See paras, 24, 86

Indexed as:

Nufort Resources Inc. v. Eustace

Between
Nufort Resources Inc. and Nahanni Mines Limited, plaintiffs,
and
Michael Anthony Eustace, Edwin J. Robertson, M.A. Eustace & Associates and 460226 Ontario Limited, defendants
And between
James A. Harquail, plaintiff and
Consolidated Montclerg Mines Limited and National Trust Company Limited, defendants

[1985] O.J. No. 1024

29 B.L.R. 282

Nos. 2194/81, 2371/81

Ontario Supreme Court - High Court of Justice

Catzman J.

Oral judgment: February 8, 1985.

(61 pp.)

Counsel:

J.T. Morin, Q.C. and J.S. Leon, for the plaintiffs.
E.R. Murray, Q.C. and K.C. Cancellara, for the defendants.

CATZMAN J. (orally):--

THE ACTION AND THE PARTIES

1 On consent of counsel for all parties, these two actions were tried together and the evidence called and argument presented were treated as applicable to both actions.

2 In Action 42194/81 (York) ("the first action"), the plaintiffs are Nufort Resources Inc. ("Nufort") and Nahanni Mines Limited ("Nahanni") and the defendants are Michael Anthony Eustace ("Eustace"), Edwin J. Robertson ("Robertson") M. A. Eustace & Associates and 460226 Ontario Limited ("Newco").

3 In Action 42371/81 (York) ("the second action"), the plaintiff is James A. Harquail ("Harquail") and the defendants are Consolidated Montclerg Mines Limited ("Montclerg") and National Trust Company Limited ("National Trust").

4 Nufort and Nahanni are companies incorporated pursuant to the laws of the Province of Ontario carrying on business in the mining and resources industry. Harquail, a consulting engineer, is a substantial shareholder and president of Nufort. Nufort and Harquail together hold a controlling interest in Nahanni, of which Harquail is also president. Harquail is president as well of two companies named Reds tone Resources Inc. ("Redstone") and Impact Investments Limited ("Impact"), and is director of a private management company called Surveymin Limited ("Surveymin").

5 Eustace is a solicitor residing in the Municipality of Metropolitan Toronto where he is engaged in the practice of law. M. A. Eustace & Associates is the firm name in which Eustace carries on his practice. Robertson is a stockbroker residing in the Municipality of Metropolitan Toronto. He has since 1970 practised his occupation with the brokerage firm of Housser & Company Limited in Toronto.

6 Newco was incorporated pursuant to the laws of Ontario on October 30th, 1980.

7 Montclerg is a company incorporated pursuant to the laws of the Province of Ontario carrying on business in the mining and resources industry.

8 National Trust, which carries on business as a trust company in this province, was at all material times the transfer agent and registrar of Montclerg in connection with a rights offering made by Montclerg to which reference will be made hereafter.

9 In the prayer for relief in their statement of claim in the first action, Nufort and Nahanni claim a declaration that one-half of all of the benefits that have accrued to the defendants as result of their dealings with Montclerg, including one-half of all the common shares acquired or optioned by them, are held by way of constructive trust for the benefit of the plaintiffs and for an order requiring the transfer of such benefits to the plaintiffs; an accounting of all benefits that have accrued to the defendants as a result of their dealings with Montclerg; specific performance of an alleged agreement regarding Montclerg made between the plaintiff Nufort and Eustace and Robertson; alternatively, damages for breach of fiduciary duty; compensation for unjust enrichment and

conversion of confidential information; damages for conspiracy; punitive damages; interest and costs.

10 In the prayer for relief in his statement of claim in the second action, Harquail claims specific performance of an alleged agreement between him and Montclerg pursuant to which he was entitled to purchase an additional 180,943 common shares of Montclerg at the price of forty cents per share; damages in the amount of $250,000.00; an order requiring delivery to Harquail of that number of shares at that price sufficient to give him the same percentage interest in the issued capital of Montclerg that he would have held had the alleged agreement not been breached; alternatively, damages for breach of contract of $500,000.00; interest and costs.

CREDIBILITY

11 Before setting out the facts as I find them, I propose to deal with the question of credibility. The dramatically different versions of certain relevant events put forward in the testimony of Mr. Harquail on the one hand, and Messrs. Eustace and Robertson on the other, the extent and significance of the discrepancies between the stories which they were to tell, and the consequent necessity of making a finding as to credibility became evident at a relatively early stage in this trial. That finding was made more difficult by internal inconsistencies and contradictions, some more serious and some less so, in the testimony of each of Mr. Harquail, Mr. Robertson and Mr. Eustace, and by unsatisfactory aspects of the evidence given by each of them.

12 However, upon consideration, I have formed the view that where the evidence of Mr. Harquail differs in material respects from the evidence of Messrs. Eustace and Robertson, I accept the latter evidence in preference to the former. I come to this conclusion on the basis of my studied observation of the manner in which the principals to the litigation gave their evidence, particularly in cross-examination, and on the basis of factors which I consider to be somewhat more objective, by which I refer particularly to a number of significant omissions in the contemporaneous diary in which, according to his evidence, Mr. Harquail conscientiously and unselectively recorded important events relating to his business endeavours and to the testimony of strangers to this litigation which supported the version of events put forward by Messrs. Eustace and Robertson rather than that put forward by Mr. Harquail.

13 I turn to a recitation of the facts as I find them to be in the light of the view which I have expressed.

INITIAL INTEREST IN GOLD PROSPECTS

14 In or about September, 1978, Harquail, motivated by increases in the price of gold (Exhibit 1, Tab 35), became interested in seeking and acquiring gold prospects in the Timmins/Kirkland Lake area of Northern Ontario. In September and again in October, 1978, he met with Dr. Hugh Carlson, a consulting geologist with offices in Porcupine, Ontario, who agreed to do research and to assess the gold prospects of locations in the area. In January, 1979, Carlson presented his report (Exhibit 1,

Tab 1), entitled "Reports on Certain Mining Claims in the Porcupine-Abitibi Region of Northeastern Ontario for Surveymin Limited." The areas reported on by Carlson included a number of properties along the Pipestone Fault in the Timmins area in which companies with which Harquail was associated had an interest and which were located near, and in some cases adjoined, properties owned by Montclerg. According to Harquail, he was first alerted to the possibility of investigating Montclerg when ho road Carlson's report of January, 1979.

15 At this stage of their corporate existence, both Nahanni and Montclerg were inactive. Nahanni had been dormant since about 1973 and had no operating capital. Montclerg's charter had been cancelled in 1977. Harquail contemplated that Redstone, of which Harquail was president and a company named Rayrock Resources Limited ("Rayrock") would pay for the development work of certain properties staked by Carlson in the course of his research. Something under $20,000.00 was advanced, of which the bulk was paid to Carlson for his consulting work. Redstone had a 55 per cent interest and Rayrock a 45 per cent interest.

ROBERTSON AND EUSTACE ENTER THE PICTURE

16 Nahanni began looking for financing in the spring of 1979. Len Bednarz, a director and vice president of Nahanni, suggested to Harquail that Robertson, whom he knew, would be prepared to lend Nahanni some money in consideration of an option to purchase Nahanni shares. Discussions with Robertson led to an agreement, dated May 29, 1979 (Exhibit 1, Tab 2), between Nahanni and Nufort on the one hand and Robertson on the other, by which Robertson agreed to make a $5,000.00 unsecured, interest-free loan to Nahanni in consideration of which Nufort would transfer to Robertson or his nominees 150,000 common shares of Nahanni at the price of one cent per share and Robertson, upon Nahanni proceeding with a rights offering to its shareholders, would subscribe for a further 150,000 shares at a price not exceeding 15 cents per share. The loan was to be repaid upon the completion and out of the first proceeds of the contemplated rights offering. Robertson was to be entitled to a nominee on Nahanni's board.

17 Eustace and Robertson had been friends since high-school days and had been associated together in business ventures since the mid 1970's. Robertson brought Eustace into the picture in connection with the proposed loan to Nahanni. Eustace acted for Robertson in preparing the agreement and became a principal in the transaction, sharing an equal percentage with Robertson.

18 Paragraph 6 of the agreement of May 29, 1979 noted Eustace's agreement to act as Robertson's nominee on Nahanni's board of directors and paragraph 7 acknowledged the agreement of Nahanni and Nufort to retain the law firm with which Eustace had formerly been associated, then called O'Connor, Gold and Letovsky, as legal counsel to act on behalf of Nahanni and Nufort in all matters relating to the proposed rights offering.

