Lac Minerals *Ltd. v.* International Corona Resources Ltd., [1989] 2 S.C.R. 574

Lac Minerals Ltd. *Appellant*

v.

International Corona Resources Ltd. *Respondent*

indexed as: lac minerals ltd. *v.* international corona resources ltd.

File No.: 20571.

1988: October 11, 12; 1989: August 11.

Present: McIntyre, Lamer, Wilson, La Forest and Sopinka JJ.

on appeal from the court of appeal for ontario

Commercial law -- Confidentiality -- Mining companies discussing possible joint venture -- Confidential exploration results disclosed during discussions -- High potential property adjacent to lands of exploration company -- Mining company in receipt of information purchasing property for own use -- Whether or not company in breach of duty respecting confidences -- Whether or not breach of fiduciary duty -- If so, the appropriate remedy.

Industrial and intellectual property -- Trade secrets -- Confidentiality -- Mining companies discussing possible joint venture -- Confidential exploration results disclosed during discussions -- High potential property adjacent to lands of exploration company -- Mining company in receipt of information purchasing property for own use -- Whether or not company in breach of duty respecting confidences -- If so, the appropriate remedy.

Trusts and trustees -- Fiduciary duty -- Trade secrets -- Confidentiality -- Mining companies discussing possible joint venture -- Confidential exploration results disclosed during discussions -- High potential property adjacent to lands of exploration company -- Mining company in receipt of information purchasing property for own use -- Whether or not breach of fiduciary duty -- If so, the appropriate remedy.

Remedies -- Unjust enrichment -- Restitution -- Constructive trust -- Nature of constructive trust -- When constructive trust available.

International Corona Resources Ltd., a junior mining company, carried out an extensive exploration program and made arrangements to attempt to acquire the Williams property. Representatives from a senior mining company, Lac Minerals, read of the test results in a public newsletter and arranged to visit the Corona property. Corona showed the Lac representatives confidential geological findings and disclosed the geological theory of the site and the importance of the Williams property. Detailed private information was left with Lac officials during further

discussions about development and financing options. Corona was advised by Lac to aggressively pursue the Williams property. The matter of confidentiality was not raised.

The Lac representatives, after their visit to Corona's site, instructed their personnel to gather information on the area in question and to stake favorable claims east of the Corona property. Lac acquired the Williams property but never informed Corona at any time of its intention of acquiring that property. Later negotiations between Lac and Corona for the Williams property to be turned over to Corona failed.

Corona, after its relationship with Lac had ended, concluded various agreements with Teck Corporation. These agreements provided for a joint venture in developing a mine on the Corona property and purported to give Teck a 50 per cent interest in the fruits of Corona's lawsuit against Lac, with Teck agreeing to pay certain costs.

The trial judge concluded that Lac and Corona had not concluded a binding contract but found Lac liable under the two other possible heads of liability, breach of confidence and breach of fiduciary duty. He decided that the appropriate remedy for breach of fiduciary duty was the return of the Williams property to Corona but allowed Lac's claim for a lien for the cost of improvements, and the amounts paid to Williams excluding royalty payments. The actual amount spent by Lac on developing the property was discounted to take into account the fact that Corona, if it had not been deprived of the Williams property, would have expended less to develop the property. Both parties were given the option of undertaking a reference to determine

the amount Lac had spent to develop the Williams property. Lac was ordered to transfer the property to Corona upon payment by Corona to Lac of these amounts. A reference was also ordered to determine the amount of the profits obtained by Lac from the Williams property. Lac was ordered to pay the amount of such profits to Corona with interest. Damages were assessed on the principles applicable to breach of fiduciary duty in the event that, on appeal, a court should decide that damages were the appropriate remedy.

The Court of Appeal affirmed the findings of the trial judge with respect to breach of confidence and fiduciary duty. It also confirmed the remedy but added that a constructive trust was an appropriate remedy for both the breach of confidence and fiduciary duty. The court did not deal with the appellant's attack on the assessment of damages.

Three main issues were raised in this appeal: (1) did a fiduciary relationship exist between Corona and Lac which was breached by Lac's acquisition of the Williams property? (2) did Lac misuse confidential information obtained by it from Corona and thereby deprive Corona of the Williams property? and, (3) if either question were answered affirmatively, what was the appropriate remedy?

Held (McIntyre and Sopinka JJ. dissenting in part): The appeal and cross-appeal should be dismissed.

Per La Forest J.: Lac breached a duty of confidence owed to Corona. The test for whether there has been a breach of confidence involves establishing three elements: (1) that the information conveyed was confidential; (2) that it was communicated in confidence; and (3) that it was misused by the party to whom it was communicated. Corona had communicated private, unpublished information and, although the matter of confidence had not been raised, there was a mutual understanding between the parties that they were working towards a joint venture and that valuable information was communicated to Lac under circumstances giving rise to an obligation of confidence. The information provided by Corona was the springboard that led to Lac's acquisition of the Williams property. This use had not been authorized by Corona.

The receipt of confidential information in circumstances of confidence establishes a duty not to use that information for any purpose other than that for which it was conveyed. The relevant question to be asked is what is the confidee entitled to do with the information, not what is the confidee prohibited from doing with it, and the onus falls on the confidee to show that the use of the confidential information was not prohibited. If the information is used for such a prohibited purpose, the confider is entitled to a remedy to the extent of the detriment suffered.

Lac acted to Corona's detriment when it used the confidential information to acquire the Williams property which Corona would have otherwise acquired. Lac was uniquely disabled from pursuing property in the area for a period of time; this was not an unacceptable result. It could have either negotiated a relationship with Corona based on the disclosure of confidential

information or it could have pursued property in the area for itself on the basis of publicly available information. Lac could not have the best of both worlds.

A constructive trust was the only just remedy here, regardless of whether this remedy was based on breach of confidence or breach of a fiduciary relationship. The remedies available under one head are those available to the other. Given a breach of a duty of confidence, the finding of a fiduciary relationship was not strictly necessary.

The law of confidence and the law relating to fiduciary obligations are not coextensive and yet are not completely distinct. A claim for breach of confidence will only be made out, however, when it is shown that the confidee has misused the information to the detriment of the confider. Fiduciary law, however, is concerned with the duty of loyalty and does not require that harm result. Duties of confidence, unlike fiduciary obligations, can arise outside a direct relationship. Another difference is that breach of confidence also has a jurisdictional base at law, and accordingly can draw on remedies available in both law and equity, whereas fiduciary obligations arise only in equity and can only draw upon equitable remedies.

The following common features provide a rough and ready guide to whether or not a fiduciary obligation should be imposed on a new relationship: (1) the fiduciary has scope for the exercise of some discretion or power; (2) the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests; and (3) the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

A fiduciary obligation can arise out of the specific circumstances of a relationship where fiduciary obligations would not normally be expected. One party is entitled to expect that the other will act in his interests in and for the purposes of the relationship. A fiduciary relationship does not normally arise between arm's length commercial parties. The facts here, however, supported the imposition of a fiduciary obligation which Lac breached and may be grouped under the headings: (1) trust and confidence; (2) industry practice; and, (3) vulnerability. They overlapped to some extent.

The relationship of trust and confidence that had developed between Corona and Lac merited significant weight in determining if a fiduciary obligation existed. Both parties would reasonably expect that a legal obligation would be imposed on Lac not to act in a manner contrary to Corona's interest with respect to the Williams property.

Industry practice, while not conclusive, should be given significant weight in determining what Corona could reasonably expect of Lac. The issue was not the legal effect of custom in the industry but rather the importance of the existence of a practice in the industry in determining what could reasonably be expected. The practice in the industry was premised on the disclosure of confidential information in the context of serious negotiations and was so well known that at the very least Corona could reasonably expect Lac to abide by it. The practice was neither vague nor uncertain.

Vulnerability or its absence is not conclusive of the question of fiduciary obligation. It, however, must be considered when found in determining if the facts give rise to a fiduciary obligation. Corona was vulnerable to Lac and this vulnerability was a factor deserving of considerable weight in the identification of a fiduciary obligation. Given industry practice, Corona would not expect Lac to use this information to Corona's detriment. The fact that Corona did not protect itself with a confidentiality agreement, which would confirm what everyone knew, should not be reason to deny the existence of a fiduciary obligation. Confidentiality agreements should not be presumed where it is not established that the entering of confidentiality agreements is a common, usual or expected course of action, particularly when the law of fiduciary obligations can operate to protect the reasonable expectations of the parties. There was no reason to clutter normal business practice by requiring a contract.

Business and accepted morality are not mutually exclusive domains. Finding a breach of fiduciary obligation here would not create uncertainty in commercial law or result in *ad hoc* morality determining the rules of commercial conduct.

The constructive trust is but one remedy available in the law of restitution, and will only be imposed in appropriate circumstances. The Court determines whether a claim for unjust enrichment is established, and then examines whether in the circumstances a constructive trust is the appropriate remedy to redress that unjust enrichment. There is no unanimous agreement on the circumstances in which a constructive trust will be imposed. Some guidelines can, however, be suggested. First, no special relationship between the parties is necessary. Insistence

on a special relationship would undoubtedly lead to relationships being created in order to justify the remedy. Secondly, the constructive trust is not reserved for situations where a right of property is recognized. That would limit the constructive trust to its institutional function, and deny to it the status of a remedy, its more important role. A pre-existing right of property need not necessarily exist when a constructive trust is ordered. The imposition of a constructive trust can both recognize and create a right of property. A proprietary remedy, however, should not be imposed whenever it is "just" to do so, unless further guidance can be given as to what those situations may be.

The issue of the appropriate remedy only arises once a valid restitutionary claim has been made out. The constructive trust awards a right in property, but that right can only arise once a right to relief has been established. The facts here supported a claim for unjust enrichment. The constructive trust awards a right in property and should only be awarded if there is reason to grant to the plaintiff the additional rights that flow from recognition of a right of property. More important here was the right of the property holder to have changes in value accrue to its account rather than to the account of the wrongdoer. The moral quality of the defendants' act may also be another consideration in determining whether a proprietary remedy is appropriate. The focus of the inquiry, however, should be upon the reasons for recognizing a right of property in the plaintiff, not on the reasons for denying it to the defendant.

The constructive trust was the only appropriate remedy here, given the uniqueness of the Williams property, given the fact Corona would have acquired the property but for Lac's

breaches of duty, and given the virtual impossibility of accurately valuing the property. The trial judge's award was confirmed.

Per Lamer J.: The evidence here, for the reasons set out by Sopinka J., did not establish the existence of a fiduciary relationship. For the reasons of La Forest and Sopinka JJ., Lac breached a duty of confidence and the proper approach in arriving at the appropriate remedy was that adopted by La Forest J.

Per Wilson J.: No ongoing fiduciary relationship arose between the parties by virtue only of their arm's length negotiations towards a mutually beneficial commercial contract for the development of the mine. A fiduciary duty, however, arose in Lac when it was made privy to the confidential information about the Williams property.

Lac's acquisition of the Williams property, which was the subject of a confidence, may also be characterized as a breach of confidence at common law with respect to the information concerning the Williams property.

When the same conduct gives rise to alternate causes of action, one at common law and the other in equity, and the available remedies are different, the Court should consider which will provide the more appropriate remedy to the innocent party and give the innocent party the benefit of that remedy. The remedy of constructive trust is available for breach of confidence as well as for breach of fiduciary duty. Here, the imposition of a constructive trust on Lac with respect

to the Williams property, in contrast to an award of damages which depended on valuation techniques, was the only sure way to fully compensate Corona. It also made sure that the wrongdoer would not benefit from his wrongdoing.

Per McIntyre and Sopinka JJ. (dissenting in part): When confronted with a relationship that does not fall within one of the traditional categories, such as trustee-beneficiary, the Court must consider if the essential ingredients of a fiduciary relationship are present. A fiduciary obligation may be imposed in relationships where three general characteristics seem to exist: (1) the fiduciary has scope for the exercise of some discretion or power; (2) the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests; and, (3) the beneficiary is peculiarly vulnerable to the fiduciary holding the discretion. This last feature is indispensable to the existence of the relationship and is very relevant here.

Equity subjects the fiduciary to its strict standards of conduct where a condition of dependency exists. Two caveats must be issued, however. Firstly, the conduct that incurs the censure of a court of equity in the context of a fiduciary duty cannot itself create the duty. And secondly, the receipt and misuse of confidential information cannot of itself create a fiduciary obligation.

No fiduciary duty arose here. The combined effect of a number of factors indicating a fiduciary relationship could not overcome the absence of an element of dependency which is essential to the finding of a fiduciary relationship. The parties here had not as yet identified the type of relationship they wanted, let alone advanced beyond the negotiation stage, and no

discretionary power had been conferred on Lac to acquire the Williams property. The state of the negotiations, therefore, did not attract the principle in *United Dominions Corp. v. Brian Pty. Ltd.* The fact that Lac sought out Corona did not add very much to the case in favour of a finding that a fiduciary relationship existed. Corona was seeking a senior mining company and Lac responded with an expression of interest. In every commercial venture, one of the parties approaches the other. This is not an *indicium* of a fiduciary relationship. The arrangement as to the geochemical program should not be considered a step in the implementation of a joint venture. The evidence was too sketchy to be able to relate this activity to any proposed agreement between the parties, the nature of which itself was undetermined. The supply of confidential information is not necessarily referable to a fiduciary relationship and was therefore at best a neutral factor.

No practice in the mining industry supported the existence of a fiduciary relationship. In a contract setting, a practice that is notorious and clearly defined and relevant to the business under discussion can readily be incorporated as a term as it can readily be inferred that the parties agreed to it. It is, however, a considerable leap from this principle to erect a fiduciary relationship on the basis of such a practice. Moreover, the evidence, accepted at face value, was more consistent with the obligation of confidence.

The fact that the parties were negotiating towards a common object could not elevate the negotiations to something more. All negotiations seek to achieve a common object -- the

accomplishment of the business venture for which the partnership or joint venture is sought to be formed.

The element of dependency or vulnerability was virtually lacking. There was clearly no physical or psychological dependency which attracted fiduciary duty here. A dependency of this sort between corporations, while possible, cannot exist when the dealings are between experienced mining promoters who have ready access to geologists, engineers and lawyers. If Corona placed itself in a vulnerable position because Lac was given confidential information, this dependency was gratuitously incurred. Corona could have required Lac to undertake not to acquire the Williams property unilaterally. Corona abandoned any possible contractual claim and so could not obtain contractual protection.

A breach of confidence occurred here. The information that Lac obtained from Corona was confidential. Much of it went beyond what had been disclosed to the public. This information put Lac in a preferred position *vis-à-vis* others with respect to knowledge of the desirability of acquiring Williams property. This information was imparted in circumstances which gave rise to an obligation of confidence. Both parties understood that they were working toward a joint venture or other business arrangement. Finally, Lac's acquisition of the Williams property was a misuse of this information. This acquisition, at best, might not have amounted to a misuse of information had it been done subject to the understanding that it was in the context of working towards a joint venture with Corona.

The court can exercise considerable flexibility in fashioning a remedy for breach of confidence because the action does not rest solely on any one of the traditional jurisdictional bases for action -- contract, equity or property -- but is *sui generis* and relies on all three. There is scant jurisprudence supporting the imposition of a constructive trust over property acquired as a result of the use of confidential information. A constructive trust is ordinarily reserved for those situations where a right of property is recognized. Although confidential information has some of the characteristics of property, its foothold as such is tenuous. Unjust enrichment has been recognized as having an existence apart from contract or tort under a heading referred to as the law of restitution but a constructive trust is not the appropriate remedy in most cases. There was no reason to extend the use of the constructive trust here.

The conventional remedies for breach of confidence are an accounting of profits or damages. An injunction may be coupled with either of these remedies in appropriate circumstances. In a breach of confidence case, the focus is on the loss to the plaintiff and, as in tort actions, the particular position of the plaintiff must be examined. The object is to restore the plaintiff monetarily to the position he would have been in if no wrong had been committed and is generally achieved by an award of damages. A restitutionary remedy may be appropriate in cases involving fiduciaries because they are required to disgorge any benefits derived from the breach of trust. It would be unjust, however, to impress the whole of the property with a constructive trust when the extent of the connection between the confidential information and the acquisition of the property is uncertain.

The wrong committed by Lac was the acquisition of the Williams property for itself and to the exclusion of Corona. This was contrary to the understanding that the parties were working towards a joint venture or some other business arrangement and constituted a breach of that understanding under which the confidential information was supplied to Lac. As in contract, account must be taken of the fact that but for the breach by Lac, a joint venture agreement would likely have resulted similar to that concluded with Teck. Damages should be assessed accordingly.

Cases Cited

By La Forest J.

Considered: *Coco v. A. N. Clark (Engineers) Ltd.*, [1969] R.P.C. 41; *Guerin v. The Queen*, [1984] 2 S.C.R. 335; *Chase Manhattan Bank N. A. v. Israel-British Bank (London) Ltd.*, [1981] Ch. 105; *Tito v. Waddell (No. 2)*, [1977] 3 All E.R. 129; **referred to**: *Hospital Products Ltd. v. United States Surgical Corp.* (1984), 55 A.L.R. 417; *Frame v. Smith*, [1987] 2 S.C.R. 99; *Girardet v. Crease & Co.* (1987), 11 B.C.L.R. (2d) 361; *Goodbody v. Bank of Montreal* (1974), 47 D.L.R. (3d) 335; *United Dominions Corp. v. Brian Pty. Ltd.* (1985), 59 A.L.J.R. 676; *Saltman Engineering Co. v. Campbell Engineering Co.* (1948), 65 R.P.C. 203; *Liquid Veneer Co. v. Scott* (1912), 29 R.P.C. 639; *Cunliffe-Owen v. Teather & Greenwood*, [1967] 1 W.L.R. 1421; *Burns v. Kelly Peters & Associates Ltd.* (1987), 41 D.L.R. (4th) 577; *Nelson v. Dahl* (1879), 12

Ch. D. 568; *Norwich Winterthur Insurance (Australia) Ltd. v. Con-Stan Industries of Australia Pty. Ltd.*, [1983] 1 N.S.W.L.R. 461; *Keech v. Sandford* (1726), Sel. Cas. T. King 61, 25 E.R. 223; *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147; *Fraser Edmunston Pty. Ltd. v. A.G.T. (Qld) Pty. Ltd.*, Queensland S.C., June 3, 1986 (Williams J.), unreported; *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161; *Pettkus v. Becker*, [1980] 2 S.C.R. 834; *In re Coomber*, [1911] 1 Ch. 723; *Pre-Cam Exploration & Development Ltd. v. McTavish*, [1966] S.C.R. 551; *Seager v. Copydex, Ltd. (No. 2)*, [1969] 2 All E.R. 718; *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426; *Muschinski v. Dodds* (1985), 160 C.L.R. 583.

By Sopinka J. (dissenting in part)

Hospital Products Ltd. v. United States Surgical Corp. (1984), 55 A.L.R. 417; *Guerin v. The Queen*, [1984] 2 S.C.R. 335; *Girardet v. Crease & Co.* (1987), 11 B.C.L.R. (2d) 361; *Frame v. Smith*, [1987] 2 S.C.R. 99; *Tito v. Waddell (No. 2)*, [1977] 3 All E.R. 129; *United Dominions Corp. v. Brian Pty. Ltd.* (1985), 59 A.L.J.R. 676; *Cunliffe-Owen v. Teather & Greenwood*, [1967] 1 W.L.R. 1421; *Saltman Engineering Co. v. Campbell Engineering Co.* (1948), 65 R.P.C. 203; *Seager & Copydex Ltd.*, [1967] 1 W.L.R. 923; *Coco v. A. N. Clark (Engineers) Ltd.*, [1969] R.P.C. 41; *Nichrotherm Electrical Co. v. Percy*, [1957] R.P.C. 207; *Pettkus v. Becker*, [1980] 2 S.C.R. 834; *Nicholson v. St. Denis* (1975), 8 O.R. (2d) 315; *Unident v. Delong, Joyce and Ash Temple Ltd.* (1981), 50 N.S.R. (2d) 1; *Pre-Cam Exploration & Development Ltd. v. McTavish*, [1966] S.C.R. 551; *Dowson & Mason Ltd. v. Potter*, [1986] 2 All E.R. 418; *Talbot v. General*

Television Corp. Pty. Ltd., [1980] V.R. 224; *General Tire & Rubber Co. v. Firestone Tyre & Rubber Co.*, [1975] 2 All E.R. 173; *Florence Realty Co. v. The Queen*, [1968] S.C.R. 42.

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APPEAL from a judgment of the Ontario Court of Appeal (1987), 44 D.L.R. (4th) 592, (1987) 62 O.R. (2d) 1, dismissing an appeal from a judgment of R. Holland J. (1986), 25

D.L.R. (4th) 504, 53 O.R. (2d) 737. Appeal dismissed, McIntyre and Sopinka JJ. dissenting in part.

