Court File No.: CV-13-10280-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

DBDC SPADINA LTD.,
and THOSE CORPORATIONS LISTED ON SCHEDULE A HERETO

Applicants

and

NORMA WALTON, RONAULD WALTON, THE ROSE & THISTLE GROUP LTD. and EGLINTON CASTLE INC.

Respondents

and

THOSE CORPORATIONS LISTED ON SCHEDULE B HERETO, TO BE BOUND BY THE RESULT

BRIEF OF AUTHORITIES
RE: SUPPLEMENTARY SUBMISSIONS OF THE APPLICANTS
(MOTION HEARD ON JUNE 3, 2016)

June 27, 2016

LENCZNER SLAGHT ROYCE SMITH GRIFFIN LLP
Barristers
Suite 2600
130 Adelaide Street West
Toronto ON M5H 3P5

Peter H. Griffin (19527Q)
Tel: (416) 865-2921
Fax: (416) 865-3558
Email: pgriffin@litigate.com
Danielle Glatt (65517N)
Tel: (416) 865-2887
Fax: (416) 865-2878
Email: dglatt@litigate.com
Shara N. Roy (49950H)
Tel: (416) 865-2942
Fax: (416) 865-3973
Email: sroy@litigate.com

Lawyers for the Applicants

TO: The Service List

INDEX

INDEX

Tab 1

Fiorillo et al. v. Krispy Kreme Doughnuts, Inc. et al. [Indexed as: Fiorillo v. Krispy Kreme Doughnuts, Inc.]

98 O.R. (3d) 103

Ontario Superior Court of Justice,

Newbould J.

June 9, 2009

Corporations -- Oppression -- Director of company acquiring shares in two of three private placements -- Director selling his shares before third tranche and resigning from board of directors in compliance with condition of sale -- Sale of shares concealed from plaintiff shareholders -- Director telling one plaintiff that he was not participating in third tranche because he already had enough shares of corporation and that he had resigned from board of directors because he was not effective director -- F and other plaintiffs investing in third tranche -- Company failing and plaintiffs losing their investment -- All directors liable to plaintiffs under s. 248 of OBCA -- Plaintiffs having right under unanimous shareholder agreement to notice of required resolution approving sale of director's shares and having right to vote on resolution -- Plaintiffs not receiving notice and no shareholders' meeting held to approve sale of shares -- Conduct of directors unfairly prejudicing plaintiffs and unfairly disregarding their interests -- Business Corporations Act, R.S.O. 1990, c. B.16, s. 248. [page104]

Torts -- Fraud -- Deceit -- Defendant being director of company and acquiring shares in two of three private placements -- Defendant knowing that plaintiff F was influenced by him in his decisions to invest in company -- Defendant selling his shares before third tranche and resigning from board of directors in compliance with condition of sale -- Defendant not telling F that he had sold his shares -- Defendant telling F that he was not participating in third tranche because he already had enough shares of company and that he had resigned from board of directors because he was not effective director -- F and other plaintiffs investing in third tranche -- Company failing and plaintiffs losing their investment -- Defendant liable to F in deceit -- Defendant not liable to other plaintiffs as he did not know whether they were influenced by him in their investment decisions.

Torts -- Negligent misrepresentation -- Defendant being director of company and acquiring shares in two of three private placements -- Defendant knowing that plaintiff F was influenced by him in his decisions to invest in company -- Defendant selling his shares before third tranche and resigning from board of directors in compliance with condition of sale -- Defendant not telling F that he had sold his shares -- Defendant telling F that he was not participating in third tranche because he already had enough shares of company and that he had resigned from board of directors because

he was not effective director -- F and other plaintiffs investing in third tranche -- Company failing and plaintiffs losing their investment -- Defendant liable to F in deceit -- Defendant not liable to other plaintiffs for negligent misrepresentation as he did not know whether they were influenced by him in their investment decisions -- No special relationship existing between defendant and other plaint iffs which gave rise to duty of care.

The defendant A was a director of Kremeko. Kremeko raised capital in three private placements that took place between 2001 and 2003. A invested in the first and second tranche and then sold his shares in Kremeko and, in compliance with a condition of the sale, resigned from the board of directors. All three of the plaintiffs invested in the first and third tranches and two of them invested in the second tranche. After selling his shares, A told the plaintiff F that he did not intend to participate in the third tranche because he had all the shares of Kremeko he needed. He did not tell F that he had sold his shares and told him that he had resigned from the board of directors because he was not being effective as a director. Kremeko eventually failed and the plaintiffs lost their entire investment. They claimed that had they known that A had sold his shares in Kremeko before the third tranche, they would not have invested in the third tranche. They sued A for damages for fraudulent or negligent misrepresenta tion and made a claim against all of the Kremeko directors, including A, under s. 248 of the Business Corporations Act for oppression arising from a failure to give notice of the proposed sale of A's shares.

Held, the action should be allowed.

A was liable to F for deceit. Deceit can be by way of a false statement or, in appropriate circumstances, by the making of a half-truth. A's statement as to why he had resigned from the board of directors was false. His statement that he was not participating in the third tranche because he already had all the shares of Kremeko he needed was at best a half-truth, which was misleading and which amounted to deceit in the circumstances. A knew that the statements were false. The fact that A was required to sign a non-disclosure agreement when he sold his [page105] shares did not excuse the making of the false statements. He could have said nothing when questioned by F. It was immaterial that he made the false statements without any intention of damaging F or of benefiting a third party. The statements were made with the intention of leading F to act on the faith of the statements. A knew that F was taking the statements into account in his decision to act further. The false statements were a material inducem ent upon which F relied. He would not have invested in the third tranche had he known the truth of the matter. A was not liable to the other two plaintiffs, B and G, for deceit. While he knew that the plaintiffs were generally acting together as a group in their investments in Kremeko, he did not have the same relationship with B and G that he had with F and did not know whether B and G were influenced in their investment decisions by the fact that A was an investor. He did not intentionally deceive B and G with intent that they act on the deception. For the same reasons, A was not liable to B and G for negligent misrepresentation. Their relationship was not sufficiently close or special as to give rise to a duty of care owed to them by A to not misrepresent his shareholdings in Kremeko.

B and G were entitled to judgment under s. 248 of the OBCA. They were entitled under a unanimous shareholders' agreement to notice of a required resolution approving the sale of A's shares and to a right to vote on the resolution. In fact, they did not receive notice, there was no shareholders' meeting and the transfer of A's shares was dealt with at a meeting of the board of directors. The conduct of the directors unfairly prejudiced the plaintiffs and unfairly disregarded their interests.

The directors who acquired A's shares were personally and directly involved in the transaction. All of the directors other than A also benefited in the sense that they saw Kremeko's ability to raise further funds being assisted by the non-disclosure agreement which A signed. The plaintiffs were entitled to compensation in the amount of their lost investment in the third tranche.

A's actions were not so malicious, oppressive or high-handed as to justify an award of punitive damages.

Cases referred to

South Australia Asset Management Corp. v. York Montague Ltd., [1997] A.C. 191, [1996] 3 All E.R. 365, [1996] 27 E.G. 125, [1996] 3 W.L.R. 87, 50 Con. L.R. 153, 80 Build. L.R. 1, [1996] 2 E.G.L.R. 93 (H.L.), distd

BCE Inc. v. 1976 Debentureholders, [2008] 3 S.C.R. 560, [2008] S.C.J. No. 37, 2008 SCC 69, 52 B.L.R. (4th) 1, EYB 2008-151755, J.E. 2009-43, 301 D.L.R. (4th) 80, 71 C.P.R. (4th) 303, 383 N.R. 119, consd

Other cases referred to

Awad v. Dover Investments Ltd., [2004] O.J. No. 3847, [2004] O.T.C. 821, 47 B.L.R. (3d) 55, 133 A.C.W.S. (3d) 788 (S.C.J.); Barton v. Armstrong, [1976] A.C. 104, [1975] 2 All E.R. 465, [1975] 2 W.L.R. 1050 (P.C.); Budd v. Gentra Inc., [1998] O.J. No. 3109, 111 O.A.C. 288, 43 B.L.R. (2d) 27, 81 A.C.W.S. (3d) 779 (C.A.); C.R.F. Holdings Ltd. v. Fundy Chemical International Ltd., [1981] B.C.J. No. 1633, [1982] 2 W.W.R. 385, 33 B.C.L.R. 291, 19 C.C.L.T. 263, 12 A.C.W.S. (2d) 265 (C.A.) [Leave to appeal to S.C.C. refused (1982), 42 N.R. 358]; Derry v. Peek (1889), 14 A.C. 337, [1886-1890] All E.R. Rep. 1 (H.L.); Hercules Managements Ltd. v. Ernst & Young, [1997] 2 S.C.R. 165, [1997] S.C.J. No. 51, 146 D.L.R. (4th) 577, 211 N.R. 352, [1997] 8 W.W.R. 80, J.E. 97-1151, 115 Man. R. (2d) 241, 31 B.L.R. (2d) 147, 35 C.C.L.T. (2d) 115, 71 A.C.W.S. (3d) 169; Kripps v. Touche Ross & Co., [1997] B.C.J. No. 968, [1997] 6 W.W.R. 421, 89 B.C.A.C. 288, 33 B @.C.L.R. (3d) 254, 35 C.C.L.T. (2d) 60, 70 A.C.W.S. (3d) 931 (C.A.); Mason and Intercity Properties Ltd. (Re) (1987), 59 O.R. (2d) 631, [1987] O.J. No. 448, 38 D.L.R. (4th) 681, 22 O.A.C. 161, 37 B.L.R. 6, 4 A.C.W.S. (3d) 307 (C.A.); [page106] NBD Bank, Canada v. Dofasco Inc. (1999), 46 O.R. (3d) 514, [1999] O.J. No. 4749, 181 D.L.R. (4th) 37, 127 O.A.C. 338, 1 B.L.R. (3d) 1, 15 C.B.R. (4th) 67, 47 C.C.L.T. (2d) 213, 93 A.C.W.S. (3d) 391 (C.A.); Parna v. G. & S. Properties Ltd., [1971] S.C.R. 306, [1970] S.C.J. No. 81, 15 D.L.R. (3d) 336, revg [1969] 2 O.R. 346, [1969] O.J. No. 1330, 5 D.L.R. (3d) 315 (C.A.); Pender v. Lushington (1877), 6 Ch. D. 70 (Ch. Div.); R. v. Pressley, [1948] B.C.J. No. 63, [1949] 1 W.W.R. 692, 94 C.C.C. 29, 7 C.R. 342 (C.A.); Queen v. Cognos Inc., [1993] 1 S.C.R. 87, [1993] S.C.J. No. 3, 99 D.L.R. (4th) 626, 147 N.R. 169, J.E. 93-270, 60 O.A.C. 1, 45 C.C.E.L. 153, 14 C.C.L.T. (2d) 113, 93 CLLC Â14,019 at 12082, 37 A.C.W.S. @.(3d) 1304; Sidaplex-Plastic Suppliers Inc. v. Elta Group Inc. (1998), 40 O.R. (3d) 563, [1998] O.J. No. 2910, 162 D.L.R. (4th) 367, 111 O.A.C. 106, 43 B.L.R. (2d) 155, 81 A.C.W.S. (3d) 59 (C.A.); Sidhu Estate v. Bains, [1996] B.C.J. No. 1246, [1996] 10 W.W.R. 590, 77 B.C.A.C. 116, 25 B.C.L.R. (3d) 41, 63 A.C.W.S. (3d) 1202 (C.A.); Smith v. Chadwick (1884), 9 A.C. 187, [1881-1885] All E.R. Rep. 242 (H.L.); Tapp v. Lee (1803), 3 Bos. & P. 367, 127 E.R. 200 (H.L.); Whiten v. Pilot Insurance Co., [2002] 1 S.C.R. 595, [2002] S.C.J. No. 19, 2002 SCC 18, 209 D.L.R. (4th) 257, 283 N.R. 1, J.E. 2002-405, 156 O.A.C. 201, 20 B.L.R. (3d) 165, 35 C.C.L.I. (3d) 1, [2002] I.L.R. I-4048, REJB 2002-28036, 111 A.C.W.S. (3d) 935

Statutes referred to

Business Corporations Act, R.S.O. 1990, c. B.16, ss. 134(2), 135(3), (4) [as am.], 248, (2), (3)

Courts of Justice Act, R.S.O. 1990, c. C.43

Authorities referred to

Fleming, John G., The Law of Torts, 7th ed. (Sydney: Law Book Co., 1987)

Spencer Bower, G., J. Turner and K.R. Handley, Actionable Misrepresentation, 4th ed. (London: LexisNexis Butterworths, 2000)

ACTION for damages for deceit and negligent misrepresentation and for an oppression remedy.

