DECISION IN THE MATTER OF NUGGET RESOURCES INC -V- SILVER ORCHID PTY LTD (FIRST DEFENDANT) AND FIRST TIFFANY RESOURCE CORPORATION (SECOND DEFENDANT)

This matter arose as a result of a complaint being filed by the Complainant, Nugget Resources Inc., wherein the Complainant seeks relief and remedies in the following matters:

1. The Warden determine the contributing legal and equitable interests in the Authorities and Joint Venture Letter of Agreement dated 25 June 1993 as at 23 May 1996 as being -

Nugget Resources Inc	62.96% of 80.00%
Silver Orchid Pty Ltd	37.04% of 80.00%

2. The Warden determine the non-contributing legal and equitable interest in Authorities and Joint Venture Letter of Agreement dated 25 June 1993 as at 23 May 1996 as follows:-

Nugget Resources Inc	5.00%
First Tiffany Resource Corporation	15.00%

3. The Warden determine the non-contributing interest to be converted to a contributing interest when a bankable feasibility study for production is completed.

4. The Warden determine that, should Nugget Resources Inc continue to spend on exploration and/or development, and that Silver Orchid Pty Limited does not contribute its share (for the time being) by the end of the next month, that Silver Orchid Pty Limited's share be diluted by an additional 1.0% for every Canadian $10,000 spent by Nugget Resources Inc. For this purpose, Nugget Resources Inc undertakes to advise Silver Orchid Pty Limited by the seventh day of the next month, the expenditure for the preceding month.

5. The Warden determine the same dilution conditions as set out in (4) above, apply to First Tiffany Resource Corporation if that company becomes a contributing party.

6. The Warden determine that if Silver Orchid Pty Limited's ownership or that of First Tiffany Resource Corporation's ownership should reduce to 10%, then those interests will automatically convert to a 2% net smelter return for Silver Orchid Pty Limited, and a 1% net smelter return for First Tiffany Resource Corporation.

During the hearing the Complainant advised the Court that it was no longer seeking determinations in points (3), (5) and (6).

Attached to the Complaint and Summons were some 24 grounds of the Complainant's claim. I do not propose at this point of time to itemise those 24 individual grounds.

In reply to the Complaint and Summons in addition to filing a defence, the Defendants also filed a Cross Claim. In the Cross Claim the first Cross Claimant sought the following:-

1. A declaration that it holds all lands subject to this claim to the exclusion of any claim by the Complainant, Cross Defendant.

2. A declaration that such agreement was entered into by the Cross Defendant by its servants, agents or trustees with the Cross Claimant has lapsed.

3. This was amended in Court to read as follows:

   In the alternative an order that the Cross Defendant transfer and/or relinquish all its interest in the land held by the Cross Claimant in consideration of the payment to the Cross Defendant of the value of 100,000 shares in Gold Stake Inc, as at the close of trading on 21/12/95.

4. In the alternative an order that if the agreement between the Cross Claimant and Cross Defendant is still in force the dilution of interests shall be additional 1% for every Canadian $50,000.

Particulars of the Cross Claim were itemised. I do not propose to outline them at this point of time.

In reply to the Cross Claim the Cross Defendant lodged a defence thereto and at this point of time I do not propose to itemise the grounds of defence to the Cross Claim.

The following facts were either found by me or were not disputed:

(a) An Agreement was entered between Big Nugget Partnership and Silver Orchid Pty Limited concerning exploration at Hill End. That Agreement was dated the 25th June 1993.

(b) Big Nugget Partnership ultimately evolved into the present Plaintiff, that is Nugget Resources Inc. The rights and obligations of Big Nugget Partnership were assigned to Nugget Resources Inc.

(c) An agreement exists between Big Nugget Partnership and the Second Defendant First Tiffany whereby an interest was acquired by Big Nugget in the interests of the Second Defendant, in the same mining tenements.

(d) Various deadline dates which were itemised in the agreement referred to in (a) above were mutually extended by the parties.