Earl A. Cherniak, Q.C., and *J. L. McDougall, Q.C.*, for the appellant.

A. J. Lenczner, Q.C., *R. G. Slaght, Q.C.*, and *Larry Page*, for the respondent.

//*Sopinka J.*//

The reasons of McIntyre and Sopinka JJ. were delivered by

SOPINKA J. (dissenting in part) -- This appeal and cross-appeal raise important issues relating to fiduciary duty and breach of confidence. In particular, they require this Court to consider whether fiduciary obligations can arise in the context of abortive arm's-length negotiations between parties to a prospective commercial transaction. Also at issue are the nature of confidential information and the appropriate remedy for its misuse.

The Facts

The facts are fully developed in the reasons for judgment of the trial judge, R. Holland J. (1986), 53 O.R. (2d) 737, and in the judgment of the Ontario Court of Appeal (1987), 62 O.R.

(2d) 1. My recital of them, here, will therefore be skeletal in nature. From time to time in these reasons, some of the facts relating to specific issues will be examined in greater detail.

The parties to these proceedings are International Corona Resources Ltd. (which I will refer to as either "Corona" or the "respondent") and Lac Minerals Ltd. (which I will refer to as either "Lac" or the "appellant"). Corona, which was incorporated in 1979, was at material times a junior mining company listed on the Vancouver Stock Exchange. Lac is a senior mining company which owns a number of operating mines and is listed on several Stock Exchanges. This action arises out of negotiations between Corona and Lac relating to the Corona property, the Williams property and the Hughes property, all of which are located in the Hemlo area of northern Ontario.

The Corona property consists of 17 claims with an area of approximately 680 acres. The Williams property consists of 11 patented claims, covering a total of about 400 acres, and is contiguous to the Corona property and to the west. The Hughes property consists of approximately 156 claims and surrounds both the Corona and Williams properties, except to the north of the Williams property. It is now in the names of Golden Sceptre Resources Limited, Goliath Gold Mines Limited and Noranda Exploration Company, Limited.

In October 1980, Corona had retained Mr. David Bell, a geologist consultant to carry out an extensive exploration programme on its property which involved extensive diamond drilling. Bell hired Mr. John Dadds, a mining technician, to assist him. The core that was obtained from

the drilling was identified, logged and then stored inside a core shack built on the Corona property. Assay results were sent to Bell and to the Corona office in Vancouver. Some of the results were communicated to the Vancouver Stock Exchange in the form of news releases and assay results, and were published from time to time in the *George Cross News Letter*, a daily newsletter published in Vancouver.

The results of this exploratory work led Bell to an interesting theory. The trial judge describes it in some detail, at p. 744:

> Mr. Bell testified that by February, 1981, he was sufficiently encouraged by the results of the drilling programme that he decided that it was time to acquire the Williams property and the claims to the north. Mr. Bell said that within the first month of drilling his opinion of the geology changed from what he initially thought was a secondary intrusive model, from reading the literature of the area, to a syngenetic deposit. That is a deposit formed at the same time and by the same process as the enclosing rocks. He concluded that the mineralization and gold values were not tied into a vein but rather that the mineralization was in a zone, or beds, of megasediment that indicated a volcanic origin. In Mr. Bell's opinion, in all likelihood, the distribution of gold could be spread over quite a large area and there could be pools or puddles of ore, indicating to him that the exploration programme should be extended along the zone to adjoining properties.

This increased the interest in surrounding properties and Bell, on behalf of Corona, requested Mr. Donald McKinnon, a prospector who was familiar with the properties, to attempt to acquire the Williams property. Representatives of Lac read about these results in the March 20, 1981 *George Cross News Letter* and arranged to visit the Corona property. This property visit took place on May 6, and Bell had arranged for Dadds to have core, assay results, sections, maps and a drill plan available at the core shack. Those present at the meeting consisted of Nell Dragovan,

then President of Corona, and Messrs. Bell, Dadds, Sheehan (Vice-President for Exploration of Lac), and Pegg (a Lac geologist). The visitors were shown cores, sections, logs with assay results added and a map showing the staking in the area. Bell discussed progress to date, plans for the future and his theory of the geology. Sheehan and Pegg both examined the core and, after the meeting in the core shack, which Bell said lasted about 45 minutes, they went outside. Bell took a map and explained where the earlier drilling had taken place as well as the location of future holes, and discussed the geology further. He also indicated that the formation was continuing to the west on the Williams property and that Corona wanted to continue its exploration there. Outcrops in the area were also inspected. Bell said that before he left, Sheehan told him that he "wanted me to drop into Toronto when I was there and to further the discussions of their visit and talk about possible terms". A meeting was arranged for May 8 in Toronto at Lac's head office.

R. Holland J. found as a fact that there were no discussions regarding confidentiality during the May 6 property visit except in connection with an unrelated matter.

Following the site visit, Sheehan and Pegg returned quickly to Lac's exploration office in Toronto and instructed Lac personnel to gather information on the Hemlo area from the Lac library of files. They then went to the Assessment Office of the Ontario Department of Mines to obtain copies of all claim maps, reports, publications and assessment work files that were available on the area. Sheehan told a Lac geologist to ascertain what claims would be necessary to cover the favourable belt to the east of the Corona property. The geologist decided that about

600 claims should be staked and immediately thereafter, on May 8, Lac began staking what are now known as the White River claims.

On May 8, Bell and Sheehan met and discussed the geology of the area, its similarity to the Bousquet area of Quebec, at which both Pegg and Sheehan had worked, and the possible terms of an agreement between Corona and Lac. Sheehan told Bell of Lac's staking to the east. Bell said that the two men discussed the properties around the Corona property. Corona's interest in the Williams and Hughes properties was mentioned and Sheehan gave Bell advice on how to pursue a patented claim. Bell told Sheehan that Corona had somebody doing that, without mentioning McKinnon by name. A number of avenues for progress were discussed and Sheehan said that he would send a letter outlining the terms that were discussed. Again, nothing was said regarding confidentiality.

On May 19, Sheehan wrote to Bell as follows (at p. 750):

> Further to our meeting in Toronto I would like to give you this letter as further evidence of our sincerity in joining with Corona re exploration in the Hemlo area.
>
> As we discussed there are a number of avenues that could be explored regarding a working arrangement re the property and to that end I will list the various possibilities:
>
> a) Corona could have our Company do a financing and ultimately we would scale it forward so as to control Corona.
>
> b) We form a joint venture where Long Lac (a Lac subsidiary) spends say 1.5 to 2.0 times amount spent by Corona for a 60% interest. Beyond that point we spend on a 60-40 basis or use a dilution formula down to a minimum should one party decide to stop contributing. In addition Lac would have to spend a

definite amount of money to reach a threshold before they would acquire any interest.

c) A possible significant cash payment with a variation in interests as a result of the amount of cash payment. Followed by a Lac work proposal.

As discussed we should entertain the possibility of Corona participate (*sic*) in the Hughes ground and that should be actively pursued. In addition we are staking ground in the area and recognizing Corona's limited ability to contribute we could work Corona into the overall picture as part of an overall exploration strategy.

I believe at some point within the next few weeks we should have an understanding that Corona and Lac should seriously examine an avenue for continual work in the area. Perhaps you could give our management a presentation of results to date ie, sections, general geology, longitudinal presentation -- location potential etc. Based on foregoing we could then arrive at a sound basis for structuring a working agreement.

The trial judge found that the reference to the Hughes ground was intended to include the Williams property as well. Bell replied by letter dated May 22 as follows:

I am in receipt of your letter dated May 19, 1981 regarding the Hemlo Property.

First may I thank you for your fine hospitality during my brief visit to Toronto.

I am forwarding a copy of your proposal to Vancouver for the other directors to review. We are presently well into our Phase II, exploring and extending the previously examined parameters outlined in Phase I. Our present plans are to complete 30,000 to 35,000 feet of diamond drilling at which time a general over-all review will take place.

At this point, until I hear otherwise from the directors in Vancouver, I like your idea of Corona's contribution with Long Lac Minerals Exploration Limited as part of an overall exploration programme in the area.

In the meantime I do believe we should keep in touch and maintain the fine relationship presently established.

Bell wrote to Dragovan by letter dated May 23 which stated, in part, the following:

> Enclosed is a copy of a letter received from Long Lac Mineral Exploration Limited, also please find a copy of my letter to Lac in reply. This letter from Lac should be discussed with all directors.

On May 27, Corona released to the Vancouver Stock Exchange encouraging assay results of a drill hole, which the trial judge referred to as the "discovery hole". These results were published in the *George Cross News Letter* of May 29, and further results confirming an extension of the "discovery hole" were released on June 4 and published in the *George Cross News Letter* of June 8.

Subsequently, the results of further drill holes that were encouraging were published by Corona. On June 8, Mr. Murray Pezim, a stock promoter from Vancouver, became a director of Corona. Pezim arranged for Bell to make a presentation in Vancouver on behalf of Corona to a large number of brokers. Some of the information developed by Bell was imparted to those present at this meeting.

On June 15 a meeting was also arranged for June 30 at Lac's head office in Toronto, at which Bell was to make a presentation in accordance with Sheehan's letter of May 19. Following the meeting, sections, a detailed drill plan and apparently a vertically longitudinal section were left with Lac. Mr. Peter Allen, the President of Lac, advised Bell to be aggressive in his pursuit of the Williams property and Bell responded that Corona had somebody pursuing this property on

their behalf. Allen told Sheehan to get a proposal out to Corona and Sheehan indicated that he would have such a proposal out within three weeks.

According to Bell, no one from Lac ever told him that they would not acquire the Williams property and Lac was never told that the information given to it was private, privileged or confidential. Although the evidence was contradictory, the trial judge found as a fact that the pursuit by Corona of the Williams property was mentioned at the meeting. This and other information revealed to Lac went beyond the information that had been made public. This finding was confirmed by the Court of Appeal. The trial judge also found that it was agreed that a proposal would be sent by Lac to Corona within three weeks, and that the purpose of the meeting was to discuss a possible deal between Corona and Lac in order to provide Corona with the financing needed to develop a mine.

Meanwhile, on June 8, McKinnon had spoken to Mrs. Williams by telephone and made an oral offer for the Williams property, which was followed by a written offer prepared by solicitors. On July 3, after some searching, Sheehan located Mrs. Williams by telephone and made an oral offer to her. She asked for a written offer and by letter dated July 6, 1981, Lac's legal counsel put it in writing.

On July 21, McKinnon again spoke to Mrs. Williams who told him that she had another offer and that he should contact her Toronto solicitor. On July 22, McKinnon told Bell of the other offer and it was agreed by Bell and Dragovan that Corona should make an offer to Williams

directly. At this time, no one from Corona knew that the other offer was from Lac. On July 23, Corona's solicitor prepared an offer, which was delivered on July 27. Also on July 23, Mrs. Williams' Toronto solicitor disclosed Lac's name to Corona's solicitor. Lac's offer was accepted on July 28 and a formal agreement was signed on August 25, 1981.

After hearing that the Lac offer had been accepted, Pezim turned the matter over to his solicitors. On August 18, 1981, Sheehan went to Vancouver to attempt to resume negotiations with Pezim, who asked for the return of the Williams property. No agreement was reached. Later, Mr. Donald Moore, another director of Corona attempted to revive negotiations with Sheehan, without success.

After the Corona-Lac relationship had come to an end, Corona concluded an agreement with Teck Corporation (hereinafter referred to as "Teck") dated December 10, 1981, which was subsequently amended by agreements dated August 13, 1982 and December 14, 1983. These agreements, while providing for a joint venture in connection with the possible development of a mine on the Corona property, also purport to give Teck a 50 percent interest in the fruits of Corona's lawsuit against Lac, with Teck agreeing to pay certain costs.

The Judgments Below

Ontario High Court

The trial judge considered the liability of Lac under three heads pleaded by Corona: contract, breach of confidence and breach of fiduciary duty. R. Holland J. concluded that no binding contract was entered into by the parties but found Lac liable under the other two heads of liability, breach of confidence and breach of fiduciary duty. He decided that the appropriate remedy for breach of fiduciary duty was the return of the Williams property to Corona but allowed Lac's claim for a lien for the cost of improvements, and the amounts paid to Williams excluding royalty payments. The actual amount spent by Lac on developing the property was $203,978,000 but this was discounted by $50,000,000 to take into account the fact that if Corona had not been deprived of the Williams property, it would have developed the property and the Williams property as one mine, thereby achieving a saving represented by the discount. Either party was entitled to undertake a reference to determine the amount by which the Williams property was enhanced by virtue of Lac's expenditure if dissatisfied with the trial judge's estimate of the discount of $50,000,000. Lac was ordered to transfer the property to Corona upon payment by Corona to Lac of these amounts.

A reference was also ordered to determine the amount of the profits obtained by Lac from the Williams property. Lac was ordered to pay the amount of such profits to Corona with interest.

With the agreement of counsel, damages were assessed in the event that, on appeal, a court should decide that damages were the appropriate remedy. The assessment was made on the principles applicable to breach of fiduciary duty. The amount was $700,000,000 being the value of the mine as of January 1, 1986 on the basis of a discounted cash flow approach.

Court of Appeal

The Court of Appeal affirmed the findings of the trial judge with respect to breach of confidence and fiduciary duty. It also confirmed the remedy with the addition of its opinion that a constructive trust was an appropriate remedy for both the breach of confidence and fiduciary duty. The court did not deal with the appellant's attack on the assessment of damages. In the result, the appeal was dismissed with costs. I will deal more fully with the reasons of both the trial judge and the Court of Appeal when discussing the issues.

The Issues Before This Court

The issues raised in this appeal can be conveniently grouped under three headings:

(1) *Fiduciary Duty*

Did a fiduciary relationship exist between Corona and Lac which was breached by Lac's acquisition of the Williams property?

(2) *Breach of Confidence*

Did Lac misuse confidential information obtained by it from Corona and thereby deprive Corona of the Williams property?

(3) *Remedy*

What is the appropriate remedy if the answer to (1) or (2) is in the affirmative?

(1) *Did a Fiduciary Relationship Arise between Lac and Corona?*

The consequences attendant on a finding of a fiduciary relationship and its breach have resulted in judicial reluctance to do so except where the application of this "blunt tool of equity" is really necessary. It is rare that it is required in the context of an arm's length commercial transaction. Kennedy J., in "Equity in a Commercial Context," in P. D. Finn, ed., *Equity and Commercial Relationships*, explains why, at p. 15:

> It would seem that part of the reluctance to find a fiduciary duty within an arm's length commercial transaction is due to the fact that the parties in that situation have an adequate opportunity to prescribe their own mutual obligations, and that the contractual remedies available to them to obtain compensation for any breach of those obligations should be sufficient. Although the relief granted in the case of a breach of a fiduciary duty will be moulded by the equity of the particular transaction, an offending fiduciary will still be exposed to a variety of available remedies, many of which go beyond mere compensation for the loss suffered by the person to whom the duty was owed, equity, unlike the ordinary law of contract, having [*sic*] regard to the gain obtained by the wrongdoer, and not simply to the need to compensate the injured party.

It was submitted that the departure of the courts below from this salutary rule has resulted in a plethora of claims that would impose fiduciary relationships in a commercial-type setting.

Writing in *The Advocates' Society Journal*, Aug. 1988, Colin L. Campbell supports this point of view. He states at p. 44:

> The *Lac-Corona* decision, together with the decision in *Standard Investments v. Canadian Imperial Bank of Commerce* determining that a banker could be held to a fiduciary duty when he revealed information obtained in confidence, has given rise to a plethora of claims to impose fiduciary obligations where the parties' relationship has been formalized by a contract. In addition to the above principles, such obligations have been imposed on bankers, lawyers, stockbrokers, accountants, and others.

In *Hospital Products Ltd. v. United States Surgical Corp.* (1984), 55 A.L.R. 417, Dawson J. continued, at pp. 493-94:

> The undesirability of extending fiduciary duties to commercial relationships and the anomaly of imposing those duties where the parties are at arm's length from one another was referred to in *Weinberger v Kendrick* (1892) 34 Fed Rules Serv (2d) 450. And in *Barnes v Addy* (1874) 9 Ch App 244 at 251, Lord Selborne LC said: "It is equally important to maintain the doctrine of trusts which is established in this court, and not to strain it by unreasonable construction beyond its due and proper limits. There would be no better mode of undermining the sound doctrines of equity than to make unreasonable and inequitable applications of them."

In our own Court, in *Guerin v. The Queen*, [1984] 2 S.C.R. 335, at p. 384, Dickson J. (as he then was) referred to a passage from Professor Weinrib's article, "The Fiduciary Obligation" (1975), 25 *U. of T. L.J.* 1, at p. 4, wherein the fiduciary obligation is described as "the law's blunt tool". In my opinion, equity's blunt tool must be reserved for situations that are truly in need of the special protection that equity affords.

While equity has refused to tie its hands by defining with precision when a fiduciary relationship will arise, certain basic principles must be taken into account. There are some relationships which are generally recognized to give rise to fiduciary obligations: director-corporation, trustee-beneficiary, solicitor-client, partners, principal-agent, and the like. The categories of relationships giving rise to fiduciary duties are not closed nor do the traditional relationships invariably give rise to fiduciary obligation. As pointed out by Dickson J. in *Guerin v. The Queen*, *supra*, at p. 384:

> It is sometimes said that the nature of fiduciary relationships is both established and exhausted by the standard categories of agent, trustee, partner, director, and the like. I do not agree. It is the nature of the relationship, not the specific category of actor involved that gives rise to the fiduciary duty. The categories of fiduciary, like those of negligence, should not be considered closed.

The nature of the relationship may be such that, notwithstanding that it is usually a fiduciary relationship, in exceptional circumstances it is not. See Shepherd, *The Law of Fiduciaries*, at pp. 21-22. Furthermore, not all obligations existing between the parties to a well-recognized fiduciary relationship will be fiduciary in nature. Southin J., in *Girardet v. Crease & Co.* (1987), 11 B.C.L.R. (2d) 361, observed that the obligation of a solicitor to use care and skill is the same obligation as that of any person who undertakes to carry out a task for reward. Failure to do so does not necessarily result in a breach of fiduciary duty but simply a breach of contract or negligence. She issued this strong caveat against the overuse of claim for breach of fiduciary duty (at p. 362):

> Counsel for the plaintiff spoke of this case in his opening as one of breach of fiduciary duty and negligence. It became clear during his opening that no breach of fiduciary duty is in issue. What is in issue is whether the defendant was negligent in advising on the settlement of a claim for injuries suffered in an accident. The word "fiduciary" is flung around now as if it applied to all breaches of duty by solicitors, directors of companies and so forth. But "fiduciary" comes from the Latin "fiducia" meaning "trust". Thus, the adjective, "fiduciary" means of or pertaining to a trustee or trusteeship. That a lawyer can commit a breach of the special duty of a trustee, e.g., by stealing his client's money, by entering into a contract with the client without full disclosure, by sending a client a bill claiming disbursements never made and so forth is clear. But to say that simple carelessness in giving advice is such a breach is a perversion of words. The obligation of a solicitor of care and skill is the same obligation of any person who undertakes for reward to carry out a task. One would not assert of an engineer or physician who had given bad advice and from whom common law damages were sought that he was guilty of a breach of fiduciary duty. Why should it be said of a solicitor? I make this point because an allegation of breach of fiduciary duty carries with it the stench of dishonesty -- if not of deceit, then of constructive fraud. See *Nocton v. Lord Ashburton*, [1914] A.C. 932 (H.L.). Those who draft pleadings should be careful of words that carry such a connotation.

When the Court is dealing with one of the traditional relationships, the characteristics or criteria for a fiduciary relationship are assumed to exist. In special circumstances, if they are shown to be absent, the relationship itself will not suffice. Conversely, when confronted with a relationship that does not fall within one of the traditional categories, it is essential that the Court consider: what are the essential ingredients of a fiduciary relationship and are they present? While no ironclad formula supplies the answer to this question, certain common characteristics are so frequently present in relationships that have been held to be fiduciary that they serve as a rough and ready guide. I agree with the enumeration of these features made by Wilson J. in dissent in *Frame v. Smith*, [1987] 2 S.C.R. 99. The majority, although disagreeing in the result, did not disapprove of the following statement, at pp. 135-36:

> A few commentators have attempted to discern an underlying fiduciary principle but, given the widely divergent contexts emerging from the case law, it is understandable that they have differed in their analyses: see, for example, E. Vinter, *A Treatise on the History and Law of Fiduciary Relationships and Resulting Trusts* (3rd ed. 1955); Ernest J. Weinrib, "The Fiduciary Obligation" (1975), 25 *U.T.L.J.* 1; Gareth Jones, "Unjust Enrichment and the Fiduciary's Duty of Loyalty" (1968), 84 *L.Q.R.* 472; George W. Keeton and L.A. Sheridan, *Equity* (1969), at pp. 336-52; Shepherd, [*The Law of Fiduciaries*], at p. 94. Yet there are common features discernible in the contexts in which fiduciary duties have been found to exist and these common features do provide a rough and ready guide to whether or not the imposition of a fiduciary obligation on a new relationship would be appropriate and consistent.
>
> Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:
>
> (1) The fiduciary has scope for the exercise of some discretion or power.
>
> (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
>
> (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

It is possible for a fiduciary relationship to be found although not all of these characteristics are present, nor will the presence of these ingredients invariably identify the existence of a fiduciary relationship.