Peter F.C. Howard and Ellen M. Snow, for plaintiffs.

Peter H. Griffin and Eli S. Lederman, for defendant Paul Alofs.

Murray E. Stieber and Iain Peck, for remaining defendants.

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[1] **NEWBOULD J.**: -- This action concerns investments made by the plaintiffs in Kremeko Inc. ("Kremeko"), a private corporation which held the franchise rights for Krispy Kreme doughnuts for parts of Canada.[1] Krispy Kreme Doughnut Corporation ("KKDC"), a North Carolina Corporation, was the franchisor and one of the initial shareholders of Kremeko. KKDC and its parent Krispy Kreme Doughnuts, Inc. were named as defendants, but the action was eventually discontinued against them.

[2] Kremeko raised capital in the three private placements that took place in July 2001, September 2002 and August 2003. [page107] The plaintiffs were knowledgeable and sophisticated investors. Each of them invested in the first tranche, Mr. Fiorillo and Ms. Goulimis invested in the second tranche, and all three invested in the third tranche. The defendant Paul Alofs invested in the first and second tranche and was a director of Kremeko.[2] In June 2003, Mr. Alofs sold his shares in Kremeko to KKDC and other insiders and he resigned from the board of directors of Kremeko. He admittedly misled Mr. Fiorillo as to why he resigned from the board and did not tell him that he had sold his shares of Kremeko before the third tranche. During discussions between Mr. Fiorillo and Mr. Alofs at the time of the third tranche, Mr. Alofs also admittedly misled Mr. Fiorillo by stating that he was not going to participate in the third tranche because he had all the shares of Kremeko that he needed.

[3] The plaintiffs claim that they and Mr. Alofs were an informal group in their investment in Kremeko and that had they known that Mr. Alofs had sold his shares in Kremeko before the third tranche, they would not have invested in the third tranche. Kremeko eventually failed in Canada and the plaintiffs lost their entire investment. They claim against Mr. Alofs for the amount each of them invested in the third tranche on the basis of fraudulent or negligent misrepresentation plus punitive damages. They also claim against Mr. Alofs and the remaining defendants, all of whom were direc-

tors of Kremeko, on the basis of oppression in failing to notify the plaintiffs of the sale of Mr. Alofs' shares.

[4] Mr. Alofs take the position that he owed no duty of care to the plaintiffs and that they made their own investment decisions without in any way relying upon him. He and the directors of Kremeko take the position that there was no oppressive conduct towards the plaintiffs.

Fact Finding

[5] In this case, many of the facts are not in dispute. Some details or nuances are. What inferences should be drawn from the facts as a whole are contested. The facts that I recite are findings of fact unless I say otherwise.

[6] I did not view any of the witnesses as being intentionally dishonest in their testimony. At issue is their reliability. In making reliability assessments, I find helpful the statement of [page108] O'Halloran J.A. in R. v. Pressley, [1948] B.C.J. No. 63, 94 C.C.C. 29 (C.A.) [at para. 12]:

> The Judge is not given a divine insight into the hearts and minds of the witnesses appearing before him. Justice does not descend automatically upon the best actor in the witness-box. The most satisfactory judicial test of truth lies in its harmony or lack of harmony with the preponderance of probabilities disclosed by the facts and circumstances in the conditions of the particular case.

[7] There is no doubt that after the plaintiffs learned that Mr. Alofs had not been truthful, they were upset with him, particularly Mr. Fiorillo, who used very strong language in his telephone call to Mr. Alofs that was their last communication. Mr. Fiorillo acknowledged this, but said that he had gotten beyond hard feelings. However, one answer he gave on cross-examination indicated otherwise. These emotions are matters that I need keep in mind in considering the evidence and what inferences should be drawn from it.

[8] Each of the plaintiffs gave evidence as to the effect of Mr. Alofs' misstatements on their decisions to purchase shares in the third tranche. The circumstances in which they learned of the deception is of importance in considering their evidence. They learned of it in October 2004, a little more than one year after they had made their purchases, at a time when there were negative reports about KKDC coming from the U.S.A. They met together shortly thereafter to discuss the situation. It would have been an easy thing, and a matter of human nature, for them to have together convinced themselves that they would not have made their purchases had Mr. Alofs not lied to them. It is not to say that this occurred, but it is something that needs to be kept in mind in considering their evidence and in considering whether it is self-serving evidence as opposed to true recollection.

[9] There can be little doubt but that Mr. Alofs felt some guilt about having been untruthful, although I accept that he felt bound by a non-disclosure agreement made at the time he sold his shares. However, I viewed much of his evidence as an attempt to put his actions in the best possible light, given his untruthfulness to Mr. Fiorillo, and I had some difficulty with parts of it, as I shall discuss. With regards to differences between the evidence of Mr. Alofs and of Mr. Fiorillo as to what was discussed between them, I generally prefer the evidence of Mr. Fiorillo as being more reliable.

Cast of Characters

[10] Mr. Fiorillo earned a B.A. in economics and psychology in 1967 and an M.B.A. from the University of California at Berkeley [page109] in 1969. In 1977, he co-founded Research Manage-

ment Group ("RMG"), a market research company for consumer goods and industrial concerns, and this has been his primary occupation since then. In the early 1990s, a division of the company named Value Gap Advisers was formed which conducts investor perception surveys for large-scale public companies that are undervalued in the stock market. He began investing in public corporations in 1969. In the early 1990s, he began making private equity investments and has continued doing so to date, these being primarily the provision of early stage capital to startup businesses. He described private startup businesses as all involving high risk. He described himself as being an experienced and knowledgeable investor.

[11] Mr. Fiorillo met Mr. Alofs in the late 1980s when Mr. Alofs approached him to make an investment in a startup company named Electronics Marketing Systems. Mr. Alofs was the executive vice president of EMS with a large sweat-equity position. Mr. Fiorillo invested and went on the board of directors along with Mr. Alofs. Over the years, the two of them discussed many investments and business opportunities. Mr. Alofs arranged for Mr. Fiorillo's company RMG to conduct market research for HMV Canada and Disney Corporation when Mr. Alofs was with those corporations. Mr. Fiorillo viewed Mr. Alofs as a friend.

[12] Mr. Breen earned a B.Comm. from Queen's University in 1979. He joined CIBC and spent some years in New York, where he eventually became the deputy head of the acquisitions finance group. In 1989, he became a vice president of CIBC and was a founding member of CIBC Wood Gundy Capital, a private equity investment unit of CIBC Wood Gundy that identified and made private entity investments. His role was to identify private equity opportunities, invest in them, monitor the investments and conduct an exit strategy for them. In 1996, he was a founding principal in a private equity fund named MWI & Partners, which made equity investments in private businesses, and he remained there until November 2006. During that period, the business was acquired by Merrill Lynch, where he became a partner. In November 2006, he became a vice president of the CPP Investment Board responsible for all private equity investments. He, too, described himself as being an experienced and knowledgeable investor, although he had made n o personal private equity investments before March 2001. Mr. Breen first met Mr. Alofs in 1999 when introduced to him by Mr. Fiorillo. The three of them discussed participating in an Internet equity fund that Mr. Alofs was considering launching, but it did not materialize. Mr. Breen next met Mr. Alofs in connection with Kremeko. [page110]

[13] Ms. Goulimis earned a B.Comm. from Concordia University in 1981. She initially worked in currency trading at the Mercantile Bank of Canada and then BMO. She joined Scotia McLeod in 1987 with responsibilities for institutional equity sales into French Europe and one and a half years later began a consulting practice in the hedge fund business. She is married to Monty Gordon, one of the founders of Gordon Capital. It was her husband who was involved in discussions with Mr. Fiorillo, Mr. Alofs and others regarding the Kremeko investment and it was only after the investments had been made that the others learned that the shares had been bought by Ms. Goulimis. Ms. Goulimis testified that she and her husband, both experienced and knowledgeable investors, always looked at deals together and that her husband had a passion for private equity deals and was the person others would contact about investments. Ms. Goulimis never met Mr. Alofs.

[14] Mr. Alofs has an M.B.A. His business career was in marketing, which he began before he obtained his MBA. For a time he was the vice president of business development for Marketing Promotion Group dealing with clients in the packaged goods industry. He then joined EMF as executive vice president, and when that failed he became president of HMV Canada, a retail chain in the

music business, in 1989 and successfully expanded its business. In 1995, he became president of BMG Music Canada, which was in the creative side of the music business. In 1997, he moved to California and became the general manager and executive vice president of the Disney Store division of Disney Corporation with responsibility for over 500 stores throughout North America. In the spring of 1999, he joined an emerging dot com business named MP3.com, which was putting itself in a position for an IPO. The initial Kremeko offering memorandum described Mr. Alofs as helping to lead one of the largest Internet IPO's in history. He obtained a large stock option position in MP3.com and left in November 1999 following the IPO when he cashed in his stock position for a profit of approximately $10 million. He moved back to Toronto and did not seek employment again until after he invested in Kremeko and then sold his position in 2003. In September 2003, he became president and chief executive officer of the Princess Margaret Hospital Foundation.

[15] Mr. Alofs acknowledged that he and Mr. Fiorillo were friends, although he said not close friends, and that they had met socially from time to time. He testified that so far as his investment sophistication was concerned, he was an apprentice as compared to Mr. Fiorillo, whom he said was a master. Mr. Alofs acknowledged [page111] having met Mr. Breen in 1999 when introduced to him by Mr. Fiorillo to discuss Mr. Alofs' Internet incubator idea and having met Monty Gordon in the startup days of EMS in the late 1980s, when Gordon Capital raised startup capital for EMS.

Kremeko Opportunity

[16] In early 2001, Mr. Alofs learned that Roly Morris and his partner Robert Fisher were negotiating for the Canadian rights to Krispy Kreme. Mr. Alofs liked Krispy Kreme doughnuts and knew of its high profile in the United States. He also had known Mr. Morris since the early 1990s when Mr. Morris had taken over Starbucks in Canada and had built it into a success. He thought there was no one better than Roly Morris to bring Krispy Kreme to Canada. He met with Mr. Morris and enthusiastically discussed making an investment in the business.