(e) The Complainant did in fact expend in excess of $500,000 Canadian on the mining holdings in Hill End, thus entitling it a right to earn a 50% undivided interest, as outlined in the Agreement dated 25th June 1993.

(f) The money spent by the Complainant in excess of $500,000 Canadian has not been equally shared by the Defendant, Silver Orchid.

(g) There has been no finalisation of a Joint Venture Agreement as anticipated in Clause 9 of the Agreement of the 25th June 1993.

The main thrust of the defence case is that the Complainant is in breach of that original agreement and consequently cannot rely upon it in respect to the matter before the Court.

The Defendants are relying on a number of matters, outlined in paragraphs 4 (i) to (viii) of the Defence and Cross Claim, as being matters which breach the Agreement and consequently not making them liable on such Agreement. A further clause (ix) was added on request of Mr Morris at the hearing of 11/11/96.

> "Deny the Cross Claimant access to parts of the Mining Site".

Furthermore and in the alternative, the Defendants have sighted three separate matters which they are relying upon as a defence. Firstly paragraphs 5 to 7 refer to an oral agreement between Robert Cleaver and Gordon Strasser on the 20th and 21st December 1995, to sell the interest the Cross Defendant had in the title to EL 2037 to the Cross Claimant. Secondly the fact that the Cross Defendant failed to present to the Cross Claimant a follow-up program in accordance with the original agreement. Thirdly the Cross Defendant is seeking to rely upon a Draft Joint Venture Agreement as binding the parties where the terms of that Draft Joint Venture Agreement conflict or replace terms of the original Agreement.

The Complainant is relying heavily in respect to its case upon Clause 6 of the original Agreement and it reads as follows:-

> "When BNP has expended Cdn.$500,000, BNP and Silver Orchid will participate equally in further expenditures on the holdings. If one or other of the two parties declines to participate, then a dilution clause will take effect if one of the parties decides to continue with a program on The Holdings."

There is nothing in this agreement which specifies the meaning of a dilution clause.

Terrence Vincent Willsteed, was called as a witness for the Complainant, as an expert witness in the mining field. He gave the following evidence:-

> "The expression "dilution clause" is a well known expression in the mining industry and is a reference to a clause which is standard in the industry. Such a clause provides that if one of the parties, liable to contribute, does not contribute its share of expenditures then that party's interest is reduced

> proportionally to the funds expended by the other, whose interest increases accordingly."

That portion of his evidence has not been challenged by the defence. The witness goes on further:-

> "In the instant case, a dilution clause would work in the following manner. By expending $CAN500,000 Nugget Resources has acquired a 50% share of the equity in the mining authority previously owned, as to 100% by Silver Orchid. That notionally values the original Silver Orchid equity, at the date of the agreement, at $1,000,000. Thus by relatively simple mathematics it can be ascertained that $10,000 represents 1% of the notional value of the authority. It is to this notional value that a dilution clause operates. By way of illustration, in an authority with a notional value of $1m, if one participating party contributed $100,000 and the other party, liable to contribute, does not, then the interest of the party which did not contribute would dilute by 10% and the interest of the participating party would increase by the self same 10%."

Under cross-examination Mr Willsteed conceded that the formula that he put forward was not a "die-cast in iron sort of arrangement". He was asked by Mr Morris under cross-examination

"Q: And it is open and often open to negotiate a dilution clause between the parties?
A: That's correct."

The following exchange took place between Mr Morris and Mr Strasser under cross-examination at the hearing on the 1st August 1996:-

"Q: I put it to you that that was just after the first joint venture agreement was put for Mr Cleaver and there was a discussion with you regarding the dilution clause?
A: No, I don't recall any such discussion.

