

Case Comments

*Commentaires d'arrêt*Non-Motorist Defendants — No-Fault Insurance Schemes:
McMillan v. Thompson.

Jeffrey O'Connell* & Craig Brown**

Critics of the idea of no-fault automobile insurance usually decry what they imagine to be the removal of accountability for road accidents. After all, if fault is eliminated from the picture, those responsible for accidents need not be identified, let alone blamed and made to pay for the trouble they have caused.

We, who have long advocated the type of reforms loosely called “no-fault”, have been at pains to refute this argument. We have pointed out that faulty conduct contributing to accidents is not only identified as wrongful, it is punished. This happens through police investigation, prosecution and criminal sanction. It also occurs in the form of increases to insurance premiums or even the outright cancellation of insurance for the perpetrator. Since these are precisely the consequences faced by a wrongdoer under a tort-based system of accident compensation (which almost invariably includes liability, or third-party, insurance), we could claim with some force that the reforms we urged meant no sacrifice in accountability.

But where a change in automobile accident law does undermine accountability in that potential accident causers are not charged collectively with the costs of accidents associated with their risk-creating conduct and actual accident causers are not required to bear a relatively higher share of those costs, both tort apologists and reformers have common cause for concern.

In Canada this concern may be directed at the no-fault auto insurance schemes which have been adopted in Manitoba and, possibly to a lesser extent, Quebec. In Manitoba, the point is graphically illustrated by the decision of the Court of Appeal in *McMillan v. Thompson*.¹ In considering the scope of the tort immunity provided by that province's no-fault auto insurance scheme,² the court concluded that no one may be sued in tort for damages for bodily injury “caused by” a motor vehicle accident. This extends to any defendant, not merely another motorist, whose conduct is a contributing cause of an accident. In

* Jeffrey O'Connell, Samuel H. McCoy II Professor of Law, the University of Virginia, Charlottesville, Virginia.

** Craig Brown, of the Faculty of Law, the University of Western Ontario, London, Ontario.

¹ (1997), 40 C.C.L.I. (2d) 147 (Man. CA).

² *Manitoba Public Insurance Corporation Act* RSM 1987, c. P215, as amended by SM 1993, c. 36, s.5.

McMillan a contributing cause of the accident was an allegedly negligently maintained bridge. The plaintiff was held not entitled to sue the municipality responsible for the bridge's upkeep.

A broadly similar rule applies in Quebec although the government insurer there has a right of subrogation against non-residents responsible for accidents.³ Although this provision was intended to apply to non-resident motorists, it is possible that it could be invoked against other classes of defendants. To date, the point has not been tested.

In contrast, the tort immunity provided in Ontario as part of its no-fault scheme is limited. A person whose fault causes death or personal injury may be sued but only for economic loss in excess of first-party benefits recoverable by the plaintiff and only for non-economic loss in cases of death or permanent and serious injury. The immunity is further limited in the sense that, apart from the right to deduct the amount of accident benefits, it is available only to persons present at the accident and the owner of an vehicle involved in it. Other defendants, such as auto manufacturers or repairers, highway designers or maintainers, or purveyors of alcoholic beverages, whose negligence may have contributed to an accident, may still be sued for any tort damages in excess of no-fault benefits.⁴

The approaches to the question of non-motorist defendants represented by Manitoba and, to a large extent, Quebec, on the one hand, and Ontario on the other reflect an important policy choice. The Manitoba preference was articulated by the Court of Appeal in *McMillan*:

Surely the legislation is to be interpreted in a manner that results in equality and equity. A restrictive interpretation of the words "caused by" would defeat many of the objectives identified by the legislators prior to the introduction of the enactment: the introduction of a simplified insurance scheme, the elimination of litigation for bodily injuries received in the use of an automobile and the desire to ensure that all victims receive timely compensation. It was not the legislative intent to introduce a cumbersome two-step system which necessitates a trial on the issue of negligence in all accidents involving an automobile and thus perpetuates the uncertainty of the result for a victim. Nor could it have been the legislative intent to provide different remedies for victims depending upon the proximate cause of an accident. The exact opposite intent is clear from a reading of [the legislation] and from an examination of the debates and the Report.⁵

But to carry the non-fault concept to this extent is to allocate the costs associated with injury and death arising from automobile accidents inappropriately because

³ *Automobile Insurance Act* RSQ, ch. A-25, s. 83.61.

⁴ *Insurance Act*, RSO 1990, c. I.18, s. 267.5(10). To the extent another motorist or other person present at the accident is not immune, there is joint and several liability between such a person and the other defendants. See s.267.7. In Saskatchewan tort actions are permissible to recover excess economic loss only but there appears to be no impediment to recovery, for this head of damages, from non-motorist defendants. Indeed, the normal rules of apportionment are specifically preserved. See *Automobile Accident Amendment Act*, SS 1994, c. 34, s.18.