[17] In February or March 2001, Mr. Alofs contacted Mr. Fiorillo and told him about the Kremeko opportunity as he thought that Mr. Fiorillo would be interested in making an investment. Mr. Fiorillo was keenly interested based on what Mr. Alofs told him and it was agreed that Mr. Alofs would call Mr. Morris to tell him of Mr. Fiorillo's interest as a potential investor and arrange for a meeting. Mr. Fiorillo testified that Mr. Alofs told him that they should meet together and separately with Mr. Morris so that they could share their views on the situation. Mr. Fiorillo met with Mr. Morris in mid-April after the meeting was arranged by Mr. Alofs. Mr. Alofs testified that he did not agree with Mr. Fiorillo to meet separately with Mr. Morris and Mr. Fisher and then exchange their impressions of the situation. He stated that he did not recall attending any meeting with Mr. Morris and Mr. Fiorillo together, although he later stated that his being at meetings attended by Mr. Fiorillo and Mr. Morris was more the ex ception rather than the rule. I accept Mr. Fiorillo's evidence that the two of them met with Mr. Morris to discuss the Kremeko opportunity and that they agreed to exchange their views on the investment opportunity.

[18] Mr. Fiorillo and Mr. Alofs discussed taking a serious look at the investment. They went together to a Krispy Kreme store in Niagara Falls, New York in the first part of April 2001, and they liked what they saw. Mr. Fiorillo testified that they did further research and exchanged their views. Mr. Alofs acknowledges that he considered foreign exchange issues because the product and equipment for the stores in Canada would come from the United States, although he suggested it was a fairly straightforward matter. Mr. Fiorillo arranged on his own for his [page112] company MRG at his expense to do a brand awareness study and taste test in the GTA to compare Krispy

Kreme doughnuts with Tim Horton donuts. He gave the MRG report dated July 2001 to Mr. Alofs and to Mr. Morris and eventually Kremeko paid him $10,000 for the study.

[19] In March 2001, Mr. Alofs received a confidential business plan from Mr. Morris dated February 2001. Mr. Fiorillo also received a copy from Mr. Morris. They both read it. A unanimous shareholders agreement amongst the four founding shareholders of Kremeko was also provided and reviewed by Mr. Alofs and Mr. Fiorillo.

[20] At one point, Mr. Fiorillo told Mr. Alofs that he had other value added investors who might be interested in Kremeko, by which he meant persons who could help with an overall assessment of the investment. Mr. Fiorillo told Mr. Alofs about Monty Gordon, Mr. Breen and others, and Mr. Alofs suggested that Mr. Fiorillo tell Mr. Morris of their interest. Mr. Fiorillo did so. Mr. Fiorillo told Mr. Alofs [that] he was going to share with Mr. Breen and Mr. Gordon all of the information that he had regarding Kremeko, and he did so. Although Mr. Alofs said that he did not meet with Mr. Breen or Mr. Gordon before the first investment in Kremeko was made, an answer to an undertaking indicated that Mr. Alofs met with Mr. Breen on July 18, 2001.

First Tranche

[21] In July 2001, Kremeko issued a confidential offering memorandum seeking to raise $4,250,000 by way of a private placement of 1,700,000 common shares at $2.50 per share. A copy was provided to Mr. Alofs and to Mr. Fiorillo. Like all the other material Mr. Fiorillo had received, he provided copies to Mr. Breen and Mr. Gordon and discussed it with them. Mr. Alofs and Mr. Fiorillo discussed the offering memorandum, including the risks involved in the investment and how the funds were going to be used. Mr. Fiorillo sought Mr. Alofs views and made reference to Mr. Alofs retail experience as a reason for doing so.

[22] Mr. Alofs told Mr. Fiorillo that he was going to invest $600,000, which he did, by subscribing for and being allotted 240,000 shares. Mr. Fiorillo subscribed for and was allotted 160,000 shares, for an investment of $400,000.

[23] Mr. Breen subscribed for 60,000 shares and was allotted 40,000 shares for $100,000. Ms. Goulimis, who discussed the investment only with her husband before making it, was allotted 80,000 shares for an investment [of] $200,000. [page113]

Second Tranche

[24] After the first tranche was completed, Kremeko opened its first store in December 2001, which by all accounts was a great success. Mr. Alofs was on the board of directors of Kremeko and he continued to have discussions with Mr. Fiorillo about the company. Mr. Alofs loaned Mr. Fiorillo, for his review, the board packages that he received for the board meetings in the fall of 2001 and March 2002, and he discussed these materials with him. In turn, Mr. Fiorillo discussed these materials with Mr. Breen and Mr. Gordon.

[25] On July 30, 2002, Kremeko advised its shareholders that it wished to raise a further $14,500,000 by way of a private placement of 2,746,212 shares of Kremeko at $5.28 per share. Under the shareholders agreement of Kremeko, existing shareholders had the first right to take up the shares pro rata to their shareholdings. Kremeko announced that the price of $5.28 per share was based upon a KPMG valuation. A copy of the valuation was provided by Mr. Alofs to Mr. Fiorillo, who provided a copy to Mr. Breen and Mr. Gordon and discussed it with them.

[26] Mr. Fiorillo discussed the valuation with Mr. Alofs and also with Messrs. Morris and Fisher. He asked Mr. Alofs for his views and for any flags that he should be aware of. He discussed with Mr. Alofs what an exit strategy might be for their investment and Mr. Alofs shared his view with him as to who might be a buyer of their shares and when and at what kind of multiple. Mr. Fiorillo asked Mr. Alofs if he was going to invest in the second tranche and was told by Mr. Alofs that he was going to double up. Mr. Fiorillo told Mr. Alofs that he, too, wanted to double up his investment.

[27] Mr. Fiorillo subscribed for 80,000 shares and was allotted 60,310 shares for an investment of $318,436.80. Although Mr. Alofs told Mr. Fiorillo, he was going to double up, he subscribed for a total of 90,466 shares in his and his wife's name and was allocated that amount for an investment of $477,660, somewhat less than his initial investment of $600,000.

[28] Mr. Breen decided not to invest in the second tranche. In discussions with Mr. Fiorillo, he learned that Messrs. Fiorillo, Gordon and Alofs were going to increase their investments. However, he thought the KPMG valuation of $5.28 per share was somewhat high for Kremeko at that stage of its startup. He discussed the valuation with Mr. Morris and Mr. Fisher but was not persuaded otherwise.

[29] Ms. Goulimis received information regarding the second tranche from her husband. After discussing it with him, and [page114] being aware that Mr. Fiorillo and Mr. Alofs but not Mr. Breen were participating, she acquired 30,155 shares for an investment of $159,218.40.

Exit Discussions

[30] In September 2002, Kremeko opened another store in Richmond Hill, Ontario. Mr. Fiorillo and Mr. Alofs attended, as did Mr. Morris and Mr. Fisher. They discussed what Mr. Morris and Mr. Fisher were thinking about an exit strategy from the investment and the possible timing. Mr. Morris and Mr. Fisher said that they thought there would be a window to do an IPO within the next 18 to 24 months. Mr. Alofs said that the exits they discussed included a possible IPO or an "en block" purchase by a strategic buyer. He also said that from time to time he would discuss with Mr. Fiorillo discussions he had with Messrs. Fisher and Morris on scenarios for an exit in terms of price and timing.

[31] On November 26, 2002, Messrs. Fiorillo, Breen, Gordon and Alofs attended a meeting at Kremeko's office in Richmond Hill that was organized by Mr. Alofs. They met with Mr. Morris and senior members of his management team who made a detailed presentation of the current Kremeko situation and future plans. They went to and from the meeting in Mr. Breen's car. On the way back from the meeting, they discussed amongst themselves aspects of the Kremeko business as well as exit scenarios from their investments. They talked of possible multiples being achieved in terms of whether they would have a "five bagger", a "ten bagger", etc. No one knew what the multiple would be or when it would occur, but everyone, including Mr. Alofs, was positive about the situation. There were no negative views expressed.

[32] After that occasion, Mr. Fiorillo had other discussions with Mr. Alofs about an exit strategy. Mr. Fiorillo introduced someone from Edgestone Capital to Mr. Morris regarding a possible exit strategy involving Edgestone and he discussed that with Mr. Alofs. He had other discussions with Mr. Alofs about the same topic. Mr. Alofs never mentioned to Mr. Fiorillo that he was considering an exit from Kremeko other than discussing an exit strategy that would involve all investors exiting at the same time.

Alofs Sale of Shares and his Resignation as a Director

[33] On January 31, 2003, Mr. Alofs wrote to Mr. Fisher stating that he and his wife wished to sell 300,000 of their Kremeko shares at the last market valuation of $5.28 per share. This represented about 90 per cent of their shares. Mr. Alofs stated in [page115] the letter that he was eager to stay on the board of Kremeko and he also stated that he recognized the importance of confidentiality in this matter. He testified that prior to sending the letter, he had a discussion with Mr. Morris about it, who told him that he would have to talk to the founding shareholders and the lawyers and said that in the meantime, "let's keep this confidential". Mr. Morris testified that there was no discussion of confidentiality in that telephone call.

[34] On February 26, 2003, Mr. Morris replied to Mr. Alofs. He stated that KKDC was willing to acquire 100 per cent of their shares at $5.28 per share but was not willing to acquire less than 100 per cent. The letter stated that an agreement containing confidentiality and non-disclosure provisions would have to be signed and that Mr. Alofs would have to resign as a director of Kremeko. Two days later, Mr. and Mrs. Alofs sent a letter to Mr. Morris accepting the terms of his letter of February 26, 2003.

[35] The sale of shares was completed four months later, on June 24, 2003. Some of the shares were sold to KKDC and others were sold to some of the directors of Kremeko and to two new Kremeko employees. The share purchase agreements signed by Mr. and Mrs. Alofs on June 23 and 24, 2003, provided that they were to keep the agreement strictly confidential and that they would neither discuss with any other party the existence or the terms of the agreement nor disclose such matters publicly.

[36] Why Mr. Alofs decided to sell his shares in Kremeko when he did is puzzling. Mr. Morris testified that in late December or early January 2003, Mr. Alofs contacted him and said he was looking at another venture and was interested in reducing his holdings in Kremeko so that he would have more cash available. Mr. Alofs stated in his letter of January 31, 2003, offering to sell 300,000 of the shares that he needed to finance his future. In his e-mail on April 29, 2003, to Mr. Morris, he asked Mr. Morris to read to the board of directors the next day a statement he had prepared. The statement said he was chomping at the bit to get into an operating role and he required the funds in order to support his next venture. However, when he contacted Mr. Morris in late December 2002 or early January 2003, he had no venture that he was considering. He had just learned at the Kremeko board meeting in December that he would not be considered for an international executive position at KKDC that he had applied for. Mr. Alofs asserted in his evidence that he had not applied for the position, but I do not accept that. He acknowledged he had sent in his resume and had asked two directors to intercede with KKDC and had told Mr. Morris he was unhappy that he [page116] had received short shrift and was disappointed that he had not been given an interview with the CEO of KKDC. There is evidence that on March 24, 2003, two months after he took steps to sell his Kremeko shares, Mr. Alofs told his solicitor that he was looking at investing in a few startup opportunities, which did not materialize.

