



No. S-084670  
Vancouver Registry

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

BETWEEN:

**TNR GOLD CORP. and SOLITARIO ARGENTINA S.A.**

PLAINTIFFS

AND:

**MIM ARGENTINA EXPLORACIONES S.A., MINERA ANDES INC.,  
MINERA ANDES S.A., LOS AZULES MINING INC.,  
and ANDES CORPORACION MINERA S.A.**

DEFENDANTS

**NOTICE OF APPLICATION**

Name of applicants: TNR Gold Corp. and Solitario Argentina S.A.

To: MIM Argentina Exploraciones S.A., Minera Andes Inc., Minera Andes S.A., Los Azules Mining Inc., and Andes Corporacion Minera S.A.

TAKE NOTICE that an application will be made by the applicants to the presiding judge or master at the courthouse at 800 Smithe Street, Vancouver, BC on April 7, 2011 at 9:45 a.m. for the order set out in Part 1 below.

**Part 1: ORDERS SOUGHT**

**A. *Document Production Regarding Exercise of Option - Rule 7-1(13) and (14)***

1. An order that the defendants produce amended lists of documents which include all documents relating to the April 23, 2007 purported exercise by the defendant MIM Argentina Exploraciones S.A. of its option under the May 15, 2004 Exploration and Option Agreement, including (a) all underlying expense documentation used by the defendants in the calculation of the table attached to the October 5, 2006 letter from Xstrata Copper to Solitario Argentina S.A.; and (b) all communications by and among

individuals who compiled and calculated the expenses said to have been incurred by MIM Argentina Exploraciones S.A. to entitle it to exercise the option.

***B. Claims of Privilege Over Documents – Rule 7-1(7), (14) and (20)***

2. An order that the defendants produce amended lists of documents within 21 days containing more detailed descriptions of the Schedule B documents which are undated, and those which are dated between March 2001 – May 2007, so that, without revealing the information that is privileged, the applicants can assess the validity of the claims of privilege.
3. An order that the following partially redacted documents produced by the defendant MIM Argentina Exploraciones S.A. be placed before the court so that the validity of the claims for privilege may be decided: documents commencing with page numbers MIM009515; MIM011120; MIM010347; MIM008325; MIM004201; MIM01524; MIM003008; MIM008373; MIM010358 and MIM008304.
4. In the alternative to order 2, above, an order that the defendants produce all of their Schedule B documents to the court for inspection so that the validity of the claims of privilege may be decided.

***C. Amendment of the Notice of Civil Claim – Rule 6-1(b)***

5. TNR Gold Corp. and Solitario Argentina S.A. be given leave to file an Amended Notice of Civil Claim in the form attached as hereto as Schedule A.

***D. Adjournment of Trial Date or, Alternatively, Extensions of Time – Rule 12-1(9)***

6. An order that the trial of this matter be adjourned to a date to be set by the registry in coordination with counsel schedules.
7. Alternatively, the following extensions of time be granted: production of expert reports by May 1, 2011 and completion of discoveries by May 30, 2011.

## Part 2: FACTUAL BASIS

### Overview of the Claims

1. In the late 1980s, Solitario acquired certain mineral and exploration rights in an area known as Los Azules, in the Province of San Juan, in Argentina (the "Property"). The Property contains what is now known to be a significant copper deposit.
2. On May 15, 2003, Solitario and a company named MIM Argentina Exploraciones S.A. ("MIM") agreed to terms and conditions regarding the Property in a Letter of Understanding. MIM is a wholly owned subsidiary of Xstrata, a multinational mining conglomerate.

Webb Affidavit, Exhibit A (Letter of Understanding)

3. In the Letter of Understanding, Solitario sold an option to MIM to acquire a 100% interest in the Property which could be triggered after MIM had expended \$1 million worth of exploration. Under the agreement, Solitario retained a "back-in" right (which is a right to re-acquire an interest in the Property) which could be exercised after a feasibility study had been completed. The purpose of linking the back-in right to a feasibility study was because a junior mining company such as Solitario or TNR Gold would normally require a feasibility study to obtain financing to buy back an interest in the property, and a feasibility study would provide a lender with some comfort as to the value of the property for which financing was being sought. Solitario's back-in right was correctly described in clause 10 of the Letter of Understanding as follows (in which Solitario is named "SA"):

10. Back-in Right: SA will have the right to buy back equity up to the level of 25% of the Property at any time within 120 days of the completion of a feasibility study on any part of the Property, on the following basis:
  - a) By paying MIM two (2) times the corresponding percentage proportion of MIM's actual expenditures (e.g. should MA [*sic* SA] seek to purchase back to 25% from 0% equity it would pay MIM 2 times 25% of MIM's actual expenditure).

- b) Actual expenditures will refer only to work carried out within SA properties and any equity purchased will only be equity in SA properties.
  - c) MIM's expenditures will be calculated up to the time SA indicates unequivocally that it will exercise this Back-in Right.
4. Although MIM committed (in clause 15 of the Letter of Understanding) to preparing a full draft agreement within 90 days of the Letter of Understanding being accepted, Solitario and MIM operated under the Letter of Understanding for approximately a year, and a full agreement was not signed until approximately May 15, 2004 (the "MIM-Solitario Option Agreement").

Webb Affidavit, Exhibit B (Exploration and Option Agreement)

5. During the final exchange of the draft of what became the MIM-Solitario Option Agreement, MIM unilaterally changed the wording of the back-in provision by inserting the words "... if, within 36 months of exercising the Option..." at the beginning of the back-in clause (the "36-month restriction") so that the re-drawn back-in provision read as follows in the agreement (in which MIM is referred to as "Xstrata"):

#### 7. **BACK-IN RIGHT**

7.1 If, within 36 months of exercising the Option, Xstrata completes a feasibility study on any part of the Property, Xstrata must notify Solitario, and Solitario will have the right to elect to "buy back" up to a maximum 25% equity in the Property at any time within 120 days of receiving the said notification (the "**Back-in Right**") by giving written notice to Xstrata of the exercise of the Back-in Right. (emphasis added)

6. In other respects, the drafts leading to the MIM-Solitario Option Agreement reflected what the parties had agreed to, consistent with the spirit of the Letter of Understanding.
7. Solitario and MIM never discussed the 36-month restriction inserted unilaterally by MIM and it was included in lengthy blacklined text along with various non-substantial changes. In the result, those reviewing the agreement for Solitario missed noticing the change created by the 36-month restriction before it signed the full agreement.