⁵ *Supra* note 1 at 163.

a number of risk creators, notably product manufacturers and providers of alcohol, do not bear the costs of accidents they cause.

This has two detrimental effects, at least in theory. First, activities not having to contribute to accident costs are subsidised by those that do. Their goods and services tend to be underpriced because they do not reflect accident costs. This means that more of them are produced and consumed than is efficient. Resources are diverted to them from other areas. Second, there is no opportunity to place the costs of accidents on the cheapest cost avoider – often the manufacturer or service provider. In other words, there is no price incentive, within the scheme, for investment in the prevention of accidents.⁶ In Manitoba, for example, if the municipality whose bridge was allegedly defective is to have an incentive for proper maintenance, it must lie somewhere other than in tort. The same is true of tavern owners with respect to allowing drunk patrons to drive home.

It seems from the Canadian schemes described that legislators assumed that the policy choice was stark. Either include non-motorists in the immunity for the sake of simplicity, certainty and low transaction costs or exclude them to preserve safety incentives. But there may be a third option; one which preserves the benefits of no-fault for accident victims, but which utilises tort law to bring into a scheme like Manitoba's those risk creators who presently get a free ride without the wholesale resuscitation of tort. Consider the following proposal, adapted from one made in the United States for injuries from products, health care, and other activities.⁷

Government insurers, such as the MPIC (or la Régie, in Quebec) would be given statutory authority to pursue by subrogation a claim in tort against non-motorist tortfeasors subject to the following limitation. If a tortfeasor offered within 90 days to reimburse the insurer for the cost of its obligation to pay no-fault benefits, no further pursuit of a tort claim by either the insurer or the victim would be allowed. But if the tortfeasor did not thus quickly respond by such a commitment, then and only then *both* the insurer (for reimbursement of no-fault benefits) and the accident victim (for excess economic loss and non-economic loss) may pursue tort claims.

That way a tortfeasor (or in fact, more often, its liability insurer) would be prompted to avoid the expense and exposure of full scale tort liability by a quick reimbursement of the relatively low no-fault payment versus litigation and possible liability. That way substantial internalisation would be built into the system, but without requiring full scale tort liability in most instances. This proposal arguably accomplishes the best of both worlds – prompt payment of (especially) economic losses by no-fault insurance, coupled with reasonably efficient internalisation of accident costs, forcing potential injurers to be concerned about the safety of their conduct or products.

⁶ See G. Calabresi, *The Cost of Accidents*, (New Haven: Yale Univ. Press, 1970) at 69.

⁷ O'Connell, "Balanced Proposals for Product Liability Reform", (1987) 48 Ohio St. L.J. 317, 328.

Under this proposal there would be these possibilities following an accidental injury: (1) payment by the insurer to the victim of no-fault benefits, (2) a claim by the insurer against the non-motorist tortfeasor for the amount due the victim for the insurer, which (3) if accepted by the tortfeasor would in turn resolve responsibility for payment. But if the tortfeasor refused the insurer's claim in subrogation, (4) there could follow a tort claim both by the insurer in subrogation and the victim for damages for pain and suffering and any other losses not compensated by the insurer.

It is unlikely that this proposal would produce a flood of litigation and it is not our purpose to promote it. Rather we propose the creation of a powerful incentive for risk creators to emerge spontaneously to contribute to the no-fault scheme. We would expect defendants to settle quickly most claims brought against them by the insurers. But further, we would expect that over time additional efficiencies would be created by pre-accident agreements between the insurer and potential defendants, either individually or in groups, whereby contributions in bulk would be made to MPIC or la Régie revenues in exchange for immunity, from suit in individual cases. The amounts involved in such settlements would reflect the risk represented by the activities concerned as well as the experience of particular firms or individuals. The amount payable under each such agreement would be reviewed annually giving the payors incentives to improve their safety record with a view to decreasing their subsequent payments. Arrangements such as these already exist. For example, knock-for-knock agreements, in their various forms, are entered into by insurers with other insurers for the sensible disposition of subrogated claims arising out of auto accidents. These arrangements are made in advance of any particular case and lead to considerable efficiency.⁸

Another, perhaps more pertinent example involves the Ontario Health Insurance Plan. By statute, the Plan has a general right of subrogation against any defendant who has caused injuries for which the Plan must fund medical services. In automobile accident cases where subrogation most often arose, the Plan was incurring considerable administrative costs in pursuing individual defendants. In order to reduce these costs, the Plan entered into an arrangement with a group of liability insurers whereby the Plan agreed not to exercise its subrogation rights in return for a flat payment (approximately 2% of premiums) paid on an annual basis.⁹ This arrangement has now been given statutory force with insurers liable to annual assessment by the Ministry of Health.¹⁰ The MPIC or la Régie could offer arrangements similar to this which would have the effect of making various categories of risk creators contributors to the costs of

⁸ For a Canadian example, see C. Brown & J. Menezes, *Insurance Law in Canada* (Toronto: Carswell, 1982) at 334. See also O'Connell and Brown, "A Canadian Proposal for No-Fault Benefits Financed by Assignment of Tort Rights" (1983), 33 U. Toronto L.J. 434, 451.