[37] One explanation he gave in his evidence for the sale was that his mother's illness, during which he helped take care of her, and her passing on November 2, 2002, was a life-changing experience for him and he was giving serious consideration at that point to going into the non-profit world. However, it appears that the non-profit world came more into focus in the spring of 2003, after Mr. Alofs had agreed to sell his shares. It was after his mother's passing that he sought the international executive position at KKDC in late 2002, and it was only at the board meeting in De-

cember 2002 that he learned that he was not being considered for the position, which upset him. On June 24, 2003, in an e-mail to Messrs. Morris and Fisher he said that it was three months earlier that he had made a decision to go the not-for-profit route. If that is the case, it was no sooner than in March 2003 that he decided on his non-profit route, some two months after he had taken steps to sell his shares.

[38] Mr. Alofs also testified that in terms of his net worth and where he wanted to go, he had way too much invested in a private equity investment. While there is evidence that from the Spring of 2003 to the middle of 2004, he was looking at possible investments in startup situations and discussed some of them with Mr. Fiorillo, he acknowledged that he took his money from his Kremeko shares and invested it in other ventures, such as GMP Securities after it did an IPO and Equitable Trust, also after it did an IPO, and in a real estate property in Florida.

[39] In an e-mail to Mr. Morris on January 23, 2003, one week before he took steps to sell his shares, Mr. Alofs expressed concerns with the budgeted EBITDA for Kremeko and the fact that the first two stores that had been opened were performing below budget. One inference from this evidence is that, contrary to his evidence that he thought the outlook for Kremeko was outstanding, he had concerns regarding the profitability of Kremeko and that was a factor in his decision to sell. However, this e-mail was not put to Mr. Alofs and in the circumstances it would be unfair to draw such an inference, and I do not do so.

[40] It is not necessary to decide why Mr. Alofs decided to sell his Kremeko shares when he did. However, in light of the fact that he never hinted to Messrs. Fiorillo, Breen or Gordon that he was thinking of exiting his investment on his own and shared [page117] their optimism for an exit strategy that would involve a good multiple, it would be understandable that if Mr. Fiorillo or the others were told the whole story, they would have questions about what they were being told.

Deception by Alofs regarding his Resignation as a Director

[41] On June 25, 2003, Kremeko announced that Mr. Alofs had resigned from the board of directors effective June 24, 2003. On June 24, 2003, the day he signed the share purchase agreement, Mr. Alofs telephoned Mr. Fiorillo and advised him that he had resigned from the board of Kremeko. Until then, Mr. Alofs had never had any discussions with Mr. Fiorillo about resigning from the board of Kremeko. Mr. Fiorillo asked him why he was resigning and he responded that he was doing so because he was not being effective as a director. He told Mr. Fiorillo that KKDC was running the show and that Messrs. Morris and Fisher were just doing their bidding with all decisions being taken in the United States. He told Mr. Fiorillo it was a waste of his time and he had better things to do.

[42] Mr. Fiorillo testified that in the conversation he asked Mr. Alofs for his view on the prospects of Kremeko and that Mr. Alofs responded to the effect that "I have confidence in the management team and we are going to do well." I do not accept Mr. Alofs' evidence that there was no discussion of the prospects of the business. It would be a perfectly natural thing for Mr. Fiorillo, having just heard out of the blue that Mr. Alofs was resigning from the board, to ask him what he thought of the prospects of the company. It would be a way of probing to see if Mr. Alofs thought there was some problem that may have influenced his decision to resign from the board.

[43] Mr. Fiorillo said to Mr. Alofs he thought it important for their group to have a representative on the board of directors of Kremeko and he asked Mr. Alofs if that would be a good idea. Mr. Alofs agreed it would and suggested that Mr. Fiorillo should speak directly to Mr. Morris about it.

In his e-mail to Mr. Fisher a few days after his call with Mr. Fiorillo, Mr. Alofs stated, "He did not ask about my ownership stake but did say he wanted to go on the board to represent his, mine, Monty's and Breen's share position. I just said that he should talk to you or Roly about the board."

[44] Mr. Alofs said nothing to Mr. Fiorillo in the conversation about selling his shares or about being eager to retain his seat on the board of Kremeko but being required to give it up as a condition of selling his shares. He said he did not do so because of the non-disclosure agreement he signed. [page118]

[45] After the call from Mr. Alofs, Mr. Fiorillo called Mr. Breen and Mr. Gordon and told them of the call from Mr. Alofs and the reason he gave for resigning from the board.

Further Alofs' Deception of his Share Position in Kremeko at Time of Third Tranche

[46] In April 2003, Kremeko was awarded the Krispy Kreme rights for Alberta, Saskatchewan and Manitoba and in order to expand in those areas required further financing. On August 5, 2003, Kremeko sent to its shareholders a term sheet to raise approximately $10 million by way of a private placement of shares at $5.28 per share, the same price at which the financing in the second tranche had taken place.

[47] Mr. Fiorillo telephoned Mr. Alofs to ask him what he was going to do about this third financing. Mr. Fiorillo testified that Mr. Alofs responded by saying something to the effect that he had enough shares and he was going to stay with what he had. He said that Mr. Alofs further said that if he didn't have the shares that he already had, he would be buying more. Mr. Fiorillo further testified that he said to Mr. Alofs that he realized he had a big investment in the company, which he thought to be about $1.1 or $1.2 million, and he asked Mr. Alofs what he thought the prospects of Kremeko were. He said Mr. Alofs responded by saying that the prospects were good, he had a great deal of faith in Mr. Morris and "we" were going to do well. Mr. Fiorillo testified he told Mr. Alofs he was going to take an amount that would bring him up to the level of what Mr. Alofs owned in the company. Mr. Fiorillo then called Mr. Breen and Mr. Gordon and told them of his conversation with Mr. Alofs.

[48] Mr. Alofs testified that he was caught off guard by the call from Mr. Fiorillo. He admitted that Mr. Fiorillo asked him if he was going to be subscribing for more shares and he replied that he was not and had all the Kremeko shares he needed. He denied saying to Mr. Fiorillo that if did not have the shares that he had he would be buying more, although on a cross-examination in April 2006, he said that Mr. Fiorillo may have said that. He said he did not recall Mr. Fiorillo telling him that he was going to take up enough to bring his position close to his. He acknowledged telling Mr. Fiorillo that he thought the prospects for the company were great and that Mr. Morris was a superb manager. He denied saying that "we" were going to do well but said on cross-examination that he could have said that everybody will do well, knowing that Mr. Fiorillo thought he was still a shareholder. [page119]

[49] Regarding his evidence that he was caught off guard by the call from Mr. Fiorillo, Mr. Alofs said that he had previously mentioned to Mr. Morris a number of times that Mr. Morris should tell Mr. Fiorillo that he had sold his shares and Mr. Morris had given him assurances that he would do so, and when Mr. Fiorillo asked him what he was going to do about this third financing, he realized that Mr. Fiorillo had not been told of the sale. He testified that after the call from Mr. Fiorillo, he called Mr. Morris to say that he had had an awkward conversation with Mr. Fiorillo and told Mr. Morris that Mr. Morris must tell Mr. Fiorillo that he had sold his shares. He said that Mr. Morris

responded for the first time by saying that he would treat Mr. Fiorillo like any other shareholder and that he did not have to disclose the sale by Mr. Alofs. Mr. Alofs said that he took the response of Mr. Morris to mean that Mr. Morris was not going to tell Mr. Fiorillo of the sale of his shares.

[50] Mr. Morris testified that on two or three occasions, exactly when he does not recall, Mr. Alofs told him that he had been in communication with Mr. Fiorillo and was concerned about what he could do or say, and asked that the company deal with Mr. Fiorillo directly. Mr. Morris testified that he indicated to Mr. Alofs that he would treat Mr. Fiorillo like any other shareholder, which meant that Mr. Fiorillo was not going to be given notice of the sale of Mr. Alofs' shares. Mr. Morris did say that if asked by Mr. Fiorillo, he would answer the question honestly. In answer to a question from the bench at the end of his evidence, Mr. Morris said that answering the question honestly would be to disclose the sale if asked directly. The thrust of Mr. Morris' evidence is that he never said he would make contact with Mr. Fiorillo to tell him of the sale of Mr. Alofs' shares.

[51] Mr. Alofs' evidence that he was taken by surprise when Mr. Fiorillo called him to ask what he was going to do was given, I believe, in an attempt to justify his untruthfulness as being unintentional. I do not accept his evidence in that regard.

[52] In an affidavit sworn by Mr. Alofs in January 2005, he stated that he had asked Mr. Morris whether he was going to speak to Mr. Fiorillo about the sale of the shares. This is not a statement that he asked Mr. Morris to tell Mr. Fiorillo about the sale. He went on to state in his affidavit that Mr. Morris told him that he would deal with Mr. Fiorillo in the same way that he would deal with any other shareholder and that it was his impression that Mr. Fiorillo would be told in due course. In his evidence at the trial, Mr. Alofs said that Mr. Morris' statement to him that he would treat Mr. Fiorillo like any other shareholder was made after the August call he had had with Mr. Fiorillo and [page120] that Mr. Morris had said he didn't have to disclose the sale to Mr. Fiorillo. Mr. Alofs said that Mr. Morris' response indicated to him that Mr. Morris would not tell Mr. Fiorillo about the sale.

[53] A very telling document contrary to Mr. Alofs' testimony that before his August conversation with Mr. Fiorillo, he had thought Mr. Morris was going to tell Mr. Fiorillo of the sale is his e-mail of July 1, 2003 to Messrs. Fisher and Morris. This document was not produced by Mr. Alofs but was produced by the defendant directors just prior to the trial. I have earlier made reference to it. In the e-mail, Mr. Alofs recited the conversation he had with Mr. Fiorillo about his resignation from the board. The e-mail contained the following statement:

> If Henry asks me outright if I have sold my position my response will be this: Henry, I can't comment on anything to do with board or personal matters related to Kremeko as I have signed a confidentiality agreement. I will follow that comment with this: I can say that I have 100% confidence and faith in Robert, Roly and the Krew.
>
> Robert, is this ok with you? Also, you may get a call from Henry so I wanted to give you a heads up.

[54] Mr. Alofs did not say anything in his e-mail about Mr. Morris having said that he would tell Mr. Fiorillo of the sale, nor did he ask Mr. Morris in the e-mail to tell Mr. Fiorillo of the sale or request permission to make the disclosure himself. Rather, he proposed a form of response on his part designed not to directly disclose the sale. Had he asked Mr. Morris to that point to disclose the sale to Mr. Fiorillo, as he testified, and been told by Mr. Morris that he would do so, one would have expected that to be in the e-mail rather than what was contained in it.

[55] I do not accept Mr. Alofs' evidence that before Mr. Fiorillo called him in August 2003, he had been told by Mr. Morris that he would tell Mr. Fiorillo about the sale or that he had an expectation that Mr. Morris had done that. I accept Mr. Morris' evidence that he told Mr. Alofs that he would treat Mr. Fiorillo like any other shareholder, which meant that Mr. Fiorillo was not going to be told of the sale. Mr. Morris and the board wanted the existing shareholders to be buyers in the next financing, and the non-disclosure agreement assisted in that. It would have been inconsistent with the non-disclosure agreement for Mr. Morris to have said he would disclose the sale to Mr. Fiorillo.