The one feature, however, which is considered to be indispensable to the existence of the relationship, and which is most relevant in this case, is that of dependency or vulnerability. In this regard, I agree with the statement of Dawson J. in *Hospital Products Ltd. v. United States Surgical Corp.*, *supra*, at p. 488, that:

> There is, however, the notion underlying all the cases of fiduciary obligation that inherent in the nature of the relationship itself is a position of disadvantage or vulnerability on the part of one of the parties which causes him to place reliance upon the other and requires the protection of equity acting upon the conscience of that other . . .

The necessity for this basic ingredient in a fiduciary relationship is underscored in Professor Weinrib's statement, quoted in *Guerin, supra*, at p. 384 that:

> ". . . the hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other's discretion."

To the same effect is the discussion by Professor Ong in "Fiduciaries: Identification and Remedies" (1986), 8 *U. of Tasm. L. Rev.* 311, in which he suggests that the element which gives rise to and is common to all fiduciary relationships is the "implicit dependency by the beneficiary on the fiduciary". This condition of dependency moves equity to subject the fiduciary to its strict standards of conduct.

Two caveats must be issued. First, the presence of conduct that incurs the censure of a court of equity in the context of a fiduciary duty cannot itself create the duty. In *Tito v. Waddell (No. 2)*, [1977] 3 All E.R. 129, at p. 230, Megarry V.-C. said:

> If there is a fiduciary duty, the equitable rules about self-dealing apply: but self-dealing does not impose the duty. Equity bases its rules about self-dealing upon some pre-existing fiduciary duty: it is a disregard of this pre-existing duty that subjects the self-dealer to the consequences of the self-dealing rules. I do not think that one can take a person who is subject to no pre-

existing fiduciary duty and then say that because he self-deals he is thereupon subjected to a fiduciary duty.

Second, applying the same principle, the fact that confidential information is obtained and misused cannot itself create a fiduciary obligation. No doubt one of the possible incidents of a fiduciary relationship is the exchange of confidential information and restrictions on its use. Where, however, the essence of the complaint is misuse of confidential information, the appropriate cause of action in favour of the party aggrieved is breach of confidence and not breach of fiduciary duty.

In my opinion, both the trial judge and the Court of Appeal erred in coming to the conclusion that a fiduciary relationship existed between Corona and Lac. In my respectful opinion, both the trial judge and the Court of Appeal erred by not giving sufficient weight to the essential ingredient of dependency or vulnerability and too much weight to other factors. The latter are as follows:

(a) that the state of the negotiations attracted the principle in *United Dominions Corp. v. Brian Pty. Ltd.* (1985), 59 A.L.J.R. 676;

(b) that Lac had sought out Corona;

(c) that the geochemical program constituted an embarkation on a joint venture;

(d) that Corona had divulged confidential information to Lac;

(e) that a practice in the mining industry supported the existence of a fiduciary relationship;

(f) that the parties were negotiating towards a common object.

The *United Dominions* Case

This is a decision of the High Court of Australia involving a joint venture between three parties, United Dominions Corporation (UDC), Security Projects Ltd. (SPL) and Brian Pty. Ltd. (Brian). Land was purchased with money provided by the joint venture and was to be developed for a hotel and shopping centre. SPL acted as agent for the joint venturers and held moneys in trust which had been provided by the joint venture. UDC acted as principal financier of the project with the balance of the funds being provided by the other joint venturers. Prior to the alleged breach of fiduciary duty, the percentage participation of each joint venturer had been set and substantial amounts had been contributed by them. The land was mortgaged to UDC as security for borrowings by SPL which acted as agents for Brian and others in this respect. All this was consistent with the terms of a draft joint venture agreement that had been circulated among the participants and eventually was executed.

The mortgage which SPL granted to UDC contained a "collateralisation clause" which had the effect of subjecting lands of the joint venture to debts incurred by SPL extraneous to the joint

venture. UDC was "fully aware that the land registered in the name of SPL was held in circumstances which required SPL to account to the intended partners" (*per* Gibbs C.J., at p. 678).

The enforcement of the collateralisation clause by UDC resulted in the loss of Brian's investment and of course it obtained no return thereon.

In light of the above, the court concluded that the parties had embarked on a joint venture which the court found to be plainly a partnership. The court further found, at p. 680, that prior to the grant of the first mortgage, the "arrangements between the prospective joint venturers had passed far beyond the stage of mere negotiation". Clearly, if the draft agreement had not been signed subsequently, an agreement substantially in accordance with its terms would have been found to exist by the court. Prior to its execution, the relationship of UDC, SPL and Brian was that of a *de facto* partnership or joint venture. Furthermore, Brian entrusted SPL with its funds and its interest in the land with the full knowledge of UDC. Brian was therefore "at the mercy of their discretion". In this respect the case is clearly distinguishable from the case at bar. The trial judge found that Lac and Corona "were clearly negotiating towards a joint venture or some other business relationship". The respondent had pleaded that a partnership agreement existed between it and the appellant but this claim was abandoned. In this respect, the trial judge found as follows: "The most that can be said is that the parties came to an informal oral understanding as to how each would conduct itself in anticipation of a joint venture or some other business arrangement". (Emphasis added.)

The parties here had not advanced beyond the negotiation stage. Indeed, they had not as yet identified what precisely their relationship should be. Furthermore, Corona did not confer on Lac any discretionary power to acquire the Williams property. Lac proceeded unilaterally to acquire the property for itself allegedly making use of confidential information, and that essentially is the ground of Corona's complaint.

The Court of Appeal recognized that this case differed from the *United Dominions* case, *supra*, at p. 317. In its opinion, however, the other factors present in the case which I have enumerated above, (a) to (f), made up for the difference.

I cannot find that factor (b) adds very much to the case in favour of a finding that a fiduciary relationship existed. In every commercial venture, one of the parties approaches the other. Corona was seeking a senior mining company and Lac responded with an expression of interest. This is not an *indicium* of a fiduciary relationship. Nor can I accept that factor (c), the arrangement as to the geochemical program, was a step in the implementation of a joint venture. The trial judge did not so find and the evidence is too sketchy to be able to relate this activity to any proposed agreement between the parties, the nature of which itself was undetermined. With respect to factor (d) as explained above, the supply of confidential information is not necessarily referable to a fiduciary relationship and is therefore at best a neutral factor. The other two factors, (e) and (f), require more extensive consideration.

<u>The Practice in the Industry</u>

The trial judge concluded as follows, at pp. 537-38:

> I conclude, following *Cunliffe-Owen*, *supra*, that there is a practice in the mining industry that imposes an obligation when parties are seriously negotiating not to act to the detriment of each other.

He did so on the basis of the following evidence with which all experts were in agreement (at pp. 536-37):

> (Mr. Allen) A. If one geologist goes to another geologist and says, are you interested in making some sort of a deal and between the two of them, they agree that they should consider seriously the possibility of making a deal, I think for a short period of time that while they are exploring that, that any transference of data would be -- I would hope the geologists would be competent enough to identify the difference between published, unpublished, confidential and so on but in the case that they weren't, there was just some exchange of conversation or physical data, then I would say that while both of them were seriously and honestly engaged in preparing a deal, that Lac and the other party would both have a duty towards each other not to hurt each other as the result of any information that was exchanged.
>
> . . .
>
> Q. . . . Does the obligation not to harm each other that you referred to, et cetera, flow from the fact that they were in negotiation or discussion about a possible deal itself so long as it's a serious matter as you said?
>
> . . . . .
>
> (Mr. Allen). Yes.

No examples were apparently given illustrating the operation of this practice. *Cunliffe-Owen v. Teather & Greenwood*, [1967] 1 W.L.R. 1421, which was referred to by the trial judge and

relied on by the Court of Appeal, is a contract case. The principle is well established in contract law. It is accurately expressed by Ungoed-Thomas J. at p. 1438:

> For the practice to amount to such a recognised usage, it must be certain, in the sense that the practice is clearly established; it must be notorious, in the sense that it is so well known, in the market in which it is alleged to exist, that those who conduct business in that market contract with the usage as an implied term; and it must be reasonable.
>
> The burden lies on those alleging "usage" to establish it . . . .
>
> The practice that has to be established consists of a continuity of acts, and those acts have to be established by persons familiar with them, although, as is accepted before me, they may be sufficiently established by such persons without a detailed recital of instances. Practice is not a matter of opinion, of even the most highly qualified expert, as to what it is desirable that the practice should be. However, evidence of those versed in a market - so it seems to me - may be admissible and valuable in identifying those features of any transaction that attract usage . . . .

It is understandable that, in a contract setting, a practice that is notorious and clearly defined and relevant to the business under discussion should be incorporated as a term. It can readily be inferred that the parties agreed to it. It is a considerable leap from this principle to erect a fiduciary relationship on the basis of such a practice. No authority was cited to the Court that this concept can simply be transplanted in this fashion. It is significant that the trial judge did not rely on this evidence in finding that a fiduciary obligation existed (pp. 776-77). Moreover, accepting the evidence at face value, it is more consistent with the obligation of confidence. The practice relates to a duty which arises upon the exchange of confidential information. Furthermore, in the absence of any illustrations of the operation of the practice, we are left with an expert's opinion on what is essentially a question of law - the existence of a fiduciary duty.

The practice among geologists to act honourably towards each other is no doubt admirable and a practice to be fostered, but it should not be used to create a fiduciary relationship where one does not exist.

Common Object

The Court of Appeal stressed that the parties were not simply negotiating an ordinary commercial contract but were negotiating in furtherance of a common object. This factor does not particularly distinguish negotiations in furtherance of any partnership or joint venture. All such negotiations seek to achieve a common object, namely the accomplishment of the business venture for which the partnership or joint venture is sought to be formed. I do not see how this factor can elevate negotiations to something more.

Dependency or Vulnerability

In my opinion, this vital ingredient was virtually lacking in this case. Its absence cannot be replaced by any of the factors mentioned above. The Court of Appeal dealt with it as follows, at pp. 49-50:

> It was a case of negotiations between a junior mining company (Corona) whose primary activities were those of locating, staking and evaluating mining claims and a senior mining company (LAC) whose activities included all of the above together with the practice and experience of bringing into production and operating gold mining properties. It was a case of the senior company seeking out the junior company in order to obtain information with

> respect to mining claims already owned by the junior company and to discuss a joint business venture. Having regard to the practice found to exist in the industry with respect to the obligation not to act to the detriment of each other, particularly with respect to confidential information disclosed, it was to be expected that Corona would divulge confidential information to LAC during the course of their negotiations. In those circumstances, it is only just and proper that the court find that there exists a fiduciary relationship with its attendant responsibilities of dealing fairly including, but not limited to, the obligation not to benefit at the expense of the other from information received by one from the other.

This statement seems to imply that there was a kind of physical or psychological dependency here which attracted fiduciary duty. Illustrations of this type of dependency are not difficult to find. They include parent and child, priest and penitent and the like. Clearly, a dependency of this type did not exist here. While it is perhaps possible to have a dependency of this sort between corporations, that cannot be so when, as here, we are dealing with experienced mining promoters who have ready access to geologists, engineers and lawyers. The fact that they were anxious to make a deal with a senior mining company surely cannot attract the special protection of equity. If confidential information was disclosed and misused, there is a remedy which falls short of classifying the relationship as fiduciary. In *Frame v. Smith, supra*, Wilson J. dealt with this indicia of fiduciary duty in the following language (at pp. 137-38):

> This vulnerability arises from the inability of the beneficiary (despite his or her best efforts) to prevent the injurious exercise of the power or discretion combined with the grave inadequacy or absence of other legal or practical remedies to redress the wrongful exercise of the discretion or power. Because of the requirement of vulnerability of the beneficiary at the hands of the fiduciary, fiduciary obligations are seldom present in the dealings of experienced businessmen of similar bargaining strength acting at arm's length: see, for example, *Jirna Ltd. v. Mister Donut of Canada Ltd*. (1971), 22 D.L.R. (3d) 639 (Ont. C.A.); aff'd [1975] 1 S.C.R. 2. The law takes the position that such individuals are perfectly capable of agreeing as to the scope of discretion or power to be exercised, i.e., any "vulnerability" could have

> been prevented through the more prudent exercise of their bargaining power and the remedies for the wrongful exercise or abuse of that discretion or power . . . are adequate in such a case.

If Corona placed itself in a vulnerable position because Lac was given confidential information, then this dependency was gratuitously incurred. Nothing prevented Corona from exacting an undertaking from Lac that it would not acquire the Williams property unilaterally. And yet the trial judge found that while the Williams property was discussed by Bell and Sheehan, the latter did not agree not to acquire the Williams property. Indeed it does not appear that Lac was ever asked to refrain from so doing. In the letter dated May 19, Sheehan wrote to Bell in part as follows:

> As discussed we should entertain the possibility of Corona participate [*sic*] in the Hughes ground and that should be actively pursued.

The reference to the Hughes ground included the Williams property. It would seem that the possibility of Corona participating could only come about if the property were acquired. This would suggest that the parties contemplated that Lac might acquire the property in which event Corona would have a possibility of participating. At the very least Lac might reasonably have considered that such a course of action was open to it. In view of the abandonment by Corona of any contractual claim, I conclude that even this limited protection was not secured by any contractual arrangement.

Accordingly, if Corona gave up confidential information, it did so without obtaining any contractual protection which was available to it. This and the fact that misuse of confidential information is the subject of an alternate remedy strongly militate against the application here of equity's blunt tool. I now turn to that alternate remedy, breach of confidence.

(2) *Breach of Confidence*

Both the trial judge and the Court of Appeal applied three criteria in determining whether a breach of confidence had been made out by the respondent. These elements are:

(i) Confidential Information

> Did Corona supply Lac with information having a quality of confidence about it?

(ii) Communication in Confidence

> Did Corona communicate this information to Lac in circumstances in which an obligation of confidence arises?

(iii) Misuse of Information

Did Lac by acquiring the Williams property to the exclusion of Corona misuse or make an unauthorized use of the information?

The trial judge made findings of fact in favour of the respondent with respect to each of these criteria:

(i) Confidential Information

> In the present case much of the information transmitted by Corona to Lac was private and had not been published. There is no doubt, however, that Corona wished to attract investors. Drill hole results were published on a regular basis and incorporated in George Cross Newsletters [*sic*]. Mr. Bell permitted himself to be quoted in the March 20th George Cross Newsletter and made a presentation to a group of stockbrokers in Vancouver.
>
> Mr. Bell also quite freely discussed the Corona results with brokers, investors and friends. Lac, however, was told more than the general public. Mr. Sheehan was shown the core, the drill plan and sections on May 6th. He discussed the geology with Mr. Bell on May 6th, May 8th and June 30th, and a full presentation with up-to-date results was made to Lac on June 30th [at p. 774].

(ii) Communication in Confidence

> I find as a fact that on May 6, 1981, there was no mention of confidentiality with respect to the site visit, except in connection with New Cinch. I prefer the evidence of Messrs. Bell and Dadds to that of Messrs. Sheehan and Pegg. Clearly the information was confidential and this must have been obvious to Mr. Sheehan.
>
> The information, although partly public, was, I have found, of value to Lac and was used by Lac. It was transmitted with the mutual understanding that the parties were working towards a joint venture or some other business arrangement and, in my opinion, was communicated in circumstances giving rise to an obligation of confidence [at p. 775].

(iii) Misuse of Information

> Mr. Sheehan and Dr. Anhuesser testified that the information Lac acquired from Corona was of value in assessing the merits of the Williams property and Mr. Sheehan said that he made use of this information in making an offer to Mrs. Williams.
>
> Certainly Lac was not authorized by Corona to bid on the Williams property [at p. 775].

There are concurrent findings of fact and these should not be disturbed by this Court unless we are satisfied that they are clearly wrong. The appellant did not attack either the basic criteria or these findings of fact as such, but rather "the rules by which the existence of the elements as a matter of law are to be determined".

With respect to the first element, the appellant submitted that although some of the information was private, much of it was public. This combination did not act as a springboard to give the appellant an advantage over others. Essentially, the appellant submitted that the desirability of acquiring the Williams property could have been deduced from information which was public and it got no head start by obtaining information from the respondent.

In this regard the statement of Lord Greene in *Saltman Engineering Co. v. Campbell Engineering Co*. (1948), 65 R.P.C. 203 (C.A.) (leave to appeal to House of Lords refused), at p. 215, which was quoted by the trial judge, is apposite:

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

Seager & Copydex Ltd., [1967] 1 W.L.R. 923 (C.A.), cited by the appellant, provides a useful illustration of the concept of the use of added information to get a head start or to use it as a springboard. The plaintiff Seager was the inventor of a patented carpet grip. He negotiated with the defendant Copydex with a view to development of his invention. Negotiations were terminated without a contract. Copydex then proceeded to produce a competing grip. The Court found that much of the information which Seager gave to Copydex was public. But there was some private information that resulted from Seager's efforts such as the difficulties which had to be overcome in making a satisfactory grip. At pages 931-32, Lord Denning M.R. stated:

> When the information is mixed, being partly public and partly private, then the recipient must take special care to use only the material which is in the public domain. He should go to the public source and get it: or, at any rate, not be in a better position than if he had gone to the public source. He should not get a start over others by using the information which he received in confidence. At any rate, he should not get a start without paying for it.

Corona had conducted an extensive exploration program on its own property. The information which it obtained was pertinent in evaluating the Williams property. Its geologist, Bell, had developed a theory that the source of the zone of gold mineralization on Corona's property was

volcanogenic. This meant that gold could be spread over a large area with "pools" of ore throughout. This led him to conclude that the exploration programme should be extended to the neighbouring properties which included the Williams property. Bell was the geologist who first firmly believed that it was the land of Havilah and his enthusiasm spread to his principals. This information was developed from the results of the exploration programme and the application of Bell's knowledge as a geologist. Lac got the benefit of this information. It had the advantage of several discussions with Bell who interpreted his findings and explained his volcanogenic theory. Bell allowed Lac's representatives to examine the drill cores and the individual assays. Lac's representatives were also advised that Corona was actively pursuing the Williams property. The trial judge found as a result that:

> On all the evidence I conclude that the site visit and the information disclosed by Corona to Lac was of assistance to Lac not only in assessing the Corona property but also in assessing other property in the area and in making an offer to Mrs. Williams [at p. 768].

This information was the springboard which led to the acquisition of the Williams property. Sheehan admitted that the offer to Mrs. Williams was based in part on information obtained from Corona. The degree of reliance on Bell's input is graphically illustrated by the fact that after Lac had optioned the Williams property, it located its three drill holes on the Williams property in the same area in which Bell would have located his next three holes, westerly from the Corona property.

It was suggested in argument that although some of the information was of a private nature, it was not incremental in the sense that it did not enhance the information so as to make the Williams property more desirable. This contention is effectively refuted by the actions of Lac. Immediately after the May 6 meeting, something in that meeting triggered a frenzy of activity on the part of Lac, including a staking of 640 claims, several further meetings with Corona and the acquisition of the Williams property. I agree therefore with the conclusion of the courts below that the information obtained from Corona by Lac went beyond what had been imparted publicly in the *George Cross News Letter* or the public investors' meeting. Furthermore, it put Lac in a preferred position *vis-à-vis* others with respect to knowledge of the desirability of acquiring the Williams property.

With respect to the second element the appellant submitted that the trial judge did not apply the reasonable man test in determining whether the information was imparted in circumstances in which an obligation of confidence arises. The trial judge in his reasons cited with approval the reasonable man test enunciated in *Coco v. A. N. Clark (Engineers) Ltd.*, [1969] R.P.C. 41. Moreover, the trial judge, at p. 772, referred to the passage of Megarry J. at p. 48 which follows the articulation of that test:

> In particular, where information of commercial or industrial value is given on a business-like basis and with some avowed common object in mind, such as a joint venture or the manufacture of articles by one party for the other, I would regard the recipient as carrying a heavy burden if he seeks to repel a contention that he was bound by an obligation of confidence:

The trial judge, at p. 775, found that it was obvious to Sheehan that the information was confidential and that:

> It was transmitted with the mutual understanding that the parties were working towards a joint venture or some other business arrangement and, in my opinion, was communicated in circumstances giving rise to an obligation of confidence.