Q: And in the discussion it was agreed that the dilution clause would be amended from the first draft to be fifty thousand dollars to be for one per cent?
A: We were negotiating the dilution clause. My first edition went out suggesting ten thousand dollars for one per cent. Through Robert or through his lawyer, I don't know how it came back with him saying fifty thousand dollars and one per cent. This is normal negotiation. I would probably react with "Oh gee fifty thousand dollars is too high, let's make it twenty thousand dollars." I just don't recall those kinds of details but I do know it was being negotiated and it would eventually be resolved--

Q: Well I put it--
A. --it was one of the things in the joint venture agreement that had to be resolved.

Q: I put it to you that you agreed on the tenth or 11th April that that would be the rate?
A: No, I don't think that's true, no.

Q: Well subsequently you agreed that that would be the rate incorporated in the agreement didn't you?
A: Well I did say at one point it - I could agree to fifty thousand, but .. I needed some movement in other areas because you give on a point here, you give your best there and then the next you give your best there is no end to it. So if that would have resolved the joint venture agreement yeah I would have done so, but I didn't see resolution because I kept getting the "I'm uncomfortable with Graham Reveleigh" stuff thrown at me .....

Q: Certainly you agree that it was within contemplation that the dilution clause would be fifty thousand for one per cent.
A: That was contemplated yes as may be necessary--"

No doubt it was this evidence which lead the submission by Mr Morris at the conclusion of the case that Mr Strasser had agreed that the ratio of the dilution clause was fifty thousand dollars to one per cent.

I note however in exhibit 14 which has been referred to as the "black line draft joint venture agreement", that the following appears on page 15 of that document:-

> "....should Silver Orchid fail to make such reimbursement, its Participating Interest shall be reduced by 1% for every $25,000 so expended by Big Nugget and the Participating Interest of Big Nugget shall be correspondingly increased to the extent Silver Orchid's Participating Interest has been so reduced."

Without itemising all references to dilution clause which appear before the hearing, it is quite obvious from the evidence and the documentation tendered as exhibits that there were negotiations going on between the parties as to exactly what a dilution clause would mean in the joint venture agreement.

Referring back again to exhibit 14 there is a clause existing on page 9 of that document and I quote that clause:-

> "Section 2.05 For greater certainty, the parties hereto agree that:

(i) upon Nugget exercising the Option, the Existing Agreements shall terminate and be of no further force and effect; and

(ii) for greater certainty, the terms of this agreement shall prevail over the terms of the Existing Agreements (whose operation will be suspended) and govern all dealings of the parties hereto with respect to the Joint Venture Property."

The Complainant submitted that the original agreement is to stand on its own, that there was no joint venture agreement signed by the parties, it was still in a stage of negotiation. Consequently, any matter appearing in a draft joint venture agreement has no bearing upon an interpretation to be put on a clause in the original agreement.

It is necessary for the court to determine what the parties meant by the phrase "dilution clause" when they entered into the contract which is dated 25th June 1993. The intention of the parties may be actual, expressed or implied. In this instance it is necessary to rely upon the implied intention and if I may quote from page 221 of *Contract Law in Australia, Third Edition* by Carter and Harland, it indicates that implied intention is "the intention which is attributed to the parties in relation to matters in respect of which no intention has been expressed."

The same text at paragraph 706 puts forward a suggested formulation for The Parol Evidence Rule. It says "we would express the parol evidence rule as excluding extrinsic evidence in determining the meaning or legal effects of words used in a document which the parties have adopted as contractual or as evidencing their contract in whole or in part."

Furthermore at paragraph 711 under the heading of **Prior negotiations**, the following appears: "The negotiations of the parties prior to entry into the contract are excluded by the parol evidence rule and cannot be called in aid when interpreting the document."

Also at paragraph 712 under the heading **Subsequent conduct**, the following appears: "There is considerable authority for the proposition that, as a general rule, the subsequent conduct of the parties cannot be used for the purpose of construing the terms of a written contract ex post facto."

Mr Morris submitted that the court is entitled to look outside the written agreement and, citing **CODELFA CONSTRUCTION PTY LTD v. STATE RAIL AUTHORITY OF NSW 149 C.L.R. 327 at 347** "The broad purpose of the parol evidence rule is to exclude extrinsic evidence .... to subtract from, add to, vary or contradict the language of a written instrument ...." "On the other hand .... This has led to a recognition that evidence of surrounding circumstances is admissible in aid of the construction of a contract."