[56] Mr. Alofs said that he did not get a response to his e-mail. The fact that he did not get a response did not mean, however, that he was not thinking of what he would say to his friend Henry Fiorillo when the inevitable call came. And when the call came, his response was far different from what he had proposed in his e-mail. [page121]

[57] It is quite clear that Mr. Alofs expected Mr. Fiorillo to ask him at some point about his share position. He admitted on cross-examination that he expected that he would get a call from Mr. Fiorillo about the third equity offering. Moreover, from the time of the first financing, Mr. Alofs and Mr. Fiorillo had talked extensively about Kremeko and about what they were going to do on the first and second financing. Mr. Alofs knew from April 2003 that Kremeko had obtained the rights for Western Canada and might be undertaking a further financing and he had to be expecting a call from Mr. Fiorillo whenever that occurred. He acknowledged that he learned of the third offering directly from Mr. Morris. I do not accept Mr. Alofs' evidence that when Mr. Fiorillo called him to discuss the third financing, he was taken by surprise.

[58] I accept Mr. Fiorillo's evidence as to what was discussed in his call with Mr. Alofs. I do not see much difference between what Mr. Alofs admitted he said to Mr. Fiorillo, viz., that he was not going to purchase more shares as he already had all the shares he needed, and the statement that he denies making, viz., that if he did not have the shares that he had he would be buying more. I do not believe that Mr. Alofs' memory would permit him to admit the one and deny the other. I believe that Mr. Alofs' evidence that he only made the first statement was given to assist a justification that his untruthful statements were unintentional, as saying something once could be seen as being less intentional then saying much the same thing a second time. I find that both statements were made.

[59] I also accept the evidence of Mr. Fiorillo that he told Mr. Alofs he was going to acquire enough shares to take him up to Mr. Alofs' position. While Mr. Alofs testified that he did not recall Mr. Fiorillo saying that, he acknowledged in cross-examination in June 2006 that Mr. Alofs may have said it. I also accept Mr. Fiorillo's evidence that he and Mr. Alofs discussed the prospects for Kremeko in the conversation and that Mr. Alofs made a statement to the effect that they, including Mr. Alofs, were going to do well in their investment in Kremeko. Mr. Alofs admitted he could have said that everyone was going to do well, knowing that Mr. Fiorillo thought that Mr. Alofs still owned his Kremeko shares.

Third Tranche

[60] Mr. Fiorillo subscribed for 83,190 common shares for an investment of $439,243.20. Mr. Breen subscribed for 20,000 shares for an investment of $105,600. Ms. Goulimis subscribed [page122] for 20,797 shares for an investment of $109,808.16. It is these amounts that are claimed in this action.

Further Deception by Mr. Alofs of his Share Position in Kremeko

[61] In the summer of 2004, there were reports of financial problems at KKDC in the United States. Mr. Fiorillo and Mr. Breen together made a telephone call to Mr. Alofs to discuss the situation. During the call, Mr. Fiorillo asked Mr. Alofs whether he was aware of any past or present senior officer or director of Kremeko having sold shares in Kremeko. Mr. Alofs responded that he was not aware of any such sales. Mr. Fiorillo asked Mr. Alofs if he had sold his shares in Kremeko and Mr. Alofs responded that he had not. Mr. Fiorillo said he asked these questions because he had made several attempts to have a meeting with the company of the kind that they had all had in November 2002 and Mr. Alofs had been saying that he was too busy and could not make it but that Mr. Fiorillo should go ahead. Mr. Fiorillo said he got a feeling that Mr. Alofs was deliberately avoiding him and he formed the view that Mr. Alofs may have sold his shares. Mr. Fiorillo said that after the call he told Mr. Breen that he thought tha t Mr. Alofs was lying and he was going to pursue a meeting with Mr. Morris. Mr. Breen's evidence was confirmatory of Mr. Fiorillo's evidence of the phone call with Mr. Alofs, although he said he thought Mr. Alofs was too honourable to have lied to them.

[62] Mr. Alofs testified that he was again caught off guard by the call. He acknowledged that he told Mr. Fiorillo and Mr. Breen that he had not sold his shares. He asserted that it was obvious to him that they had been told that he had sold his shares. He said he left a voice message for Mr. Morris again telling Mr. Morris he had to tell Mr. Fiorillo that he had sold his shares. He said he got a voicemail message back from Mr. Morris saying that he would tell Mr. Fiorillo and that if Mr. Fiorillo asked Mr. Alofs directly, he could tell him that he had sold the shares. I have some difficulty with this evidence. Mr. Morris was not asked to confirm or deny this exchange of voicemails. He did not call Mr. Fiorillo to tell him of the sale of Mr. Alofs' shares.

[63] Mr. Fiorillo eventually was able to set up a meeting with Mr. Morris for October 2004. On September 16, 2004, Mr. Fiorillo called Mr. Alofs to tell him of the meeting. Mr. Alofs responded that there was something as a friend that he had to tell him. He told Mr. Fiorillo that he has signed a confidentiality agreement and he could not talk about it but there was something that Mr. Fiorillo should know and that he should talk to Mr. Morris about it. Mr. Fiorillo testified that he asked Mr. Alofs [page123] if he was trying to tell him that he had sold his shares, to which Mr. Alofs responded that he did not want to talk about it but that Mr. Fiorillo should read between the lines. Mr. Alofs' testimony was confirmatory of what took place in the call.

[64] Mr. Fiorillo reported the call to Mr. Breen, who said he was going to call Mr. Colin Moore, who had previously been a director of Kremeko, whom Mr. Fiorillo knew. Mr. Fiorillo called Mr. Moore, who told him that no other director other than Mr. Alofs had sold his shares. The next morning, Mr. Fiorillo called Mr. Alofs with very harsh words, which is the last time they spoke.

Issues

[65] The plaintiffs base their claim against Mr. Alofs on fraudulent misrepresentation and in the alternative on negligent misrepresentation. They also make a claim against all of the Kremeko directors, including Mr. Alofs, for oppression arising from a failure of the plaintiffs to be given notice of the proposed sale by Mr. Alofs.

Fraudulent Misrepresentation

[66] Fraud is a false representation of fact, made with a knowledge of its falsehood, or recklessly, without belief in its truth, with the intention that it should be acted upon by the complaining party, and actually inducing him to act upon it: see Parna v. G. & S. Properties Ltd., [1971] S.C.R. 306, [1970] S.C.J. No. 81.

[67] The elements of the tort of fraudulent misrepresentation can thus be distilled to five criteria which a plaintiff must demonstrate in order to establish a defendant's liability:

(a) The defendant made a false statement;
(b) the defendant knew that the statement was false or was indifferent to its truth or falsity;
(c) the defendant had the intention to deceive the plaintiff;
(d) the false statement was material in that it induced the plaintiff to act; and
(e) the plaintiff suffered damages as a result of so acting.

(a) Was there a false statement?

[68] Deceit can be by way of a false statement or, in appropriate circumstances, by the making of a half truth. As early as [page124] 1803, in Tapp v. Lee (1803), 3 Bos. & P. 367, 127 E.R. 200 (H.L.), at 203 E.R., it was stated:

> An action on the case for deceit is an action well known to the law, and I cannot agree in the argument which has been used for the defendant, that such actions ought to be confined to representations which are literally false. Fraud may consist as well in the suppression of what is true, as in the representation of what is false. If a man, professing to answer a question, select those facts only which are likely to give a credit to the person of whom he speaks, and keep back the rest, he is a more artful knave than he who tells a direct falsehood.

[69] A more recent statement of the same principle can be found in Spencer Bower and Turner, Actionable Misrepresentation, 4th ed. (London: LexisNexis Butterworths, 2000), at 85:

> A half truth may be a misrepresentation. To state a thing which is true only with qualifications or additions known to, but studiously withheld by, the representor, is to say the thing which is not. Such a statement is a "lie", and a most dangerous and insidious form.

(i) Statement of June 24, 2003

[70] On June 24, 2003, when Mr. Alofs telephoned Mr. Fiorillo to tell him that he was resigning from the board of Kremeko, in response to Mr. Fiorillo's question as to why, he replied that he was doing so because he was not being effective as a director and it was a waste of his time and he had better things to do. His statement was false and, even if it had not been, was a half truth as to what it did not disclose. Mr. Alofs did not resign from the board of Kremeko because he was not being effective, but rather because he was required to do so as a condition of selling his shares. When he offered to sell 90 per cent of the shares, he stated that he was eager to remain on the board of Kremeko. Mr. Alofs testified that he felt that he was not being effective as a director of Kremeko, and while that may have been true, it was not the reason for his resignation. His answer was also a half truth in that he did not disclose that the reason he was resigning as a director was because he was selling all of the sh ares in Kremeko and his resignation was a condition of the sale.

[71] Mr. Alofs admitted that in his discussion with Mr. Fiorillo, he gave only half the story and did not give him the whole truth as to why he resigned. Mr. Alofs knew that Mr. Fiorillo believed

that he was still a shareholder. In Mr. Alofs' words, "I didn't level with him", and he agreed that his answer was misleading.

(ii) Statement in August 2003

[72] When Mr. Fiorillo called Mr. Alofs in August 2003 and asked him if he was going to be subscribing for more shares in [page125] response to the third private placement offer, Mr. Alofs replied that he was not as he had all the Kremeko shares he needed and if he did not have the shares that he had he would be buying more. These statements were false. Even if Mr. Alofs had said only that he was not going to buy more shares as he had all the Kremeko shares he needed, as he asserted in his evidence, that would have been misleading and false as, even if it were literally true in that he had no need for any shares, in the context in which the statement was made it conveyed the notion that he had shares and they were enough for him at that time. In any event, I have found that Mr. Alofs made both statements to Mr. Fiorillo.

(iii) Statement in August 2004

[73] There is no question but that Mr. Alofs' statement to Mr. Fiorillo and Mr. Breen in August 2004 that he still owned his shares in Kremeko was a false statement. However, this statement was made long after the plaintiffs had acquired their shares in the third equity offering and nothing turns on it.

(b) Did Mr. Alofs know that his statements were false?

[74] It is quite clear that Mr. Alofs knew that his statements were false. He knew he had sold his shares in Kremeko and he knew he was saying something quite different to Mr. Fiorillo.

(c) Did Mr. Alofs intend to deceive Mr. Fiorillo and the other plaintiffs?

(i) Mr. Fiorillo

[75] A plaintiff must establish that the false statement was made with the intention of deceiving the plaintiff. It is not necessary, however, for a plaintiff to establish that the defendant intended to cause loss to the plaintiff and a defendant's motive is irrelevant. It is immaterial that the false statement was made without any intention of damaging the plaintiff or of benefiting some third party. In Spencer Bower and Turner on Actionable Misrepresentation, 4th ed. (London: LexisNexis Butterworths, 2000) it is stated, at 61:

> Although fraud involves an intention on the part of the representor that the representee should act in the way he did, there is no need to prove any further intention, and the representor's motive is irrelevant. It is immaterial that the representation was made without any intention of damaging the representee, or of benefiting the representor or some third person, or even with the intention of benefiting the representee. A false representation made without honest belief in its truth will be fraudulent if made with the intention that the representee act upon it, even if there is no apparent motive. [page126]

[76] In Derry v. Peek (1889), 14 A.C. 337, [1886-1890] All E.R. Rep. 1 (H.L.), at p. 374 A.C., Lord Herschell stated, "if fraud be proved, the motive of the person guilty of it is immaterial. It

matters not that there was no intention to cheat or injure the person to whom the statement was made".