8. The 36-month restriction, if part of the agreement, effectively destroys the commercial purpose of the back-in provision. It would mean that so long as MIM chose not to complete a feasibility study within 36 months of exercising the option, Solitario would lose any ability to realize its 25% interest in the Property, unless it was able to waive the completion of a feasibility study within the 36 month period and exercise the back-in right before the feasibility of a mine was known.
9. Solitario first noticed the 36-month restriction in November 2007 and in August 2008, it brought a claim for rectification.
10. In addition to rectification, Solitario says that if the 36-month restriction is enforceable, which is denied, it was an implied term of the MIM-Solitario Option Agreement that MIM would exercise its best efforts to complete a feasibility study within 36 months of exercising its option. MIM made no such efforts.
11. In 2005, MIM and an Argentinian company named Minera Andes S.A. and its Canadian parent, Minera Andes Inc., began discussing a proposal whereby Minera Andes would explore all of MIM's properties in the area and MIM would retain a contractual right to back-in to the project.
12. In May 2006, Minera Andes and MIM decided that they would attempt to extinguish Solitario's interest in the Property by quickly exercising MIM's option to commence the tolling of the 36 month restriction, yet neither MIM nor Minera Andes would take steps to complete a feasibility study within that period. In this way, Minera Andes and MIM hoped to prevent Solitario from being able to back-in to the project.

Webb Affidavit, Exhibit P

13. In a letter dated October 5, 2006, MIM gave notice to Solitario that it had spent over \$1 million in exploring the Property and was therefore entitled to exercise its option under the MIM-Solitario Option Agreement. On April 23, 2007, MIM gave notice to Solitario that it was exercising the option. That meant that if the 36-month restriction applied, Solitario's back-in had to be exercised by close of business on April 23, 2010.

14. On November 2, 2007, MIM entered into an agreement with Minera Andes S.A. (the MIM-MASA Option Agreement”) whereby MIM transferred its interest in the Property to Minera Andes, while retaining a right to back-in to 51% of the development of the project, and alternatively, a right of first refusal over any future disposition by Minera Andes of the Property. Solitario, believing that MIM and Minera Andes were acting in all parties’ interests to explore the Property and advance its potential, consented to MIM entering into an agreement with Minera Andes, although it was not advised of the specific terms thereof.
15. On May 29, 2009, Minera Andes S.A. completed certain obligations under the MIM-MASA Option Agreement and acquired from MIM 100% of the Property (subject to Solitario’s right to back-in), and thereby triggered a 90-day period by the end of which MIM had to elect to exercise its right to back-in or elect to take a right of first refusal over any disposition of the project.
16. By the expiry of the 90 day period, MIM had chosen not to deliver either a back-in notice or a notice to maintain a right of first refusal. As a result, Minera Andes S.A. held 100% of the Property subject only to Solitario’s right to back-in.
17. In October 2009, Minera Andes S.A. completed an assignment of its interest in the Property to its subsidiaries Los Azules Mining Inc. and Andes Corporacion Minera S.A.
18. In March 2010, Solitario informed Minera Andes that it was contemplating waiving the production of a feasibility study and exercising its right to back-in before April 23, 2010, which was 36 months from MIM’s purported exercise of the option.
19. In response, before any back-in notice was issued by Solitario, Minera Andes SA and its subsidiaries commenced an action on April 1, 2010 seeking a declaration that any back-in notice issued by Solitario would be a nullity.
20. On April 22, 2010, Solitario issued a back-in notice to MIM and the Minera Andes companies waiving the production of a feasibility study as a promissory condition for the sole benefit of Solitario, posting \$5 million in trust for the exercise, and electing to back-

in to the Property for a 25% interest. In a letter dated April 26, 2010, the Minera Andes companies rejected Solitario's back-in notice.

21. In the fall of 2010, as detailed below, the Minera Andes companies were joined to the original action and the two actions were joined for a four week trial commencing June 20, 2011.

**The Status of the Proceedings**

22. The steps that have been completed in the proceeding to date are as follows:

June 30, 2008	Writ of Summons in the Solitario Action filed over ownership of a property adjacent to the Property called Escorpio IV
August 8, 2008	Writ of Summons in the Solitario Action amended to claim rectification
October 27, 2008	Statement of Claim in the Solitario Action filed
April 17, 2009	List of Documents produced by Solitario and TNR Gold (75 documents)
May 28, 2009	List of Documents produced by MIM (256 documents)
May 2009	Minera Andes exercises its option under the MIM-MAI Option Agreement
October 2009	MIM chooses not to back-in and fails to take a right of first refusal
October 28, 2009	Supplemental List of Documents produced by MIM (67 documents)
December 7, 2009	Supplemental List of Documents produced by Solitario and TNR Gold ( 19 documents)

December 9, 2009	Discovery of TNR's Paul Chung by MIM
March 1, 2010	Responses to outstanding requests from the discovery of Paul Chung delivered to MIM
April 1, 2010	The Minera Andes companies commence an action against Solitario to prevent a back-in notice from being issued
April 23, 2010	Solitario and TNR issue a back-in notice
April 26, 2010	The Minera Andes companies reject Solitario's back-in notice
May 11, 2010	Solitario and TNR amend their Statement of Defence in the Minera Andes Action and issue a counterclaim against Minera Andes and MIM.
May 2010	Solitario and TNR advise the Minera Andes companies that they will be seeking to add them to the Solitario Action. The amendments are made by consent and the trial date, then set for September 27 - October 8, 2010, is adjourned.
September 16, 2010	The consent order is filed for the Minera Andes companies to be added to the Solitario Action and the two actions are joined for hearing.
September 28, 2010	A trial date for the joined actions is set for June 20 – July 15, 2011
October 14, 2010	The Minera Andes companies issue third party notices to lawyers at Armstrong Simpson, the lawyers who represented TNR and Solitario between 2004-2008, and bring an application to join an unserved writ issued by Solitario and TNR against its lawyers with the other two actions. Armstrong Simpson, with TNR and Solitario's support, bring a motion to strike the third