⁹ See O'Connell and Brown, *ibid.*

¹⁰ *Insurance Act*, *supra* note 4, s.14.1. See also O.R. 401/96.

automobile accidents although the identity of these payors and the amounts they paid would be set by the market rather than by direct regulation.

Of course this approach also has transaction costs. These are the costs related to negotiating agreements (or settlements in individual cases). But this approach could be streamlined. Accident experience could be recorded and tabulated, if it is not already, and the chances of particular products and services causing injury identified. This would provide an actuarial basis for determining how much insurers should charge in return for immunity from suit. This may be the method of effective allocation which has the lowest transaction costs even though it involves some regulatory-like activity. The advantage of our scheme over pure regulation is that it is self-policing and subject to negotiation.

Confidentiality — Joint Ventures — Acquisitions: *Alpha v. TVX*.

Donald E. Wakefield*

I. *Introduction and background*

The recent decision of Madam Justice Feldman in the *Alpha* case¹ provides valuable lessons for the lawyer advising on business arrangements initiated by the delivery of confidential information. While the facts are typical of how mining properties are acquired in a period when foreign governments are privatizing inefficient state owned operations, the legal issues could arise in many business contexts. The downsizing in several industries and a focus on particular business segments has created many talented people with unfinished projects that require continued funding. Many of these are as attractive and complicated business ventures as the Kassandra mines in Greece. In the *Alpha* case, when Curragh Resources went into receivership, former Curragh executives who had prepared information and estimates for their employer that predicted the unprofitable Greek Kassandra mines could be turned into very profitable gold producers with new equipment and technology, saw an opportunity to capitalize on this information. If the mining related specifics are ignored, the more general facts, relating to the assembly of information and the exercise of a “process of mind” to create a profitable business opportunity, would find parallel situations in many industries today.

Following the receivership of Curragh, the Alpha Group, composed of Messrs. Visagie, Lean and Stephenson, hired a financial advisor and continued to pursue the purchase of the Kassandra mines for their own account with representatives of the liquidator of the mines and Greek government officials. Even if an auction process would eventually be required, they believed a no shop period would give them an inside track in the acquisition process and would help them to locate a suitable industry partner to fund the project.

II. *The Confidentiality Agreement*

Prior to revealing all its information on the Kassandra mines opportunity, the Alpha Group had TD Securities, as their agent, forward to TVX Gold Inc. a marketing document from previous efforts to sell the mines, their own 14 point Highlights Sheet on the project which, among other matters, stated that identified gold on site appeared in excess of 10 million ounces and their own

* Donald E. Wakefield, of Osler, Hoskin & Harcourt, Toronto, Ontario.

¹ *Visagie, Lean and Stephenson v. TVX Gold Inc.*, Ontario Court (General Division) Court File No. 95-CU-93990 CM, Released October 14, 1998 but not reported as of May 1, 1999. TVX has appealed to the Ontario Court of Appeal.

form of confidentiality agreement. Enough information to whet the appetite of any expanding gold miner, like TVX.

After TVX signed this form of confidentiality agreement, under which it agreed to use the proprietary information supplied by the group only as authorized by the group and without any time limit on such obligation, TVX was supplied with five categories of documents obtained from the following sources: (1) from the mines under a confidentiality agreement with Citibank, including ore sections and mine drawings; (2) from the Greek company which had erected a metallurgical complex and spent approximately U. S. \$7 million on gold plant research; (3) from Curragh's outside consultants including Mr. Visagie now of the Alpha Group; (4) from calculations of the potential gold resource potential, the economics of making the lead and zinc profitable and detailed financial models and projections for all aspects of the future operation of the property prepared by Mr. Visagie; and (5) from the liquidator of the current mine owner operator (the "Liquidator"), from the National Bank of Greece (which was the mines' major secured creditor) (the "Bank") and from the Alpha Group's Greek lawyers. Under this documentation with the Liquidator and the Bank, the Alpha Group had the exclusive right to negotiate the purchase of the mines up to December 31, 1993 for U. S. \$32 million but subject to the approval of the Greek Government in the form of a legislative enactment.