19 In implementation of the agreement, Robertson lent Nahanni $5,000.00 in May 1979 (Exhibit 1, Tab 4) and a further $1,000.00 in September 1979 (Exhibit 1, Tab 5). The total of $6,000.00 was repaid to Robertson by Nahanni in October 1979 (Exhibit 1, Tab 5). Robertson's family company

received 37,500 shares in Nahanni and Eustace's family trust acquired the same number. Eustace was appointed to Nahanni's board of directors on May 29, 1979 (Exhibit 1, Tab 3(a)). The Nahanni rights offering was completed in the late fall of 1979.

20 Robertson confirmed that he first saw Carlson's deport during his discussions with Harquail about the refinancing of Nahanni, and it is undisputed that it was Harquail who first mentioned Montclerg to Robertson as something which had been brought to his attention as a gold prospect.

REDSTONE ACQUIRES RAYROCK'S INTEREST - NAHANNI ACQUIRES REDSTONE'S INTEREST

21 To put in context the matters which follow, I interrupt the chronology at this point to deal briefly with the acquisition by Redstone of Rayrock's interest in the properties to which I have referred and the subsequent acquisition by Nahanni of Redstone's interest.

22 In May 1979, Nahanni and Nufort had no interest in the Pipestone Fault claims; Redstone and Rayrock did. A letter from Carlson to Harquail dated September 22, 1979 (Exhibit 1, Tab 6), suggested, in specific reference to Montclerg, that "a good gold deposit may be up for grabs in the near future". At this point, Redstone, which already had 55 per cent, acquired Rayrock's 45 per cent interest at the latter's cost. Harquail's evidence was that though Redstone purchased this interest, it was not specializing in gold projects and it was Harquail's intention to offer Redstone's interest to the directors of Nahanni to see if they would agree to purchase it. The plan he says he formulated around October, 1979 was to have Redstone acquire. Rayrock's interest, to recommend to Nahanni's directors that they acquire that interest, and that Nahanni and Redstone would then jointly embark on an exploration programme as recommended by Carlson. That phase of Harquail's plan to which he referred in his evidence as Phase One, is reflected in the minutes of the meeting of Nahanni's board of directors of November 27, 1979 (Exhibit 1, Tab 3(c)), under headings relating to the "Timmins Joint Venture". According to Harquail, Phase Two would be to work out an arrangement with Montclerg, which owned neighbouring properties, to develop its properties jointly with those of Nahanni.

23 By agreement dated as of September 4, 1980 (Exhibit 1, Tab 22), Redstone agreed to convey to Nahanni its 55 per cent interest in consideration of Nahanni's agreement to cause not less than $100,000.00 of work to be done on the mining claims before 1982 and, at Redstone's election immediately following the incurring of an exploration expenditures aggregating $250,000.00 either a seven per cent net profit interest or a 25 per cent participating interest. According to Harquail, Redstone's acquisition from Rayrock in 1979 was done with the intention of turning the interest over to its associated company, Nahanni, and was an accommodation to Nahanni, which was "our gold vehicle". Harquail acknowledged that there was nothing in writing to confirm that accommodation. At the time of Nahanni's acquisition of Redstone's interest, Harquail testified, Redstone had very little money and Nahanni had just raised over $200,000.00. Redstone sold the properties at its cost to Nahanni which agreed to spend money in the development of the properties.

INITIAL APPROACHES TO MONTCLERG

24 The first approach to Montclerg was made in late 1979. Harquail testified that in October 1979 he mentioned Montclerg to Robertson and asked the latter to check to see if there was a cease and desist order with respect to its shares. Robertson testified that in December 1979, while thumbing through the Canadian Mines Handbook (Exhibit 2, Tab 51), he came upon an entry for Montclerg which referred to one J. H. Seguin as Secretary. He called Eustace, who had been trying to introduce him for some time to a man named Seguin and asked Eustace if it were one and the same person. Eustace confirmed that it was, and Robertson immediately relayed the information to Harquail.

25 Whoever provided the inspiration, a meeting with Seguin was arranged and took place in Harquail's office on December 12, 1979. Present were Harquail, Robertson, Bednarz, one Jeff Green and Seguin. Eustace was not there. Like Robertson, Bednarz and Green were stockbrokers. The meeting addressed Montclerg's status and the viability of its properties and concluded with Sequin's agreement to Harquail's request to make available technical reports on Montclerg's properties so that the feasibility of the reactivation of Montclerg could be assessed.

26 It is appropriate at this juncture to identify the shares of the investors and the roles to be played by the three principals to this litigation. I shall be dealing shortly with three proposals which were made to Montclerg in January, March and September, 1980. Robertson's evidence, which I accept, was that as of the date of the first proposal, each of the five investors -- Eustace, Robertson, Harquail, Green and Berdnarz -- was to have an equal 20 per cent interest. By the date of the March proposal, there was to be a different split; while Harquail's share was still 20 per cent, Eustace's was to be 36 per cent, Robertson's 24 per cent, and Bednarz and Green 10 per cent each. By September, 1989, the investors' interests were back to 20 per cent each.

27 With respect to the role of the investors were to play, I accept the evidence of Robertson and Eustace that each of the investors was to contribute his particular expertise to the venture and there was no contemplation of or agreement for remuneration to be paid to the investors beyond what would come to them by reason of their participation in the venture. Harquail was to be responsible for the technical geological end. Robertson's responsibility related to finance and marketing. Eustace's responsibility was to be negotiating and in preparing the appropriate documentation and giving legal advice with respect to the venture as required. In his testimony, Eustace insisted that there was no agreement that he be separately remunerated for his legal services. He never submitted an account, nor received remuneration for his legal services. Harquail's evidence was that, though it was not contemplated that he or Robertson be separately remunerated, he did contemplate that Eustace would be paid by the group for his services, though I understood him to acknowledge on cross-examination that he never discussed with Eustace or any other investors the fact that Eustace would be remunerated for his services. I reject Harquail's evidence on the subject of Eustace's separate remuneration.

28 On January 2, 1980, as a follow-up to the meeting with Seguin, Harquail met with Arthur S. Bayne, Montclerg's consulting engineer, and on that day and the following day, received from Bayne a number of documents (referred to in Exhibit 1, Tabs 7, 8 and 9). Following his study and analysis of these documents, he concluded that the property was an above average and an excellent gold prospect. On January 11, 1980, Robertson and Eustace met with Seguin on what was primarily a fact-finding meeting to obtain information regarding Montclerg which would be required in the event of a proposal to that company. Consistent with the respective roles which Harquail, Robertson and Eustace were to play, Harquail was not present at this meeting.

JANUARY 1980 - THE FIRST PROPOSAL

29 The upshot was a letter, dated January 14, 1980, from M.A. Eustace & Associates to Seguin ("the first proposal"). Like the March and September proposals, the letter, (Exhibit 1, Tab 10) was prepared by Eustace. It opened with the words:

> "Further to our various discussions and more particularly our meeting with my client, Edwin J. Robertson and the writer on January 11, 1980, Mr. Robertson on behalf of certain investors is prepared to enter into an agreement with Montclerg which agreement would contain the following terms and conditions"

30 In cross-examination, Eustace defended his use of the phrase "my client, Edwin J. Robertson" both as a matter of tactics (because, he said, it gave him a certain edge in the negotiations to indicate he was representing a client even though he himself was a principal) and as a matter of accuracy (because Robertson was in fact Eustace's client for the purposes of the proposal). He acknowledged that he was acting as a solicitor in the context of the first proposal. With some reluctance, he agreed that he had been retained for the purpose of putting forward the proposal on behalf of the investor group, although he considered the term "retainer" inappropriate because his services were to be by way of contribution of his expertise to the fulfilment of the venture in accordance with the division of responsibility to which I have referred.

31 The first proposal contemplated a $15,000.00 unsecured interest-free loan to Montclerg, in consideration of which 250,000 common shares of Montclerg would be transferred to Robertson or as he directed at the price of one cent per share. The proceeds of the loan were to be applied to pay Montclerg's creditors and to bring the corporation into good standing with government and regulatory authorities. The only reference to Nahanni in the first proposal is found in paragraph 8, which provided that, after Montclerg's reinstatement to good standing, Eustace,

> "a director of a Corporation known as Nahanni Mines Limited, a public Ontario Corporation trading over the counter in Ontario, which owns adjacent property to your Matheson claims, would be prepared to present to the Board of Directors of Nahanni a proposal to pool the two claim groups pursuant to a 50-50 agreement between Nahanni and Montclerg for the pool claims to conduct an exploration programme at the sole expense of Nahanni up to a maximum amount of dollars

to be negotiated and decided upon."