If one were to take into account the evidence given as mentioned before by Mr Strasser in relation to the dilution clause and if one is to also consider as to whether or not any weight can be placed upon the draft joint venture agreement which has been tendered, having regard to the law in respect to subsequent conduct and prior negotiations, one really cannot put any weight upon that evidence and that document when interpreting the phrase "dilution clause" which appears in paragraph 6 of the Contract dated 25th June 1993.

There has been no evidence brought forward on behalf of the defence to dispute the opinion expressed by Mr Willsteed. Therefore the opinion of Mr Willsteed should be accepted as to the meaning of "dilution clause".

The next matter to be determined is whether or not the matters outlined in the defence to the complaint are such that the "dilution clause" ought not to take effect.

In his submissions Mr Morris stated that the dilution only applies if there has been a follow-up scheme. The extra expenditure was not a follow-up program. It was an over-expenditure on the original program.

I find it hard to accept this submission. Clause 6 does not make mention of a follow-up scheme, but to "further expenditures". Furthermore, I cannot see it as an over-expenditure. My reading of the clause is that it means an initial expenditure by one party of a certain sum of money, which then enables both parties to be on an equal footing in relation to the share of the holdings, following that, it, in my opinion, envisages further expenditure under that clause.

The text *The Law of Contract* by Greig and Davis, at p.532, expresses the opinion of the authors that there is a possibility in appropriate circumstances, of implying a term to give effect to notions of fair play in the performance of a contract. To be more specific towards a complaint before the court, in *Australian Mining and Petroleum Laws* second edition Forbes and Lang, paragraph [1914], the following appears:-

> "....it is idle to support that no fiduciary duties arise in a joint venture. All such agreements involve some degree of subordination of individual interest to those of the group. It is suggested that these duties are implicit in every joint venture:
>
> (i) A duty not to derive personal profit from property dedicated to the venture;
>
> (ii) A duty not to derive personal advantage from, or to keep to oneself information or opportunities gained in the course of the venture; and
>
> (iii) a duty to avoid conflicts between personal interest and the interest of the group.
>
> In practice the agreement will probably require the operator to report periodically to all participants and expressly impose a duty of good faith and confidentiality."

Although the document dated June 25, 1993 may not be a joint venture agreement as such, I accept that what the authors of the abovementioned text say and accept that in relation to that document, which I have referred to earlier as the "original agreement", there must be on the side of all parties, an attention to fair play or good faith in carrying out obligations and/or responsibilities under the agreement.

The matters outlined in paragraph 4 of the defence, including clause 9 that was added during the hearing, are matters that, if found to be correct, could, the defence want the court to accept, amount to a breach of duty of good faith and confidentiality.

In reference to those matters outlined in the defence, as constituting a breach of the agreement, I make the following observations:

Concerning false statements to Cross Claimant concerning assay results:

Mr Strasser agreed there was a letter to Mr Cleaver indicating assaying results would be available upon completion and further that a press release stated that samples had been sent for assaying. However, he conceded that samples were not sent for assaying as it "would have been a waste".

Mr Reveleigh in evidence stated that the press release dated 12.4.95 was issued before a decision was made not to assay the core. The quarterly report for period ended 31.3.95 rectified that statement.

Failure to provide details of accounts of expenditure and time sheets:

A core shed was a major dispute in this area. One was constructed on the land of Mr Reveleigh. Due to a heritage listing, it was necessary to use stringy bark timber in lieu of the usual galvanised iron and concrete. Evidence was produced to show that Mr Reveleigh himself paid the difference in cost between the core shed built and the cost of a 15m x 8m galvanised iron shed with a concrete floor. The joint venture only paid $12,228.08 for the shed while Mr Reveleigh paid the balance of $19,384.76.