III. *The Joint Venture*

After executives of TVX reviewed this mixture of public and private information a joint venture was formed with the Alpha Group. This joint venture was in the form of a corporate vehicle, named Aegean, in which TVX initially acquired 10% of the issued shares for \$163,000, which was an amount that was intended to reimburse the group for their incurred costs. TVX would have been entitled to acquire a further 78 % of the issued shares of Aegean, if this vehicle had succeeded in acquiring the Kassandra mines. TVX was obligated to provide the funding to make the acquisition which, at the time, was thought to be approximately U. S. \$35 million but later turned out to be U. S. \$47 million. From the time of entering into this joint venture funding agreement, TVX continued its due diligence review and took over negotiations with the Greek government and the Bank. The court found that both the plaintiffs and the defendant knew that the work done by the Alpha Group did not entitle them to make the acquisition but did give them an "inside track".

IV. *The Public vs Private Sale*

After elections in Greece, in a not unanticipated move, the new Greek government required the Kassandra mines to be sold by public auction. As permitted by the funding agreement, TVX terminated its obligations. Thereafter, TVX met with a representative of the Alpha Group and stated that TVX would be bidding at

the public auction and advised the group that it could do likewise. TVX offered to renegotiate the joint venture but that offer was not accepted by the Alpha Group. The court found that the Alpha Group was not required to disclose that if TVX did win the auction, it was Alpha's position that such acquisition was on behalf of the joint venture, entitling Alpha to a 12% carried and an option on a 12% participating or working interest. After TVX was announced as the successful bidder, the lawyer for the Alpha Group wrote to TVX and asserted this position. At the time of the trial the Kassandra mines were estimated to contain enough gold to be worth approximately U. S. \$800 million.

V. *Summary of the Courts' Findings*

At the end of a lengthy trial Justice Feldman found that TVX had breached a duty of confidence imposed both under the confidentiality agreement and also a duty that arose at common law and was not modified by the confidentiality agreement. The court also determined that the parties continued in a fiduciary relationship after the termination of the joint venture funding agreement.

With regard to TVX's position that the plaintiff's information belonged to Curragh and not to the Alpha Group so that the plaintiffs had no standing to enforce rights in respect of such information, Justice Feldman found that the Alpha Group's standing was based on the two agreements with TVX and the relationship established by the disclosure of the confidential information for the purpose of acquiring the mines. Furthermore, the court found that, while it was the express written intention of the plaintiffs not to compete with Curragh for the mines, they had not secured Curragh's permission to seek them on their own account or use the information for such purpose. The court also found that the disclosure by the Alpha Group and the use by both parties of Curragh's confidential information might be a breach of contract or even a tort, if Curragh could show damage. Without a complaint by Curragh and a trial of the facts, however, the court refused to find the confidentiality agreement between the Alpha Group and TVX an illegal contract or one which it should not enforce. Significantly, counsel for the plaintiffs confirmed in argument that if Curragh wished to make a claim against either party, it could seek to do so.²

As to remedy, the court declared that TVX held the Kassandra mines in trust as to a 12% carried interest and, a further 12% participating interest on the payment or 12% of the costs of TVX associated with such 12%. No definition of the 12% carried interest was described and no time was set for the Alpha Group to pay the amount necessary to acquire this 12% participating interest, although the terminated joint venture funding agreement had provided a one year option. Furthermore, there was no reference to how the amount to be paid would be determined if there was disagreement on any of these matters. Perhaps, the determination of some of these matters would fall under the terminated agreement; however, that is not clear from the reasons for judgement.

² Paragraphs 226 to 232 of the reasons for judgement, *supra* note 1.

VI. Comments on the Court's Reasoning on Liability

(i) Breach of Confidence

The court found that at the time of entering into the confidentiality agreement, five categories of documentation were delivered to TVX. The only proviso on those documents not being considered proprietary to the group was that they were not generally available to the public. Many of such documents were prepared for or by the current owner of the mines or by third parties who were or had been in a contractual relationship with such owner and had been obtained by the Alpha Group by entering into confidentiality agreements with such entities. The Alpha Group argued that available to the "public" meant the public in general. The court, however, found that the relevant public for this purpose was interested mining companies³ and that none who sought information from the mines or some of the third parties involved were denied it. Accordingly, any documents which could be obtained from third parties with or without the execution of a confidentiality agreement with such third parties were excluded from those documents which the Alpha Group were entitled to have treated as proprietary. The court stated:

"when examining the confidentiality of information in the context of its notoriety or availability in the public domain, one looks at the relevant public as opposed to the general public which has no interest in or reason to have access to such information."⁴

When TVX submitted that the information supplied by the Alpha Group contained nothing new or different from the available information from the mines and in published literature, Justice Feldman disagreed and emphasized the time and effort that Mr. Visagie had spent in the preparation of detailed cash flow and other financial analyses of possible future profit from mine operations. The court also noted that Mr. Visagie studied and analyzed the two competing methodologies for extracting the refractory gold and recommended the method which was now proposed by TVX.