	party notices and oppose joinder of the actions.
December 18, 2010	An Amended List of Documents is delivered by Solitario and TNR (adding 55 documents, most of which were already publicly disclosed on Sedar). Claims for privilege are particularized in Part 4 of the list.
December 18, 2010	A List of Documents is produced by the Minera Andes companies. 640 documents are listed in Part 1 of the list. In Part 4 of the list, privilege is claimed over 4,648 documents.
December 28, 2011	The Minera Andes companies bring an application to amend their Response to Civil Claim and Counterclaim
January 13, 2011	The applications to (a) strike the third party notices, (b) join all of the actions for hearing, and (c) amend Minera Andes' pleadings are heard before Mr. Justice Greycastle
February 18, 2011	An Amended List of Documents is produced by MIM (821 new documents) including the 2004 file from MIM's lawyers in Australia. In Part 4 of its list, MIM claims privilege over 660 documents.
February 28, 2011	The decision of Mr. Justice Greycastle is handed down, granting the amendments, granting the application to strike and dismissing the joinder application.
March 7, 2011	An Amended List of Documents is produced by the Minera Andes companies containing 1,554 new documents in Part 1. In Part 4 of the list, Minera Andes claims privilege over an additional 836 documents, bring the total privilege claim to 5,484 documents.

March 11, 2011	Solitario demands production of additional documents relating to whether MIM's exercise of its option on April 23, 2007 was valid. No documents are produced.
March 14 and 16, 2011	Gary Schellenberg of TNR is examined for discovery by the Minera Andes companies. 89 requests are left on the record by Minera Andes.
March 25, 2011	Minera Andes' amended Response and Counterclaim have yet to be filed.
April 12-13, 2011	MIM has set an examination for discovery of TNR's Gary Schellenberg.
April 14, 2011	MIM has set the continuation of its examination for discovery of TNR's Paul Chung.
April 23-30, 2011	Proposed dates for discovery of Minera Andes' Allen Ambrose
May 2011	Proposed dates for discovery of MIM's Carl Hallion
June 20 - July 15, 2011	Trial Date

**Part 3: LEGAL BASIS**

**A. Document Production Regarding April 23, 2007 Exercise of Option**

23. Among the documents disclosed by the defendants are emails indicating that MIM may not have actually spent the necessary funds to exercise the option but nevertheless in October 2006 informed Solitario that it had. This has led TNR and Solitario to believe that MIM, with Minera Andes' assistance, breached the MIM-Solitario Option Agreement and improperly purported to exercise the option when MIM had not met the conditions for doing so. The basis of this belief is set out below.
24. In 2006, MIM and Minera Andes decided that they would attempt to "take out" Solitario's interest in the Property. This discussion began in May 2006 as reflected in an email from Allen Ambrose of Minera Andes to Carl Hallion of MIM:

*"Next we should look at our alternatives to take out the Solitario agreement. I looked at the agreement briefly over the weekend and if I read it correctly their back-in is pretty soft since they appear to only have the right to exercise if Xstrata completes a feasibility study in three years from the date of notice. To trigger the start of the notice period now, we would have to make the next payment of \$160,000 and a \$250,000 payment giving them notice to start the clock now."*

Webb Affidavit, Exhibit P

25. This plan was further reflected in a September 27, 2006 email exchange among Xstrata employees, where Xstrata's Steve Brown wrote to Carl Hallion: *"Yes, taking Solitario out of the game is a good idea. All we have to do now is not complete a feasibility study within the next three years!!"*

Webb Affidavit, Exhibit P

26. Similarly, in an October 2006 email from Carl Hallion of MIM to Allen Ambrose of Minera Andes, Hallion stated, *"After exercising the option this month the only residual interest on Solitario's behalf is the 3 year Back-in right. Given it will be virtually impossible to complete a feasibility study in that time frame there will be no residual right exercised by Solitario once the option has been exercised"*.

Webb Affidavit, Exhibit P

27. The exercise of the option required, however, a \$1 million expenditure of funds toward the exploration of the property. By the fall of 2006, MIM was far short of \$1 million in expenditures. It had incurred some expenses exploring the property in 2003 and 2004 and, according to its assertions, spent only \$570,906. No drilling work had been done on the property in 2005. In 2006, Minera Andes had conducted an exploration program on its property immediately to the south of MIM's properties, and had also done some exploration work on MIM's properties. To reach the \$1 million of expenditures required to exercise the Solitario option, MIM and Minera Andes decided to allocate Minera Andes expenditures as being MIM's work. Communications to that end are appended as Exhibit Q to the Affidavit of Ms. Webb and include the following:

**June 19, 2006 email** from Minera Andes' Allen Ambrose to MIM's Carl Hallion stating that Minera Andes had drilled 1574.15 metres on Xstrata's land.

**July 13, 2006 email** from Allen Ambrose to Carl Hallion stating, "*as we discussed before [likely referring to an exchange of emails on June 19 and June 27], I believe the simplest way to do this would be to prorate program expenditures on each portion of the Los Azules property by taking the footage of the core drilling on each property and divide it by the total footage drilled to come up with a percentage that applies to each respective property based on the proportion of drilling on that property*".

**September 1, 2006 email** from Carl Hallion to Allen Ambrose stating, "*...we believe that if we approach Solitario with both the letter of consent and the advice electing to exercise the option early (based on expenditure limits and payout of all option payments) it will speed up their acceptance and title transfer to us. I have our lawyers seeking similar POA's from Solitario to those discussed above for Bosque. To this end we would need to organize and allocate our costs and your costs to support the \$1m expenditure within the next two weeks (prefer earlier if possible).*"

**September 20, 2006 email** from Allen Ambrose to Carl Hallion stating, "*A lot of our May expenses are not in yet from Argentina, so even after we subtract the land payment of \$100,000 from the total expenses we may still get close to a million dollars spent with about half that amount spent on the Solitario ground. Could we get your detailed expenses to date on the property to see if we are at the million dollar expense level on the Solitario ground?*"

**October 5, 2006 letter** from Xstrata Copper to Solitario claiming that "*Xstrata hereby gives notice for the purpose of clause 5(a) of the Solitario Agreement that the Expenditure Requirement of US \$1 mln has been spent in relation to the Property.*" A schedule was attached purportedly showing expenditure of \$1,321,149.