32 The loan was to be repaid from the proceeds of completion of a refinancing of Montclerg and Robertson was to have the first right of refusal on any public financing of Montclerg for a period of six months from the date of its reinstatement by the Ontario Securities Commission.

33 There was no response from Seguin or anyone else to the first proposal.

MARCH 1980 - THE SECOND PROPOSAL

34 On March 5, 1980, Robertson and Eustace again met with Seguin. Again, Harquail was not present, though he participated in a portion of the meeting by way of telephone conference call. The object of the meeting was to consider what form of proposal might be of interest to Montclerg. The conference call dealt with a pooling of the Nahanni and Montclerg claims for development.

35 There followed, on March 7, 1980, the second proposal, again, in the form of a letter from M. A. Eustace and Associates to Seguin (Exhibit 1, Tab 11). Eustace acknowledged on cross-examination that he prepared the second proposal acting as a solicitor on behalf of the members of the investor group and that he signed the proposal in his capacity as solicitor for the parties he was representing. He agreed that in the second proposal, unlike the first, Nahanni became a party to the transaction. He acknowledged that he was acting as solicitor for Nahanni in connection with this proposal and drafted on behalf of Nahanni a document that could affect its interests, but was emphatic that he was not looking to Nahanni for compensation and did not expect to be compensated but rather was acting in fulfilment of the responsibility devolving upon him as a member of the investor group.

36 The second proposal differed from the first proposal primarily in the introduction of paragraph 8, which contemplated a pooling by Montclerg and Nahanni of their joint claims in the Matheson area on a 50/50 pooled claim basis and Nahanni's agreement to spend a minimum of $250,000.00 on the pooled claims by way of exploration and development over a period of 12 months, such expenditure to be under the direction of Harquail in consultation and conjunction with Montclerg's consulting engineer.

37 The second proposal expressly contemplated signature by Robertson, by Harquail on behalf of Nahanni and by Seguin on behalf of Montclerg.

38 As with the first proposal, no response was received to the second proposal.

SEPTEMBER 1980 - THE THIRD PROPOSAL

39 Through the spring and summer of 1980, nothing was heard from Montclerg. Again, there is a conflict as to who initiated the events that led to the third proposal. Harquail testified that around the middle of August the gold market became very active. He heard that others were looking at the

Montclerg property and thought that the March proposal should be reconsidered and made more attractive to Montclerg, an idea which he then passed on to Robertson. Robertson testified that he decided on his own to give it one more try and that, on his own initiative, he telephoned Don Lough, Montclerg's president, in Huntsville. Again, whosoever was the incentive, the result was that Lough suggested a meeting at the Engineers Club. in Toronto on September 9, 1980.

40 Much controversy surrounds what took place on September 9, 1980. Before dealing with the events of that date, however, I pause to note the introduction into the scenario at this stage of Nufort. Nahanni was then in the midst of preparation for its refinancing. It had received two deficiency letters from the Ontario Securities Commission with respect to its Gold Drilling Fund and, at the time of the negotiations involving the third proposal, did not have a great deal of money. According to Harquail, Nufort, which Harquail described as Nahanni's "parent" but which, to be accurate, owned 27 per cent of Nahanni that, in combination with Harquail's shareholdings of 16 per cent totalled 43 per cent and constituted effective control, had at the time some $800,000.00 in cash. Harquail formed the view that Nufort, rather than Nahanni, should provide the financial guarantee on the basis of what Harquail described as an "oral agreement or undertaking" that Harquail would recommend to the directors of Nufort that they turn over calf of their interest to Nahanni at cost and the two companies would each have an equal interest in the venture.

41 I return to the events of September 9, 1980. It is clear that there were three separate meeting occasions on that date, but who was present, what was discussed and whether anything was or was not agreed are very much in dispute.

42 The three separate occasions to which I refer are:

> (1) a meeting at Harquail's office before the attendance at the Engineers Club, ("the pre-meeting");
>
> (2) a meeting in the library of the Engineers Club ("the library meeting"); and
>
> (3) a meeting at dinner in the dining room of the Engineers Club ("the dinner meeting").

43 According to Harquail, the pre-meeting was a strategy meeting with Robertson and Eustace. Harquail was emphatic about two events which he said took place at that meeting. The first was that he instructed Eustace who agreed, to act as solicitor on behalf of Nufort and Nahanni, to do the negotiating and prepare the legal agreements regarding the Nufort/Nahanni proposed offer to Montclerg. The second was that he told Eustace about the oral agreement or understanding between Nufort and Nahanni and that in the proposal, Nufort's name would replace that of Nahanni, whose name would not appear.

44 Robertson and Eustace denied that Eustace was at the pre-meeting. Furthermore, Eustace denied that he was ever retained by Harquail to act on behalf of Nufort or that Harquail ever indicated to him the existence of an agreement or understanding between Nufort and Nahanni by which Nufort was to replace Nahanni and the two companies would share on an equal basis the fruits of any such venture.

45 I accept the evidence of Eustace and Robertson, supported by the witnesses of Gurvitch, Young and Levy, and inferentially by that of the witness Bayne, that Eustace did not attend the pre-meeting at Harquail's office and could not have been there because he was engaged in a meeting at his own office until roughly 5:30 p.m. on that day and did not leave his office until after 6:00 p.m., when he proceeded directly to the Engineers Club. I reject the suggestion that Eustace was specifically retained at the pre-meeting or on any other occasion to act as solicitor on behalf of Nufort or that he or Robertson was ever advised of the alleged agreement or undertaking between Nufort and Nahanni. I accept Robertson's evidence that the pre-meeting was of brief duration and that, at the pre-meeting, he and Harquail did not review in any detail the form of proposal or develop strategy or the approach to take with the Montclerg people at the meeting at the Engineers Club, but rather, at most, "broad brushed" in general terms a number of matters that might come up at that meeting.

46 Following the pre-meeting, Harquail and Robertson -- but not Eustace -- proceeded together to the Engineers Club where, in the library, they met with Lough, Montclerg's president; Bayne, its consulting engineer; and Wansborough, a chartered accountant, who was Montclerg's auditor. Again, I accept the evidence of the defendants that Eustace was not at the meeting except for the tail end of it, a maximum of five minutes, that it was primarily a social meeting at which parties were getting to know each other, and that no proposal was submitted or accepted. I find that no agreement was reached at the library meeting.

47 Likewise, I find that the dinner meeting was primarily a social event at which, again, no agreement was reached but rather that Lough indicated that if a proposal was to be pursued, it should be submitted to the office of Ralph Caswell, Montclerg's solicitor.

48 Following the meeting, between September 11 and September 19, 1980, Eustace engaged in a number of telephone conversations and prepared draft proposals for submission to Montclerg which he discussed with Harquail and Robertson. I find that in one such telephone conversation, on September 16, 1980, Harquail specifically instructed Eustace to execute the proposal on behalf of Nufort as well as Newco. The result of all of these discussions was the third proposal, a letter dated September 22, 1980 (Exhibit 1, Tab 19), addressed to Montclerg in care of Caswell and signed by "Nufort Resources Inc. and Newco by their solicitors M. A. Eustace and Associates per Michael A. Eustace". Eustace acknowledged in his evidence that he was acting as a solicitor in preparing the third proposal and had been "retained", within the performance of his role.in the investor group, by the parties who were looking to him to protect their interests. He specifically signed the third proposal as solicitor for Nufort and Newco and agreed that he acted as solicitor for both in

connection with this proposal.