These findings were made at least in part on the basis of a preference of the evidence of Bell and Dadds to that of Sheehan and Pegg. As did the Court of Appeal, I accept them.

With respect to the third element, Lac submits that it did not misuse the information because it went to the public record and then started staking and making the inquiries which eventually culminated in the acquisition of the Williams property. The trial judge has found, however, that the information obtained from Corona was of value to Lac in assessing the merits of the Williams property and Lac made use of this information to the detriment of Corona. This finding is amply supported by the evidence and should be accepted.

The trial judge also found that Lac was not authorized by Corona to bid on the Williams property. I interpret this to mean that Corona did not advise Lac that it could bid on the Williams property. Furthermore, as noted above, Sheehan never expressly agreed that Lac would refrain from acquiring the Williams property. The trial judge so found. There was an "informal oral understanding as to how each would conduct itself in anticipation of a joint venture or some other business arrangement". The terms of this informal arrangement as they

relate to the acquisition of the Williams property are very sketchy. I have set out above the evidence and findings of fact that relate to this matter, including the portion of the letter of May 19, 1981 which states:

> As discussed we should entertain the possibility of Corona participate [*sic*] in the Hughes ground and that should be actively pursued.

As I said earlier in my reasons, that statement is neutral as to who would acquire the property. It is consistent with either Corona's or Lac's acquiring the property but subject to the loose oral arrangement that they were working toward a joint venture or other business arrangement which would involve participation by Corona in accordance with one of the formulae set out in the May 19 letter or an arrangement similar thereto.

On this basis, acquisition by Lac of the Williams property to the exclusion of Corona was not an authorized use of the confidential information which it received from Corona and which was of assistance in enabling Lac to get the property for itself.

In summary, the three elements of breach of confidence were made out at trial, affirmed on appeal, and notwithstanding the able submissions for the appellant, I find the decision of the trial judge and the Court of Appeal unassailable on this branch of the case. Accordingly, with respect to liability for breach of confidence, the appeal fails.

(3) *Nature of Remedy for Breach of Confidence*

The trial judge dealt with remedy solely on the basis of breach of a fiduciary duty. On this basis he ordered that, upon payment to Lac of the amounts referred to above, the mine be transferred to Corona.

The Court of Appeal, at p. 65, affirmed the trial judge but after expressing the view that it "is artificial and difficult to consider the question of the proper remedy for breach of the obligation of confidence on the hypothesis that there is no co-existing fiduciary obligation", it concluded that a constructive trust would in such circumstances be a possible remedy.

Furthermore, based on the fact that (i) but for "LAC's actions, Corona would have acquired the Williams property" and (ii) "it may fairly be said that, but for the confidential information LAC received from Corona, it is not likely that it would have acquired the Williams property", the Court of Appeal concluded, at p. 66, that it was the appropriate remedy.

Constructive Trust or Damages

The foundation of action for breach of confidence does not rest solely on one of the traditional jurisdictional bases for action of contract, equity or property. The action is *sui generis* relying on all three to enforce the policy of the law that confidences be respected. See Gurry, *Breach*

of Confidence, at pp. 25-26, and Goff and Jones, *The Law of Restitution* (3rd ed. 1986), at pp. 664-67.

This multi-faceted jurisdictional basis for the action provides the Court with considerable flexibility in fashioning a remedy. The jurisdictional basis supporting the particular claim is relevant in determining the appropriate remedy. See *Nichrotherm Electrical Co. v. Percy*, [1957] R.P.C. 207, at pp. 213-14; Gurry, op. cit., at pp. 26-27; and Goff and Jones, op. cit., at pp. 664-65. A constructive trust is ordinarily reserved for those situations where a right of property is recognized. As stated by the learned authors of Goff and Jones, op. cit., at p. 673:

> In restitution, a constructive trust should be imposed if it is just to grant the plaintiff the additional benefits which flow from the recognition of a right of property.

Although confidential information has some of the characteristics of property, its foothold as such is tenuous (see Goff and Jones, op. cit., at p. 665). I agree in this regard with the statement of Lord Evershed in *Nichrotherm Electrical Co. v. Percy*, *supra*, at p. 209, that:

> . . . a man who thinks of a mechanical conception and then communicates it to others for the purpose of their working out means of carrying it into effect does not, because the idea was his (assuming that it was), get proprietary rights equivalent to those of a patentee. Apart from such rights as may flow from the fact, for example, of the idea being of a secret process communicated in confidence or from some contract of partnership or agency or the like which he may enter into with his collaborator, the originator of the idea gets no proprietary rights out of the mere circumstance that he first thought of it.

As a result, there is virtually no support in the cases for the imposition of a constructive trust over property acquired as a result of the use of confidential information. In stating that such a remedy is possible, the Court of Appeal referred to Goff and Jones, op. cit., at pp. 659-74. The discussion of proprietary claims commences at p. 673 with the statement which I have quoted above and thereafter all references to constructive trust pertain to an accounting of profits. No reference is made to any case in which a constructive trust is imposed on property acquired as a result of the use of confidential information.

In Canada as in the United Kingdom, the existence of the constructive trust outside of a fiduciary relationship has been recognized as a possible remedy against unjust enrichment. See Waters, *Law of Trusts in Canada* (2nd ed. 1984), at pp. 386-97.

In Canada this device has been sporadically employed where the unjust enrichment occurred in the context of a pre-existing special relationship between the parties. Thus in *Pettkus v. Becker*, [1980] 2 S.C.R. 834, Dickson J. (as he then was) spoke of "a relationship tantamount to spousal". In *Nicholson v. St. Denis* (1975), 8 O.R. (2d) 315 (leave to appeal to the Supreme Court of Canada refused), MacKinnon J.A. refused the remedy in the absence of "a special relationship" between the parties. In *Unident v. Delong, Joyce and Ash Temple Ltd.* (1981), 50 N.S.R. (2d) 1, Hallett J., quoting MacKinnon J.A., refused restitution where a special relationship could not be shown.

In *Pre-Cam Exploration & Development Ltd. v. McTavish*, [1966] S.C.R. 551, an employee acting on information which he obtained entirely in the course of his employment, staked certain claims which would otherwise have been staked by the employer. This Court affirmed the decision of the trial judge who held that the employee was a trustee of the claims for his employer. In his reasons for the Court, Judson J. stated, at p. 555, that:

> . . . it was a term of his employment, which McTavish on the facts of this case understood, that he could not use this information for his own advantage. The use of the term "fraud" by the learned Chief Justice at trial was fully warranted.

In these circumstances, Judson J. referred to the use of the constructive trust. I do not consider that that decision lays down any principle that makes the remedy of a constructive trust an appropriate remedy for misuse of confidential information except in very special circumstances.

Although unjust enrichment has been recognized as having an existence apart from contract or tort under a heading referred to as the law of restitution, a constructive trust is not the appropriate remedy in most cases. As pointed out by Professor Waters in *Law of Trusts in Canada*, *supra*, at p. 394, although unjust enrichment gives rise to a number of possible remedies:

> . . . the best remedy in the particular circumstances is that which corrects the unjust enrichment without contravening other established legal doctrines. In most cases, as in *Deglman v. Guar. Trust Co. of Can. and Constantineau* itself, a personal action will accomplish that end, whether its source is the common law or equity, providing as it often will monetary compensation.

While the remedy of the constructive trust may continue to be employed in situations where other remedies would be inappropriate or injustice would result, there is no reason to extend it to this case.

The conventional remedies for breach of confidence are an accounting of profits or damages. An injunction may be coupled with either of these remedies in appropriate circumstances. A restitutionary remedy is appropriate in cases involving fiduciaries because they are required to disgorge any benefits derived from the breach of trust. In a breach of confidence case, the focus is on the loss to the plaintiff and, as in tort actions, the particular position of the plaintiff must be examined. The object is to restore the plaintiff monetarily to the position he would have been in if no wrong had been committed. See *Dowson & Mason Ltd. v. Potter*, [1986] 2 All E.R. 418, and *Talbot v. General Television Corp. Pty. Ltd.*, [1980] V.R. 224. Accordingly, this object is generally achieved by an award of damages, and a restitutionary remedy is inappropriate.

The Williams property was acquired as a result of information which was in part public and in part private. It would be impossible to assess the role of each. The trial judge went no further than to find that the confidential information was "of value" to Lac and

> . . . of assistance to Lac not only in assessing the Corona property but also in assessing other property in the area and in making an offer to Mrs. Williams [at p. 768].

The Court of Appeal went further and stated, at p. 65, that "but for the confidential information LAC received from Corona, it is not likely that it would have acquired the Williams property". The reasons do not disclose any factual basis for extending the finding of the trial judge and I see no basis for so doing. The best that can therefore be said is that it played a part. When the extent of the connection between the confidential information and the acquisition of the property is uncertain, it would be unjust to impress the whole of the property with a constructive trust.

The case has been presented on the basis that either a transfer of the property or damages is the appropriate remedy. The respondent contends that the former is appropriate and the appellant the latter. No submissions were made in oral argument for or against an accounting of profits. Moreover, damages were assessed in the alternative in the event that on appeal this was considered the appropriate remedy. In all the circumstances, therefore, I have concluded that of the two alternatives presented, damages is the proper remedy.

It is, therefore, necessary to determine the basis upon which damages will be assessed. The formula for the measure of damages does not appear to be seriously disputed, although the application of the formula is. In *Dowson & Mason Ltd. v. Potter*, *supra*, Sir Edward Eveleigh adopted the statement of Lord Wilberforce in *General Tire & Rubber Co. v. Firestone Tyre & Rubber Co.*, [1975] 2 All E.R. 173, in a breach of confidence action. Lord Wilberforce was dealing with the measure of damages applicable to economic torts. He stated, at p. 177:

> As in the case of any other tort (leaving aside cases where exemplary damages can be given) the object of damages is to compensate for loss or injury. The general rule at any rate in relation to `economic' torts is that the measure of damages is to be, so far as possible, that sum of money which will put the injured party in the same position as he would have been in if he had not sustained the wrong (*Livingstone v Rawyards Coal Co* [(1880) 5 App Cas 25 at 39] per Lord Blackburn).

In applying this test it is necessary to consider what the wrong is and what the position of the plaintiff would have been if he had not sustained the wrong. To put it shortly, what loss was caused to the plaintiff by the defendant's wrong?

In my opinion, the wrong committed by Lac was the acquisition of the Williams property for itself and to the exclusion of Corona. That was contrary to the understanding found to exist by the trial judge that the parties were working towards a joint venture or some other business arrangement.

This set the parameters of the permitted use of the confidential information and its use within these parameters was not a misuse of it. Lac did not agree to refrain from acquiring the property and Corona did not tell Lac not to acquire the property. This would be surprising unless the parties thought that in keeping with their efforts to conclude a joint business arrangement, either one could acquire it for that purpose. This is supported by the letter of May 19 in which Sheehan set out three alternative "possibilities" for a working arrangement with Corona. That is followed with a paragraph relating to the Williams property. For ease of reference I will again reproduce the relevant correspondence:

> As discussed we should entertain the possibility of Corona participate (*sic*) in the Hughes ground and that should be actively pursued. In addition we are staking ground in the area and recognizing Corona's limited ability to contribute we could work Corona into the overall picture as part of an overall exploration strategy.

Bell's reply states in part:

> At this point, until I hear otherwise from the directors in Vancouver, I like your idea of Corona's contribution with Long Lac Minerals Exploration Limited as part of an overall exploration programme in the area.

The correspondence reflected the discussion between the parties up to that point. In my view it can only be read as envisaging a participation by Corona with Lac in the Williams property. Either party could acquire it for this purpose. This is further supported by the following evidence of Sheehan which was elicited on cross-examination. This evidence was relied on by the trial judge in concluding that a statement made by Bell at the meeting of May 8 that Corona was "happy with our land position" was made in the context of additional staking and not that it (Corona) was not interested in acquiring the Williams property:

> Q. Mr. Sheehan, on May 8th -- and, my Lord, page 803, question 3971:
>
> "Q. Can you tell me now then, please, your discussion with Mr. Bell on the 8th as it concerns the Hughes property?
>
> A. My best recollection of that discussion was where the Hughes property was concerned was I was discussing the area in general. I believe I had indicated to Mr. Bell that we would be staking in the area.
>
> MR. McDOUGALL: You have given that evidence.

> THE DEPONENT: With respect to the Hughes property, I had suggested the possibilities that we pick up the Hughes property, that is to say Lac, that Corona may pick it up, that any combination of those factors could be addressed. In other words, if indeed we were going to make a deal, Lac could fund Corona since he had indicated that they were just a small company without much money."

A. Yes, that's correct.

Q. Were you asked those questions and did you give those answers?

A. Yes.

MR. LENCZNER: And we have this already in on[e] of the tabs, my Lord, with regard to the May 19th letter, but let me just -- I had better pull out the tab. It is tab 146.

Q. Page 863, the answer you gave:

> "A. Well, I think I had discussed with Mr. Bell in that meeting and I may have referred to this in previous testimony that the patented ground as well as the Hughes ground should be picked up and that's what that is referring to there."

A. Yes.

Q. So that you had discussed with Bell on May 8th, picking up the Hughes ground and the patented ground?

A. Yes.

Q. And that Lac could pick it up, Corona could pick it up?

A. Yes.

Q. Or you would even fund Corona to pick it up?

A. Yes, we would do the funding.

Q. In addition to all of that, you said you had a staking programme going down to the east and he could participate in that if he wanted?

A. Yes, we could bring him into that.

Q. In that context, I suggest to you he said, "We are happy with our land position"?

A. It was in that context that he said, "No, I'm happy with my land position and we will continue drilling and doing the Phase II programme".

The trial judge is correct in his finding that Corona was interested in "the possession of either Williams or Hughes". There is no finding, however, that acquisition by Lac of the Williams property as part of the joint exploration programme along with continued negotiations towards an agreement on the basis of one of the scenarios outlined in the letter of May 19 would have constituted a breach of mutual understanding under which the confidential information was supplied to Lac. Furthermore, I am satisfied that had that occurred, the most likely conclusion is that Lac and Corona would have continued to negotiate and Corona would have made a deal with Lac for their respective participation in a joint venture including the Williams property. Corona could not finance the development on its own property without the assistance of a senior mining company. Accordingly, it entered into an agreement with Teck on somewhat similar terms as those proposed by Lac. Even after it discovered that Lac had acquired the Williams property, a director, Moore, sought to continue the negotiations. His evidence in part is as follows:

Q. What is it that you were setting about doing then in your attempts to reach Mr. Sheehan?

A. Well, the stage -- the stage was still set, even at that point, for -- to continue with this joint venture. Lac had picked up a big piece of ground in the area, 600 claims, and Corona had a nice start, that Williams' claims were off on the side. We felt that they should be ours. But it was, uh, it was still possible in

> that scenario, in my opinion, to make a joint venture work, or to have a reconciliation and make a joint venture work, even with -- all the pieces were still there to make a good deal.

But for Lac's breach, those negotiations would likely have continued and it would have resulted in Corona's acquiring an interest in the Williams property of 50 percent or perhaps a smaller percentage interest. It would have also acquired a corresponding obligation to contribute on the same basis. Corona's damages should therefore be calculated on the basis of the loss of this interest.

In his reasons the trial judge stated, at p. 777:

> If Corona had obtained the Williams property, Corona may well have entered into a joint venture agreement with Lac covering the Corona and Williams properties together with the White River claims. Corona's damages would be assessed accordingly in an action for breach of contract.

R. Holland J. went on to hold that based on his finding of a fiduciary duty the appropriate remedy was a restitutionary remedy requiring the whole of the property to be returned to Corona upon payment of the added value. I have decided that there is no breach of a fiduciary duty and therefore, as in contract, account must be taken of the fact that but for the breach by Lac, a joint venture agreement would likely have resulted. Damages should be assessed accordingly.

Assessment of Damages

The appellant, in its factum, para. 177, submits as follows:

> If it is found that, through misuse of information relating to Corona's intentions or otherwise, the loss suffered by Corona was the loss of the opportunity to acquire and to explore the Williams property, Corona would be entitled to damages. However, its loss is not to be measured by LAC's gain. Corona is to be put in the same position it would have been if it had not sustained the wrong. In making that assessment in the case of a lost opportunity the correct approach is:
>
> i) to determine the form of business arrangement that Corona would have been obliged to have entered into with a senior mining partner and the proportionate interest that Corona would probably have conceded to that partner. The later arrangement with Teck suggests this would be 55%. Sheehan suggested 60%;
>
> ii) to value the property as improved by LAC. This was done by the trial judge and produced a figure of $700,000,000.00 after tax, being the value created by the size of the facilities LAC decided to put on the Williams property. LAC disputed this assessment on appeal but the Court of Appeal did not deal with this issue. LAC's submissions on the value of the property as improved by LAC are set out in Appendix "A". In addition, Corona may have decided or been compelled to exploit the property with a lower rate of extraction. The value of the property must be discounted to reflect that eventuality;
>
> iii) to deduct from that discounted figure the 60% (or 55%) interest of the senior partner;
>
> iv) to deduct from that figure a capitalized estimate of the costs Corona would have had to contribute to the exploration and exploitation of the property; and
>
> v) to deduct a further amount to reflect Corona's own share of responsibility for its loss.

I agree that this approach generally gives effect to the principles which I have stated above. I would not, however, include item v) to deduct a further amount to reflect Corona's own share

of responsibility for its loss. This is essentially a plea of contributory negligence for which there is no support in the findings of fact or evidence.

(i) The Business Arrangement

In determining the nature of the business arrangement that the parties would likely have concluded, the arrangement with Teck is very pertinent. This arrangement was set out in a number of agreements. For my purposes I refer primarily to an Agreement dated December 10, 1981 (Property Agreement) with the "Joint Venture Agreement" attached as Schedule B, and the "Area of Interest Agreement" contained in a letter dated August 13, 1982 as amended by an agreement made as of December 14, 1983, particularly paragraphs 3.2 and 5. Under these agreements, the parties entered into the following arrangement.

(a) Corona Property: Teck undertook to complete exploration and development work and prepare a feasibility study with respect to 17 properties. The initial costs were financed out of a fund to which both Teck and Corona contributed $1,000,000. Teck acquired a 55 percent interest upon completion of the feasibility study and election to bring the property into production, leaving Corona with 45 percent. Thereafter development was to be financed in accordance with the respective interests of the parties, i.e., 55 percent by Teck and 45 percent by Corona.

(b) Other Property: Any property in the area not covered by the property agreement subsequently acquired by either Teck or Corona would be shared on a 50-50 basis with contributions accordingly. This provision was expressly extended to the Williams property contingent on Corona's obtaining a favourable judgment.

In the circumstances, I conclude that Corona would have concluded with Lac a business arrangement with respect to the Williams property substantially similar to that which it concluded with Teck: a 50-50 property interest with participation in the development costs in the same ratio. Although this is a slightly higher percentage in favour of Corona than that proposed by Sheehan and agreed upon with Teck in respect of Corona's own property, it is the figure that was applied to the Williams property in the Teck agreement. The benefit of any doubt as to whether it should be 45 percent or 50 percent should be given to the innocent party Corona rather than to the party in breach.

(ii) Value of Improved Mine

The trial judge fixed the value at $700,000,000 after tax. Both parties take issue with this assessment. While there is some merit in some of the issues raised by each side, it has not been established that this is a wholly erroneous assessment and I accept it. I will deal with several of the criticisms which raise an issue of law or principle. Other objections are primarily factual and the findings of the trial judge should be accepted.

First, although not directly raised in this Court, the appellant submitted below that the date for valuation was the date of breach and not the date of trial. The trial judge chose January 1, 1986, a date during the latter period, applying equitable principles. Having regard to the flexibility possessed by the Court to do justice in an action for breach of confidence, I have no difficulty in applying those principles to this assessment to the extent of adopting the later date. To do otherwise would be to ignore the vast potential that the Williams property possessed at the time it was acquired by Lac. That potential can best be valued by determining its value as of the date fixed by the trial judge.

The trial judge elected to adopt a discounted cash flow approach to value the Williams property as opposed to a market capitalization approach. Although I recognize that each approach has its strengths and weaknesses, I am not prepared to hold that the trial judge erred in opting for a discounted cash flow of the mine on the Williams property over the life of the mine to ascertain its present value. In my opinion, there is ample evidence to support the conclusion that this was the proper means to assess the value of the property.

I am also of the opinion that the trial judge correctly applied this Court's decision in *Florence Realty Co. v. The Queen*, [1968] S.C.R. 42, in deducting corporate taxes from the cash flow to determine the value of the mine.