28. The calculation that Minera Andes and MIM performed to reach \$1,321,149, however, was based on prorated expenses for 1,574.15 metres of drilling in 2006. Minera Andes' public disclosure states that in 2006, Minera Andes drilled 6 holes on MIM's property totalling 1,574.15 metres. However, in Minera Andes' and MIM's calculations, they made no adjustment for the fact that the property over which Solitario had an option was only part of MIM's property. The other part of property on which MIM was entitled to explore was derived from an option agreement entered into with an individual named Hugo Bosque and is referred to in the documents as "the Bosque property". The Bosque property lay between Minera Andes' property to the south and Solitario's property to the north. Two of the drill holes (AZ-06-11 and AZ-06-16) included in Minera Andes' assertion that 1,574.15 metres had been drilled on MIM's property, appear to have been on the Bosque property and not on Solitario's property. Each of these holes accounts for approximately 250 drilling metres, with the result that MIM's claim for expenses for 1,574.15 metres of drilling was likely significantly inflated.
29. Moreover, the schedule attached to the October 5, 2006 letter from Xstrata Copper to Solitario claimed expenses of \$331,539 from MIM's drilling in 2004. In 2004, MIM drilled four holes in the Los Azules area totalling 864 metres. Like the two Minera Andes' drill holes from 2006, discussed above, one of the four drill holes used to substantiate MIM's 2004 expenses appears to have been on the Bosque property, and not on the Solitario property. This drill hole (LA-03-04) accounted for approximately 226 drilling metres. MIM did not adjust its claimed 2004 expenses to reflect that only some of the drilling expenses were expended on Solitario property, with the result that MIM's claim for expenses for 864 metres of drilling in 2004 was also likely significantly inflated.
30. Documents presently disclosed which relate to this issue are attached to Ms. Webb's affidavit at Exhibit R, as follows:

**Four maps** showing the location of the Bosque property and the location of drill holes LA-03-04, AZ-06-11 and AZ-06-16 as being within the border of the Bosque property.

**June 2008 report** prepared by Minera Andes showing the precise location and depth of drill holes within the Los Azules area prior to 2008, including drill holes LA-03-04, AZ-06-11 and AZ-06-16 (the latter incorrectly identified as AZ-07-16).

31. In the 2006-2007 drilling season, no work was done on MIM's property. This is reflected in the last document included in Ms. Webb's Exhibit R, which is a May 31, 2007 report from Minera Andes.
32. In view of the motivation that the defendants' exhibit in the documents for increasing the magnitude of the costs expended on the property, other claimed expenditures now appear suspect as well.
33. On March 11, 2011, TNR and Solitario requested all documents underlying the purported \$1,321,149 expenditure. No documents have been received and counsel for Minera Andes has rejected the request.

Webb Affidavit, Exhibits S and T

34. The consequence of what strongly appears to be a breach of contract by MIM is that MIM was not in a position to exercise the option on October 5, 2006 when it stated that it had incurred \$1,321,149, nor on April 23, 2007, when it declared that it was exercising the option. Given the importance of this issue to all parties' legal rights, all of the relevant documents relating to the calculations of the expenditures must be produced, and TNR and Solitario therefore seek the orders for production set out above at item 1.

***B. Description of Privilege in Lists of Documents and Inspection of Privilege Claims***

35. Rule 7-1(7) provides that "the nature of any document for which privilege from production is claimed must be described in a manner that, without revealing information that is privileged, will enable other parties to assess the validity of the claim of privilege".
36. In this case, the privilege claim of the defendants, and particularly of Minera Andes, is enormous. MIM has produced 1,144 documents, and claimed privilege over 660. Minera Andes has produced 2,194 documents and claimed privilege over 5,484.

37. The lists of documents produced by MIM and Minera Andes are appended to Ms. Webb's affidavit as Exhibits L and M respectively. It may be seen that the claims of privilege are generically described and the date of the documents indicated, but in no case are there any names of the parties who are said to have provided privileged advice. In some cases, "litigation privilege" is claimed for documents with dates in 2003, 2004 and 2005.
38. When the privileged documents are placed into a chronology with the produced documents, as has been done in Exhibit O of Ms. Webb's affidavit, it may be seen that what are said to be privileged communications occur at almost every juncture in the events at issue, but it is impossible to tell from the descriptions given whether the privilege claim is validly made. TNR and Solitario accept that in some circumstances, the identity of the authors of a document over which privilege is claimed may be confidential, but in this case it is common knowledge that all parties had legal counsel and the identity of the lawyers and the law firms is well known. As a result, listing the names of the authors and recipients of the documents is very unlikely to compromise privilege and the absence of those names makes it impossible for TNR and Solitario to assess the validity of the claims for privilege, as rule 7-1(7) requires.
39. In the context of this litigation, where a handful of communications may be determinative of the success or failure of the claims, TNR and Solitario must have an opportunity to assess, and if necessary, challenge the claims of privilege. The defendants' blanket approach to the listing of the privileged documents is inappropriate in this case.
40. Accordingly, TNR and Solitario seek an order that the defendants produce amended lists of documents within 21 days containing more detailed descriptions of the Schedule B documents from March 2001 – May 2007 so that, without revealing the information that is privileged, the plaintiffs can assess the validity of the claim of privilege:
41. In the alternative, TNR and Solitario seek an order pursuant to Rule 7-1(20) that the defendants produce all of their Schedule B documents to the court for inspection so that the validity of their claims of privilege may be assessed.