[77] In Smith v. Chadwick (1884), 9 A.C. 187, [1881-1885] All E.R. Rep. 242 (H.L.), at p. 201 A.C., Lord Blackburn stated, "the motive of the person saying that which he knows not to be true to another with the intention to lead him to act on the faith of the statement is immaterial".

[78] In my view, the statements made by Mr. Alofs on June 24, 2003, and in August 2003, were made with the intention to lead Mr. Fiorillo to act on the faith of the statements and were intentionally deceitful. Mr. Alofs' statements to Mr. Fiorillo were intended to hide the fact that he had sold his shares in Kremeko. As I have already discussed, Mr. Alofs was not taken by surprise when he made the statements to Mr. Fiorillo.

[79] It is contended on behalf of Mr. Alofs that he was not in any way a promoter of Kremeko at the time he made his statements on June 24, 2003 and later in August of that year and he had no interest in whether Mr. Fiorillo or the other plaintiffs purchased shares of Kremeko in the third equity offering. That may be. However, on the authorities, it is immaterial that his statements were not made to benefit Mr. Alofs or a third party such as Kremeko. In the words of Lord Herschell in Derry v. Peek, supra, it matters not that there was no intention to cheat or injure Mr. Fiorillo.

[80] Mr. Alofs' statements to Mr. Fiorillo in August 2003 were made in the context of being called by Mr. Fiorillo and being asked what his intentions were regarding the third equity offering and in the context of Mr. Fiorillo considering what he himself was going to do about the offering. Mr. Alofs told Mr. Fiorillo that he had enough shares and would be buying more if he did not have as many shares as he did, i.e., he was maintaining his considerable share position in Kremeko. Mr. Alofs knew that Mr. Fiorillo wanted to know his intentions and made his statements intending Mr. Fiorillo to believe them and knowing Mr. Fiorillo would have them in mind in making his decision whether or not to invest further. Mr. Fiorillo told Mr. Alofs that he was going to take his position in Kremeko up to Mr. Alofs' level and thus Mr. Alofs knew that Mr. Fiorillo was going to act on what he told him of his share position. Mr. Alofs did not tell Mr. Fiorillo to disregard what he was saying. He wanted Mr. Fiorillo t o believe that he was still a shareholder. It cannot be said that Mr. Alofs did not intend the consequences of his acts [page127] when he knew that Mr. Fiorillo was acting on the statements that he knew to be false and yet did not stop Mr. Fiorillo from doing so.

[81] It is contended that Mr. Alofs felt constrained by the non-disclosure agreement made when he sold his shares and therefore his statements could be said to have been made without any fraudulent intent. Motive, however, is not a defence. Moreover, Mr. Alofs was required by his non-disclosure agreement not to disclose the sale. He was not required to lie about it and his choice was to either say nothing about his shareholding, which was what the non-disclosure agreement required, or to tell the truth if he decided to talk. Mr. Alofs could have said that he could not discuss the situation, but he chose not to do so.

[82] Before Mr. Alofs sold his shares, there was nothing preventing him from discussing with Mr. Fiorillo his desire to sell his shares. In light of the relationship that he had with Mr. Fiorillo, not only with respect to their shareholdings in the Kremeko but also their ongoing discussions about various investments, one would have expected Mr. Alofs to discuss in advance with Mr. Fiorillo his desire to sell his shares. Mr. Alofs testified that he never turned his mind to whether he should inform Mr. Fiorillo before selling, but I do not give credit to that evidence. He chose not to discuss his intent to sell with Mr. Fiorillo and the inference I draw is that he did so because of a concern that if

he did, it could jeopardize his desire to sell his shares. Although Mr. Alofs testified that he thought the confidentiality agreement was requested of him because there were a lot of people interested in buying franchises and shares and Mr. Morris did not want another distraction, Mr. Morris' evidence was that the board, of whom Mr. Alofs was one, did not want the existing shareholders to be selling but rather wanted them to be buyers in the upcoming third tranche to raise capital for the anticipated Western Canada expansion. Mr. Alofs agreed on cross-examination that Kremeko had that concern. I conclude that Mr. Alofs knew of the concern of the board of Kremeko and chose not to disclose to Mr. Fiorillo his intention to sell before agreeing to a non-disclosure clause because he did not want to jeopardize the sale of his shares.

[83] If Mr. Alofs had no relationship with Mr. Fiorillo so far as their shareholdings in Kremeko were concerned, there would have been no reason for Mr. Alofs to call Mr. Fiorillo to tell him of his resignation from the board of Kremeko. He knew, however, that the announcement was going to be made the next day and I believe he felt obliged to call Mr. Fiorillo before the announcement [page128] was made and to put the best possible light on it. He knew that he owed Mr. Fiorillo an explanation and he chose to mislead Mr. Fiorillo as to the reason for his resignation from the board. When the inevitable call came from Mr. Fiorillo in August to discuss the third equity offering, which Mr. Alofs admits he was expecting, Mr. Alofs was caught up in his earlier lie and I believe decided to continue the lie. He made his statements intentionally at that time with the knowledge that Mr. Fiorillo believed them and was taking them into account in his decision to invest further. He was thus intentionally deceitful.

(ii) Mr. Breen and Mr. Gordon/Ms. Goulimis[3]

[84] Mr. Fiorillo's evidence was that he shared with Mr. Breen and Mr. Gordon everything he learned about Kremeko, including Mr. Alofs' call about his resignation from the board and what he learned from Mr. Alofs about Mr. Alofs' investment intentions for each of the three tranches. I accept Mr. Fiorillo's evidence. Mr. Breen gave confirmatory evidence of it and Ms. Goulimis gave evidence that her husband passed on this information to her.

[85] Mr. Alofs knew that Messrs. Fiorillo, Breen and Gordon were generally acting together as a group in their investments in Kremeko. He knew this from the fact the four of them visited the head office of Kremeko in November 2002 for a presentation from Mr. Morris and other senior officers of Kremeko. It is clear from his e-mail to Messrs. Fisher and Morris on July 1, 2003, in which he reported on his call to Mr. Fiorillo to tell him of his resignation from the board of Kremeko, that he understood that the four of them were seen by Mr. Fiorillo at least to be acting as a group. He stated that Mr. Fiorillo had told him that he wanted to go on the board of Kremeko "to represent his, mine, Monty's and Breen's share position".

[86] When Mr. Alofs made his statements to Mr. Fiorillo in August 2003 about his having enough shares in Kremeko, he had to know that his statements might be passed on to Mr. Breen and Mr. Gordon.

[87] However, there is no evidence that Mr. Alofs had any knowledge or belief as to whether Mr. Breen or Mr. Gordon was going to do anything about the third equity offering. Mr. Fiorillo [page129] did not say anything to Mr. Alofs about that in their August conversation. Nor did he do so in their earlier conversations about the first or second offering. This is unlike the situation Mr. Alofs found himself in with Mr. Fiorillo. Mr. Alofs knew from his August conversation with Mr.

Fiorillo that Mr. Fiorillo was going to increase his investment in the third tranche and he intentionally deceived Mr. Fiorillo knowing that Mr. Fiorillo was going to invest.

[88] Further, Mr. Alofs did not know whether Mr. Breen and Ms. Goulimis were influenced in their investment decisions in Kremeko by the fact that Mr. Alofs was an investor. Mr. Alofs had never been told that and had no basis for thinking one way or the other whether that would influence them if they were thinking of investing in the third tranche.

[89] It is clear that Mr. Alofs did not have the same relationship with Mr. Breen or Mr. Gordon as he did with Mr. Fiorillo. He did not introduce them to the opportunity to invest in Kremeko as he had done with Mr. Fiorillo. It was Mr. Fiorillo who introduced them to Kremeko. Mr. Alofs did not discuss their investments in Kremeko with them before they were made. He did not call them to discuss his resignation from the board of Kremeko. He did not discuss investments generally with them as he did with Mr. Fiorillo. He was not friends with them. I am not prepared to find that Mr. Alofs intentionally deceived Mr. Breen or Mr. Gordon with intent that they act on the deception.

(d) Did the false statements of Mr. Alofs induce Mr. Fiorillo to purchase?

[90] In an action in deceit, it is necessary for a plaintiff to establish that the misrepresentation was a material inducement upon which the plaintiff relied. It is not necessary for a plaintiff to establish that the misrepresentation was the sole inducement for acting and it matters not if the misrepresentation was only one of several factors contributing to the plaintiff's decision: see Sidhu Estate v. Bains, [1996] B.C.J. No. 1246, 25 B.C.L.R. (3d) 41 (C.A.), at paras. 35-36; Kripps v. Touche Ross & Co., [1997] B.C.J. No. 968, 89 B.C.A.C. 288 (C.A.), at paras. 102-103; NBD Bank, Canada v. Dofasco Inc. (1999), 46 O.R. (3d) 514, [1999] O.J. No. 4749 (C.A.), at para. 81.

[91] In Sidhu Estate, supra, Finch J.A. (as he then was) quoted with approval from Fleming, The Law of Torts, 7th ed. (Sydney: Law Book, 1987), which stated, at 604

> At the same time, a defendant cannot excuse himself by proving that his misrepresentation was not the sole inducing cause, because it might have been precisely what tipped the scales . . . [page130]

And from Barton v. Armstrong, [1976] A.C. 104, [1975] 2 All E.R. 465 (P.C.), in which Lord Cross, who wrote for the majority, in part stated, at p. 118 A.C.

> If on the other hand Barton relied on the misrepresentation Armstrong could not have defeated his claim to relief by showing that there were other more weighty causes which contributed to his decision to execute the deed, for in this field the court does not allow an examination into the relative importance of contributory causes.

(Emphasis Finch J.A.'s)

[92] Mr. Fiorillo gave evidence of the effect of his discussions with Mr. Alofs on his decisions to invest in all three tranches. He testified that it gave him some confidence when Mr. Alofs told him that he was going to invest $600,000 in the first tranche. Mr. Fiorillo said that Mr. Alofs' views and his decision to invest that much was a big factor in his decision to invest in the first tranche. With respect to the second tranche, Mr. Fiorillo testified he asked Mr. Alofs for his views and if there were any flags that he should be aware of. Mr. Alofs told him that he was going to double up his

investment. Mr. Fiorillo said that the information he got from Mr. Alofs, including the fact that he was going to invest further, was a major factor in his decision to invest in the second tranche.

[93] With respect to the third tranche, Mr. Fiorillo testified that Mr. Alofs told him that if he had not had the shares that he had, he would be investing more, and that since he knew that Mr. Alofs had a big commitment in Kremeko, he told Mr. Alofs that he was going to take an amount it would take him up to about what Mr. Alofs had in the company. Mr. Fiorillo testified that he took from the conversation that Mr. Alofs still owned approximately $1.2 million worth of shares and that Mr. Alofs' continuing involvement as a shareholder, i.e., not having sold, was a factor in his decision to invest in the third tranche. He said that other factors that led him to make the investment were that the company was adding more stores and expanding, there was no indication that the product was not being accepted in the market place, it looked like the company was building to be a successful retail chain and the management team was credible and solid.

[94] On his examination for discovery in May 2008, Mr. Fiorillo was asked why he invested in the third tranche. His answer had to do solely with what Mr. Alofs had told him and the fact Mr. Alofs still had a sizable investment in Kremeko. It is contended that Mr. Fiorillo's evidence is self-serving and not to be accepted and that his evidence at the trial that Mr. Alofs' statements were [page131] only one factor in his decision was given to shore up an obviously unpersuasive answer given on his discovery.