In response to the TVX claim that Mr. Visagie's work was of no value, the court relying on the authority of *Fraser et al. v. Thames Television Ltd. et al.* quoted with approval the following:

"...novelty in the industrial field can be derived from the application of human ingenuity to well-known concepts... To succeed in his claim the plaintiff must establish not only that the occasion of communication was confidential, but also that the content of the idea was clearly identifiable, original, of potential commercial attractiveness and capable of being realized in actuality."⁵

³ The court relied on the definition of "public", as a noun, being "A section of the community having a particular interest in or special connection with the person or thing specified" and the cases of *Bendix Home Systems Limited v. Clayton et al.* [1977] 5 W.W.R. 10 at 24 (B.C.S.C.) and *Cradle Pictures (Canada) Ltd. v. Penner et al.* (No. 2) (1977), 34 C.P.R. (2d) 34 at 45.

⁴ Paragraph 241 of the reasons for judgment, *supra* note 1.

⁵ [1983] 2 All E.R. 101 at 121-22 (Q.B.).

Justice Feldman also referred to the *Saltman Engineering*,⁶ the *Coco*⁷ and the *Ansell Rubber*⁸ cases, which endorsed the “processes of the mind” test applied to published information, as authorities which permit a plaintiff to succeed in a case for breach of confidence where that plaintiff can also meet the other requirements of the common law test for such an action. Relying on the expert evidence of the witnesses for the Alpha Group, Jack McQuat and Christopher Lattanzi, and her own appreciation of the evidence, Justice Feldman decided that the Alpha Group brought a new and novel approach to the mine through the geological concept of the property as a 10.5 million ounce gold producer, the plan for modernization of the lead/zinc operation together with construction of the gold plant as well as the cash flows that would result therefrom. Significantly, however, Justice Feldman stated that there was a serious practical issue for the mining industry, not addressed by any of the expert or other witnesses at the trial, as to how confidentiality agreements actually operate (short of seeking the assistance of the court) where there is no agreement as to what information was originally public or has become public.⁹

TVX submitted that the two 1994 Greek government offering documents used in the public auction process disclosed all the same information that the Alpha Group brought forward. The court, however, found that these documents did not contain all of Mr. Visagie’s theories and analysis and did not present the information or conclusions in the same way. In particular, they did not quantify the potential gold resource as 10.5 million ounces and the experts testifying for the Alpha group were of the opinion that the government documents did not contain all of the Alpha Group’s original and confidential information. Thus, the court determined that not all of the confidential proprietary information provided by the Alpha Group to TVX was ever made public and therefore it remained covered by the terms of the written confidentiality agreement throughout the relevant period.

It should be recalled that the confidentiality agreement was specific on the uses which could be made of the information delivered by the Alpha Group which had not become generally available to the public. Such information could not be used “for any purpose other than in connection with the consummation of the Proposed Acquisition in a manner which [the Alpha Group had] approved.” The confidentiality agreement further provided “If you determine that you do not wish to proceed with the Proposed Acquisition, you will promptly advise us of that decision. In that case,...you will upon our request, promptly deliver to us all of the Proprietary Information,...” As a practical matter, however, it would likely have been impossible for TVX to establish which documents they originally received so as to return them and declare the original Proposed Acquisition was not being proceeded with.

⁶ [1963] 3 All E.R. 413 at 415 (C.A.).

⁷ [1969] R.P.C 41 at 47 (Ch).

⁸ [1972] R.P.C. 811 at 825 (S.C. Vict).

⁹ Paragraph 178 of the reason for judgment, *supra* note 1.

Since the lead in words to the confidentiality agreement stated that its purpose was "... to allow [TVX] to evaluate the possible participation with the Alpha Group in the acquisition of the Kassandra mining assets ..." without further definition of the "Proposed Acquisition" and importantly, without time limit, the next line of defence for TVX was to show it never used the Proprietary Information supplied by the Alpha Group in the acquisition that was completed after winning the public auction. The use only of newly generated publically available information may, however, not have avoided the "spring board" or "head start" doctrine. In connection with that doctrine, without legal elaboration, the court noted that in the public auction process there had been only two bidders, TVX and an Australian company. The court also noted that the Australian bidder had found it necessary to make its bid subject to the condition of further due diligence, a condition which the TVX bid did not contain. The court reasoned that with the head start which the information from the Alpha Group provided, TVX did not require a further due diligence period. Thus, Justice Feldman determined that TVX's due diligence team went to the mines following the termination of the joint venture funding agreement to confirm what TVX had learned from the Proprietary Information delivered by the Alpha Group. As further evidence of the head start gained by TVX, the court noted that TVX had spent considerable sums on the acquisition project before it terminated the joint venture funding agreement. As evidence of the use of the Alpha Group's Proprietary Information, the court also noted that TVX used as employees and consultants for its bid many of the same personnel that the Alpha Group had introduced to TVX.