49 The third proposal, unlike the first two, made no reference to a pooling of claim groups but rather contemplated a refinancing of Montclerg by way of rights offering to be guaranteed by Nufort and Newco. It provided, in paragraph 1, for the calling of an annual and general meeting of Montclerg's shareholders at which five directors would be elected, three of whom were to be the nominees of Nufort and Newco. By paragraph 2, Montclerg's registered and executive offices were to become located in Harquail's office. By paragraph 3, Montclerg's board of directors was to approve an application for a rights offering to shareholders on terms set out in paragraph 4 and, by paragraph 5, Newco and Nufort were to guarantee on a 50/50 basis the subscription of the rights offering the sum of not less than 5218,210.00. In consideration of their guarantee, Nufort and Newco were by paragraph 6 to receive from Montclerg a 12-month option to purchase 436,420 common treasury shares in Montclerg at 25 cents per share. By paragraph 8, the Bird Estate, North Oka Holdings Ltd. and Joseph Seguin were to make available and assign to Nufort and Newco all rights attaching to shares controlled by them. By paragraph 11, Montclerg's current debts, estimated at $45,000.00, were to be repaid from the rights issue.

50 It is clear from a reading of the third proposal that the parties to the proposed agreement on whose behalf the proposal was submitted were Nufort and Newco. Nahanni had no legal interest in the proposal although, as I understood Eustace himself to confirm in his evidence, it was "interested" in the proposal in the colloquial sense.

51 Following submission of the third proposal, Caswell telephoned Eustace and set up a meeting for September 24, 1980.

THE FALLING-OUT

52 The meeting was attended by Eustace, Robertson, Caswell and Seguin. Harquail was not present. A number of items were discussed relating to the third proposal and two specific issues were raised to which Eustace and Robertson indicated their agreement. The first was Montclerg's position that it wanted its accounts payable to be paid forthwith after the proposed annual meeting of shareholders rather than awaiting the proceeds of the rights offering ("the early payment point"); the second, which arose from Montclerg's concern that if the investors did agree to the early payment of accounts payable and thus became in effect the company's only creditor, they should not exercise their rights as creditors if the rights offering did not succeed as proposed ("the creditors' rights point"). Eustace and Robertson agreed to both points.

53 On the following day, September 25, 1980, Eustace and Robertson met with Harquail in Harquail's office. What transpired at that meeting is the subject of considerable controversy among those present. All agree that there was a discussion of the early payment point. Harquail denied he objected and said that he agreed. Robertson said that Harquail objected quite vigorously. Eustace said that Harquail objected immediately, and that the point was not resolved. I accept the evidence of Eustace and Robertson.

54 Eustace reported as well at this meeting on the creditors rights point, but the subject was not considered because of the heated discussion which ensued on the next subject. Again, the parties do not agree as to what that subject was as to how divisive it was. Again, I accept Robertson's version and find that the subject led to a critical and fundamental disagreement between Harquail on the one hand and Eustace and Robertson and, though they were not present, Green and Bednarz, on the other.

55 In his evidence in chief, Robertson said that the view he expressed at that meeting was that the investors should be able to deal with their interests on a separate basis. One of the matters that motivated Robertson, Green and Bednarz' interest in the Newco concept was that, through the proposed rights issue, they would each have a pro-rata share of rights and shares available as low priced "product" for their brokerage clientele. What then transpired -- and here I quote from Robertson' s examination-in-chief -- was that:

> "Q. Mr. Harquail made it abundantly clear that the public or our investor clients were not going to participate at the proposed agreement at twenty-five cents a share. He also made it abundantly clear that Newco/Nufort and he introduced Nufort as a potential fifty percent investor in Newco, were going to gobble up every right that became available and hold the shares. None would be available to the client base.
> Q. Did he offer an explanation as to why he was putting that position forward?
> A. Well, he thought it ridiculous to offer the client base stock at twenty-five cents a share.
> Q. Was that question resolved at any time during the course of the meeting?
> A. Absolutely not.
> Q. Incidentally, what was the tenor of this meeting?
> A. I, quite frankly, I was getting very agitated and Mr. Eustace was sitting back with his jaw down a bit, watching Robertson stand up for his investors and vigorously pursuing what he thought was the original notion of the investor group. And Mr. Harquail and I were at loggerheads. I basically said to Mr. Harquail, 'I am not in here through Newco to have you control the whole thing and have everything locked up and not have anything available to the client base.' We had a basic disagreement, the style and form of Newco.
> Q. Was there any intention expressed in the course of that meeting as to the future discussions with respect to these differences?
> A. None. I basically got up and left, sir.
> Q. Did you have a discussion in the course of that meeting as to whether you would pursue the matter further, that is the concept further, with Montclerg?
> A. No.
> Q. I want to be clear on your answer.
> A. Okay.
> Q. No, you didn't pursue it further in discussions or you did pursue it and you

wouldn't pursue the concept further?

A. I made it abundantly clear to Mr. Harquail that I was not interested in being locked in, having my investors locked in, to a Newco that he was showing desires to control, and I got up and said, 'I can't pursue this any further.' I said, 'Perhaps you would pursue it on your own', wished him luck and walked out of his office and I told him at the time that I had not further interest in pursuing with the contemplated arrangement."

56 Not surprisingly, Mr. Robertson was extensively cross-examined on his evidence as to what differences of opinion emerged at this meeting. After establishing three items of dispute - the early payment point; Nufort's proposed 50 per cent interest in Newco; and the ability of the stock broker investors to make rights issued by Montclerg available to their clients - Mr. Morin dealt with each in turn. The cross-examination on the points now under consideration continued as follows:

"Q. Now, let's go back to the list of items in dispute and move on to the second one and that is that Mr. Harquail told you that Nufort was to have a fifty percent interest in Newco. Is that correct?

A. That's correct.

Q. Now, did that mean that Newco was to have a fifty percent of the guarantee that is referred to in the September 22nd letter and that Nufort was to have a fifty percent interest in Newco?

A. It meant that Mr. Harquail wished to have Nufort a fifty percent shareholder in Newco, which was unacceptable.

Q. So he wanted Nufort to have fifty percent of Newco and that left fifty percent then for you, Eustace, Green and Bednarz.

A. And Mr. Harquail was an original participant too. There are five.

Q. Now, did he raise this for the very first time at your meeting, on September the 25th?

A. He did.

Q. Now, that was a pretty radical departure from the basis upon which Newco had been constituted before that date; isn't that correct?

A. Indeed it was.

Q. And that's a pretty fundamental difference from the way it had been constituted before, wasn't it?

A. Absolutely.

Q. And that led, I suggest, to a very fundamental disagreement between you and Mr. Harquail.

A. It certainly did."

And, on the third item:

"Q. Now, all right, so then we have talked about the fundamental disagreement about how much Nufort was going to have in Newco. And we come then to the third item and that relates to the sale of Montclerg rights to clients, your firm and the firm of Messrs Green and Bednarz. Now, I suggest to you, sir, that what the difference in view was on this item is this: Mr. Harquail wished to have Nufort and Newco purchase rights that became available in the market and you wished to be free to sell those rights to your clients. Is that fair?

A. Pass them through to my clients.

Q. Is there a difference?
A. Yes, there is.
Q. Between selling them and passing them through?
A. No profit involved. Make them available.
Q. So you are saying that you weren't going to take your normal brokerage commission on the sale or the pass through.
A. No commission involved, sir. Make them available to the client so that they can become original subscribers.
Q. But that is the essence of the difference of views that you and Mr. Harquail had as far as Item No. 3 is concerned.
A. There was to be no availability.
Q. So, this Item No. 3 relates to a matter that is going to arise, if at all, after you have made a deal with Montclerg and after you've accomplished your rights offering. Is that fair?
A. If we had gone that far, we would have had a resolution as we tried to gain in the meeting of an understanding, the style and form and operation of Newco.
Q. This problem that we have been talking about is a problem that would have arisen, if at all, if you had made a deal with Newco, sorry, with Montclerg, and after you had done a rights offering.
A. I didn't have a chance to go any further than the culmination of that meeting, sir."

57 The interrelationship between these two items became clear at a subsequent point in Robertson's cross-examination in which he was being asked about the contents of a letter delivered by Eustace to Caswell on October 1st, 1980, (Exhibit 2, Tab 9):

"Q. Nor is there any reference in this letter to the fact that Mr. Harquail wanted Nufort to have a fifty percent interest in Newco, is there?