Mr Strasser in his evidence agreed that the shed was constructed on land owned by Mr Reveleigh and that that was one of the reasons he deducted $50,000 from the accounts.

Mr Cleaver was challenging the expense of bringing a drilling rig from interstate when one was available through Lords at Lithgow; Mr Cleaver was aware of this through his staff. There is evidence that a fax was received from Lords of Lithgow advising that a BQ drilling rig was not available at the time. Mr Cleaver said he was aware, through his staff, that other types of rigs were available - he was unaware of the necessity for a BQ rig. On that point, evidence from Mr Strasser was that the rig that was used was not the type Dr. McBride would have preferred, but it did the job.

Mr Cleaver gave evidence of his concern for the amount of money expended without him seeing all the accounts; he said that there would be an implied term in the agreement that all parties could have access to accounts.

There is no dispute before this court that when Mr Cleaver was challenging aspects of expenditure, that Mr Strasser offered to deduct $50,000 from the expenditure and that Mr Cleaver was happy to settle on that.

Failure to preserve and destruction of records:

There is no dispute that Mr Reveleigh and Dr McBride had burnt material from the office at Hill End. On the evidence of Mr Reveleigh the only documents burnt were done so in the process of tidying up the office. The only documents burnt were

redundant and outdated parish maps. Before burning, Mr Reveleigh and Dr McBride ensured that the original or best copy of maps were retained and surplus destroyed.

Suggestion by the defence that other material was destroyed is speculation. The defence want the court to accept that empty suspension filing folders are evidence of those records, that were originally contained therein, being destroyed by the Complainant. I cannot draw that assumption on the evidence before me.

Mr Cleaver gives evidence of a yellow field book of Mr Reveleigh is missing. Mr Reveleigh's evidence is that the field book was his personal book, ;left behind in 1986 at the request of Mr Dreverman and Mr Gramoner so that they could complete the compilation of maps. That notebook, Mr Reveleigh says, was never returned to him. He found it in Silver Orchid's office when he returned in 1994.

It is perhaps trite to say that the retention of core samples are essential to an exploration program. I am unable to ascertain from the evidence the person or persons responsible for the filing of the core samples in such a way that it renders them virtually useless. It would appear from the evidence that some persons were not aware that samples are stored at Newcastle University and apparently some samples are held by the Department of Mineral Resources.

Denying access to parts of mining site:

There is no dispute that locks were changed on gates and keys were not given to the Defendant's staff forthwith. The reason given for changing the locks was "for the security of the equipment on site". On the evidence placed before the court I cannot accept that this was a deliberate attempt by the Complainant to deny the Defendant access to the mining site.

Oral agreement for Nugget Resources to sell interest to Silver Orchid:

The so-called "handshake deal" which took place in Canada, between Mr Strasser and Mr Cleaver, has, according to the defence, been breached by the Complainant. There is no suggestion that Silver Orchid was not going to meet its part of the deal at the time the agreement was struck in Canada. There were three people present when the "handshake deal" took place, Mr Strasser, Mr McAlpine and Mr Cleaver.

Mr Strasser gives evidence that: "We had a handshake deal on an offer to sett our position in Hill End subject to shareholder and regulatory approval. Under cross examination he denied that the only condition the "handshake deal" was subject to was regulatory approval. He went on to explain:- "....regulatory approval includes the need to have shareholder approval and when you are selling all or substantially all of your assets you must go to the shareholders for approval. So whether you call it regulatory or shareholder approval you are talking about the same thing."

Mr Strasser conceded he never put the proposition to a formal meeting of shareholders. He told the Court that in Alberton he required 66% of the shareholders

to vote in favour of the agreement and his personal conversations with major shareholders indicated well over 40% were not in favour, consequently it would be fruitless to call a special meeting.

Mr Cleaver gives evidence that Mr Strasser said not to worry about board and shareholder approval and "you have got to be aware that we're going to have to get regulatory approval".

The evidence of Mr McAlpine on that point was: "I think both of us or Strasser said, 'we agree to the proposal subject to statutory regulation".