42. In addition, MIM has produced a number of communications between non-lawyers which have been redacted for privilege. While it is accepted that where non-lawyers communicate legal advice that they have received, those communications can be privileged unless the communication itself is a waiver of privilege, TNR and Solitario nevertheless wish to have the court verify the validity of the privilege claims by having those documents placed before the court and the claims of privilege considered. Accordingly, TNR and Solitario seek an order that unredacted copies of the documents appended to Ms. Webb's affidavit at Exhibit U be placed before the court so that the claims of privilege may be assessed.

**C. *Amendment of the Notice of Civil Claim***

43. As a result of what appears to be the wrongful exercise of the option which has come to light in the documents produced by the defendants, TNR and Solitario seek leave to file an Amended Notice of Civil Claim in the form attached as Schedule A hereto, adding claims of breach of contract and intentional interference with economic relations.

**D. *Adjournment of Trial Date or, Alternatively, Extensions of Time***

44. As noted above, MIM produced 256 documents on May 28, 2009, 67 documents on October 28, 2009 and then, almost three years after the litigation commenced and 4 months before trial, produced 821 new documents.
45. Similarly, on December 18, 2010, Minera Andes produced 640 documents and then, after confirming on January 20, 2011 that its document production was complete, produced on March 7, 2011 another 1,554 documents, three and a half months before trial.
46. The late production of documents, combined with the inadequate nature of the production, as described above, and the new claims, has placed TNR and Solitario in an impossible position in terms of preparing the case for trial. As a result, TNR and Solitario seek an adjournment of the trial date. The case as a whole is not in an advanced stage – it was only on February 28, 2011 (the decision by Greyall J.) when it was determined who the parties would be, documents are still outstanding and discoveries are

not completed. Now there are new claims to address. In the context of the case as a whole, an adjournment is appropriate and in the interests of justice.

47. TNR and Solitario stand to lose their entire interest in the Property if they are unsuccessful in this case. Without an adjournment, their ability to prosecute their claims has been compromised by the conduct of the defendants.
48. While Minera Andes will argue that it will suffer commercial prejudice if the trial is adjourned, the reality is that it is carrying on with exploring the Property and it has been publicly dismissive about the strength of TNR and Solitario's case. While Minera Andes will no doubt benefit if it succeeds in the litigation and confirms title to the Property, its prejudice from an adjournment is relatively minimal compared to TNR and Solitario's. Moreover, the need for an adjournment results from Minera Andes' conduct in bringing an unmeritorious application to add TNR's lawyers as parties to the litigation and in producing so many documents at a late date.
49. MIM will suffer no prejudice from an adjournment because it no longer has any interest in the Property.
50. In the alternative, the difficult position that TNR and Solitario have been placed should be reflected in generous extensions of time in which to produce expert reports (May 1, 2011) and to complete discoveries (May 30, 2011).

**Part 4: MATERIAL TO BE RELIED ON**

1. The applicants will refer to the following:
  - (a) Affidavit of Tiffany Webb sworn March 24, 2011;
  - (b) the pleadings herein; and
  - (c) such other materials as the applicants may advise and the court permit.

The Applicants estimate that the application will take 2 hours.

The application respondents have filed in this proceeding a document that contains the application respondents' address for service.

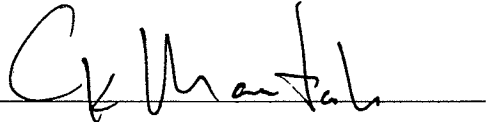
This matter is within the jurisdiction of a master.

This matter is not within the jurisdiction of a master.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to the application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application,

- (a) file an application response in Form 33,
- (b) file the original of every affidavit, and of every other document, that
  - (i) you intend to refer to at the hearing of this application, and
  - (ii) has not already been filed in the proceeding, and
- (c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:
  - (i) a copy of the filed application response;
  - (ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;
  - (iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7(9).

Dated: March 25, 2011



Signature

Lawyer for applicants

**George K Macintosh QC**

THIS NOTICE OF APPLICATION is prepared and delivered by George K. Macintosh QC of the firm Farris, Vaughan, Wills & Murphy LLP, Barristers & Solicitors, whose place of business and address for service is 2500 – 700 West Georgia Street, Vancouver, British Columbia, V7Y 1B3. Telephone: (604) 684-9151. Facsimile: (604) 661-9349. **Attention: Sean Hern.**

**To be completed by the court only:**

**Order made**

- in the terms requested in paragraphs of Part 1 of this notice of application
- with the following variations and additional terms:

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<b>Dated:</b>	<b>Signature of</b> <input type="checkbox"/> <b>Judge</b> <input type="checkbox"/> <b>Master</b>

**Appendix**

*[The following information is provided for data collection purposes only and is of no legal effect.]*

THIS APPLICATION INVOLVES THE FOLLOWING:

- discovery: comply with demand for documents
- discovery: production of additional documents
- other matters concerning document discovery
- extend oral discovery
- other matter concerning oral discovery
- amend pleadings
- add/change parties
- summary judgment
- summary trial
- service
- mediation
- adjournments
- proceedings at trial
- case plan orders: amend
- case plan orders: other
- experts
- other

# **SCHEDULE A**

No. S-084670  
Vancouver Registry

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

BETWEEN:

**TNR GOLD CORP. and SOLITARIO ARGENTINA S.A.**

PLAINTIFFS

AND:

**MIM ARGENTINA EXPLORACIONES S.A., MINERA ANDES INC.,  
MINERA ANDES S.A., LOS AZULES MINING INC.,  
and ANDES CORPORACION MINERA S.A.**

DEFENDANTS

**AMENDED NOTICE OF CIVIL CLAIM**

This action has been started by the plaintiffs for the relief set out in Part 2 below.

If you intend to respond to this action, you or your lawyer must

- (a) file a response to civil claim in Form 2 in the above-named registry of this court within the time for response to civil claim described below, and
- (b) serve a copy of the filed response to civil claim on the plaintiff.

If you intend to make a counterclaim, you or your lawyer must

- (a) file a response to civil claim in Form 2 and a counterclaim in Form 3 in the above-named registry of this court within the time for response to civil claim described below, and
- (b) serve a copy of the filed response to civil claim and counterclaim on the plaintiff and on any new parties named in the counterclaim.