A. That's covered by Nufort restrictions.

Q. Sir, the restrictions that are set out in this letter, clearly refer to the marketing of securities, do they not?
A. Yes, but that would have also been imposed through Nufort's efforts to maintain absolute control of Newco.
Q. But there is a big difference between a restriction on the marketing and securities and the disagreement as to the equity interest of Nufort in Newco, isn't there, sir?
A. They went hand on time. Had the equity interest been achieved by Nufort and Newco, everybody else would have been frozen out of being able to do anything in Newco.
Q. But even if Mr. Harquail had his twenty percent, the difference of opinion still existed with respect to the marketing of securities, didn't it?
A. Yes, it did. But it was controllable.
Q. So you say that the language, restrictions placed on Newco and Nufort with regard to the marketing of securities, intended to and did refer to the fact that Mr. Harquail wanted fifty percent in Newco for Nufort. Is that your evidence, sir?
A. That effort to obtain control was part and parcel of Mr. Harquail's efforts to control "the marketing."

And, at a later point:

"Q. That doesn't make any sense, does it, Mr. Robertson? That Mr. Harquail under those circumstances at that point would make that kind of a demand.
A. It does absolutely to me. He wanted to control the thing and prevent any marketing of shares at twenty-five cents and that was a device he hoped to use because if he acquired that interest, if we ceded to that interest in Newco, he would have been completely in charge of Newco, completely in charge of the whole thing and the investor group would have been frozen out with nothing to do but invest in Newco.
Q. That is a demand that had absolutely no chance of being agreed to by the other investors in Newco, is it?
A. The other investors would have acted on my recommendation. It was a demand that I could not recommend to the other investors.
Q. The other investors I mean to include you and Eustace.
A. Myself, Mr. Eustace, Mr. Green and Mr. Bednarz."

58 I accept the evidence of Mr. Robertson on the matters referred to in the quotations I have set out.

59 September 25th, 1980, was a Thursday. On the following Sunday, September 28th, Robertson met with Eustace, who was his neighbour, in Eustace's home. Eustace expressed the view that they had spent several months on this transaction and should not simply walk away from it. Robertson decided that if he could be satisfied as to a recission of any contemplated arrangements between Newco and Nufort and himself, they should enter what he described as "a competitive fray for the refinancing of Montclerg".

60 Events moved rapidly thereafter. On September 29, 1980, Eustace telephoned Lough, told him that Nufort and Harquail were no longer involved and that Robertson and Eustace would agree to guarantee one hundred per cent of the deal. On the same day, Harquail phoned Eustace and asked whether Robertson had changed his mind regarding the deal. Eustace said he had not. On the same day, Eustace and Robertson met with Letovsky, the lawyer associated with Eustace's former firm who had done the legal work for Nahanni in connection with its rights offering. Letovsky dictated a letter, sent on Eustace's letterhead, to Harquail, dated September 30, 1980, (Exhibit 1, Tab 20). The original letter was delivered to Harquail and a copy was delivered to Caswell. It read:

> " Further to our meeting, with Mr. E.J. Robertson and yourself on September 25, 1980, we confirmed that at such meeting there were substantial differences between Newco and yourself regarding the proposed transaction with Consolidated Montclerg and that those disagreements are fundamental to the proposal as outlined in my letter to Mr. Ralph Caswell Q.C. dated September 22, 1980.
>
> After due consideration and lengthy deliberation, we have come to the conclusion that we cannot proceed on the basis contemplated.
>
> Therefore by these presence we are in effect terminating the proposed arrangements between us at this early stage, in order to minimize the costs and damages of tile various parties involved."

61 Through no apparent fault of Eustace, Harquail did not receive the letter until the following day. Eustace telephoned Caswell on September 30, 1980 and advised him of the situation including the irreconcilable differences on the basis of which Eustace and Robertson were not prepared to go ahead with Harquail. Eustace delivered a confirming letter to Caswell to which I have referred above, on October l, 1980, (Exhibit 2, Tab 9). On the same day, Eustace returned a telephone call from Harquail in which Harquail expressed annoyance at the fact that Eustace had sent to Caswell a copy of his letter to Harquail of September 30, 1980. Harquail advised that he was going to make an offer to the Montclerg group. Eustace said that "we were too". That telephone conversation is reflected in Eustace's note (Exhibit 2, Tab 22), though not in Harquail's diary (Exhibit 1, Tab 31, Page 38). On his cross-examination, Harquail said that he had no recollection of Eustace advising of

his intention to submit an offer to Montclerg but conceded that if Eustace's memory was to that effect positively", he could not deny it. Eustace's memory was to that effect positively, and I accept that that conversation took place as Eustace described it.

62 So it was that competing proposals came to be sent to Montclerg by Eustace and by Harquail.

63 By letter dated October 1, 1980 (Exhibit 2, Tab 10), Newco, by its solicitors, M. A. Eustace and Associates, addressed a proposal to Montclerg in care of Caswell. The introductory paragraph referred to the meetings of September 9 1980 and September 24, 1980. With the deletion of all references to Nufort, the October 1st proposal was substantially identical to the third proposal with the exception of the location of the registered and executive offices of Montclerg (paragraph 2), a small increase in the number of treasury shares forming the subject matter of the option (paragraph 6), the addition of a provision for the early payment of Montclerg's accounts payable (paragraph 8 of the October 1st proposal) and a provision for the delivery of proxies in respect of the Bird Estate, North Oka Holdings Ltd. and Seguin shares (paragraph 9 of the October 1st proposal), and a small increase in the ceiling of outstanding liabilities paragraph 11 of the third proposal). The October 1st proposal contained no reference to the creditors' rights point, which does,however,appear in paragraph 14 of the counter-proposal Caswell forwarded on October 15, 1980 and which Eustace and Robertson accepted on October 27, 1980 (Exhibit 1, Tab 23).

64 By letter dated October 2nd, 1980 (Exhibit 1, Tab 21), addressed to Montclerg in care of Caswell on behalf of Nufort and Impact (the latter appearing on the scene for the first time Harquail confirmed that he was not prepared to recommend to Nufort the "method of proceeding" suggested by Newco to implement the agreement and indicated that Nufort (as to 75 per cent) and Impact (as to 25 per cent) were "prepared to proceed under the terms of the September 22nd letter". No reference was made in this letter to the early payment point.

65 As noted, agreement was reached with the Eustace/Robertson group in late October. Although Harquail received no response to his letter of October 2, 1980, he testified that he made no inquiries of Montclerg regarding a response and did not become concerned until towards the end of October. He also testified that he was informed that Eustace and Robertson had submitted a proposal around the end of October or the beginning of November, 1980, although there is no notation to that effect in his diary.

THE AGREEMENT WITH THE EUSTACE/ROBERTSON GROUP

66 The final version of the Eustace/Robertson agreement appears in a letter, dated october 15, 1980, addressed to Eustace and Robertson and signed by Northolka Holdings Limited, J. H. Seguin and the estate of S. J. Bird, and accepted by Eustace and Robertson on October 27, 1980 (Exhibit 1, Tab 23). That letter proposed amendments to paragraphs 4, 8 and 9 of the October 1st proposal, the deletion of paragraph 13 and the addition of paragraphs 14 and 15. Eustace and Robertson accepted all of the changes proposed. However one assesses the substance of those changes, it is clear that Montclerg chose to consummate a deal with Eustace and Robertson, and not with Harquail, and it is

the entitlement of Eustace and Robertson to make that deal which is in issue in the first action.

MONTCLERG'S RIGHTS OFFERING

67 The contemplated Montclerg rights offering was successfully completed. The rights offering circular (Exhibit 1, Tab 26) was mailed by National Trust on January 14 or 15, 1981. Montclerg granted to shareholders of record as at the close of business on January 12, 1981, one right for each common share held. Two rights had to be exercised to subscribe for and purchase one additional common share in the capital of Montclerg at a subscription price of 40 cents. There were currently 2,668,520 common shares of Montclerg's issued and outstanding. If all rights were exercised, a maximum of 1,334,260 common shares would be issued and Montclerg would receive net proceeds of $533,704.00. The minimum offering was 625,000 common shares for which Montclerg would receive net proceeds of $225,000.00. If less than the minimum number of shares were subscribed for and purchased, all subscription funds were to be returned. The circular described an additional subscription privilege, which is the subject matter of the second action and which I shall set out hereafter. The rights offering expired at 4:00 p.m. on February 13, 1981.

68 The cease trading order in respect of Montclerg's shares was lifted sometime in November 1980. Trading started at 25-35 cents or 35-40 cents a share. By December 1980, shares were trading at 95 cents. According to Eustace, in January 1985, the shares were trading in the range of 18-22 cents. The rights offering achieved the maximum of $533,704.00.