While the confidentiality agreement had no clear mechanism for its termination, in this writer's view, it would have been helpful to TVX's defence to have tried to terminate that agreement at that same time as the joint venture funding agreement. If TVX had announced that it was terminating both agreements, attempted to return all the Proprietary Information without retaining any copies and asserted that the Proposed Acquisition was only a private sale transaction, strategically it might have caused the Alpha Group to reveal its position. In this writer's view, the Alpha Group was claiming the equitable remedy of constructive trust and, if TVX had taken all of these steps, the court might have determined that TVX genuinely believed the relationship was restricted to a private sale transaction. Alternatively, the court might have been more sympathetic to TVX's claim that it offered to renegotiate the joint venture funding agreement and find that the Alpha Group had to declare that it would not renegotiate the joint venture or would only do so on some specified basis.

However, Justice Feldman reasoned that the silence of the Alpha Group in the face of TVX's termination of the funding agreement and the attempt of Mr. Hick to get Mr. Stephenson to agree that TVX was free to pursue the mines for its own account was strategizing after the receipt of legal advice. Also, that actions by TVX could not change the legal rights of the Alpha Group and that if TVX wished to clarify its legal rights prior to proceeding alone, a court application was available to it.

The reason that this writer believes that TVX would have improved its position by trying to extricate itself from the strictures of the confidentiality agreement does not relate to TVX being able to prove that it complied with such agreement but rather to the equities of the situation. In this writer's view, the central issue raised but not satisfactorily answered by the decision, is the issue of how long, without agreement among parties, is information imparted in confidence entitled to protection. The general rule on how long confidential information must be used only for the purposes imparted under the *Saltzman Engineering case*¹⁰ is until the express or implied consent of the imparter, in this case, the Alpha Group, is obtained. Thus, if TVX had tried to terminate the relationship established under both the confidentiality agreement and the joint venture funding agreement at the same time, the court would have been faced with a much more difficult fact situation. The court would have had to consider whether the silence of the Alpha Group in the face of such purported termination of all responsibility to the Alpha Group should be considered implied consent. There would at least be more substance to the TVX assertion that the Alpha Group had unclean hands in letting TVX complete the public bid process without declaring its legal position.

As the court noted, the strategy which TVX relied on of trying to illicit the consent of the Alpha Group to its proceeding alone by stating that Alpha Group was also entitled to bid on its own, failed because Mr. Stephenson remained silent. However, if an attempt were made to return all the information Alpha might not have considered it could remain silent. If the strategy of purporting to return all information failed to obtain a response from the Alpha Group or if the group asserted that TVX was not entitled to acquire the mines without them, TVX could have focussed on its second strategy of renegotiation. In that situation, refusal by the Alpha Group to renegotiate might have resulted in the individual plaintiffs, without the mines yet being acquired, facing the business risks of litigation against a producing mining company to determine the rights of the parties. Furthermore, if the Alpha Group had remained silent in the face of a more aggressive assertion of TVX's entitlement to proceed alone in the public auction, in addition to seeking or threatening to seek a court declaration, TVX might have been better able to use its other strategy of renegotiation.

The court determined that if TVX failed to bid, the Alpha Group would have received nothing and that would have been the Alpha Group's tough luck because that was their bargain. Thus, when stating that it was willing to renegotiate, TVX could also have asserted that in view of the Alpha Group's unwillingness to confirm TVX's entitlement to proceed alone, TVX was going to court for a declaration of its rights or alternatively, it was not going to proceed to seek the mines without a renegotiation of the Alpha Group's entitlement to share in the results of the bid. Then, the Alpha Group would have been faced with the possibility that it would not share in the business opportunity without

¹⁰ *Supra* note 6.

finding another financial backer or court costs to establish its legal position. When TVX had terminated the funding agreement, if it had also threatened court clarification of its rights, it would have been very difficult for the Alpha Group to interest other mining industry participants in funding a bid with them. Such a situation would have entailed considerable uncertainty for the Alpha Group and, as a minimum, might have caused them to negotiate down their entitlement. As matters turned out, the TVX strategies of seeking consent and offering to renegotiate both failed.

What TVX did try to establish was that it had proceeded in the public auction process without the benefit of Alpha's Proprietary Information. Justice Feldman noted that under the *Lac* case¹¹ (which concerned the common law duty of confidence) the burden of proof would have been on TVX to show that the use made of the information subject to the duty of confidence was not a prohibited use and stated that:

"it is only logical to impose the same heavy burden on the confidEE who denies any use of the information, to show that it did not use that confidential information when it made the very acquisition which was the purpose of the disclosure of the information in the first place."¹²

The court noted that the tremendous upside of 10.5 million ounces was first revealed by Mr. Visagie in his Gold Resource Update and Highlights Sheet. The court also inferred that the ultimate decision maker for TVX did not testify because he was not able to establish non-use by TVX in its bid of the Alpha Group's Proprietary Information. Also, Mr. Hick, TVX's President during the relevant period, did not deny such use. Furthermore, to bring the facts within the criteria in the *Lac* case¹³ for the breach of confidence remedy, the court found that when TVX acquired the property for itself in the public auction and refused to include the Alpha Group, the group suffered a detriment.