**JUDGMENT MAY BE PRONOUNCED AGAINST YOU IF YOU FAIL to file the response to civil claim within the time for response to civil claim described below.**

## TIME FOR RESPONSE TO CIVIL CLAIM

A response to civil claim must be filed and served on the plaintiffs,

- (a) if you reside anywhere in Canada, within 21 days after the date on which a copy of the filed notice of civil claim was served on you,
- (b) if you reside in the United States of America, within 35 days after the date on which a copy of the filed notice of civil claim was served on you,
- (c) if you reside elsewhere, within 49 days after the date on which a copy of the filed notice of civil claim was served on you, or
- (d) if the time for response to civil claim has been set by order of the court, within that time.

## CLAIM OF THE PLAINTIFFS

### **Part 1: STATEMENT OF FACTS**

#### **The Parties**

1. The Plaintiff, TNR Gold Corp. ("TNR"), is a British Columbia company with offices at Suite 620, 650 West Georgia Street, Vancouver, British Columbia. It is a junior mining company engaged in identifying, exploring and developing mineral properties in North and South America, on its own and through subsidiary and affiliated companies.
2. The Plaintiff, Solitario Argentina S.A. ("Solitario"), is a corporate body established under the laws of Argentina with offices in San Juan, Argentina. It is a wholly-owned subsidiary of TNR engaged in the identification, exploration and development of mineral properties in Argentina.
3. The Defendant, MIM Argentina Exploraciones S.A. ("MIM"), is a corporate body established under the laws of Argentina with offices at Emilio Civil 375 (5500), Mendoza, Argentina. MIM is a member of the Xstrata Group of Companies led by Xstrata plc ("Xstrata"), with headquarters in Zug, Switzerland. Xstrata is a mining company which operates worldwide.
4. The Defendant, Minera Andes Inc. ("MAI"), is a company incorporated pursuant to the laws of Alberta and is extra-provincially registered in British Columbia with a head office located at 111 Magnesium Road, Suite A, Spokane WA, 99208, United States.

MAI is a mining exploration company, its shares trade on the TSX and it is a reporting issuer in most Canadian jurisdictions, including British Columbia.

5. The Defendant Minera Andes S. A. (“MASA”), is a company incorporated pursuant to the laws of Argentina with an office located at Peru 930, 2 Piso, Mendoza, CP M5500FAQ in Argentina. MASA is a wholly owned subsidiary of MAI.
6. The Defendant, Los Azules Mining Inc. (“LAMI”), is a company incorporated pursuant to the laws of the Cayman Islands with an office for service in this action at 1600-925 West Georgia Street, Vancouver British Columbia, V6C 3L2. LAMI is a wholly owned subsidiary of MAI.
7. The Defendant, Andes Corporacion Minera S.A. (“Andes”), is a company incorporated pursuant to the laws of Argentina with an office for service in this action at 1600-925 West Georgia Street, Vancouver British Columbia, V6C 3L2. Andes is a wholly owned subsidiary of MAI.

#### **The Insertion of the 36-Month Restriction**

8. Solitario acquired mining and exploration rights in an area known as Los Azules, in the Province of San Juan, in Argentina more particularly described as: Escorpio I (File 153-F18-96), Escorpio II (File 154-F18-96), Escorpio III (File 155-F28-96), Totora I (File 0483-C-99), Totora II (File 0496-C-99) and Cateo Valle Hermosa (File 545054/P/94, until the Cateo expired). These rights are referenced herein as the “Property”.
9. Solitario and MIM agreed to terms and conditions regarding the Property in a Letter of Understanding dated May 15, 2003.
10. In the Letter of Understanding, Solitario sold an option to MIM to acquire all of the Property and explore the Property, and retained a “back-in” right, which is a right to re-acquire an interest in the Property in specified circumstances. Solitario’s back-in right is correctly described in clause 10 of the Letter of Understanding as follows:

10. Back-in Right: SA will have the right to buy back equity up to the level of 25% of the Property at any time within 120

days of the completion of a feasibility study on any part of the Property, on the following basis:

- a) By paying MIM two (2) times the corresponding percentage proportion of MIM's actual expenditures (e.g. should MA [*sic* SA] seek to purchase back to 25% from 0% equity it would pay MIM 2 times 25% of MIM's actual expenditure).
- b) Actual expenditures will refer only to work carried out within SA properties and any equity purchased will only be equity in SA properties.
- c) MIM's expenditures will be calculated up to the time SA indicates unequivocally that it will exercise this Back-in Right.

11. In clause 15 of the Letter of Understanding, MIM committed to preparing a full draft agreement within 90 days of the Letter of Understanding being accepted. In fact, Solitario and MIM operated under the Letter of Understanding for approximately a year, and the full agreement was not signed until approximately May 15, 2004 (the "MIM-Solitario Option Agreement").
12. Notwithstanding the agreement as to Solitario's back-in right, as correctly recorded in clause 10 of the Letter of Understanding, MIM unilaterally changed the back-in provision in the final draft of the MIM-Solitario Option Agreement. MIM inserted the words "If, within 36 months of exercising the Option..." at the beginning of the back-in clause (the "36-month restriction") so that the re-drawn back-in provision read as follows, in the MIM-Solitario Option Agreement as signed:

## 7. BACK-IN RIGHT

- 7.1 If, within 36 months of exercising the Option, Xstrata\* completes a feasibility study on any part of the Property, Xstrata\* must notify Solitario, and Solitario will have the right to elect to "buy back" up to a maximum 25% equity in the Property at any time within 120 days of receiving the said notification (the "**Back-in Right**") by giving written notice to Xstrata\* of the exercise of the Back-in Right.

(emphasis added)

\*"Xstrata" is synonymous with MIM for the purposes of this notice of civil claim.