[95] There is no question that Mr. Fiorillo was a very experienced investor. He had his own investment criteria for making investments that had to be met, and he considered his criteria to have been met for each of his three investments in Kremeko. He had access to Mr. Morris, the president of Kremeko, and to Mr. Fisher, the chairman, and he discussed the various offerings with them. He liked the prospects of Kremeko at the time he invested in the third tranche and thought that it was still a "multi-bagger". I think Mr. Fiorillo in his evidence overstated the effect of Mr. Alofs' discussion with him on his decision to make his third investment. I do not think, however, that this was intentional, and I viewed Mr. Fiorillo as honestly doing his best to give accurate testimony.

[96] Having said that, I believe, and find, that what Mr. Alofs said to Mr. Fiorillo in their telephone conversation influenced Mr. Fiorillo in his decision to invest in the third tranche in that it was one factor that Mr. Fiorillo took into account in making his decision. It must be remembered that Mr. Fiorillo called Mr. Alofs to discuss the matter. Mr. Alofs' views must have been of some importance to Mr. Fiorillo for him to call Mr. Alofs. Mr. Alofs had been a director of Kremeko who had passed on board information to Mr. Fiorillo and although he had recently resigned from the board, he could be expected to be fairly current. Because someone is a sophisticated investor does not mean that such person would not listen to others and take their views into account. It was Mr. Alofs, who at the time was to become a director, who contacted Mr. Fiorillo to see if he was interested in investing in Kremeko and the two of them had discussed each of the equity offerings of Kremeko. Mr. Alofs acknowledged that Mr. F iorillo sought out his views on the investment because of his experience in the retail business.

[97] For Mr. Fiorillo to be influenced by Mr. Alofs' statements that he would be buying more shares if he did not already have his sizable position and that he still thought the prospects for Kremeko were good is not surprising. The purpose of Mr. Fiorillo's call to Mr. Alofs was to take the temperature of Mr. Alofs' appetite for Kremeko. Also, if Mr. Fiorillo gave no consideration to what Mr. Alofs told him, and was indifferent to Mr. Alofs' share position in Kremeko, one might ask why Mr. Fiorillo was so upset when he heard that Mr. Alofs had sold his Kremeko shares. His being up-

set is consistent with his having taken Mr. Alofs' statements into account in making his investment decision in the third tranche. [page132]

[98] I accept that Mr. Fiorillo's views on the prospects of Kremeko which he was able to form from information available to him directly from others and from the company were obviously important considerations for him in coming to his decision to invest in the third tranche. It is clear that he did not rely solely on what Mr. Alofs told him. As he said, it was he who had to write the cheque and make the decision to do so. But what Mr. Alofs told Mr. Fiorillo in their August 2003 conversation was a material inducement reasonably relied on by Mr. Fiorillo in making his investment decision in the third tranche.

(e) Did Mr. Fiorillo suffer damages?

[99] Kremeko eventually failed and became bankrupt. Mr. Fiorillo lost his entire investment. He claims damages for his investment of $439,243.20 on the third tranche on the basis that he was misled by the deceit of Mr. Alofs and he would not have made the investment had he known the truth.

[100] In an action in deceit, plaintiffs are entitled to be put in the same position they would have been in if the representations had not been made, but not to be put in the position they would have been if the representations had been true: see Parna v. G. & S. Properties Ltd., [1969] 2 O.R. 346, [1969] O.J. No. 1330 (C.A.), revd [1971] S.C.R. 306, [1970] S.C.J. No. 81; and C.R.F. Holdings Ltd. v. Fundy Chemical International Ltd., [1981] B.C.J. No. 1633, [1982] 2 W.W.R. 385 (C.A.); leave to appeal to S.C.C. refused (1982), 42 N.R. 358.

[101] Mr. Fiorillo was asked in his evidence in chief to assume that he had been told certain things by Mr. Alofs before making his investment decision on the third tranche, viz, (i) Mr. Alofs had told him that he had sold his Kremeko shares; (ii) Mr. Alofs had told him that his resignation from the board of Kremeko was a condition of the sale of the shares impose by KKDC; (iii) Mr. Alofs had told him that the reason for the sale of his shares was to obtain the funds for his new career path; and (iv) Mr. Alofs had told him his view that the prospects of Kremeko were positive. Mr. Fiorillo was asked if in those circumstances he would have invested in the third tranche. His response was "absolutely not". He said that as an experienced investor one of the major red flags that one looks at is when a co-investor leaves the investment, and in this case the co-investor was someone he had literally been joined at the hip with all through the investment, with whom he had discussed other investments, some risky, and who had agreed with him that they would exit Kremeko with a multiple of their money. He said he would ask why this person was leaving for a very small gain when the prospects of a very [page133] large gain were ahead of them, and it would have been a major red flag. He said not only would he not have invested, but that he would have attempted to exit his investment.

[102] I accept Mr. Fiorillo's evidence on this. The fact that he was an experienced investor does not mean that he would not take into account relevant information. To the contrary, one would expect him to do so if the information was relevant to his decision. The fact that he and Mr. Fiorillo had been in this investment together from the start and that Mr. Alofs had been on the board of directors of Kremeko and was making his decision to sale his shares while he was on the board would quite reasonably be something that could influence Mr. Fiorillo. I accept and find that not only did Mr. Alofs' statements made to Mr. Fiorillo influence Mr. Fiorillo in his decision to invest in the

third tranche, but also that Mr. Fiorillo would not have made this investment had he been told the truth of the matter rather than having been deceived.

[103] The reason for the non-disclosure agreement is an indication of the materiality of the fact that Mr. Alofs had sold his shares and that such knowledge of it could influence others not to buy more shares. Mr. Morris acknowledged that at the time Mr. Alofs offered to sell his shares, the prospects for Kremeko obtaining the rights to Western Canada were on the table and Kremeko would need to raise more capital for that purpose. Mr. Morris testified that normally in a private equity investment the shareholders are locked into the investment until such time as there is an IPO, a sale, a merger, an acquisition. Kremeko was concerned that if it were known that Mr. Alofs had sold his shares, some of the existing shareholders might want to be sellers themselves rather than making further investments in a subsequent equity offering. As Mr. Morris put it, Kremeko did not want a flood of potential investors wanting to redeem their shares. Kremeko wanted them to be buyers.

[104] It is asserted on behalf of Mr. Alofs that the loss was not caused by any misrepresentation of his share position in Kremeko, but rather by the risk factors attached to the Kremeko shares that were identified in the first offering memorandum read and understood by Mr. Fiorillo. It is contended that these risk factors overwhelmed the company.

[105] Reliance is placed on Lord Hoffman's reasons in South Australia Asset Management Corp. v. York Montague Ltd., [1997] A.C. 191, [1996] 3 All E.R. 365 (H.L.). I do not think it assists the defence. That case involved the extent of liability of a valuer who provided a lender with a negligent overvaluation of a property given as security for a loan. It was held that liability should be [page134] limited to those consequences attributable to what made the act wrongful, which in a case of liability for negligent misrepresentation would limit liability to the consequences of the information being wrong. The consequences of the negligent misrepresentation was that the bank had less valuable security than it thought it had and it was this difference in the value of the security that the bank was entitled to recover.

[106] In this case, unlike the bank case in which the loan would have been made, Mr. Fiorillo would not have made the investment at all and would not have suffered any loss if he had not been deceived by Mr. Alofs. Moreover, Lord Hoffman pointed out that an exception to the rule that the person giving wrong information is responsible only for the consequences of the information being wrong is subject to exceptions, fraud commonly being one. He said:

> The principle that a person providing information upon which another will rely in choosing a course of action is responsible only for the consequences of the information being wrong is not without exceptions. This is not the occasion upon which to attempt a list, but fraud is commonly thought to be one. In Doyle v. Olby (Ironmongers) Ltd. [1969] 2 All E.R. 119 at 122, [1969] 2 Q.B. 158 at 167 Lord Denning M.R. said:
>
> > The defendant is bound to make reparation for all the actual damages directly flowing from the fraudulent inducement. The person who has been defrauded is entitled to say: "I would not have entered into this bargain at all but for your misrepresentation. . . ."
>
> Such an exception, by which the whole risk of loss which would not have been suffered if the plaintiff had not been fraudulently induced to enter into the transaction is trans-

> ferred to the defendant, would be justifiable both as a deterrent against fraud and on the ground that damages for fraud are frequently a restitutionary remedy . . .

[107] To argue in this case that Mr. Alofs should not be responsible for Mr. Fiorillo's loss because the consequences of the information that he was a shareholder being wrong was not the demise of Kremeko ignores the fact that we are dealing with deceit, not negligence, and also ignores the finding that Mr. Fiorillo would not have invested had he not been knowingly misled. Fraud unravels all.

I find that Mr. Fiorillo has been damaged to the extent of $439,243.20 and that he is entitled to a judgment for that amount against Mr. Alofs.

Negligent Misrepresentation

(i) Duty of care

[108] A claim for negligent misrepresentation has been made by the plaintiffs as an alternative claim to the claim for fraudulent [page135] misrepresentation. It is only necessary to deal with this alternate claim with respect to the plaintiffs John Breen and Denise Goulimis.

[109] In Queen v. Cognos Inc., [1993] 1 S.C.R. 87, [1993] S.C.J. No. 3, at para. 33, the required elements that must be satisfied to make out a successful claim of negligent misrepresentation were stated:

(1) there must be a duty of care based on a "special relationship" between the representor and the representee;
(2) the representation in question must be untrue, inaccurate, or misleading;
(3) the representor must have acted negligently in making said misrepresentation;
(4) the representee must have relied, in a reasonable manner, on the said negligent misrepresentation; and
(5) the reliance must have been detrimental to the representee in the sense that damages resulted.

[110] The principles for establishing a duty of care in a claim for negligent misrepresentation do not differ in a material way from any other negligence claim. Consequently, the two-part Anns test applies to determine whether a duty of care arises in a particular set of circumstances and the plaintiff must show that (a) there is a sufficiently close relationship between the plaintiff and the defendant such that it is in the reasonable contemplation of the defendant that [carelessness] on his part may cause damage to the plaintiff; and (b) if there is a sufficiently proximate relationship between the parties to found a duty of care, there are no policy considerations which ought to negative or limit the scope of the duty owed: see Hercules Managements Ltd. v. Ernst & Young, [1997] 2 S.C.R. 165, [1997] S.C.J. No. 51, at paras. 20 and 21.

[111] This is an unusual claim in the sense that the misstatements of Mr. Alofs relied on were knowingly rather than just negligently made. However, the fact that the misstatement was made intentionally should not defeat the claim if the constituent elements of the tort are present. Unlike the tort of deceit, an intention that a representee act on the statement made is not a requirement for the tort of negligent misrepresentation. Negligence deals with foreseeable risk of harm rather than intentional acts.

[112] For essentially the same reasons that I am not prepared to find that Mr. Alofs intentionally deceived Mr. Breen and Mr. Gordon, I do not find that their relationship constituted a sufficiently close or special relationship giving rise to a duty of [page136] care owed to them by Mr. Alofs to not misrepresent his shareholdings in Kremeko. They did not make any enquiries of Mr. Alofs as Mr. Fiorillo did. Mr. Alofs did not know whether Mr. Breen or Mr. Gordon were considering investing in the third tranche or whether they would be influenced by the fact that he remained a shareholder, and he did not have a relationship with them as he did with Mr. Alofs. This is even more the case with Ms. Goulimis, whom Mr. Alofs did not know was a shareholder and whom he had not met, and what Mr. Gordon may say to her about investing in Kremeko and what might influence her in coming to a decision to invest would be something he would have no way of knowing.