69 The allotment of shares pursuant to the rights offering is set out in the summary which appears at Tab 3 of Exhibit 10. Robertson's firm, Housser and Co. Ltd., subscribed in the original share subscription ("the first round") for 87,000 shares. All of the rights made available were "passed through", "given away" to clients of Housser and clients introduced by Housser to Green. No rights went to Robertson or his family company or to Eustace. All of the subscriptions made through Housser were for client accounts. 460226 Ontario Limited never exercised its options and never bought or sold a share. In 1983, Eustace purchased 200,000 shares at 70 cents a share with a 100 per cent ($140,000) interest-free loan from the company pursuant to the employees stock purchase plan referred to in Note 2 to the Montclerg Financial Statements appearing in Montclerg's 1983 Annual Report (Exhibit 32). He has purchased no further shares under that plan.

70 In December 1980, Harquail purchased 500 common shares of Montclerg. As appears from the subscription warrant he received in respect of his shares (Exhibit 1, Tab 27), he subscribed in the first round for 250 shares, the full amount to which he was entitled, and in the second round for 1,333,500 shares. His subscription warrant was submitted at 3:50 p.m. on February 13, 1981, ten minutes before the expiration of the rights offering.

71 By letter dated February 18, 1981 (Exhibit 1, Tab 29), National Trust advised Harquail that he had been allotted a total of 1,560 common shares. As appears from Exhibit 43, National Trust did not participate in the decision on the manner in which the shares by way of oversubscription would be allocated. The instructions on the manner in which the shares would be allotted was made by

Montclerg. Harquail's position, set out in paragraph 10 of the statement of claim in the second action, is that he should have received a total of 180,943 shares, some 179,383 more than were allotted to him.

72 No complaint by or on behalf of the plaintiffs in these actions about the conduct of the defendants was made or communicated to the defendants at any time between September 30, 1980 and the expiration of the rights offering on February 13, 1981. Although Harquail testified that proceedings were in contemplation during that period, it appears that, until he was notified of his oversubscription by National Trust's letter of February 18, 1981 (Exhibit 1, Tab 29), which he received very shortly thereafter, no communication of the plaintiffs' complaints against the defendants were addressed to them prior to Mr. Menzel's letters of February 23, 1981 to National Trust (Exhibit 10, Tab 9) and to Montclerg (Exhibit 10, Tab 10), which voice complaints limited to the allocation of shares. The writs of summons in both actions were issued in late February, 1981.

73 Page 8 of the rights offering circular (Exhibit 1, Tab 26) sets out the proposed application of the proceeds to be derived from the rights offering. $15,000.00 was to pay she expenses of the rights offering; $60,000.00 was to repay the amount paid to retire the accounts payable; $150,000.00 was to be used to carry out the work programme recommended by Mr. Bayne. In fact, something less than $60,000.00 was spent on this programme (see Exhibit 31) and no drilling work was done because after the field season in 1981, when the price of gold fell from its original highs, Bayne recommended to the board of directors that Montclerg not conduct a drilling programme but rather seek a joint venture partner. The board accepted his recommendation and, though there have been negotiations, no such partner has yet been found.

74 Eustace became president of Montclerg on December 8, 1980, and continues as such. Caswell, who was a director at the time of the rights offering, resigned Sometime in 1981. Gurvitch is an officer and director of Montclerg.

ROBERTSON'S FIDUCIARY DUTY AS A STOCKBROKER

75 Before turning to the submissions of law, I should deal briefly with the facts relating to the claims asserted against Robertson as stockbroker and against Eustace as director of Nahanni.

76 It is not contested that, for roughly the last six months of 1980, Harquail had an account with Robertson's firm and Robertson was Harquail's stockbroker. From the monthly statements (Exhibit 1, Tab 15), it appears that Harquail's brokerage account covered the period from July 4, 1980 until January 7, 1981, and was limited to a number of transactions in respect of the shares of Redstone and of Garrison Creek Consolidated Mines Limited. Though Harquail indicated he and Robertson spoke at least once a day during the brokerage period, he conceded on cross-examination that he revealed no confidential information to Robertson in the latter's capacity as stockbroker during the brokerage period.

EUSTACE'S FIDUCIARY DUTY AS A DIRECTOR OF NAHANNI

77 Between May 29, 1979 (Exhibit 1, Tab 3(a)) and December 1, 1980 (Exhibit 1, Tab 25), when he resigned, Eustace was a member of the board of directors of Nahanni. As he admitted on cross-examination, he was aware of the fiduciary duty which the law imposes on a director to act in the best interests of the company of which he is a director and its shareholders. He acknowledged that he knew that the purpose of all three proposals -- in January, in March and in September, 1980 -- was to revive Montclerg so that its properties and Nahanni's properties could be developed jointly. He also acknowledged that on October 3, 1980, the date of his letter to Caswell of that date and of the enclosed memorandum prepared by Robertson regarding the possible development of the Montclerg properties in conjunction with Pamour Porcupine Mines Limited (Exhibit 2, Tab 12), he was still a director of Nahanni and was aware that that company was still desirous of accomplishing its goal of developing its properties in conjunction with those of Montclerg.

FIDUCIARY DUTY OF JOINT VENTURERS

78 Having in mind the facts as I have found them to be, I turn now to the submissions of law which were made by counsel for the plaintiffs.

79 Mr. Morin's first submission was that that there was a joint venture between Newco and the individuals in the investor" group who made up Newco, on the one hand, and Nufort and, through Nufort, Nahanni on the other, with respect to Montclerg, to which the parties were introduced by Harquail, and which, ultimately, was breached when Eustace and Robertson and the members of the Newco group other than Harquail on their own unilaterally acquired the prospect to the exclusion of Harquail, Nufort and Nahanni.

80 For his part, Mr. Murray conceded the existence of a joint venture and conceded the existence of a fiduciary duty among joint venturers during the currency of the joint venture. But in Mr. Murray's submission, with which I agree, the joint venture came to an end with the meeting of September 25, 1980, when Harquail asserted a position with respect to the internal operation of the joint venture which was so fundamentally intolerable to his co-joint venturers that, in Mr. Murray's words, "it was all over". Aside entirely from Harquail's refusal to agree to the early payment of Montclerg's accounts payable, to which Eustace and Robertson had indicated their assent to Caswell, I am of the view that the joint venture was ruptured at that point by reason of the position taken by Harquail at that meeting.

81 I adopt, with reference to the relationship among the joint venturers and the circumstances in which I have found the joint venture to have terminated, the language of McRuer C.J.H.C. (cast in terms of "partners" and "partnerships") in Sinclair v. Ridout and Moran, [1955] O.R. 167, where he said, at pp. 187-188:

"It was open to either one of them at any time, without notice, to dissolve the partnership. While the partnership existed they were agents of a particular character for one another within the scope of the partnership. When the partnership was terminated the agency was terminated. I know of no law, and no law was cited to me, that would support a finding that, upon the dissolution of a partnership, in

the absence of any agreement to the contrary, the partners cannot make use of information acquired by them in the course of the partnership in competition with each other with respect to matters for which the partnership was formed. Since the parties failed to have a written agreement relating to this matter to the contrary, I think they were both at liberty upon the termination of the relationship to compete with one another for the purchase of Taylor-Forbes Limited."

82 In the present case, the relationship between the partners or joint venturers clearly terminated before the defendants went their own way and succeeded in the acquisition which they had previously been pursuing in common with the plaintiff. On the evidence, I consider the relationship between the parties to have terminated on September 25, 1980, when Robertson said and did what I have set out above in response to the position put forward by Harquail. In case Harquail had any doubt as to the termination of the relationship, that doubt was dispelled in the telephone conversation he had with Eustace on September 29th, 1980, in which, in response to Harquail's inquiry whether Robertson had changed his mind, Eustace said that he had not. In the circumstances, the parties were, to use the words of McRuer C.J.H.C., "at liberty ... to compete with one another", as, in fact, they did in the days that followed the termination of the relationship that was severed at the meeting of September 25, 1980.

83 I am aware of the doubt expressed by Chief Justice McEachern in Davis v. Ouellette (1981), 27 B.C.L.R. 162, whether Sinclair -- in which it should be noted, Chief Justice McRuer expressly found, as I do not find in the present case, that the defendants were acting in bad faith and had made up their minds to seek the first opportunity to oust the plaintiff and to proceed with the proposed transaction without him -- continues to be authoritative in view of the subsequent decision of the Supreme Court of Canada in Canadian Aero Service Ltd. v. O'Malley et al., [1974] S.C.R. 592 ("Canaero"). Whatever the force of that observation, I consider that the circumstances of the present case, as outlined in my recitation of the facts, are significantly different from those which were determined to exist in Canaero and, indeed, in Davis, and that the factual situation disclosed by those circumstances does not engage the principle enunciated by the Supreme Court of Canada in Canaero.