13. MIM prepared the final draft of the MIM-Solitario Option Agreement, introducing the 36-month restriction, on or about April 21, 2004, nearly a year after the Letter of Understanding and shortly before the MIM-Solitario Option Agreement was signed, in May, 2004. The final draft contained numerous other amendments as well, none of which were substantial. In all other respects, the drafts leading to the MIM-Solitario Option Agreement reflected what the parties had agreed to, as recorded in the Letter of Understanding.
14. Solitario and MIM never discussed the 36-month restriction which MIM inserted unilaterally, and MIM did not notify Solitario, orally or in writing, that it was inserting the 36-month restriction. In the result, Solitario missed noticing the change created by the 36-month restriction before it signed the full agreement.
15. The 36-month restriction would effectively destroy the commercial purpose of the back-in provision. It would mean that so long as MIM chose not to complete a feasibility study within 36 months of exercising the option, Solitario would lose all back-in rights, unless it was able to waive the completion of a feasibility study within the 36 month period and exercise the back-in right.
16. Solitario first noticed the 36-month restriction in November 2007, and in August 2008 at ~~which time~~ it amended the writ in this action to plead rectification.

**Rectification**

17. Solitario asks this Court to rectify the MIM-Solitario Option Agreement, to make it accord with the agreement on back-in rights reached between Solitario and MIM, as evidenced in clause 10 of the Letter of Understanding (see para. 10 above).
18. Alternatively, Solitario asks this Court to rectify the MIM-Solitario Option Agreement because of Solitario's unilateral mistake in believing that the 36-month restriction formed no part of the agreement and when the 36-month restriction was:
  - (a) contrary to the agreement between Solitario and MIM, as correctly recorded in the Letter of Understanding;
  - (b) included in the agreement only because Solitario did not notice its insertion;
  - (c) not expressly brought to the attention of Solitario; and
  - (d) not commercially reasonable.

**Unenforceability for Want of Consideration**

19. If rectification is not granted, the 36-month restriction is unenforceable in any event for want of consideration.

**Breach of Implied Term and Breach in Exercising the Option**

20. Alternatively, if the 36-month restriction is enforceable, which is denied, it was an implied term of the MIM-Solitario Option Agreement that MIM would exercise its best efforts to complete a feasibility study within 36 months of exercising its option. MIM made no such efforts.
21. In 2005, MIM and MAI (together with MASA) began discussing a plan whereby MAI would take over the exploration efforts on the Property and MIM would retain a contractual right to back-in to the project. These discussions led to MIM and MAI, on behalf of itself and its subsidiaries, entering into a Letter of Understanding dated August

5, 2005 whereby, after a final agreement was entered into (which did not occur until November 2007), MAI and its subsidiaries would have the exclusive right to explore and evaluate MIM's properties for a period of 4 years.

22. In ~~April~~ May 2006, MAI, having reviewed the MIM – Solitario Option Agreement, decided together with MIM, that rather than comply with the implied obligation to complete a feasibility study within 36 months, they would attempt to extinguish Solitario's interest in the Property. The plan which MAI and MIM developed was based on the 36 month restriction which MIM had inserted into the MIM – Solitario Option Agreement, such that MIM would quickly exercise its option to commence the tolling of the 36 month period, yet neither MIM nor MAI would complete a feasibility study within that period. In this way, MAI and MIM hoped to prevent Solitario from being able to back-in to the project, and hoped to thereby extinguish Solitario's interest in the Property.
23. MIM had not, however, completed the necessary work on the Property to entitle it to exercise its option under the MIM – Solitario Option Agreement. MIM and MAI therefore developed a plan to allocate some expenditures by MAI and its subsidiaries to MIM, and MIM would advise Solitario that MIM had completed the \$1 million of exploration work for the exercise of MIM's option. In a letter dated October 5, 2006, MIM advised Solitario that \$1,321,149 had been expended such that the conditions of the MIM – Solitario Option Agreement for the exercise of the option had been met.
24. MIM's assertion, made with MAI and MASA's assistance, that over \$1 million had been expended on the Property was inaccurate. In calculating the expenditures on the Property, MIM and MAI inflated expenditures and included expenditures incurred for drilling holes which were not located on the Property, but which were instead located on the "Bosque property" immediately to the south of the Property. Without the inaccurate allocation of expenditures on the Bosque property as being expenditures on the Property, less than \$1 million had been spent on the Property as at October 5, 2006. No further work was completed on the Property in the 2006-2007 drilling season, with the result that when MIM purported to exercise its option under the MIM-Solitario Option Agreement on April 23, 2007, it had not met the conditions for exercising the option. The purported

exercise was therefore in breach of the terms of the option agreement and was a nullity. MIM did not complete \$1 million of exploration work on the Property and did not lawfully exercise the option prior to the expiry of the option after 5 years.

25. The inaccurate allocation of expenses by MIM, MAI and MASA to support the purported exercise of the option by MIM was a breach of contract by MIM, and MAI and MASA's participation in the calculations, and therefore the breach, constituted an intentional interference by MAI and MASA with Solitario's economic relations.
26. On November 2, 2007, MIM entered into an agreement with MASA (the MIM-MASA Option Agreement") whereby MIM transferred its interest in the Property to MASA, while retaining a right to back-in to 51% of the development of the project, and alternatively a right of first refusal over any future disposition by MASA of the Property. Solitario, ignorant of the plan that MIM and MASA had developed to extinguish Solitario's interest in the Property, and unaware of the wrongful exercise of the option, consented to MIM entering into an agreement with MASA, although it was not advised of the specific terms thereof.
27. On May 29, 2009, MASA's assignees, LAMI and Andes, delivered an earn in notice to MIM in accordance with the MIM-MASA Option Agreement such that MIM transferred the Properties to Andes, subject to Solitario's underlying interest. In accordance with the MIM-MASA Option Agreement, on October 29, 2009, LAMI exercised its option and acquired MIM's interest in the Property.
28. In taking 100% of MIM's interest in the Property, MASA, LAMI and Andes, or any of them, assumed the implied obligation of MIM to complete a feasibility study within 36 months of MIM's exercise of the option on April 23, 2007, but failed to complete the same.