(ii) *Breach of Fiduciary Duty*

Justice Feldman found that the obligation of TVX to fund the acquisition of the Kassandra mines under the joint venture funding agreement was terminated by TVX but that the Alpha Group had no express right to terminate its obligations under such agreement. The court noted that this agreement was specific about the activities of the Alpha Group and the joint venture company, Aegean, in the case where TVX terminated its obligation to fund under such agreement. Specifically, the agreement provided if either of the Alpha Group or Aegean acquired the mines, the Alpha Group must purchase the original 10% interest which TVX acquired in Aegean and the domination of the board of directors by TVX would end. From this, the court concluded that the joint

¹¹ (1989), 61 D.L.R. (4th) (S.C.C.).

¹² Paragraph 262 of the reasons for judgment, *supra* note 1.

¹³ *Supra* note 11.

venture funding agreement contemplated either the Alpha Group or Aegean as free to acquire the mines but that TVX was not entitled to do so. The court accepted the evidence of the two expert witnesses called by the Plaintiffs and found that one of the two experts called by the Defendant was in agreement that:

“Non-competition after termination of a funding arrangement, at least within some time and geographic parameters, is mining industry practice or expectation.”¹⁴

The court also considered whether the fiduciary obligation of TVX not to compete with the venture survived the termination of the venture. Justice Feldman reviewed the case law regarding the continuation of fiduciary duties beyond the termination of partnerships and joint ventures and concluded that the following facts were relevant to continuance in this situation: (1) TVX owed the Alpha Group a duty of confidence; (2) there continued a maturing business opportunity. Although the public auction rather than a private negotiation was required after the change in the Greek Government, the public auction was a possibility in the venture's plans; (3) there was no gap in time during which TVX's exposure to the Proprietary Information and contacts of the Alpha Group would become stale nor would continuing to restrict TVX be unfair and the mines were still being offered for the original purpose of the construction of a gold mine; (4) the circumstance that a private sale was no longer possible which TVX had used as its reason for terminating the venture was not a circumstance that detracted from the fact that the Proprietary Information and contacts had been give to TVX eight months before, thus creating for TVX a head start; (5) once the venture was created the Alpha Group gave up all active involvement in acquiring the mines relying solely on TVX and, after the termination, the Alpha Group became even more vulnerable to the advantage which TVX had gained over the eight months when TVX alone was pursuing the mines; and (6) there is an industry practice that upon termination of a funding agreement by a senior company, the senior does not for a period of time pursue the acquisition of a target mining property for its own account. The acceptance of this practice by TVX was the implication the court drew from the provisions of the joint venture funding agreement which did not delineate any circumstances under which TVX could purchase the mines. Thus, the court concluded this was not contemplated by the parties.

In this conclusion, the court recognized that non-competition should be time limited. However, perhaps, because the actions of TVX did not require it, the court did not speculate about when, if ever, TVX would be free to compete for the mines without the participation of the Alpha Group.

Based on finding that all of these six factors were present, the court determined this was a proper case for the fiduciary obligations of TVX to extend beyond the termination of the venture, at least during the public auction process.

¹⁴ Paragraph 220 of reasons for judgment, *supra* note 1.

VI. Comments on the Court's Reasoning on Remedy

(i) *Constructive Trust*

Justice Feldman rejected the claim for a constructive trust over the whole property and decided that it was irrelevant that the Alpha Group made no attempt to acquire the mines on its own or with another industry partner. In the court's view, if TVX had not bid for the mines, then the Alpha Group would have got nothing but that would have been in accordance with its expectations and bargain and there would have been no breach of any duty or obligation by TVX. The court found that the "but for" test articulated in the *Lac* case¹⁵ was satisfied by finding in this case that "but for the breach by TVX of its fiduciary duty to the Alpha Group" in purporting to acquire the mines on its own behalf, the mines would have been acquired for the benefit of the venture where each party would benefit according to its respective interest.

The court also determined that the appropriate restitutionary remedy was not the entire mines which the Alpha Group was never in a position to acquire but the interest which it would have had if TVX had not breached its fiduciary duty, namely an interest equivalent to its joint venture interest. In so deciding the court applied the reasoning of Morden A.C.J.O. in *Olson v. Gullo*.¹⁶ In that case, the court distinguished between the fiduciary obligations of an agent who is obligated to act selflessly for its principle and a partner or venturer who has the mix of self interest and selflessness when acting on behalf of the partnership or venture of which such partner-venturer is a member. The result being that the partner - venturer must only disgorge the part of the gain on breach of fiduciary duty that does not represent its share. The court also adopted Justice Morden's rationale for this conclusion, namely, that for the part of the gain which represented its share of the partnership or venture, the partner-venturer should be viewed as not being in breach of its fiduciary duty.