Furthermore, the figure of $700,000,000 was based on the payment of a 1 1/2 percent net smelter return to Mrs. Williams in accordance with the contract negotiated by Lac. Although

Corona offered a 3 percent net smelter return to Mrs. Williams, which would reduce the value of the property, I accept the figure of 1 1/2 percent as the likely figure which would have been paid if Lac had not been in breach of confidence.

(iii) Damages for Loss of Interest in Mine

Damages for loss of Corona's interest in the mine are therefore assessed at $350,000,000 which is 50 percent of $700,000,000.

(iv) Contribution to Development Costs

I agree with the appellant that Corona should not have the value by which the mine was increased by the expenditures made by Lac without contributing in accordance with its interest. Lac presented evidence that it had expended $203,978,000 in developing the Williams property. The trial judge held that had Corona developed the two properties together then a number of savings would have been realized over the sums expended by both Lac and Corona in developing their two mines independently. The trial judge suggested that there would have been only two shafts rather than three, only one mill and only one group of service facilities. For this reason, he estimated that Lac spent an additional $50,000,000 by virtue of its independent development of the Williams property.

I agree that this sum is to be deducted from the expenditures by Lac in developing the Williams property. The operative principle of damages is to place Corona in the position it would have occupied had there been no breach of confidence by Lac. If Lac had acquired the property for the benefit of both parties, the two properties would have been developed jointly rather than separately. Lac is, therefore, responsible for the extra costs incurred as a result of the inability to take advantage of any natural economies of scale.

Accordingly, $50,000,000 is to be deducted from the figure of $203,978,000 representing Lac's improvements to the property, for a difference of $153,978,000. One-half of this sum ($76,989,000) must be deducted from $350,000,000 for a difference of $273,011,000.

This does not fully dispose of the assessment of damages. Several further items having a possible bearing on the amount require consideration. In arriving at the figure of $153,978,000 the trial judge expressed some uncertainty with respect to the quantum of the deduction of $50,000,000 from the $203,978,000 which resulted in a difference of $153,978,000. Accordingly, a reference was directed but only if either party was dissatisfied with the trial judge's figure. The formal order expressed it as a reference concerning the amount of $153,978,000. As I read the trial judge's reasons, the uncertainty was in the amount of the deduction and not the $203,978,000 expenditure by Lac which was based on its records. Nevertheless, I propose to direct a reference in the same terms as the trial judge.

In addition, the trial judge ordered that the amounts paid to Mrs. Williams, exclusive of royalty payments, should also be paid by Corona. This cost of the acquisition of the property would have been necessary had no breach occurred. Corona would have been obliged to pay one-half of these payments. Accordingly, one-half of the amounts paid to Mrs. Williams exclusive of royalty payments must be deducted from the award of damages of $273,011,000 or from that figure as varied by any reference undertaken as indicated above.

The trial judge also directed that the appellant pay the respondent the profits, if any, obtained by the appellant from the operation of the Williams mine. The foundation for this order was the restitutionary remedy which I have found to be inappropriate. Accordingly, no such order is made. The respondent is, however, entitled to pre-judgment interest in accordance with s. 138(1)(*b*) of the *Courts of Justice Act*, S.O. 1984, c. 11. If, therefore, a notice has been served as provided by that provision, the respondent will be entitled to interest in accordance with that section. The respondent is also entitled to post-judgment interest in accordance with s. 139 of the *Courts of Justice Act*.

Disposition

In the result, I would allow the appeal in part and dismiss the cross-appeal. I would set aside the judgment at trial and the order of the Court of Appeal and direct that judgment should issue as follows:

1. The plaintiff is entitled to recover from the defendant damages in the sum of $273,011,000 less one-half of all sums paid to Mrs. Williams with the exception of royalties, subject to the right of either the plaintiff or defendant to undertake a reference to the Master concerning the deduction of $153,978,000.

2. The plaintiff is entitled to recover pre-judgment interest from the defendant on the sum referred to in paragraph 1, or as varied on a reference, in accordance with s. 138(1)(b) of the *Courts of Justice Act* from the date of service of any notice, and post-judgment interest on the said sum in accordance with s. 139 of the *Courts of Justice Act*.

3. The plaintiff is entitled to recover from the defendant the costs of the action.

I would also order that the appellant recover from the respondent the costs of the appeal and cross-appeal to the Court of Appeal and the costs of the appeal and cross-appeal to this Court.

//*Lamer J.*//

The following are the reasons delivered by

LAMER J. -- I have read the judgments of my colleagues, Justice La Forest and Justice Sopinka. I am in agreement with my brother Sopinka J. and for the reasons set out in his judgment that the evidence does not establish in this case the existence of a fiduciary relationship.

I am in agreement with both of my colleagues, and concur in their reasons in support thereof, that there was a breach of confidence on the part of Lac Minerals Ltd.

As regards the appropriate remedy, I am of the view that the approach taken by La Forest J. is the proper one.

I would accordingly dismiss the appeal with costs and dismiss the cross-appeal with costs.

//*Wilson J.*//

The following are the reasons delivered by

WILSON J. -- I have had the advantage of reading the reasons of my colleagues, Justice Sopinka and Justice La Forest and I agree with my colleague, La Forest J., as to the appropriate remedy in this case. I propose to comment briefly on the three issues before the Court on this appeal as identified by them:

(1) Fiduciary Duty

It is my view that, while no ongoing fiduciary relationship arose between the parties by virtue only of their arm's length negotiations towards a mutually beneficial commercial contract for the development of the mine, a fiduciary duty arose in Lac Minerals Ltd. ("Lac") when International Corona Resources Ltd. ("Corona") made available to Lac its confidential information concerning the Williams property, thereby placing itself in a position of vulnerability to Lac's misuse of that information. At that point Lac came under a duty not to use that information for its own exclusive benefit. Lac breached that fiduciary duty by acquiring the Williams property for itself.

It is, in other words, my view of the law that there are certain relationships which are almost *per se* fiduciary such as trustee and beneficiary, guardian and ward, principal and agent, and that where such relationships subsist they give rise to fiduciary duties. On the other hand, there are relationships which are not in their essence fiduciary, such as the relationship brought into being by the parties in the present case by virtue of their arm's length negotiations towards a joint venture agreement, but this does not preclude a fiduciary duty from arising out of specific conduct engaged in by them or either of them within the confines of the relationship. This, in my view, is what happened here when Corona disclosed to Lac confidential information concerning the Williams property. Lac became at that point subject to a fiduciary duty with respect to that information not to use it for its own use or benefit.

(2) Breach of Confidence

I agree with my colleagues that Lac's conduct may also be characterized as a breach of confidence at common law with respect to the information concerning the Williams property. The breach again consisted of Lac's acquisition of the Williams property for itself, such property being the subject of the confidence.

(3) The Remedy

It seems to me that when the same conduct gives rise to alternate causes of action, one at common law and the other in equity, and the available remedies are different, the Court should consider which will provide the more appropriate remedy to the innocent party and give the innocent party the benefit of that remedy. Since the result of Lac's breach of confidence or breach of fiduciary duty was its unjust enrichment through the acquisition of the Williams property at Corona's expense, it seems to me that the only sure way in which Corona can be fully compensated for the breach in this case is by the imposition of a constructive trust on Lac in favour of Corona with respect to the property. Full compensation may or may not be achieved through an award of common law damages depending upon the accuracy of valuation techniques. It can most surely be achieved in this case through the award of an *in rem* remedy. I would therefore award such a remedy. The imposition of a constructive trust also ensures, of course, that the wrongdoer does not benefit from his wrongdoing, an important consideration in equity which may not be achieved by a damage award.

It is, however, my view that this is not a case in which the available remedies are different. I believe that the remedy of constructive trust is available for breach of confidence as well as for breach of fiduciary duty. The distinction between the two causes of action as they arise on the facts of this case is a very fine one. Inherent in both causes of action are concepts of good conscience and vulnerability. It would be strange indeed if the law accorded them widely disparate remedies. In his article on "The Role of Proprietary Relief in the Modern Law of Restitution," McCamus, in *The Cambridge Lectures 1987*, at p. 150, Professor McCamus poses the rhetorical question:

> Would it not be anomalous to allow more sophisticated forms of relief for breach of fiduciary duty than for those forms of wrongdoing recognized by the law of torts, some of which, at least, would commonly be more offensive from the point of view of either public policy or our moral sensibilities than some breaches of fiduciary duty?

I believe that where the consequence of the breach of either duty is the acquisition by the wrongdoer of property which rightfully belongs to the plaintiff or, as in this case, ought to belong to the plaintiff if no agreement is reached between the negotiating parties, then the *in rem* remedy is appropriate to either cause of action.

I would dismiss the appeal with costs. I would also dismiss the cross-appeal with costs.

//*La Forest J.*//

The following is the judgment delivered by

LA FOREST J. --

Introduction

The short issue in this appeal is whether this Court will uphold the Ontario Court of Appeal and trial court decisions ordering Lac Minerals Ltd. ("Lac") to deliver up to International Corona Resources Ltd. ("Corona"), land (the Williams property) on which there is a gold mine, on being compensated for the value of improvements Lac has made to the property ($153,978,000) in developing the mine.

The facts in this case are crucial. The trial lasted some five and one half months, and the hearing before the Court of Appeal took ten days. The trial judge made extensive findings of fact, and the Court of Appeal examined the record in detail and with care. The latter court emphatically dismissed any argument that the trial judge had overlooked or misconstrued the evidence, failed to make any necessary findings or made any erroneous inferences. It stated ((1987), 62 O.R. (2d) 1, at p. 4):

> Certainly the establishment of the facts in this case was fundamental and vital to the determination of the issues. It is submitted that erroneous inferences were taken from the facts, that evidence was overlooked or misconstrued, and that relevant findings were not made at all.

> There is no obligation on a trial judge to refer to every bit of conflicting evidence to show he has taken it into consideration, nor is he required to cite all the evidence to support a particular finding. In the instant case, the trial judge made some rather terse findings of fact in his recital of the events and of the relationship between the parties in the course of his lengthy reasons. On occasion he encapsuled a great deal of evidence in short form. However, the trial was a lengthy one, his reasons for judgment were lengthy and, as stated, he was not called on to cite every piece of relevant evidence to show he had considered it . . . .
>
> We can say in opening that we have not been persuaded that the learned trial judge overlooked or misconstrued any important or relevant evidence. There was ample evidence to support his conclusions on the facts and there is no palpable or overriding error in his assessment of the facts.

In this Court, Lac disclaimed any attack on the facts as found by the trial judge, but they argued that the Court of Appeal erred in making further findings and drawing inferences from the facts so found. I accept the facts as they are set out in the judgments below, and I would respectfully add that, in my view, the Court of Appeal in no way misconstrued the purport of what it describes as the trial judge's necessarily "rather terse findings of fact" in the course of lengthy reasons.

I have had the advantage of reading the reasons of my colleague, Justice Sopinka. He has given a general statement of the facts as well as the judicial history of the case, and I shall refrain from doing so. I should immediately underline, however, that while I am content to accept this statement as a general outline, it will become obvious that I, at times, take a very different view of a number of salient facts and the interpretation that can properly be put upon them, in particular as they impinge on the nature, scope and effect of the breach of confidence alleged to have been committed by Lac against Corona.

It is convenient to set forth my conclusions at the outset. I agree with Sopinka J. that Lac misused confidential information confided to it by Corona in breach of a duty of confidence. With respect, however, I do not agree with him about the nature and scope of that duty. Nor do I agree that in the circumstances of this case it is appropriate for this Court to substitute an award of damages for the constructive trust imposed by the courts below. Moreover, while it is not strictly necessary for the disposition of the case, I have a conception of fiduciary duties different from that of my colleague, and I would hold that a fiduciary duty, albeit of limited scope, arose in this case. In the result, I would dismiss the appeal.

The Issues

Three issues must be addressed:

1. What was the nature of the duty of confidence that was breached by Lac?

2. Does the existence of the duty of confidence, alone or in conjunction with the other facts as found below, give rise to any fiduciary obligation or relationship? If so, what is the nature of that obligation or relation?

3. Is a constructive trust an available remedy for a breach of confidence as well as for breach of a fiduciary duty, and if so, should this Court interfere with the lower courts' imposition of that remedy?

Breach of Confidence

I can deal quite briefly with the breach of confidence issue. I have already indicated that Lac breached a duty of confidence owed to Corona. The test for whether there has been a breach of confidence is not seriously disputed by the parties. It consists in establishing three elements: that the information conveyed was confidential, that it was communicated in confidence, and that it was misused by the party to whom it was communicated. In *Coco v. A. N. Clark (Engineers) Ltd.*, [1969] R.P.C. 41 (Ch.), Megarry J. (as he then was) put it as follows at p. 47:

> In my judgment, three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself, in the words of Lord Greene, M.R. in the *Saltman* case on page 215, must "have the necessary quality of confidence about it." Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorized use of that information to the detriment of the party communicating it . . .

This is the test applied by both the trial judge and the Court of Appeal. Neither party contends that it is the wrong test. Lac, however, forcefully argued that the courts below erred in their application of the test. Lac submitted that "The real issue is whether Corona proved that LAC received confidential information from it and [whether] it should have known such information was confidential".

Sopinka J. has set out the findings of the trial judge on these issues, and I do not propose to repeat them. They are all supported by the evidence and adopted by the Court of Appeal. I

would not interfere with them. Essentially, the trial judge found that the three elements set forth above were met: (1) Corona had communicated information that was private and had not been published; (2) while there was no mention of confidence with respect to the site visit, there was a mutual understanding between the parties that they were working towards a joint venture and that valuable information was communicated to Lac under circumstances giving rise to an obligation of confidence; and, (3) Lac made use of the information in obtaining the Williams property and was not authorized by Corona to bid on that property. I agree with my colleague that the information provided by Corona was the springboard that led to the acquisition of the Williams property. I also agree that the trial judge correctly applied the reasonable man test. The trial judge's conclusion that it was obvious to Sheehan, Lac's Vice-President Exploration, that the information was being communicated in circumstances giving rise to an obligation of confidence, following as it did directly on a finding of credibility against Sheehan, is unassailable.

In general, then, there is no difference between my colleague and me that Lac committed a breach of confidence in the present case. Where we differ -- and it is a critically important difference -- is in the nature and scope of the breach. The precise extent of that difference can be seen by a closer examination of the findings and evidence on the third element of the test set forth above, and I will, therefore, set forth my views on this element at greater length.

With respect to this aspect of the test, it is instructive to set out the trial judge's finding in full. He said ((1986), 53 O.R. (2d) 737), at pp. 775-76:

C.(iii) *Has Corona established an unauthorized use of the information to the detriment of Corona?*

Where the duty of confidence is breached, the confidee will not be allowed to use the information as a springboard for activities detrimental to the confider: see *Cranleigh Precision Engineering, Ltd. v. Bryant et al.*, [1964] 3 All E.R. 289 (Q.B.).

Mr. Sheehan and Dr. Anhuesser testified that the information Lac acquired from Corona was of value in assessing the merits of the Williams property and Mr. Sheehan said that he made use of this information in making an offer to Mrs. Williams.

Certainly Lac was not authorized by Corona to bid on the Williams property.

I have already reviewed the evidence dealing with the acquisition of the Williams property by Lac and the efforts made by Corona through Mr. McKinnon and also directly to acquire the Williams property. On a balance of probabilities I find that, but for the actions of Lac, Corona would have acquired the Williams property and therefore Lac acted to the detriment of Corona.

I conclude that Corona has established the three requirements necessary for recovery based on the doctrine of breach of confidence. [Emphasis added.]

Later in his reasons he reiterated at p. 778 that "but for the actions of Lac, Corona would probably have acquired the Williams property".

The Court of Appeal was of the same view. It held at p. 66 that:

. . . the evidence also amply sustains the finding that the confidential information which LAC received from Corona was of material importance in its decision to acquire the Williams property. In this latter regard it may fairly be said that, but for the confidential information LAC received from Corona, it is not likely that it would have acquired the Williams property.

It was argued that this passage in the Court of Appeal's reasoning is a finding of fact that was not made by the trial judge and that the record will not support. In my view, the Court of Appeal in no way extended the finding of the trial judge. The portion of R. Holland J.'s reasons I have set out above was directed solely at the question of whether Corona had established an unauthorized use of the information to the detriment of Corona. He concluded that there had been an unauthorized use since Lac had not been authorized by Corona to bid on the Williams property. In other words, Corona did not consent to the use of the information by Lac for the purpose of acquiring the Williams land for Lac's own account, or, for that matter, for any purpose other than furthering negotiations to jointly explore and develop these properties. He also found that the information had been used to the detriment of Corona. When the sole question the learned trial judge was addressing was whether Lac misused the confidential information Corona had provided to it and his sole conclusion was that "but for the actions of Lac, Corona would have acquired the Williams property and therefore Lac acted to the detriment of Corona" [emphasis added], I find the conclusion inescapable that the trial judge found as a fact that but for the confidential information received and misused, Corona would have acquired the Williams property and that Lac was not authorized to obtain it.

If, as we saw, each of the three elements of the above-cited test are made out, a claim for breach of confidence will succeed. The receipt of confidential information in circumstances of confidence establishes a duty not to use that information for any purpose other than that for which it was conveyed. If the information is used for such a purpose, and detriment to the confider results, the confider will be entitled to a remedy.

There was some suggestion that Lac was only restricted from using the information imparted by Corona to acquire the Williams property for its own account, and had Lac acquired the claims on behalf of both Corona and Lac, there would have been no breach of duty. This, as I have noted, seems to me to misconstrue the finding of the trial judge. What is more, the evidence, in my view, does not support that position. While Sheehan's letter of May 19, relied on by my colleague, may have been unclear as to who should acquire the Williams property, the events on June 30 make it clear that both Lac and Corona contemplated Corona's acquisition of the Williams claims. The trial judge, again making a finding of credibility against Sheehan and Allen (Lac's President), accepted the evidence of Corona's witnesses, Bell and Dragovan, that not only was the Williams property discussed at the meeting on this latter date, but that Corona's efforts to secure it were discussed and that Allen advised Corona that they had to be aggressive in pursuing a patent group such as this. Lac in no way indicated to Corona, at this time or any other, that they were also pursuing the property. Yet three days later, Sheehan spoke with Mrs. Williams about making a deal for her property, and on July 6, 1981, Lac's counsel and corporate secretary submitted a written bid for the eleven patented claims. It strains credulity to suggest that on June 30 either Lac or Corona contemplated that Corona had given Lac confidential information so that Lac could acquire the property on either its own behalf or on behalf of both parties jointly. Certainly Corona would not have allowed the use of the confidential information for Lac's acquisition of the property to Corona's exclusion. Had the joint acquisition of the property been an authorized use of the information, surely there would have been some discussion of Lac's efforts to that end at the June 30 meeting. Instead, Lac advised Corona to aggressively pursue the claims.

The evidence of Lac's President, Mr. Allen, and of the experts called on behalf of Lac also support the position that Lac was not entitled to bid on the property and that Corona could expect that Lac would not do so. Allen testified as follows, in a passage to which both courts below attached central importance:

> If one geologist goes to another geologist and says, are you interested in making some sort of a deal and between the two of them, they agree that they should consider seriously the possibility of making a deal, I think for a short period of time that while they are exploring that, that any transference of data would be -- I would hope the geologists would be competent enough to identify the difference between published, unpublished, confidential and so on but in the case that they weren't, there was just some exchange of conversation or physical data, then I would say that while both of them were seriously and honestly engaged in preparing a deal, that Lac and the other party would both have a duty towards each other not to hurt each other as the result of any information that was exchanged. [Emphasis added.]

All the experts called by Lac agreed with the tenor of this statement. The testimony of Dr. Derry is indicative. He testified as follows:

> Q. Ah, so now we have it this way: that if some -- so I understand your evidence -- if Sheehan knew, as apparently he does from the way you read the evidence, that Corona was intending to acquire the Williams property; correct?
>
> A. Yes.
>
> Q. That, for at least some period of time, Lac is precluded from making an offer or outbidding Corona on that property?
>
> A. I would say early on, yes.
>
> Q. Yes. And that obligation or the rationale for that preclusion comes from the fact that it is recognized in the industry, is it not?
>
> A. Yes.

Whether these statements amount to a legally enforceable custom or whether they create a fiduciary duty are separate questions, but at the very least, they show that Lac was aware that it owed some obligation to Corona to act in good faith, and that that obligation included the industry-recognized practice not to acquire the property which was being pursued by a party with which it was negotiating.