84 I therefore reject the claim asserted against the defendants on the basis of breach of fiduciary duty as joint venturers.

MISUSE OF CONFIDENTIAL INFORMATION

85 Mr. Morin's next submission, which he advanced both in association with the concept of joint venture and independently, may for convenience be termed "misuse of confidential information". The proposition he put forward was that where one party gives information that is confidential to another, the other party may not use that information to gain an advantage without the consent of the person from whom he acquired it. He submitted that the information did not have to be labelled or expressed to be confidential if, in the circumstances, the reasonable recipient would understand it to have that character. When asked in argument what confidential information, in his submission,

Harquail imparted to Eustace and Robertson, he indicated that it was the fact that there was a defunct company called Consolidated Montclerg that owned valuable property along the Pipestone Fault that appeared ripe for reactivation which was, he submitted, information that Eustace and Robertson did not know until Harquail told them about it, information they did not get from the public domain or from Montclerg, but only from Harquail, who gave it to them in confidence.

86 With respect, I do not consider the information identified by Mr. Morin to be confidential within the contemplation of the law. The evidence of Bayne on this point, which I accept, makes clear that none of the reports, memoranda, plans, maps, logs or other documents or information which Montclerg freely made available to Harquail and indeed to other inquirers between 1973 and 1980 was or was intended to be treated as confidential. The situation is, in my view, comparable to that considered by the Alberta Court of Appeal in Ridgewood Resources Ltd. v. Henuset (1982). 18 Alta. (2d) 68, in which, in affirming a trial judgment which dismissed a claim based on alleged misuse of confidential information, the court concluded, at pp. 75-76:

> "In my opinion this appeal must fail, in any event, because the information transmitted by Miles to Henuset was not secret. It was in the public domain. During the course of argument it was contended that, though the information is not secret, the circumstances of disclosure may nevertheless produce a confidential relationship which makes the recipient liable for subsequent use to the detriment of the giver of the information. In my view that is not a correct statement of the law. Both elements, secrecy of the information and the circumstances of confidential disclosure, must co-exist. In addition, to render the cause of action complete, there must, of course, be unauthorized use of the information to the detriment of the party giving the information."

87 I therefore reject the alleged claim for misuse of confidential information.

FIDUCIARY DUTY AS SOLICITOR

88 Mr. Morin's next submission was founded on the alleged fiduciary duty owing by Mr. Eustace, as a solicitor, to Nufort and Nahanni as his clients. He urged me to find on the evidence that Eustace was acting as solicitor for those companies, that the fact that he was also involved as a principal in Newco did not detract from his acting as their solicitor and that even though that relationship may subsequently have come to an end, Eustace was not then at liberty to act in his own interests and against the interests of those companies. In his submission, the fiduciary duty arising from the relationship of solicitor and client could be created even in the absence of a formal retainer by or contractual relationship with the person for whom the solicitor performs legal services, and one consequence of breach of that duty is the requirement that the solicitor make restitution to his client if he permits his duty and his personal interest to conflict and unjustly benefits therefrom at his client's expense.

89 I have been much troubled by the different roles that Eustace played during the events that

give rise to this litigation. He was a member of the board of directors of Nahanni. He was a principal in Newco. He was a solicitor who defined his area of responsibility as a participant contributing his expertise to be that of negotiating the transaction, preparing and submitting documents and giving legal advice regarding the proposed venture if, as and when required. As I understood him, he agreed that he was acting as a solicitor in the preparation and submission of the proposals of January, March and September, 1980, but always within the limitations of his role as participant and contributor of his particular expertise.

90 The January proposal was submitted by "M. A. Eustace and Associates" purportedly on behalf of "my client, Edwin J. Robertson ... on behalf of certain investors". Nahanni, to which reference appears in paragraph 8, was not a party to the proposal.

91 The March proposal, submitted by M. A. Eustace and Associates, again refers to "my client, Edwin J. Robertson", whose capacity is now recited to be "on behalf of certain investors and Nahanni Mines Limited". Both in the context of the proposal and in the form of acceptance set out at the foot of the letter, Nahanni was clearly a party to the proposal, which Eustace drafted on its behalf as well as Newco's, aware that the interests of and potential benefits to be derived by Nahanni thereunder differed from those of Newco.

92 The September proposal was submitted by M. A. Eustace and Associates as solicitors for Nufort Resources Inc. and Newco. Both were clearly parties to this proposal. Eustace agreed on cross-examination that he acted as solicitor for Newco and for Nufort in connection with this proposal, qualified, again, within the scope of the contribution of expertise contemplated among the individual investors. I have already indicated that I do not accept Harquail's evidence that he formally retained Eustace to act as solicitor for Nufort, or for Nufort and Nahanni, in connection with this proposal, or that he advised Eustace of the 50/50 agreement or undertaking between Nufort and Nahanni.

93 On the evidence, I find that Nahanni had no legal interest in the first proposal or, certainly so far as Eustace was aware, in the third proposal. Notwithstanding Mr. Murray's submissions to the contrary, however, it is my view that Eustace was acting as a solicitor on behalf of Nahanni and on behalf of Newco in connection with the second proposal and on behalf of Nufort and on behalf of Newco in connection with the third proposal. I am unprepared to accept that the fact that Eustace did what he did by way of contribution of his particular expertise in accordance with the understood division of responsibility among the members of the investor group diminished or negatived the fact that, in so doing, he was acting as a solicitor for the parties to the proposal under submission.

94 The more difficult question, in my opinion, is whether the fact that Eustace was acting as a solicitor for Nahanni and for Nufort, respectively, as well as Newco in connection with the second and third proposals now imposes upon him, in the circumstances which eventuated, the restitutionary obligation urged by Mr. Morin and referred to in Lockhart v. MacDonald (1980), 42 N.S.R. (2d) 29 at paragraphs 68 and following.

95 I have concluded that it does not. I am aware, in reaching that conclusion, of the breadth of the observations of Chief Justice McRuer in Sinclair v. Ridout and Moran, to which I have previously referred, at pp. 182-183 and 185. But one must not lose sight of the circumstances of the present case. While, in my view, Eustace was acting as a solicitor for Newco and for Nahanni and Nufort, respectively, in connection with the second and third proposals, he was, had been throughout and was to continue to be - to the knowledge of all concerned - a principal in the transaction. The extent to which he acted as solicitor in each instance was specific and limited to the negotiation, preparation and submission of the particular proposal under review. From the perspective of Nahanni and Nufort, this was not a situation where a client, as client, retained a solicitor, as solicitor, who though initially a stranger to the transaction, later sought to appropriate it for himself; nor was this a general, ongoing retainer by a client of a solicitor on a continuing basis. Though Eustace was acting as a solicitor, as indicated, he was doing so on each occasion for the limited purpose of the proposal under consideration, the recipient of no information and the repository of no trust or confidence beyond that of any of the other principals in the transaction, and, in my view, in the circumstances then existing and later obtaining, he was not, as a consequence, subject to any greater disability, upon the rejection or nonacceptance of the proposal in question and the ultimate termination of the joint venture, than that to which his membership in the joint venture rendered him subject. For the reasons which I have previously given, the claim against him in that capacity does not succeed.

EUSTACE'S FIDUCIARY DUTY AS DIRECTOR

96 I turn to the suggested liability of Mr. Eustace for breach of his fiduciary duty as a director of Nahanni. In this regard, of course, Mr. Morin relies upon the Canaero case.

97 Eustace became a director of Nahanni in May, 1979. He resigned as a director by letter dated December 1st, 1980. He attended meetings of Nahanni's board of directors in May, June and November, 1979 and in February, April, May and October, 1980.

98 As noted, at Nahanni's board meeting of November 27, 1979, which Eustace attended as a director and at which Robertson was present by invitation, there was a discussion of, and the board approved, Nahanni's purchase from Redstone of the latter's interest in the Timmins joint venture property and a budget of $18,000.00 for a line cutting programme then in progress on the joint venture claims under the supervision of Dr. Carlson: see Exhibit 1, Tab 3(c), under the headings "Timmins Joint Venture" and "Budget for Timmins Joint Venture". Far from being divulged only to those in attendance at that meeting, however, the essence of that information was set out in Nahanni's interim report to its shareholders dated December 5th, 1979 (Exhibit 18B).