Mr Cleaver said he was aware that they would have difficulty getting Regulatory approval if they sell their only asset in Hill End. Mr Cleaver agreed to assist Nugget Resources in obtaining another property in Indonesia to overcome this regulatory problem. There were also discussions between the parties as to Nugget Resources obtaining a royalty on the Hill End property until another property was obtained in Indonesia. Negotiations on a royalty were not satisfied.

Mr Cleaver said that Mr Strasser gave an assurance that he could get Board and Shareholder approval for the deal. Mr McAlpine gave similar evidence. "The only thing that I had a doubt about was ..... on the regulatory approval." "I said, 'what about Shareholder approval', he said, 'don't worry about it'."

The press release, which was cleared by Mr Cleaver and amended in some instances, contained inter alia the following: "this transaction is subject to shareholder and regulatory approval". That sentence was not altered by Mr Cleaver.

Mr Cleaver was well aware that this "handshake deal" could not go ahead without the regulatory approval - such approval would require, inter alia, an appropriate resolution being passed at a meeting of shareholders. Neither that was forthcoming, despite the assurances in the first instance by Mr Strasser, nor was the requirement for the company to maintain an interest in a property to remain registered met.

These "technicalities" if I may call them that, had to be met before the agreement could go ahead. Mr Cleaver was aware of this and entered the agreement well knowing that it could not be finalised unless regulatory approval was forthcoming.

I do not find the Complainant is in breach of the oral agreement that has been referred to as the "handshake deal".

Draft Joint Venture Agreement:

The Cross Claimant, the original draft, seeks to rely upon a draft Joint Venture Agreement and such terms as have been mutually agreed by the parties as binding the joint venture.

The Cross draft submitted to the Court that it could not impose upon the parties a document which is still in the stage of negotiation.

It is true, some aspects could be considered to be settled, but I refer to the evidence of Mr Strasser, when he was questioned on the draft Joint Venture Agreement in relation to the ratio of a dilution clause, he said "you give on a point here, you give your best there and then next you give your best there ...."

One doesn't know as to what terms may be subsequently altered before the final draft is agreed upon. It is my opinion that the Court may not rely upon this draft Joint Venture Agreement as binding upon the parties, where those terms conflict with or replace the terms of the original agreement dated 25 June 1993.

Although on the evidence it could be said that the interactions between the parties in relation to the original agreement were far less than ideal and indeed some acrimony existed, which no doubt started with Mr Cleaver's dissatisfaction with Nugget Resources employing Mr Reveleigh, I do not hold that the matters raised by the defence, either individually or cumulatively, amount to a breach of good trust or a breach of fiduciary duty of a joint partner, to such a degree that the court should hold that the agreement dated 25.6.1993 has been breached by the Complainant. Consequently it is the court's decision that Clause 6 of the agreement is still valid.

There will be a verdict for the Complainant on the Complaint.

There will be a verdict for the Cross Defendant on the Cross Claim.

I make the following order:-

1. The contributing legal and equitable interests in the Authorities and Joint Venture Letter of Agreement dated 25 June 1993, as at 23 May 1996 are -

Nugget Resources Inc.	62.90% of 80.00%
Silver Orchid Pty Ltd	37.04% of 80.00%

2. The non-contributing legal and equitable interests in Authorities and Joint Venture Letter of Agreement dated 25 June 1993, as at 23 May 1996 are -

Nugget Resources Inc.	5.00%
First Tiffany Resource Corporation	15.00%

3. If Nugget Resources Inc. continue to spend on exploration and/or development, and if Silver Orchid Pty Ltd does not contribute its share (for the time being) by the end of the next month following, then I order that Silver Orchid Pty Ltd's share be diluted by an additional 1.0% for every CND. $10,000 spent by Nugget Resources Inc. For this purpose, it is noted that Nugget Resources Inc. undertakes to advise Silver Orchid Pty Ltd by the 7th day of the next month, the expenditure for the preceding month.