Corona's activity following Lac's acquisition of the property is also noteworthy. The Court of Appeal thus described it at pp. 42-43:

> Upon learning from Dragovan of the LAC offer to Mrs. Williams, Pezim immediately instructed his solicitor to act for Corona in the matter and Bell ordered LAC's crew engaged in the joint geochemical sampling programme to leave Corona's property. After Sheehan had learned of the termination of the geochemical study, he telephoned Bell on August 4th and was told by him that the reason for the termination was LAC's offer to Mrs. Williams. Sheehan said that he was still interested in a deal with Corona and Bell answered that he would have to discuss the matter with Pezim. On August 18th Sheehan and Pezim met in Vancouver to discuss the Corona property. The meeting was abortive. According to Pezim's evidence, and the trial judge so found, Pezim insisted that it was a condition of any deal that LAC "give back" to Corona the Williams property. Subsequent negotiations between Sheehan and Donald Moore, a director of Corona, also failed to resolve the differences between LAC and Corona. After his meeting with Sheehan, Pezim, according to his testimony, instructed his solicitors to press on with the matter. This action was commenced on October 27, 1981, long before it was established that a producing gold mine on the Williams property was a probability.

This is certainly inconsistent with Corona's having provided Lac the information so that Lac could acquire the property, whether alone or for their joint ownership.

This entire inquiry appears, however, to be misdirected. In establishing a breach of a duty of confidence, the relevant question to be asked is, "what is the confidee entitled to do with the information?" and not, "to what use he is prohibited from putting it?" Any use other than a permitted use is prohibited and amounts to a breach of duty. When information is provided in confidence, the obligation is on the confidee to show that the use to which he put the information is not a prohibited use. In *Coco v. A. N. Clark (Engineers) Ltd.*, *supra*, at p. 48, Megarry J. said this in regard to the burden on the confidee to repel a suggestion of confidence:

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

In my view, the same burden applies where it is shown that confidential information has been used and the user is called upon to show that such use was permitted. Lac has not discharged that burden in this case.

I am therefore of the view that Lac breached a duty owed to Corona by approaching Mrs. Williams with a view to acquiring her property, and by acquiring that property, whether or not Lac intended to invite Corona to participate in its subsequent exploration and development. Such a holding may mean that Lac is uniquely disabled from pursuing property in the area for a period of time, but such a result is not unacceptable. Lac had the option of either pursuing a relationship with Corona in which Corona would disclose confidential information to Lac so that

Lac and Corona could negotiate a joint venture for the exploration and development of the area, or Lac could, on the basis of publicly available information, have pursued property in the area on its own behalf. Lac, however, is not entitled to the best of both worlds.

In this regard, the case can be distinguished from *Coco v. A. N. Clark (Engineers) Ltd.*, *supra*, in that here the confidential information led to the acquisition of a specific, unique asset. Imposing a disability on a party in possession of confidential information from participating in a market in which there is room for more than one participant may be unreasonable, such as where the information relates to a manufacturing process or a design detail. In such cases, it may be that the obligation on the confidee is not to use the confidential information in its possession without paying compensation for it or sharing the benefit derived from it. Where, however, as in the present case, there is only one property from which Lac is being excluded, and there is only one property that Corona was seeking, the duty of confidence is a duty not to use the information. The fact that Lac is precluded from pursuing the Williams property does not impose an unreasonable restriction on Lac. Rather, it does the opposite by encouraging Lac to negotiate in good faith for the joint development of the property.

Fiduciary Obligation

Having established that Lac breached a duty of confidence owed to Corona, the existence of a fiduciary relationship is only relevant if the remedies for a breach of a fiduciary obligation differ from those available for a breach of confidence. In my view, the remedies available to

one head of claim are available to the other, so that provided a constructive trust is an appropriate remedy for the breach of confidence in this case, finding a fiduciary duty is not strictly necessary. In my view, regardless of the basis of liability, a constructive trust is the only just remedy in this case. Nonetheless, in light of the argument, I think it appropriate to consider whether a fiduciary relationship exists in the circumstances here.

There are few legal concepts more frequently invoked but less conceptually certain than that of the fiduciary relationship. In specific circumstances and in specific relationships, courts have no difficulty in imposing fiduciary obligations, but at a more fundamental level, the principle on which that obligation is based is unclear. Indeed, the term "fiduciary" has been described as "one of the most ill-defined, if not altogether misleading terms in our law": see Finn, *Fiduciary Obligations*, at p. 1. It has been said that the fiduciary relationship is "a concept in search of a principle"; see Mason, "Themes and Prospects," in P. D. Finn, ed., *Essays in Equity*, at p. 246. Some have suggested that the principles governing fiduciary obligations may indeed be undefinable (Klinck, "The Rise of the `Remedial' Fiduciary Relationship: A Comment on *International Corona Resources Ltd. v. Lac Minerals Ltd.*" (1988), 33 *McGill L.J.* 600, at p. 603), while others have doubted whether there can be any "universal, all-purpose definition of the fiduciary relationship" (see *Hospital Products Ltd. v. United States Surgical Corp.* (1984), 55 A.L.R. 417, at p. 432; Austin, "Commerce and Equity -- Fiduciary Duty and Constructive Trust" (1986), 6 *O.J.L.S.* 444, at pp. 445-46). The challenge posed by these criticisms has been taken up by courts and academics convinced of the view that underlying the divergent categories

of fiduciary relationships and obligations lies some unifying theme; see *Frame v. Smith*, [1987] 2 S.C.R. 99, at p. 134, *per* Wilson J.; Weinrib, "The Fiduciary Obligation" (1975), 25 *U. of T. L.J.* 1; Finn, "The Fiduciary Principle" Victoria Law School Conference Lecture, 1988; Shepherd, "Towards a Unified Concept of Fiduciary Relationships" (1981), 97 *L.Q.R.* 51; Frankel, "Fiduciary Law" (1983), 71 *Calif. L. Rev.* 795; Gautreau, "Demystifying the Fiduciary Mystique" (1989), 68 *Can. Bar Rev.* 1. This case presents a further opportunity to consider such a principle.

In *Guerin v. The Queen*, [1984] 2 S.C.R. 335, Dickson J. (as he then was) discussed the nature of fiduciary obligations in the following passage, at pp. 383-84:

> The concept of fiduciary obligation originated long ago in the notion of breach of confidence, one of the original heads of jurisdiction in Chancery.
>
> . . .
>
> Professor Ernest Weinrib maintains in his article *The Fiduciary Obligation* (1975), 25 U.T.L.J. 1, at p. 7, that "the hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other's discretion." Earlier, at p. 4, he puts the point in the following way:
>
> > [Where there is a fiduciary obligation] there is a relation in which the principal's interests can be affected by, and are therefore dependent on, the manner in which the fiduciary uses the discretion which has been delegated to him. The fiduciary obligation is the law's blunt tool for the control of this discretion.
>
> I make no comment upon whether this description is broad enough to embrace all fiduciary obligations. I do agree, however, that where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a

fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct.

It is sometimes said that the nature of fiduciary relationships is both established and exhausted by the standard categories of agent, trustee, partner, director, and the like. I do not agree. It is the nature of the relationship, not the specific category of actor involved that gives rise to the fiduciary duty. The categories of fiduciary, like those of negligence, should not be considered closed. [Emphasis added.]

Wilson J. had occasion to consider the extension of fiduciary obligations to new categories of relationships in *Frame v. Smith, supra*. She found, at p. 136 that:

. . . there are common features discernible in the contexts in which fiduciary duties have been found to exist and these common features do provide a rough and ready guide to whether or not the imposition of a fiduciary obligation on a new relationship would be appropriate and consistent.

Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:

(1) The fiduciary has scope for the exercise of some discretion or power.

(2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.

(3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power. [Emphasis added.]

It will be recalled that the issue in that case, though not originally raised by the parties but argued at the request of the Court, was whether the relationship of a custodial parent to a non-custodial parent could be considered a category to which fiduciary obligations could attach. Wilson J. would have been willing to extend the categories of fiduciary relations to include such

parties. While the majority in that case did not consider it necessary to address the bases on which fiduciary obligations arise (essentially because it considered the statute there to constitute a discrete code), as will be seen from my reasons below, I find Wilson J.'s approach helpful.

Much of the confusion surrounding the term "fiduciary" stems, in my view, from its undifferentiated use in at least three distinct ways. The first is as used by Wilson J. in *Frame v. Smith*, *supra*. There the issue was whether a certain class of relationship, custodial and non-custodial parents, were a category, analogous to directors and corporations, solicitors and clients, trustees and beneficiaries, and agents and principals, the existence of which relationship would give rise to fiduciary obligations. The focus is on the identification of relationships in which, because of their inherent purpose or their presumed factual or legal incidents, the courts will impose a fiduciary obligation on one party to act or refrain from acting in a certain way. The obligation imposed may vary in its specific substance depending on the relationship, though compendiously it can be described as the fiduciary duty of loyalty and will most often include the avoidance of a conflict of duty and interest and a duty not to profit at the expense of the beneficiary. The presumption that a fiduciary obligation will be owed in the context of such a relationship is not irrebuttable, but a strong presumption will exist that such an obligation is present. Further, not every legal claim arising out of a relationship with fiduciary incidents will give rise to a claim for breach of fiduciary duty. This was made clear by Southin J. (as she then was) in *Girardet v. Crease & Co.* (1987), 11 B.C.L.R. (2d) 361 (S.C.), at p. 362. She stated:

> Counsel for the plaintiff spoke of this case in his opening as one of breach of fiduciary duty and negligence. It became clear during his opening that no breach of fiduciary duty is in issue. What is in issue is whether the defendant was negligent in advising on the settlement of a claim for injuries suffered in an accident. The word "fiduciary" is flung around now as if it applied to all breaches of duty by solicitors, directors of companies and so forth. But "fiduciary" comes from the Latin "fiducia" meaning "trust". Thus, the adjective, "fiduciary" means of or pertaining to a trustee or trusteeship. That a lawyer can commit a breach of the special duty of a trustee, e.g., by stealing his client's money, by entering into a contract with the client without full disclosure, by sending a client a bill claiming disbursements never made and so forth is clear. But to say that simple carelessness in giving advice is such a breach is a perversion of words.

It is only in relation to breaches of the specific obligations imposed because the relationship is one characterized as fiduciary that a claim for breach of fiduciary duty can be founded. In determining whether the categories of relationships which should be presumed to give rise to fiduciary obligations should be extended, the rough and ready guide adopted by Wilson J. is a useful tool for that evaluation. This class of fiduciary obligation need not be considered further, as Corona's contention is not that "parties negotiating towards a joint-venture" constitute a category of relationship, proof of which will give rise to a presumption of fiduciary obligation, but rather that a fiduciary relationship arises out of the particular circumstances of this case.

This brings me to the second usage of fiduciary, one I think more apt to the present case. The imposition of fiduciary obligations is not limited to those relationships in which a presumption of such an obligation arises. Rather, a fiduciary obligation can arise as a matter of fact out of the specific circumstances of a relationship. As such it can arise between parties in a relationship in which fiduciary obligations would not normally be expected. I agree with this comment of Professor Finn in "The Fiduciary Principle", *supra*, at p. 64:

> What must be shown, in the writer's view, is that the actual circumstances of a relationship are such that one party is entitled to expect that the other will act in his interests in and for the purposes of the relationship. Ascendancy, influence, vulnerability, trust, confidence or dependence doubtless will be of importance in making this out. But they will be important only to the extent that they evidence a relationship suggesting that entitlement. The critical matter in the end is the role that the alleged fiduciary has, or should be taken to have, in the relationship. It must so implicate that party in the other's affairs or so align him with the protection or advancement of that other's interests that foundation exists for the "fiduciary expectation". Such a role may generate an actual expectation that that other's interests are being served. This is commonly so with lawyers and investment advisers. But equally the expectation may be a judicially prescribed one because the law itself ordains it to be that other's entitlement. And this may be so either because that party should, given the actual circumstances of the relationship, be accorded that entitlement irrespective of whether he has adverted to the matter, or because the purpose of the relationship itself is perceived to be such that to allow disloyalty in it would be to jeopardise its perceived social utility.

It is in this sense, then, that the existence of a fiduciary obligation can be said to be a question of fact to be determined by examining the specific facts and circumstances surrounding each relationship; see Waters, *Law of Trusts in Canada* (2nd ed. 1984), at p. 405. If the facts give rise to a fiduciary obligation, a breach of the duties thereby imposed will give rise to a claim for equitable relief.

The third sense in which the term "fiduciary" is used is markedly different from the two usages discussed above. It requires examination here because, as I will endeavour to explain, it gives a misleading colouration to the fiduciary concept. This third usage of "fiduciary" stems, it seems, from a perception of remedial inflexibility in equity. Courts have resorted to fiduciary language because of the view that certain remedies, deemed appropriate in the circumstances, would not be available unless a fiduciary relationship was present. In this sense, the label fiduciary imposes no obligations, but rather is merely instrumental or facilitative in achieving

what appears to be the appropriate result. The clearest example of this is the judgment of Goulding J. in *Chase Manhattan Bank N.A. v. Israel-British Bank (London) Ltd.*, [1981] Ch. 105. There the plaintiff had transferred some $2,000,000 to the defendant's account at a third bank. Due to a clerical error, a second payment in the same amount was made later that day. Instructions to stop the payment were made, but not quickly enough. The defendant bank was put into receivership shortly after the payment made in error was received, and as it was insolvent, the plaintiff could only recover the full amount of its money if it could trace it into some identifiable asset. Responding to the argument that, even if the funds could be identified, they could not be recovered since there was no fiduciary relationship, Goulding J. made the following comments, at pp. 118-19, which are worth setting out extensively:

> The facts and decisions in *Sinclair* v. *Brougham* [1914] A.C. 398 and in *In re Diplock* [1948] Ch. 465 are well known and I shall not take time to recite them. I summarise my view of the *Diplock* judgment as follows: (1) The Court of Appeal's interpretation of *Sinclair* v. *Brougham* was an essential part of their decision and is binding on me. (2) The court thought that the majority of the House of Lords in *Sinclair* v. *Brougham* had not accepted Lord Dunedin's opinion in that case, and themselves rejected it. (3) The court (as stated in *Snell*, [*Principles of Equity*, 27th ed., 1973]) held that an initial fiduciary relationship is a necessary foundation of the equitable right of tracing. (4) They also held that the relationship between the building society directors and depositors in *Sinclair* v. *Brougham* was a sufficient fiduciary relationship for the purpose: [1948] Ch. 465, 529, 540. The latter passage reads, at p. 540: "A sufficient fiduciary relationship was found to exist between the depositors and the directors by reason of the fact that the purposes for which the depositors had handed their money to the directors were by law incapable of fulfillment." It is founded, I think, on the observations of Lord Parker of Waddington at [1914] A.C. 398, 441.
>
> This fourth point shows that the fund to be traced need not (as was the case in *In re Diplock* itself) have been the subject of fiduciary obligations before it got into the wrong hands. It is enough that, as in *Sinclair* v. *Brougham* [1914] A.C. 398, the payment into wrong hands itself gave rise to a fiduciary relationship. The same point also throws considerable doubt on Mr. Stubbs's submission that the necessary fiduciary relationship must

> originate in a consensual transaction. It was not the intention of the depositors or of the directors in *Sinclair* v. *Brougham* to create any relationship at all between the depositors and the directors as principals. Their object, which unfortunately disregarded the statutory limitations of the building society's powers, was to establish contractual relationships between the depositors and the society. In the circumstances, however, the depositors retained an equitable property in the funds they parted with, and fiduciary relationships arose between them and the directors. In the same way, I would suppose, a person who pays money to another under a factual mistake retains an equitable property in it and the conscience of that other is subjected to a fiduciary duty to respect his proprietary right. [Emphasis added.]

It is clear that if a fiduciary relationship was necessary for the plaintiff to be entitled to a proprietary tracing remedy, then such a relationship would be found. It is equally clear that this relationship has nothing to do with the imposition of obligations traditionally associated with fiduciaries. For another example, see *Goodbody v. Bank of Montreal* (1974), 47 D.L.R. (3d) 335 (Ont. H.C.), at p. 339, where a thief was considered to be a fiduciary so as to ground an equitable tracing order.

Professor Birks has described this approach as follows (Birks, "Restitutionary damages for breach of contract: *Snepp* and the fusion of law and equity," [1987] *Lloyd's Mar. & Com.L.Q.* 421, at p. 436):

> This approach moves the characterization of a relationship as fiduciary from the reasoning which justifies a conclusion to the conclusion itself: a relationship becomes fiduciary because a legal consequence traditionally associated with that label is generated by the facts in question.

Professor Weinrib has criticized it because ("The Fiduciary Obligation", *supra*, at p. 5):

> This definition in terms of the effect produced by the finding of a fiduciary relation begs the question in an obvious way: one cannot both define the relation by the remedy and use the relation as a triggering device for remedy.

Megarry V.-C. commented on this approach to identifying a fiduciary obligation in *Tito v. Waddell (No. 2)*, [1977] 3 All E.R. 129, at pp. 231-32. In that case, the argument made was that:

> . . . A was in a fiduciary position towards B if he was performing a special job in relation to B which affected B's property rights, at any rate if A was self-dealing. This . . . could be put in two ways. First, there was a fiduciary duty if there was a job to be performed and it was performed in a self-dealing way. Alternatively, there was a fiduciary duty if there was a job to perform, and equity then imposed a duty to perform it properly if there was any self-dealing.

He rejected this position as follows, at p. 232:

> I cannot see why the imposition of a statutory duty to perform certain functions, or the assumption of such a duty, should as a general rule impose fiduciary obligations, or even be presumed to impose any. Of course, the duty may be of such a nature as to carry with it fiduciary obligations: impose a fiduciary duty and you impose fiduciary obligations. But apart from such cases, it would be remarkable indeed if in each of the manifold cases in which statute imposes a duty, or imposes a duty relating to property, the person on whom the duty is imposed were thereby to be put into a fiduciary relationship with those interested in the property, or towards whom the duty could be said to be owed.
>
> . . .
>
> Furthermore, I cannot see that coupling the job to be performed with self-dealing in the performance of it makes any difference. If there is a fiduciary duty, the equitable rules about self-dealing apply: but self-dealing does not impose the duty. Equity bases its rules about self-dealing on some pre-existing fiduciary duty: it is a disregard of this pre-existing duty that subjects the self-dealer to the consequences of the self-dealing rules. I

> do not think that one can take a person who is subject to no pre-existing fiduciary duty and then say that because he self-deals he is thereupon subjected to a fiduciary duty.

Megarry V.-C. held in that case that there was no fiduciary relationship and so no breach of the fiduciary obligations that would have been imposed by finding such a relationship. Self-dealing would only have been a breach of fiduciary obligation if a fiduciary obligation existed. Megarry V.-C. rejected the notion that one can argue from a conclusion (there has been self-dealing) to a duty (therefore there is a fiduciary relationship) and then back to the conclusion (therefore there has been a breach of duty).

In my view, this third use of the term fiduciary, used as a conclusion to justify a result, reads equity backwards. It is a misuse of the term. It will only be eliminated, however, if the courts give explicit recognition to the existence of a range of remedies, including the constructive trust, available on a principled basis even though outside the context of a fiduciary relationship.

To recapitulate, the first class of fiduciary is not in issue in this appeal. It is not contended that all parties negotiating towards a joint venture are a class to which fiduciary obligations should presumptively attach. As will be clear from my discussion of the third usage of the term fiduciary, I am not prepared to hold that because a constructive trust is the appropriate remedy a fiduciary label therefore attaches, though I will deal later with why, even if the relationship is not fiduciary in any sense, a constructive trust may nonetheless be appropriate. The issue that remains for immediate discussion is whether the facts in this case, as found by the courts below,

support the imposition of a fiduciary obligation within the second category discussed above, and whether, acting as it did, Lac was in breach of the obligations thereby imposed.

In addressing this issue, some detailed consideration must be given to the analysis made by the Court of Appeal. Before that court, Lac was attacking the trial judge's conclusion that Lac was in breach of its fiduciary duty to act fairly and not to the detriment of Corona by acquiring the Williams property. I note that, in their discussions of this breach, neither court below spoke of Lac's duty not to acquire the property for its own account to the exclusion of Corona, but rather spoke of a duty not to acquire the property at all. For the reasons I have outlined in my discussion of breach of confidence, and for reasons which I will more fully outline later, I am of the view that the courts below were correct in their description of the duty owed.

The Court of Appeal agreed with the submission made by LAC that the law of fiduciary relations does not ordinarily apply to parties involved in commercial negotiations. Such negotiations are normally conducted at arm's length. They held, however, that in certain circumstances fiduciary obligations can arise, and it is a question of fact in each case whether the relationship of the parties, one to the other, is such as to create a fiduciary relationship. *United Dominions Corp. v. Brian Pty. Ltd.* (1985), 59 A.L.J.R. 676, was given as an example of where such an obligation might arise. In terms of the scheme I have outlined above, the Court of Appeal accepted that the first usage of "fiduciary" was not in issue, but that the second must be more closely examined.