99 The last meeting Eustace attended was held on October 8, 1980, which was unquestionably subsequent to the rupture of the joint venture and the submission by him on behalf of Newco of the proposal of October 1, 1980, to Montclerg. He acknowledged that he was aware during the period of the joint venture January, March and September, 1980 proposals and of Newco's October 1980

proposal that Nahanni was desirous of developing its properties together with those of Montclerg.

100 But it must be recalled that there was no assurance that Montclerg, if ever reactivated and refinanced, would develop its properties, either by itself or jointly with anyone else. Indeed, Eustace testified that to date Montclerg has effectively done neither. Conversely, Nahanni's aspirations for the joint development of its properties with those of Montclerg were not precluded by the events of October, 1980 and following, and there is no suggestion that Nahanni made subsequently made any effort to pursue, or that Montclerg rebuffed any suggestion, for such joint development.

101 While, therefore, I do not agree with Mr. Murray's submission that Eustace was merely a "rubber stamp nominee" whose continued presence on Nahanni's board of directors did not burden him with the obligations which the law would otherwise impose upon a director, I do not consider that the plaintiffs have established any claim against Eustace on the basis of the alleged breach by him of his fiduciary duty as a director of that company.

FIDUCIARY DUTY AS A STOCKBROKER

102 I can deal very briefly with the claim against Robertson for breach of fiduciary duty as a stockbroker. As noted, it is clear from Harquail's own evidence that he imparted no confidential information concerning any of the matters in issue to Robertson in the latter's capacity as Harquail's stockbroker during the period in which Robertson acted as stockbroker for Harquail. There is no factual foundation for the breach of fiduciary duty as a stockbroker alleged against Robertson in the statement of claim.

EQUITABLE DEFENCES

103 In view of the conclusion which I have reached, I need not deal with the equitable defences relied on by Mr. Murray, variously described as estoppel, acquiescence, abandonment, waiver and laches.

THE ADDITIONAL SUBSCRIPTION PRIVILEGE

104 I turn to the claim in the second action.

105 It is common ground that the only issue in the second action is whether the correct formula in the construction of the additional subscription privilege appearing on page 4 of Montclerg's rights offering circular is that advanced by the plaintiff or that advanced by the defendants. The clause in question reads:

> "ADDITIONAL SUBSCRIPTION PRIVILEGE
>
> The Company has also granted to each holder of rights who subscribes for and purchases Common Shares pursuant to the rights offering the privilege of

> applying for additional Common Shares at a price of $0.40 per Common Share. The maximum number of Common Shares which may be issued under the additional subscription privilege is the difference between 1,334,260 Common Shares and the number of Common Shares for which rights are exercised. If a greater number of Common Shares are subscribed for under the additional subscription privilege than the number to be issued, the number issued to each subscriber will be pro-rated."

106 The competing formulae advanced by the parties relating to the determination of the number of shares to be issued pursuant to this clause differs on whether the proration is to be calculated according to the number of shares applied for under the additional subscription privilege (the plaintiff's formula) or according to the number of shares subscribed' for on the initial share subscription (the defendant's formula).

107 In support of the plaintiff's formula, Mr. Leon made two submissions:

(1) that the clause on its face is not ambiguous and that on its plain reading the number of shares that Harquail was entitled to receive on a prorated basis should have been calculated according to the proportion that the number of shares for which he as a shareholder subscribed pursuant to the additional subscription privilege bore to the total number of shares subscribed for pursuant to the additional subscription privilege; and

(2) in the alternative, that if I found the additional subscription privilege clause to be ambiguous, I should, on the state of the evidence and the application of the contra proferentem principle, resolve such ambiguity in favour of the construction for which the plaintiff contends.

108 With respect to the first submission, I do not consider the clause to be unambiguous or to have any plain meaning, either the plaintiff's formula or the defendants' formula. The clause ends with the words "the number issued to each subscriber will be pro-rated" but gives no guidance, and contains no clear reference point, regarding what the number to be issued to each subscriber will be pro-rated to. There is, in my view, a clear ambiguity.

109 In support of the second submission, noting the absence of words of qualification indicating that the proration was to be calculated according to the number of shares subscribed for on the initial share subscription and of any evidence on behalf of the defendants as to what was intended when the rights offering circular was drafted, Mr. Leon urged that the plaintiff's formula made "commerciaL sense" because one was considering speculative stock and a shareholder who was prepared to take the risk should have been entitled to receive additional shares calculated without regard to the number of shares he subscribed for on the initial share subscription. Again, with respect, I do not agree. While I am unmoved by the evidence of Mr. Steen, Deputy Director, Corporate Finance, of the Ontario Securities Commission, as to his interpretation of the wording of

the additional subscription privilege clause, I am convinced by his evidence as to the propriety of the plaintiff's formula and by Harquail's own evidence on his cross-examination that, far from making commercial sense, the plaintiff's formula is inappropriate and logically absurd. In this connection, I consider that the rights offering circulars (Exhibits 14 and 15) which were put to Mr. Steen on cross-examination and relied on in support of the plaintiff's formula contain limitations which negate the position which the plaintiff put forward in the present instance.

110 I conclude that-of the competing formulae, the construction advanced by the plaintiff yields an absurd result and the construction advanced by the defendants is reasonable and sensible. I reject the former and adopt the latter.

DAMAGES

111 In his closing submissions, Mr. Morin indicated that he was not pursuing the plaintiffs' claims for declaratory relief and an accounting in respect of the benefits accruing to the defendants as a result of their dealings with Montclerg. He did, however, press the plaintiffs' claim for damages and, in that connection, filed a schedule asserting such claims, in some cases based on alternative methods of approach, for loss of the option to purchase shares; loss of the rights to be made available from the Bird Estate, Northolka Holdings Limited and J.H. Sequin; loss of opportunity; punitive damages; and loss sustained in connection with the additional subscription privilege. Because an appellate court, were it to disagree with my conclusions, would be in no worse position than I to consider and assess these claims, and because the nature and quantum of such assessment would vary depending on what bases or aspects of liability that the court might find to be appropriate, I do not propose to deal with the claims for damages referred to in Mr. Morin's schedule other than to indicate my view that, on the evidence, the claim for loss of opportunity is so remote and speculative as not to justify any award of damages and I would not have thought this to be an appropriate case for punitive damages.

DISPOSITION OF ACTIONS AND COSTS

112 For the foregoing reasons, both actions will be dismissed.

(Submissions as to costs)

113 With respect to the second action, Mr. Murray has urged and Mr. Morin has not resisted that I award costs on a party-and-party basis and that I note for the assistance of the Assessment Officer that the issues in the second action took approximately five per cent of the total trial time. That is the order I propose to make with respect to the second action.

114 With respect to the first action, Mr. Morin and Mr. Murray are divided on the scale or basis upon which I should order costs to be paid. Mr. Morin does not argue that the first action should not be dismissed with costs, but argues that the appropriate basis is the party-and-party basis. Mr. Murray argues that costs should be awarded on a solicitor-and-client basis and points in support to

alleGations in the pleadings which were unsuccessful, to the evidence that was given and to the nature of the findings that I have made with respect to that evidence.

115 I do not consider the circumstances of the first action to bring it within that exceptional class of case in which an award of solicitor-and-client costs is appropriate. Even accepting the version of the facts that was put forward on behalf of the defendants, I found very troublesome the different roles which Mr. Eustace chose to play in connection with this transaction and found difficult the resolution of the question whether, even on the defendants' version of the facts, the plaintiffs' claim to entitlement to some relief was not justified in law.

116 I therefore Propose to award the defendants their costs in the first action, but on a party-and-party basis, not on a solicitor-and-client basis.

117 I have made these endorsements on the records. In the first action, I have made the endorsement:

> "For reasons given orally this day, this action is dismissed with costs on a party-and-party basis payable immediately after their assessment."

118 In the second action, I have made this endorsement:

> "For reasons given orally this day, this action is dismissed with costs on a party-and party basis payable immediately after their assessment. For the guidance of the Assessment Officer, counsel for the parties agree, as do I, that the issues in this action took roughly five per cent of the total trial time of the trial of this action and of action number 2194/81.

qp/s/afr