**Escorpio IV**

29. Additionally, Solitario claims here as follows with respect to a property interest known as "Escorpio IV".
30. The Letter of Understanding described the property optioned by Solitario to MIM as:

Manifestaciones: Escorpio I (Expte. 153-F18-96), E[s]corpio II (Expte. 154-F18-96), Escorpio III (Expte. 155-F28-96), Totorá I (Expte. 0483-C-99), and Totorá II (Expte. 0496-C-99) and Cateo: 545054/P/94.
31. As a matter of Argentinian law, a Cateo provides preliminary exploration rights over relatively large areas of mineral property and requires the payment of modest government fees. Once preliminary exploration work has been performed the owner of a Cateo must reduce the scope of the property it wishes to explore further. The exploration rights over the reduced property are described as a Manifestacione. Manifestaciones require payment of larger government fees.
32. The rights granted by Cateo 545054-P-94 expired in June 2003, a fact which was known to MIM at the time. In June 2003, pursuant to an agreement complimentary to the Letter of Understanding (the "Complimentary Agreement"), Solitario and MIM jointly filed Manifestacione 435213-C-2003 with respect to a portion of the former Cateo 545054-P-94 property. The Manifestacione was referred as "Escorpio IV".
33. The Complimentary Agreement provided that if MIM abandoned its rights with respect to Escorpio IV, the property would become the property of Solitario alone.
34. By written instrument in October 2003 MIM assigned its joint interest in Escorpio IV to Solitario and thereby abandoned any interest in that property.
35. After abandoning its interest in Escorpio IV, MIM continued work on the Property subject to the Letter of Understanding. Escorpio IV is not a part of the Property.

Solitario and TNR alone have made all payments and have taken all steps necessary to keep Escorpio IV in good standing.

36. The schedule of optioned properties referred to in the MIM – Solitario Option Agreement listed the same properties referred to in the Letter of Understanding. The schedule did not include Escorpio IV, MIM having abandoned its interest in that property in October 2003.
37. The MIM – Solitario Option Agreement did not provide MIM an option to acquire Escorpio IV.
38. On or about April 23, 2007, MIM exercised the option referred to in the MIM – Solitario Option Agreement.
39. Despite the express terms of the MIM – Solitario Option Agreement and contrary to the abandonment of its interest in Escorpio IV, MIM has wrongfully taken the position that Escorpio IV was included in the MIM – Solitario Option Agreement and was acquired by MIM upon exercise of its option.
40. TNR and Solitario have rightfully asserted that Escorpio IV was not subject to the MIM – Solitario Option Agreement or to any other right in favour of MIM.
41. MIM has nonetheless made public statements asserting its position with respect to Escorpio IV and has threatened legal action against TNR and Solitario, and has and continues to unlawfully interfere with the economic interests of TNR and Solitario.
42. In accordance with the transactions detailed above, MIM has purported to transfer its alleged interest in Escorpio IV to MASA, which has assigned the same to Andes. MIM, MASA, and Andes have thereby caused, and are continuing to cause loss, damage and expense to TNR and Solitario.

**Part 2: RELIEF SOUGHT**

TNR and Solitario ask for:

- (a) a declaration that MIM's purported April 23, 2007 exercise of the option in the MIM – Solitario Option Agreement was in breach of the conditions for the exercise of the option and was a nullity;
- (b) a declaration that, as a result of MAI and MASA's intentional interference with Solitario's economic relations in participating in the breach of the conditions for the exercise of the option, MAI, MASA, and their assignees LAMI and Andes hold the Property in constructive trust for Solitario;
- (c) an order that MAI, MASA, LAMI and Andes, or any of them, take all necessary steps to transfer ownership of the Property to Solitario;
- (d) alternatively, general damages against the defendants, or any of them, for breach of contract and intentional interference with economic relations;
- (e) rectification of the MIM – Solitario Option Agreement;
- (f) a declaration that such rectification is enforceable as against MAI, MASA, LAMI and Andes;
- (g) alternatively, a declaration that the 36-month restriction is unenforceable for want of consideration;
- (h) in the further alternative, damages for breach of the implied term that the Defendants would exercise best-efforts to complete a feasibility study within 36 months of MIM exercising its option;
- (i) a declaration that Escorpio IV was not included in the option granted to MIM;
- (j) a declaration that the defendants have no right to any interest in Escorpio IV;
- (k) alternatively, damages in relation to the appropriation of Escorpio IV;

- (l) interest;
- (m) special costs; or alternatively, costs;
- (n) further relief which appears just to this Court.

**Part 3: LEGAL BASIS**

The Plaintiffs' claims are based in the common law of contract, including the law of rectification, implied terms, lack of consideration, assignment and abandonment of interest, and exercise of options, as detailed above. They are also based in the common law of tort including unlawful interference with economic relations.

Plaintiffs' address for service:

Farris, Vaughan, Wills & Murphy LLP  
Barristers & Solicitors  
2500 - 700 West Georgia Street  
Vancouver, British Columbia V7Y 1B3

Fax number address for service (if any): 604-661-9349

E-mail address for service (if any): shern@farris.com

Place of trial: Vancouver

The address of the registry is: 800 Smithe Street,  
Vancouver, BC V6Z 2E1

Dated: \_\_\_\_\_

\_\_\_\_\_  
Signature

Plaintiff

Lawyer for plaintiffs

**George K. Macintosh, Q.C.**

Rule 7-1(1) of the Supreme Court Civil Rules states:

- (1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,
  - (a) prepare a list of documents in Form 22 that lists
    - (i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and
    - (ii) all other documents to which the party intends to refer at trial, and
  - (b) serve the list on all parties of record.

**APPENDIX**

*[The following information is provided for data collection purposes only and is of no legal effect.]*

**Part 1: CONCISE SUMMARY OF NATURE OF CLAIM:**

This action involves a dispute arising out of a mining contract respecting a property located in Argentina.

**Part 2: THIS CLAIM ARISES FROM THE FOLLOWING:**

A personal injury arising out of:

- a motor vehicle accident
- medical malpractice
- another cause

A dispute concerning:

- contaminated sites
- construction defects
- real property (real estate)
- personal property
- the provision of goods or services or other general commercial matters
- investment losses
- the lending of money
- an employment relationship
- a will or other issues concerning the probate of an estate
- a matter not listed here

**Part 3: THIS CLAIM INVOLVES:**

- a class action
- maritime law
- aboriginal law
- constitutional law
- conflict of laws
- none of the above
- do not know

**Part 4:** Nil.