Before undertaking that examination, the court made the following comments on the relationship between fiduciary law and the law of confidential information, at pp. 47-48:

> . . . the trial judge found that Corona imparted confidential information to LAC during the course of their negotiations. He recognized that the law regarding obligations imposed by the delivery of confidential information is distinct from the law imposing fiduciary duties and that it does not depend upon any special relationship between the parties. In *Canadian Aero Service Ltd. v. O'Malley* . . . [1974] S.C.R. 592 at p. 616, Laskin J. said for the court:
>
> > The fact that breach of confidence or violation of copyright may itself afford a ground of relief does not make either one a necessary ingredient of a successful claim for breach of fiduciary duty.
>
> That statement recognizes that the courts will provide relief for a breach of confidence in proper circumstances where there is no fiduciary relationship between the parties. On the other hand, a fiduciary relationship between parties may co-exist with a right of one of the parties to an obligation of confidence with respect to information of a confidential nature given by that party to the other party. It is indeed difficult to conceive of any fiduciary relationship where the right to confidentiality would not exist with respect to such information.
>
> In the case at bar, the trial judge concluded that the legal principles regarding the obligations imposed by the delivery of confidential information and the obligations imposed as a result of the existence of a fiduciary relationship are intertwined. We are of the opinion that he was correct in this conclusion and that the law of fiduciary relationships can apply to parties involved, at least initially, in arm's length commercial discussions. [Emphasis added.]

The Court of Appeal then discussed the several factors which in its view supported the finding of a fiduciary obligation. In doing so, they were specifically responding to Lac's submission that the correct approach is to ask "whether the relationship by law, custom or agreement is such that one party is obligated to demonstrate loyalty and avoid taking advantage for himself". In light of this submission to the court below, I must say that it lies ill in the mouth of Lac to now assert

before this Court that the custom or usage found by the courts below cannot as a matter of law give rise to fiduciary obligations. Were I not of the view that that submission is in error, I incline to think that Lac may be estopped by its conduct below from raising it in this Court.

The Court of Appeal relied on four main factors in upholding the imposition of the fiduciary obligation. First, Lac was a senior mining company and Corona a junior, and Lac had sought out Corona in order to obtain information and to discuss a joint venture. Second, the parties had arrived at a mutual understanding of how each would conduct itself in the course of their negotiations, were working towards a common objective and had in fact taken preliminary steps in the contemplated joint exploration and development venture. Third, Corona disclosed confidential information to Lac and Lac expected to receive that confidential information in the course of the negotiations. Finally, there was established by Lac's own evidence a custom, practice or usage in the mining industry that parties in serious negotiation to a joint venture not act to the detriment of the other, particularly with respect to the confidential information disclosed, and the parties had reached the stage in negotiations where such an industry practice applied. In all these circumstances, the Court of Appeal found that it was just and proper that a fiduciary relationship be found, and a legal obligation not to benefit at the expense of the other from information received in negotiations imposed. By acquiring the Williams property, Lac had breached this obligation.

While it is almost trite to say that a fiduciary relationship does not normally arise between arm's length commercial parties, I am of the view that the courts below correctly found a

fiduciary obligation in the circumstances of this case and correctly found Lac to be in breach of it. I turn then to a consideration of the factors which in this case support the imposition of that duty. These can conveniently be grouped under three headings, (1) trust and confidence, (2) industry practice and (3) vulnerability. As will be seen these factors overlap to some extent, but considered as a whole they support the proposition that Corona could reasonably expect Lac to not act to Corona's detriment by acquiring the Williams land, and that Corona's expectation should be legally protected.

Trust and Confidence

The relationship of trust and confidence that developed between Corona and Lac is a factor worthy of significant weight in determining if a fiduciary obligation existed between the parties. The existence of such a bond plays an important role in determining whether one party could reasonably expect the other to act or refrain from acting against the interests of the former. That said, the law of confidence and the law relating to fiduciary obligations are not coextensive. They are not, however, completely distinct. Indeed, while there may be some dispute as to the jurisdictional basis of the law of confidence, it is clear that equity is one source of jurisdiction: see *Saltman Engineering Co. v. Campbell Engineering Co.* (1948), 65 R.P.C. 203 (C.A.) In *Guerin v. The Queen*, *supra*, Dickson J. noted that the law of fiduciary obligations had its origin in the law of confidence. Professor Finn thought it was settled that confidential information, whether classified as property or not, will attract fiduciary law's protection provided the circumstances are such as to attract a duty of confidence: "The Fiduciary Principle", *supra*, at

p. 50. I agree with the view of both courts below that the law of confidence and the law of fiduciary obligations, while distinct, are intertwined.

In a claim for breach of confidence, Gurry tells us (*Breach of Confidence*, at pp. 161-62):

> . . . the court's concern is for the protection of a confidence which *has been created* by the disclosure of confidential information by the confider to the confidant. The court's attention is thus focused on the protection of the confidential information because it has been the medium for the creation of a relationship of confidence; its attention is *not* focused on the information as a medium by which a *pre-existing* duty is breached.

However, the facts giving rise to an obligation of confidence are also of considerable importance in the creation of a fiduciary obligation. If information is imparted in circumstances of confidence, and if the information is known to be confidential, it cannot be denied that the expectations of the parties may be affected so that one party reasonably anticipates that the other will act or refrain from acting in a certain way. A claim for breach of confidence will only be made out, however, when it is shown that the confidee has misused the information to the detriment of the confidor. Fiduciary law, being concerned with the exaction of a duty of loyalty, does not require that harm in the particular case be shown to have resulted.

There are other distinctions between the law of fiduciary obligations and that of confidence which need not be pursued further here, but among them I simply note that unlike fiduciary obligations, duties of confidence can arise outside a direct relationship, where for example a third party has received confidential information from a confidee in breach of the confidee's obligation

to the confidor: see *Liquid Veneer Co. v. Scott* (1912), 29 R.P.C. 639 (Ch.), at p. 644. It would be a misuse of the term to suggest that the third party stood in a fiduciary position to the original confidor. Another difference is that breach of confidence also has a jurisdictional base at law, whereas fiduciary obligations are a solely equitable creation. Though this is becoming of less importance, these differences of origin give to the claim for breach of confidence a greater remedial flexibility than is available in fiduciary law. Remedies available from both law and equity are available in the former case, equitable remedies alone are available in the latter.

The Court of Appeal characterized the relationship in the present case as one of "trust and cooperation". Lac and Corona were negotiating, and on the evidence of Sheehan, negotiating in good faith, towards a joint venture or some other business relationship. It was expected during these negotiations that Corona would disclose confidential information to Lac, and Corona did so. This was in conformity with the normal and usual practice in the mining industry. The evidence accepted by both courts below established a practice in the industry, known to Lac, that Lac would not use confidential information derived out of the negotiating relationship in a manner contrary to the interests of Corona. R. Holland J. found that it "must have been obvious" to Sheehan that he was receiving confidential information. In light of that finding, it should be apparent that the lowest possible significance can attach to the absence of discussions between the parties relating to confidentiality. Lac, in the view of the Court of Appeal, felt that it had some obligation to confirm areas of interest with Corona, and did so with respect to staking other property in the area. The trial judge, noting that Corona had "agreed" to Lac's staking in the area, thought that this gave rise to an "informal understanding as to how each

would conduct itself in anticipation of" the conclusion of a formal business relationship. In all these circumstances, I am of the view that both parties would reasonably expect that a legal obligation would be imposed on Lac not to act in a manner contrary to Corona's interest with respect to the Williams property.

Industry Practice

Both courts below placed considerable weight on the evidence of Allen to the effect that there was a "duty" not to act to the other party's detriment when in serious negotiations through the misuse of confidential information. For ease of reference, I set out his testimony here again:

> If one geologist goes to another geologist and says, are you interested in making some sort of a deal and between the two of them, they agree that they should consider seriously the possibility of making a deal, I think for a short period of time that while they are exploring that, that any transference of data would be -- I would hope the geologists would be competent enough to identify the difference between published, unpublished, confidential and so on but in the case that they weren't, there was just some exchange of conversation or physical data, then I would say that while both of them were seriously and honestly engaged in preparing a deal, that Lac and the other party would both have a duty towards each other not to hurt each other as the result of any information that was exchanged.

All of Lac's experts agreed with this statement. The trial judge, in reliance on this evidence said, at pp. 763, 769 and 770:

> THE EVIDENCE OF THE EXPERTS ON LIABILITY
>
> . . .

C. *Whether the conduct of the parties, according to the experts, imposed fiduciary obligations on Lac*

. . .

I conclude, following *Cunliffe-Owen*, *supra*, that there is a practice in the mining industry that imposes an obligation when parties are seriously negotiating not to act to the detriment of each other.

The Court of Appeal affirmed the conclusion that Corona had established a "custom or usage" in accordance with the principle set forth in *Cunliffe-Owen v. Teather & Greenwood*, [1967] 1 W.L.R. 1421 (Ch.), and that the trial judge was correct in applying that case.

Undoubtedly experts on mining practice are not qualified to give evidence on whether fiduciary obligations arose between the parties, as the existence of fiduciary obligations is a question of law to be answered by the court after a consideration of all the facts and circumstances. Thus, while the term "fiduciary" was not properly used by the trial judge in this passage, the evidence of the experts is of considerable importance in establishing standard practice in the industry from which one can determine the nature of the obligations which will be imposed by law.

It will be clear then, that in my view Lac's submissions relating to custom and usage were largely misdirected. The issue is not, as Lac submitted, what is "the legal effect of custom in the industry". Rather, it is what is the importance of the existence of a practice in the industry, established out of the mouth of the defendant and all its experts, in determining whether Corona

could reasonably expect that Lac would act or refrain from acting against the interests of Corona. Framed thus, the evidence is of significant importance.

I must at this point briefly advert to the law relating to custom and usage. Lac submitted that the Court of Appeal erred in using the terms "custom" and "usage" interchangeably. "Custom" in the sense of a rule having the force of law and existing since time immemorial is not in issue in this case. Indeed, Canadian law being largely of imported origin will rarely, if ever, evince that sort of custom. Custom in Canadian law must be given a broader definition. In any event, both courts below were not using the term in such a technical sense, as is clear from the fact that both substituted the term "practice" as a synonym. It is not necessary to decide, and I do not decide, whether a usage, properly established on the evidence, can give rise to fiduciary obligations. For these purposes I accept the definition of "usage" from *Halsbury's Laws of England*, vol. 12, 4th ed., para. 445, at p. 28, as follows:

> Usage may be broadly defined as a particular course of dealing or line of conduct generally adopted by persons engaged in a particular department of business life, or more fully as a particular course of dealing or line of conduct which has acquired such notoriety, that, where persons enter into contractual relationships in matters respecting the particular branch of business life where the usage is alleged to exist, those persons must be taken to have intended to follow that course of dealing or line of conduct, unless they have expressly or impliedly stipulated to the contrary.

I should mention that I have the greatest hesitation in saying that the only circumstances in which a legal obligation can arise out of a notorious business practice is when a contract results. The cases cited against implying terms in a contract have no relevance to negotiating practices.

When the parties have reduced their understandings to writing, it is obviously the proper course for courts to be extremely circumspect in adding to the bargain they have set down (see, for example, *Burns v. Kelly Peters & Associates Ltd.* (1987), 41 D.L.R. (4th) 577, *per* Lambert J.A., at p. 601; *Nelson v. Dahl* (1879), 12 Ch. D. 568 (C.A.); *Norwich Winterthur Insurance (Australia) Ltd. v. Con-Stan Industries of Australia Pty. Ltd.*, [1983] 1 N.S.W.L.R. 461 (C.A.) In any event, it is not, in my opinion, necessary to determine if the practice established by the evidence of Lac's executives and experts amounts to a legal usage. It is clear to me that the practice in the industry is so well known that at the very least Corona could reasonably expect Lac to abide by it. There is absolutely no substance to the submission of Lac that this practice is vague or uncertain. It is premised on the disclosure of confidential information in the context of serious negotiations. I do not find it necessary to define "serious", and will not interfere with the concurrent findings of the courts below. The industry practice therefore, while not conclusive, is entitled to significant weight in determining the reasonable expectations of Corona, and for that matter of Lac regarding how the latter should behave.

Vulnerability

As I indicated above, vulnerability is not, in my view a necessary ingredient in every fiduciary relationship. It will of course often be present, and when it is found it is an additional circumstance that must be considered in determining if the facts give rise to a fiduciary obligation. I agree with the proposition put forward by Wilson J. that when determining if new classes of relationship should be taken to give rise to fiduciary obligations then the vulnerability

of the class of beneficiaries of the obligation is a relevant consideration. Wilson J. put it as follows in *Frame v. Smith*, *supra*, at pp. 137-38:

> The third characteristic of relationships in which a fiduciary duty has been imposed is the element of vulnerability. This vulnerability arises from the inability of the beneficiary (despite his or her best efforts) to prevent the injurious exercise of the power or discretion combined with the grave inadequacy or absence of other legal or practical remedies to redress the wrongful exercise of the discretion or power. Because of the requirement of vulnerability of the beneficiary at the hands of the fiduciary, fiduciary obligations are seldom present in the dealings of experienced businessmen of similar bargaining strength acting at arm's length: see, for example, *Jirna Ltd. v. Mister Donut of Canada Ltd.* (1971), 22 D.L.R. (3d) 639 (Ont. C.A.), aff'd [1975] 1 S.C.R. 2. The law takes the position that such individuals are perfectly capable of agreeing as to the scope of the discretion or power to be exercised, i.e., any "vulnerability" could have been prevented through the more prudent exercise of their bargaining power and the remedies for the wrongful exercise or abuse of that discretion or power, namely damages, are adequate in such a case.

However, as I indicated, this case does not require a new class of relationships to be identified, but requires instead an examination of the specific facts of this case.

The Oxford English Dictionary, vol. 19, 2nd ed., at p. 786, defines "vulnerable" as follows:

> . . . That may be wounded; susceptible of receiving wounds or physical injury.
>
> . . . Open to attack or injury of a non-physical nature; *esp*., offering an opening to the attacks of raillery, criticism, calumny, etc.

Persons are vulnerable if they are susceptible to harm, or open to injury. They are vulnerable at the hands of a fiduciary if the fiduciary is the one who can inflict that harm. It is clear,

however, that fiduciary obligations can be breached without harm being inflicted on the beneficiary. *Keech v. Sandford* (1726), Sel. Cas. T. King 61, 25 E.R. 223, is the clearest example. In that case a fiduciary duty was breached even though the beneficiary suffered no harm and indeed could not have benefitted from the opportunity the fiduciary pursued. Beneficiaries of trusts, however, are a class that is susceptible to harm, and are therefore protected by the fiduciary regime. Not only is actual harm not necessary, susceptibility to harm will not be present in many cases. Each director of General Motors owes a fiduciary duty to that company, but one can seriously question whether General Motors is vulnerable to the actions of each and every director. Nonetheless, the fiduciary obligation is owed because, as a class, corporations are susceptible to harm from the actions of their directors.

I cannot therefore agree with my colleague, Sopinka J., that vulnerability or its absence will conclude the question of fiduciary obligation. As I indicated above, the issue should be whether, having regard to all the facts and circumstances, one party stands in relation to another such that it could reasonably be expected that that other would act or refrain from acting in a way contrary to the interests of that other. In any event, I would have thought it beyond argument that on the facts of this case Corona was vulnerable to Lac.

The argument to the contrary seems to be based on two propositions. First, Corona did not give up to Lac any power or discretion to affect its interests. Second, Corona could have protected itself by a confidentiality agreement, and the Court should not interfere if the parties

could have, but did not in fact protect themselves. In my view there is no substance to either of these arguments.

The first is rebutted by the facts. Lac would not have acquired the property but for the information received from Corona. Lac in fact acquired the property. In doing so it affected Corona's interests. All power and discretion mean in this context is the ability to cause harm. Clearly that is present in this case. Lac acquired a power or ability to harm Corona by obtaining the Williams property. Corona gave it that power by giving up information about the property and about Corona's intentions. Having regard to the well-established practice in the mining industry, Corona would have had no expectation that Lac would use this information to the detriment of Corona.

This leads to the second point. This Court should not deny the existence of a fiduciary obligation simply because the parties could have by means of a confidentiality agreement regulated their affairs. That, it seems to me, is an unacceptable proposition, particularly on the facts of this case. The concurrent findings below are that Sheehan was aware the information he was receiving was confidential information and that it was being received in circumstances of confidence. It is clear that a claim for breach of confidence is then available if the information is misused. Why one would then go and enter into a confidentiality agreement simply confirming what each party knows escapes me. I cannot understand why a claim for breach of confidence is available absent a confidentiality agreement, but a claim for breach of fiduciary duty is not. The fact that the parties could have concluded a contract to cover the

situation but did not in fact do so does not, in my opinion, determine that matter. Many claims in tort could be avoided through more prudent negotiation of a contract, but courts do not deny tort liability; see Gautreau, *supra*, at p. 11; *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147. The existence of an alternative procedure is only relevant in my mind if the parties would realistically have been expected to contemplate it as an alternative. It is useful here to once again refer to the evidence of Lac's experts. Dr. Robertson testified as follows:

> Q. Do large companies generally or typically make use of such agreements [confidentiality agreements]?
>
> A. They are not common. In the last five years they have become increasingly so. Even prospectors now ask large companies for confidentiality agreements.
>
> This whole process is data dissemination. They rarely have anything so highly confidential that a large company will trade away its right to do what it wants to do in return for, in essence, very little back. [Emphasis added.]

Dr. Derry testified to similar effect:

> Q. In 1981, in your view, how could Corona have protected itself if it both wanted to acquire more ground and it also wanted to allow the visit by Lac Minerals?
>
> A. It would be unusual, but I think it would have to ask the visitor to make some assurance, probably a written assurance, that he would not acquire ground or conflict with the interest of the owning company. [Emphasis added.]

The present litigation is, according to the evidence of Corona's witness Dr. Bragg, one of the reasons that confidentiality agreements are being used with increasing frequency. Where it is

not established that the entering of confidentiality agreements is a common, usual or expected course of action, this Court should not presume such a procedure, particularly when the law of fiduciary obligations can operate to protect the reasonable expectations of the parties. There is no reason to clutter normal business practice by requiring a contract.

In this case the vulnerability of Corona at Lac's hand is clearly demonstrated by the circumstances in which Lac acquired the Williams property. Even though the offer from Corona would have paid to Mrs. Williams $250,000 within three years plus a 3 percent net smelter return, Mrs. Williams accepted the offer from Lac which paid only half that return. It is nothing short of fiction to suggest that *vis-à-vis* third parties or each other Lac and Corona stood on an equal footing. Corona was a junior mining company which needed to raise funds in order to finance the development of its property. This is why Corona welcomed the overture of Lac in the first place. Lac was a senior mining company that had the ability to provide those funds. Indeed Lac used this as a selling point to Mrs. Williams when it advised her that it was "an exploration and development company with four gold mines in production and had been in the mining and exploration business for decades".

I conclude therefore that Corona was vulnerable to Lac. The fact that these are commercial parties may be a factor in determining what the reasonable expectations of the parties are, and thus it may be a rare occasion that vulnerability is found between such parties. It is, however, shown to exist in this case and is a factor deserving of considerable weight in the identification of a fiduciary obligation.

Conclusion on Fiduciary Obligations

Taking these factors together, I am of the view that the courts below did not err in finding that a fiduciary obligation existed and that it was breached. Lac urged this Court not to accept this finding, warning that imposing a fiduciary relationship in a case such as this would give rise to the greatest uncertainty in commercial law, and result in the determination of the rules of commercial conduct on the basis of *ad hoc* moral judgments rather than on the basis of established principles of commercial law.

I cannot accept either of these submissions. Certainty in commercial law is, no doubt, an important value, but it is not the only value. As Grange J. has noted ("Good Faith in Commercial Transactions," *Commercial Law: Recent Developments and Emerging Trends*, Special Lectures of the Law Society of Upper Canada, 1985, at p. 70:

> There are many limitations on the freedom of contract both in the common law and by statute. Every one of them carries within itself the seeds of debate as to its meaning or at least its applicability to a particular set of facts.

In any event, it is difficult to see how giving legal recognition to the parties' expectations will throw commercial law into turmoil.

Commercial relationships will more rarely involve fiduciary obligations. That is not because they are immune from them, but because in most cases, they would not be appropriately

imposed. I agree with this comment of Mason J. in *Hospital Products Ltd. v. United States Surgical Corp.*, *supra*, at pp. 456-57:

> There has been an understandable reluctance to subject commercial transactions to the equitable doctrine of constructive trust and constructive notice. But it is altogether too simplistic, if not superficial, to suggest that commercial transactions stand outside the fiduciary regime as though in some way commercial transactions do not lend themselves to the creation of a relationship in which one person comes under an obligation to act in the interests of another. The fact that in the great majority of commercial transactions the parties stand at arms' length does not enable us to make a generalization that is universally true in relation to every commercial transaction. In truth, every such transaction must be examined on its merits with a view to ascertaining whether it manifests the characteristics of a fiduciary relationship.

