contract or other agreement to which it is party or by which it is bound; (iv) violate any order, judgment or decree against, or binding upon, it or upon its respective securities, properties or businesses; or (v) violate any law or regulation of its country of organization or any other country in which it maintains is principal office;

H.J. WILTON-SIEGEL J.

cp/e/qljel/qlpmg/qlced/qlgpr