This has a ring of fairness about it; however, in terms of deterring partner-venturers from breaching their fiduciary obligations, it may suffer from the "bird in the hand" rationale of the practical world of commercial relations. By this I mean, if a partner-venturer (current or former) can never be worse off than it would have been if it choose to comply with its fiduciary duty why should it ever comply. In any case, where a large and wealthy organization in a joint venture determines that, at most, its less well-funded partner-venturer is only entitled to a minority share of a business opportunity why not go for the 100%. If the less well-funded partner-venturer sues for its share of the gain, given the uncertainties and costs of litigation, the larger organization may, in any event, be able to negotiate a settlement that

¹⁵ *Supra* note 11.

¹⁶ [1994] 17 O.R. (3d) 790 (C.A.).

is less than the other partner-venturer's share. This strategy is what was earlier suggested TVX might have resorted to in order to negotiate a lesser share for the Alpha Group.

(ii) *Damages*

With regard to the alternative remedy of damages, the court again applied the reasoning in the *Lac* case¹⁷ noting the uniqueness of the property, the lack of evidence on value and the difficulty even with adequate evidence of value in fixing appropriate damages for these breaches of duty. Thus, Justice Feldman turned to the partial restitutionary remedy, effectively leaving the parties as partners in the joint venture which TVX had rightfully terminated.

The court also rejected the concern of the Alpha Group's counsel about such a result. In this writer's view, Justice Feldman did not give enough credence to the point of the Alpha Group's counsel that it is very difficult to operate a group of expanding mines without an agreement when the relations between the owners necessary to operate a joint venture have been poisoned by a long and acrimonious trial. If the ongoing problems between the parties to the *Ontex and Metalore*¹⁸ case are any precedent, in order to avoid interminable wrangling, the court might better have given judgement on liability and invited argument and further evidence on remedy.

In her decision, Justice Feldman ordered a constructive trust over a 12% carried interest and 12% participating or working interest on payment of the costs related thereto, namely, the interests the Alpha Group would have had if the joint venture was still in place. The court considered this the appropriate remedy for the reasons given in the *Lac* case¹⁹ without noting, first, there was no contract in existence in the *Lac* case whereas, in this case, there was a contract which had been rightfully terminated. Furthermore, the purpose of the contract in this case namely, the acquisition of the mines, had been performed even if the performance was in a manner the court found was not proper. Secondly, in the *Lac* case there was evidence that the plaintiff had within its grasp the whole property not just an interest in it but for the actions of the defendant. Thus, the remedy of declaring a constructive trust over the total interest in the *Lac* case did not leave the parties locked together in a development situation without an agreement on how they would proceed. Here, the joint venture funding agreement only covered the acquisition of the Kassandra mines, an event which had taken place. Development and operation of the mines would require new agreements. The Alpha Group in bringing its suit had not sought the opportunity to negotiate such agreements in the position of a beneficial co-owner with TVX. The court awarded the Plaintiffs a remedy they had not sought.

¹⁷ *Supra* note 11.

¹⁸ Action commenced in 1986 and reported [1993] 13 O.R. (3d) 229; 63 O.A.C. 258 and only recently settled.

¹⁹ *Supra* note 11.

VIII. *Lessons from the Decision*

In this writer's view, the following are some of the lessons to be learned from the *Alpha v. TVX* decision:

- (i) Before seeking business associates for a project based on the use of confidential information be sure that you are entitled to use all the information you acquired from or on behalf of any third party;
- (ii) When an apparently attractive business opportunity is about to be presented subject to compliance with the presenter's form of confidentiality agreement and there appears insufficient time to review it carefully, make the time;
- (iii) Date, stamp and keep track of all documents received pursuant to a confidentiality agreement;
- (iv) If you are trying to establish that no confidential information was used and no benefit obtained from confidential information, be in a position to track what was received, return it and do not use the employees and consultants introduced by the imparter;
- (v) Make sure the confidentiality agreement contains a mechanism for determining what information is or has become public;
- (vi) Make sure the confidentiality agreement does not interfere with business plans should circumstances change;
- (vii) If the confidentiality agreement leads to a joint venture agreement, make sure the two agreements are tied together appropriately and both are terminable on reasonable terms having regard to their purposes; and
- (viii) Confidentiality and Joint Venture agreements should explicitly spell out the rights of each party following their termination.

Furthermore, all of these suggested actions are good advice in all business transactions based on confidential or proprietary information.