A fiduciary relationship is not precluded by the fact that the parties were involved in pre-contractual negotiations. That was made clear in the *United Dominions Corp.* case, *supra*, where the majority held, at p. 680, that:

> A fiduciary relationship can arise and fiduciary duties can exist between parties who have not reached, and who may never reach, agreement upon the consensual terms which are to govern the arrangement between them.

The fact that the relationship between the parties in that case was more advanced than in the case at bar does not affect the value of the conclusion. See also *Fraser Edmunston Pty. Ltd. v. A.G.T. (Qld) Pty. Ltd.*, Queensland S.C., (June 3, 1986, Williams J.), at p. 17. It is a question to be determined on the facts whether the parties have reached a stage in their relationship where their expectations should be protected. In this case the facts support the existence of a fiduciary

obligation not to act to the detriment of Corona's interest by acquiring the Williams property by using confidential information acquired during the negotiation process.

The argument on morality is similarly misplaced. It is simply not the case that business and accepted morality are mutually exclusive domains. Indeed, the Court of Appeal, after holding that to find a fiduciary relationship here made no broad addition to the law, a view I take to be correct, noted that the practice established by the evidence to support the obligation was consistent with "business morality and with encouraging and enabling joint development of the natural resources of the country". This is not new. Texts from as early as 1903 refer to the obligation of "good faith by partners in their dealings with each other extend[ing] to negotiations culminating in the partnership, although in advance of its actual creation" (Lindley, *A Treatise on the American Law Relating to Mines and Mineral Lands* (reprint of 2nd ed. 1903). In my view, no distinction should be drawn here between negotiations culminating in a partnership or a joint venture.

Remedy

The appropriate remedy in this case cannot be divorced from the findings of fact made by the courts below. As I indicated earlier, there is no doubt in my mind that but for the actions of Lac in misusing confidential information and thereby acquiring the Williams property, that property would have been acquired by Corona. That finding is fundamental to the determination of the appropriate remedy. Both courts below awarded the Williams property to Corona on payment

to Lac of the value to Corona of the improvements Lac had made to the property. The trial judge dealt only with the remedy available for a breach of a fiduciary duty, but the Court of Appeal would have awarded the same remedy on the claim for breach of confidence, even though it was of the view that it was artificial and difficult to consider the relief available for that claim on the hypothesis that there was no fiduciary obligation.

The issue then is this. If it is established that one party, (here Lac), has been enriched by the acquisition of an asset, the Williams property, that would have, but for the actions of that party been acquired by the plaintiff, (here Corona), and if the acquisition of that asset amounts to a breach of duty to the plaintiff, here either a breach of fiduciary obligation or a breach of a duty of confidence, what remedy is available to the party deprived of the benefit? In my view the constructive trust is one available remedy, and in this case it is the only appropriate remedy.

In my view the facts present in this case make out a restitutionary claim, or what is the same thing, a claim for unjust enrichment. When one talks of restitution, one normally talks of giving back to someone something that has been taken from them (a restitutionary proprietary award), or its equivalent value (a personal restitutionary award). As the Court of Appeal noted in this case, Corona never in fact owned the Williams property, and so it cannot be "given back" to them. However, there are concurrent findings below that but for its interception by Lac, Corona would have acquired the property. In *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161, at pp. 1202-03, I said that the function of the law of restitution "is to ensure that where a plaintiff has been deprived of wealth that is either in his possession or would have accrued for

his benefit, it is restored to him. The measure of restitutionary recovery is the gain 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.

That enrichment is also unjust, or unjustified, so that the plaintiff is entitled to a remedy. There is, in the words of Dickson J. in *Pettkus v. Becker*, [1980] 2 S.C.R. 834, at p. 848, an "absence of any juristic reason for the enrichment". The determination that the enrichment is "unjust" does not refer to abstract notions of morality and justice, but flows directly from the finding that there was a breach of a legally recognized duty for which the courts will grant relief. Restitution is a distinct body of law governed by its own developing system of rules. Breaches of fiduciary duties and breaches of confidence are both wrongs for which restitutionary relief is often appropriate. It is not every case of such a breach of duty, however, that will attract recovery based on the gain of the defendant at the plaintiff's expense. Indeed this has long been recognized by the courts. In *In re Coomber*, [1911] 1 Ch. 723, at pp. 728-29, Fletcher Moulton L.J. said:

> Fiduciary relations are of many different types; they extend from the relation of myself to an errand boy who is bound to bring me back my change up to the most intimate and confidential relations which can possibly exist between one party and another where the one is wholly in the hands of the other because of his infinite trust in him. All these are cases of fiduciary relations, and the Courts have again and again, in cases where there has been a fiduciary relation, interfered and set aside acts which, between persons in a wholly independent position, would have been perfectly valid. Thereupon in some minds there arises the idea that

> if there is any fiduciary relation whatever any of these types of interference is warranted by it. They conclude that every kind of fiduciary relation justifies every kind of interference. Of course that is absurd. The nature of the fiduciary relation must be such that it justifies the interference. There is no class of case in which one ought more carefully to bear in mind the facts of the case, when one reads the judgment of the Court on those facts, than cases which relate to fiduciary and confidential relations and the action of the Court with regard to them. [Emphasis added.]

In breach of confidence cases as well, there is considerable flexibility in remedy. Injunctions preventing the continued use of the confidential information are commonly awarded. Obviously that remedy would be of no use in this case where the total benefit accrues to the defendant through a single misuse of information. An account of profits is also often available. Indeed in both courts below an account of profits to the date of transfer of the mine was awarded. Usually an accounting is not a restitutionary measure of damages. Thus, while it is measured according to the defendant's gain, it is not measured by the defendant's gain at the plaintiff's expense. Occasionally, as in this case, the measures coincide. In a case quite relevant here, this Court unanimously imposed a constructive trust over property obtained from the misuse of confidential information: *Pre-Cam Exploration & Development Ltd. v. McTavish*, [1966] S.C.R. 551. More recently, a compensatory remedy has been introduced into the law of confidential relations. Thus in *Seager v. Copydex, Ltd. (No. 2)*, [1969] 2 All E.R. 718 (C.A.), an inquiry was directed concerning the market value of the information between a willing buyer and a willing seller. The defendant had unconsciously plagiarized the plaintiff's design. In those circumstances it would obviously have been unjust to exclude the defendant from the market when there was room for more than one participant.

I noted earlier that the jurisdictional base for the law of confidence is a matter of some dispute. In the case at bar however, it is not suggested that either the contractual or property origins of the doctrine can be used to found the remedy. Thus while there can be considerable remedial flexibility for such claims, it was not argued that the Court may not have jurisdiction to award damages as compensation and not merely in lieu of an injunction in the exercise of its equitable jurisdiction, and since I am of the view that a constructive trust is in any event the appropriate remedy, I need not consider the question of jurisdiction further.

In view of this remedial flexibility, detailed consideration must be given to the reasons a remedy measured by Lac's gain at Corona's expense is more appropriate than a remedy compensating the plaintiff for the loss suffered. In this case, the Court of Appeal found that if compensatory damages were to be awarded, those damages in fact equalled the value of the property. This was premised on the finding that but for Lac's breach, Corona would have acquired the property. Neither at this point nor any other did either of the courts below find Corona would only acquire one half or less of the Williams property. While I agree that, if they could in fact be adequately assessed, compensation and restitution in this case would be equivalent measures, even if they would not, a restitutionary measure would be appropriate.

The essence of the imposition of fiduciary obligations is its utility in the promotion and preservation of desired social behaviour and institutions. Likewise with the protection of confidences. In the modern world the exchange of confidential information is both necessary and expected. Evidence of an accepted business morality in the mining industry was given by the

defendant, and the Court of Appeal found that the practice was not only reasonable, but that it would foster the exploration and development of our natural resources. The institution of bargaining in good faith is one that is worthy of legal protection in those circumstances where that protection accords with the expectations of the parties. The approach taken by my colleague, Sopinka J., would, in my view, have the effect not of encouraging bargaining in good faith, but of encouraging the contrary. If by breaching an obligation of confidence one party is able to acquire an asset entirely for itself, at a risk of only having to compensate the other for what the other would have received if a formal relationship between them were concluded, the former would be given a strong incentive to breach the obligation and acquire the asset. In the present case, it is true that had negotiations been concluded, Lac could also have acquired an interest in the Corona land, but that is only an expectation and not a certainty. Had Corona acquired the Williams property, as they would have but for Lac's breach, it seems probable that negotiations with Lac would have resulted in a concluded agreement. However, if Lac, during the negotiations, breached a duty of confidence owed to Corona, it seems certain that Corona would have broken off negotiations and Lac would be left with nothing. In such circumstances, many business people, weighing the risks, would breach the obligation and acquire the asset. This does nothing for the preservation of the institution of good faith bargaining or relationships of trust and confidence. The imposition of a remedy which restores an asset to the party who would have acquired it but for a breach of fiduciary duties or duties of confidence acts as a deterrent to the breach of duty and strengthens the social fabric those duties are imposed to protect. The elements of a claim in unjust enrichment having been made out, I have found no reason why the imposition of a restitutionary remedy should not be granted.

This Court has recently had occasion to address the circumstances in which a constructive trust will be imposed in *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426. There, the Chief Justice discussed the development of the constructive trust over 200 years from its original use in the context of fiduciary relationships, through to *Pettkus v. Becker*, *supra*, where the Court moved to the modern approach with the constructive trust as a remedy for unjust enrichment. He identified that *Pettkus v. Becker*, *supra*, set out a two-step approach. First, the Court determines whether a claim for unjust enrichment is established, and then, secondly, examines whether in the circumstances a constructive trust is the appropriate remedy to redress that unjust enrichment. In *Hunter Engineering Co. v. Syncrude Canada Ltd.*, a constructive trust was refused, not on the basis that it would not have been available between the parties (though in my view it may not have been appropriate), but rather on the basis that the claim for unjust enrichment had not been made out, so no remedial question arose.

In the case at hand, the restitutionary claim has been made out. The Court can award either a proprietary remedy, namely that Lac hand over the Williams property, or award a personal remedy, namely a monetary award. While, as the Chief Justice observed, "The principle of unjust enrichment lies at the heart of the constructive trust": see *Pettkus v. Becker*, at p. 847, the converse is not true. The constructive trust does not lie at the heart of the law of restitution. It is but one remedy, and will only be imposed in appropriate circumstances. Where it could be more appropriate than in the present case, however, it is difficult to imagine.

The trial judge assessed damages in this case at $700,000,000 in the event that the order that Lac deliver up the property was not upheld on appeal. In doing so he had to assess the damages in the face of evidence that the Williams property would be valued by the market at up to 1.95 billion dollars. Before us there is a cross-appeal that damages be reassessed at $1.5 billion. The trial judge found that no one could predict future gold prices, exchange rates or inflation with any certainty, or even on the balance of probabilities. Likewise he noted that the property had not been fully explored and that further reserves may be found. The Court of Appeal made the following comment, at p. 59, with which I am in entire agreement:

> . . . there is no question but that gold properties of significance are unique and rare. There are almost insurmountable difficulties in assessing the value of such a property in the open market. The actual damage which has been sustained by Corona is virtually impossible to determine with any degree of accuracy. The profitability of the mine, and accordingly its value, will depend on the ore reserves of the mine, the future price of gold from time to time, which in turn depends on the rate of exchange between the U.S. dollar and Canadian dollar, inflationary trends, together with myriad other matters, all of which are virtually impossible to predict.

To award only a monetary remedy in such circumstances when an alternative remedy is both available and appropriate would in my view be unfair and unjust.

There is no unanimous agreement on the circumstances in which a constructive trust will be imposed. Some guidelines can, however, be suggested. First, no special relationship between the parties is necessary. I agree with this comment of Wilson J. in *Hunter Engineering Co. v. Syncrude Canada Ltd.*, *supra*, at p. 519:

> Although both *Pettkus v. Becker* and *Sorochan v. Sorochan* were "family" cases, unjust enrichment giving rise to a constructive trust is by no means confined to such cases: see *Deglman v. Guaranty Trust Co.*, [1954] S.C.R. 725. Indeed, to do so would be to impede the growth and impair the flexibility crucial to the development of equitable principles.

As I noted earlier, the constructive trust was refused in *Hunter Engineering Co. v. Syncrude Canada Ltd.*, not because the parties did not stand in any special relationship to one another, but because the claim for unjust enrichment was not made out. Similarly, in *Pre-Cam Exploration & Development Ltd. v. McTavish, supra*, it cannot be said that the parties stood in a "special relationship" to one another, but a constructive trust was nonetheless awarded. In *Chase Manhattan Bank N.A. v. Israel-British Bank (London) Ltd., supra*, a constructive trust was imposed, but to describe the banks as standing in a special relationship one to the other would be as much of a fiction as describing them as fiduciaries. Insistence on a special relationship would undoubtedly lead to that same sort of reasoning from conclusions. Courts, coming to the conclusion that a proprietary remedy is the only appropriate result will be forced to manufacture "special relationships" out of thin air, so as to justify their conclusions. In my view that result can and should be avoided.

Secondly, it is not the case that a constructive trust should be reserved for situations where a right of property is recognized. That would limit the constructive trust to its institutional function, and deny to it the status of a remedy, its more important role. Thus, it is not in all cases that a pre-existing right of property will exist when a constructive trust is ordered. The imposition of a constructive trust can both recognize and create a right of property. When a

constructive trust is imposed as a result of successfully tracing a plaintiff's asset into another asset, it is indeed debatable which the Court is doing. Goff and Jones, *The Law of Restitution* (3rd ed. 1986), at p. 78, take the position that:

> . . . the question whether a restitutionary proprietary claim should be granted should depend on whether it is just, in the particular circumstances of the case, to impose a constructive trust on, or an equitable lien over, particular assets, or to allow subrogation to a lien over such assets.
>
> It is the nature of the plaintiff's claim itself which is critical in determining whether a restitutionary proprietary claim should be granted; the extent of that claim is a different matter, which should be dependent upon the defendant's knowledge of the true facts. There are certain claims which must always be personal. Such are claims for services rendered under an ineffective contract; the plaintiff is then in no different position from any unsecured creditor. In contrast there are other claims, for example, those arising from payments made under mistake, compulsion or another's wrongful act, where a restitutionary proprietary claim should presumptively be granted, although the court should always retain a discretion whether to do so or not.

In their view, a proprietary claim should be granted when it is just to grant the plaintiff the additional benefits that flow from the recognition of a right of property. It is not the recognition of a right of property that leads to a constructive trust. It is not necessary, therefore, to determine whether confidential information is property, though a finding that it was would only strengthen the conclusion that a constructive trust is appropriate. This is the view of Fridman and McLeod, *Restitution*, at p. 539, where they say:

> . . . there appears to be no doubt that a fiduciary who has consciously made use of confidential information for private gain will be forced to account for the entire profits by holding such profits made from the use of the confidential information on a constructive trust for the beneficiary-estate. The proprietary remedy flows naturally from the conclusion that the

> information itself belonged to the beneficiary and there has been no transaction effective to divest his rights over the property.

I do not countenance the view that a proprietary remedy can be imposed whenever it is "just" to do so, unless further guidance can be given as to what those situations may be. To allow such a result would be to leave the determination of proprietary rights to "some mix of judicial discretion . . . subjective views about which party `ought to win' . . . , and `the formless void of individual moral opinion'", *per* Deane J. in *Muschinski v. Dodds* (1985), 160 C.L.R. 583, at p. 616.

As Deane J. further noted, at p. 616:

> Long before Lord Seldon's anachronism identifying the Chancellor's foot as the measure of Chancery relief, undefined notions of "justice" and what was "fair" had given way in the law of equity to the rule of ordered principle which is of the essence of any coherent system of rational law. The mere fact that it would be unjust or unfair in a situation of discord for the owner of a legal estate to assert his ownership against another provides, of itself, no mandate for a judicial declaration that the ownership in whole or in part lies, in equity, in that other . . .

Much of the difficulty disappears if it is recognized that in this context the issue of the appropriate remedy only arises once a valid restitutionary claim has been made out. The constructive trust awards a right in property, but that right can only arise once a right to relief has been established. In the vast majority of cases a constructive trust will not be the appropriate remedy. Thus, in *Hunter Engineering Co. v. Syncrude Canada Ltd.*, *supra*, had the restitutionary

claim been made out, there would have been no reason to award a constructive trust, as the plaintiff's claim could have been satisfied simply by a personal monetary award; a constructive trust should only be awarded if there is reason to grant to the plaintiff the additional rights that flow from recognition of a right of property. Among the most important of these will be that it is appropriate that the plaintiff receive the priority accorded to the holder of a right of property in a bankruptcy. More important in this case is the right of the property holder to have changes in value accrue to his account rather than to the account of the wrongdoer. Here as well it is justified to grant a right of property since the concurrent findings below are that the defendant intercepted the plaintiff and thereby frustrated its efforts to obtain a specific and unique property that the courts below held would otherwise have been acquired. The recognition of a constructive trust simply redirects the title of the Williams property to its original course. The moral quality of the defendants' act may also be another consideration in determining whether a proprietary remedy is appropriate. Allowing the defendant to retain a specific asset when it was obtained through conscious wrongdoing may so offend a court that it would deny to the defendant the right to retain the property. This situation will be more rare, since the focus of the inquiry should be upon the reasons for recognizing a right of property in the plaintiff, not on the reasons for denying it to the defendant.

Having specific regard to the uniqueness of the Williams property, to the fact that but for Lac's breaches of duty Corona would have acquired it, and recognizing the virtual impossibility of accurately valuing the property, I am of the view that it is appropriate to award Corona a constructive trust over that land.

Before turning to the cross-appeal, I must make brief reference to the relevance of the fact that Corona entered an arrangement with Teck under which the latter not only obtained an interest in the Corona property, but also an interest in the result of this lawsuit. Since I view this case as one where a restitutionary claim has been made out, the position of Teck is irrelevant. The focus must be on the enrichment Lac received at Corona's expense. That enrichment was found as a fact to be the Williams property. Subsequent to acquiring it, Corona would likely have entered a joint venture agreement with Lac. Lac has no one to blame but itself for that joint venture not coming about. Only because of Lac's breach of duty did the arrangement with Teck result. The fact that it is not proved that Teck demanded a share of the litigation as the price for joining with Corona is irrelevant. It cannot be said that such an agreement was unreasonable in the circumstances. Given Lac's breach of duty to Corona, and Corona's awareness of that breach, there is no way that Lac would ever have acquired an interest in the Williams property. Corona was entitled to cease negotiating with Lac and pursue other opportunities.

If, however, this case is viewed, as my colleague, Sopinka J., views it, as a case of compensation, then the position of Teck is relevant. Corona had to enter into an agreement with someone. Corona contemplated eventually owning approximately a one half interest in the developed properties. To award only an estimated value of a one half interest in the property when that half will be further subdivided is, in essence, to award Corona only a one quarter interest in the Williams property. As I am of the view that damages are not an appropriate award, I need not discuss this matter further.

The Cross-Appeal

I can briefly deal with the cross-appeal. Lac has been enriched at the expense of Corona by acquiring the Williams property. Having acquired that property in breach of a duty of confidence and in breach of a fiduciary obligation, that enrichment is unjustified. Likewise, however, Corona will receive an enrichment when Lac hands over the property, in the amount of the value of the improvement of the land to Corona. That value is equal to what would have been spent by Corona to develop both properties, less what Corona in fact spent. The trial judge made a $50,000,000 downward adjustment to the amount Lac spent, directing a reference to determine the exact amount in the event the parties disputed the adjustment. I would affirm that award. The three elements of a claim for restitution are made out, namely there is an enrichment (the mine), that enrichment accrued to Corona at Lac's expense, and the enrichment is unjustified. The enrichment is not justified since, on the assumption that Corona had acquired the Williams property, it would of necessity have had to expend funds to develop the mine. In these circumstances, Lac is entitled to a restitutionary remedy, namely a lien on the Williams property to the extent that Corona was saved a necessary expenditure.

In view of this conclusion it becomes unnecessary to address the contingent cross-appeal by which Corona asked that damages be reassessed at $1.5 billion. I would dismiss the appeal with costs and dismiss the cross-appeal with costs.

Appeal and cross-appeal dismissed with costs, MCINTYRE *and* SOPINKA JJ. *dissenting in part.*

Solicitors for the appellant: Fraser & Beatty, Toronto.

Solicitors for the respondent: McCarthy & McCarthy, Toronto.