[113] Put in another way, can it be said that there was a sufficiently close relationship between Mr. Alofs and Messrs. Breen and Gordon so that it was in Mr. Alofs' reasonable contemplation that carelessness on his part in saying he was still a shareholder might cause damage to them, or to Ms. Goulimis? That would involve a question as to whether he could foresee that their knowing he was still a shareholder would influence them in their decision to invest in the third tranche. In my view, Mr. Alofs did not know enough about what went into their investment decisions or whether they were contemplating investing in the third tranche to foresee that his statements that he was still a shareholder and would buy more if he did not have the investment that he did would materially influence them in deciding whether to invest in the third tranche. This was quite different from what he knew about Mr. Fiorillo, with whom he certainly had a special relationship.

[114] In this regard, I do not think the question is what Mr. Alofs could foresee they might have done had they known that the statement was a misstatement and he had already sold his shares. That might be relevant to the credibility of their evidence that they relied on what Mr. Alofs said to Mr. Fiorillo, or to the question of how they were damaged in relying on the misstatement, but to determine whether there was reliance, the issue is whether they reasonably relied on the representations that were made, not what they would have done knowing the representations to be false.

[115] Because I have found that there was not a special relationship between Messrs. Alofs, Breen and Gordon or Ms. Goulimis giving rise to a duty of care, it is not necessary to deal with the issues of reliance or damage. However, I will deal with these issues in case I am wrong in my conclusion that there was no duty of care. [page137]

(ii) Reliance and damage -- Mr. Breen

[116] Mr. Breen testified as to the criteria he uses when investing in private equity situations. Included was an alignment of interest with those people he invests with. He said it was important that they have "skin in the game". He did not have a direct discussion with Mr. Alofs about Kremeko but information regarding Mr. Alofs was passed on to him by Mr. Fiorillo. He said that he was aware of Mr. Alofs successful career in the consumer retail business, including his positions at HMV, Disney and MP3.com, and aware he had made a spectacular exit from MP3.com. He saw Mr. Alofs as a person who was helpful to the information gathering process.

[117] Mr. Breen discussed the factors that led him to invest in the first tranche. One of the factors he listed was who his partners were. He did not state who those partners were. On cross-examination, he said that Mr. Alofs' participation as an investor was a factor in his decision to invest.

[118] Mr. Breen did not invest in the second tranche because he believed the valuation by KPMG was too high. He spoke to Messrs. Fisher and Morris who did not persuade him otherwise. In an e-mail to Mr. Morris shortly afterwards, he referred to the five key things he looked at in private investments: management, business, capital resources, exit strategy and valuation of the shares. He did not refer to who else was investing as being a key factor. I accept his evidence, however, that there were other factors he looked at in private equity investments, including whether others he considered to be partners were investing.

[119] Mr. Breen testified that with respect to the third tranche, he was aware from Mr. Fiorillo that Mr. Alofs was comfortable with his position and was not making a further investment. He said that he knew that Mr. Alofs had doubled his position a year earlier and his view was that as Mr. Alofs was in for over $1 million, it did not give him concern that he was not going to be investing further. In listing the factors that led him to invest in the third tranche, he included the fact that Mr. Alofs had a substantial investment in Kremeko, which gave him some comfort.

[120] Mr. Breen was asked if he would have invested in the third tranche if he had known (i) Mr. Alofs had sold all of the shares; (ii) Mr. Alofs resignation as a director was a condition of the sale; (iii) the reason Mr. Alofs gave for selling his shares was to fund his new career path; and (iv) Mr. Alofs believed the prospects for Kremeko were generally positive. His answer was that [page138] he did not think he would have invested and would have sought an exit from the company at that time. He said he would have had a heightened concern about the prospects of the investment because the facts did not add up. He referred to the fact that just a few months before the four of them, being Messrs. Fiorillo, Alofs, Gordon and himself, on the way back from the presentation in Markham, had talked positively about the business performance of Kremeko. The timing of the request itself and the secrecy would have caused him to wonder if there was a concern about the prospects of the business. The fact that Mr. Alofs was required to leave the board would have caused him concern. He said he would have questioned the rationale that Mr. Alofs needed the money to fund some other endeavour because of their belief that things were going well and that a successful exit strategy was on the horizon. Insofar as Mr. Alofs' belief that the outlook for Kremeko was positive was concerned, he said that it would have concerned him as it was incongruous with Mr. Alofs' actions.

[121] The test for reliance is the same in a negligent misrepresentation case as in a fraudulent misrepresentation case: see Kripps v. Touche Ross & Co., supra, and NBD Bank, Canada v. Dofasco Inc., supra. Thus it is not necessary for a plaintiff to establish that the misrepresentation was the sole inducement for acting and it matters not if the misrepresentation was only one of several factors contributing to the plaintiff's decision.

[122] I recognize that it was a little over one year after Mr. Breen had invested in the third tranche that he learned of the deception of Mr. Alofs and that he and Mr. Fiorillo and Ms. Goulimis shortly thereafter got together to discuss the situation and what they would have done had they known the true facts. There is risk, for certain, that they talked themselves into believing what they have now testified to. That being said, I accept Mr. Breen's evidence that he would not have invested in the third tranche had he known that Mr. Alofs had sold the shares. There is logic to what he said and I accept him as a truthful witness. A sudden change by Mr. Alofs regarding his investment in Kremeko shortly after their positive discussions in the car after their meeting at Kremeko, without any discussion by Mr. Alofs with any of them as to what he was thinking of doing would naturally give pause to Mr. Breen. The fact that Mr. Breen was a highly sophisticated investor, like Mr.

Fiorillo, does not mean that he woul d not take account of what he learned. Mr. Alofs had until shortly before been a director providing corporate information to Mr. Breen through Mr. Fiorillo and I accept that what Mr. Alofs was doing would be relevant to [page139] Mr. Breen. I accept that Mr. Breen would not have made his investment in the third tranche had he known that Mr. Alofs had sold his shares and been required to resign from the board.

[123] The other question, however, is not quite so easy to judge. That is, was Mr. Breen influenced in making his investment in the third tranche by the fact that Mr. Alofs said that he was satisfied with his investment and would be investing more if he did not have what he had? He knew that Mr. Alofs was no longer a director with access to up to date information, although as he knew that Mr. Alofs had only resigned two months earlier, it would be natural to think that Mr. Alofs was relatively up to date in his information. There is no doubt that Mr. Breen had to be satisfied of the investment based on his investment criteria, including the price, and he had been told that Mr. Morris had wanted the valuation to be one dollar per share higher but had been overruled. He also thought the prospects for an exit strategy were good. All of these were factors he took into account.

[124] However, on balance I accept Mr. Breen's evidence that it also gave him some comfort in making his decision to invest the third tranche that Mr. Alofs had a substantial investment in Kremeko. What Mr. Alofs was doing would not be irrelevant to him. The fact that there were more weighty causes that influenced his decision is not determinative as a court will not allow an examination into the relative importance of contributory causes: see Sidhu Estate, supra. I find that Mr. Breen reasonably relied on the information passed on to him by Mr. Fiorillo that Mr. Alofs said that he was satisfied with his investment and would be investing more if he did not have what he had.

[125] The damage that Mr. Breen suffered was his lost investment in the third tranche. While Kremeko failed because of the business risks which it faced, Mr. Breen would not have made the investment had he known the true state of affairs regarding Mr. Alofs.

(iii) Reliance and damages -- Ms. Goulimis

[126] Ms. Goulimis had no direct contact with anyone other than her husband Monty Gordon regarding her investments in Kremeko. Her information regarding Mr. Alofs and the other investors came from her husband. She testified on cross-examination that her decision to invest was not made alone, but rather in conjunction with her husband. She also said that she asked her husband for his impressions and he would give her his judgment. It is contended on behalf of Mr. Alofs that the failure [page140] to call Mr. Gordon as a witness is fatal to Ms. Goulimis' case as it is not possible to know what Mr. Gordon may or may not have relied on. While there may be something in the point, it seems to me that if Ms. Goulimis relied on statements made by Mr. Alofs in making her investment decisions, or if she would not have invested had she known the truth about Mr. Alofs, it does not matter what her husband thought about Mr. Alofs. This is not a case in which Mr. Gordon made the investment decision and for tax or other considerations put the shares in his wife's name. She, too, was in the financial business and an experienced and knowledgeable investor.

[127] Ms. Goulimis testified that at the time she made the first investment in Kremeko, she was living in London, England. She was made aware by her husband of Mr. Alofs' background as president of HMV Canada and of Disney and that he had extensive high-level positions in the retail area. Her husband also told her of Mr. Fiorillo and Mr. Breen and told her that it was Mr. Fiorillo who had brought the Kremeko opportunity to him and Mr. Alofs who had brought the opportunity to Mr. Fiorillo. She was told that Mr. Fiorillo and Mr. Alofs had gone to visit a Krispy Kreme store in the

U.S. She learned in the fall of 2001, sometime after her first investment in Kremeko, that Mr. Alofs had become a director of Kremeko. This evidence of Ms. Goulimis of what she was told by her husband is not, of course, admissible to prove the truth of the statements made to her but is admissible as things told to her on which she may or may not have relied. Ms. Goulimis was given a copy of the offering memorandum by her husband and she read it.

[128] Ms. Goulimis testified that the fact Mr. Fiorillo, who had brought the investment opportunity to her husband, and Mr. Alofs, who had brought the investment opportunity to Mr. Fiorillo, were investing in Kremeko was a major but not the sole factor in her decision to invest in the first tranche. She said the fact that Mr. Breen was also investing was not as important a factor in her mind because he was not what she referred to as the originator of the deal and was not a large investor.

[129] Regarding the second tranche, Ms. Goulimis said that she was aware that Messrs. Fiorillo and Alofs were investing, which was a factor in her decision to invest as well. She said she knew that Mr. Breen was not investing, but that was not a factor as the key players in the informal group were Messrs. Fiorillo and Alofs.

[130] Ms. Goulimis testified that she learned from her husband of the meeting in November 2002 at the Kremeko offices, which was reported to her as positive. She said her husband told [page141] her that Mr. Alofs anticipated a five or six times return. She also was later told that Mr. Alofs had resigned from the board and was curious to find out why. She could not recall the specific reason she was given other than it was innocuous.

[131] Regarding the third tranche, Ms. Goulimis testified that she read the offering memorandum. She was curious to know if Messrs. Fiorillo and Alofs would be participating and was told by her husband that Mr. Fiorillo was increasing his position substantially and Mr. Alofs was not putting in more because he had told Mr. Fiorillo that he had enough stock and did not want to increase his position. She said the fact that Mr. Alofs was not going to be a purchaser did not alter their position and she knew that he already had a large position in the company so was not concerned. She said on cross-examination that the investment met her investment criteria, which included the fact that the people who had brought them the investment were still supportive of the company.

[132] Ms. Goulimis was asked the same question that was put to Mr. Fiorillo and Mr. Breen, namely, did she believe she would have invested in the third tranche had she known (i) Mr. Alofs had sold all of the shares; (ii) Mr. Alofs resignation as a director was a condition of the sale; (iii) the reason Mr. Alofs gave for selling his shares was to fund his new career path; and (iv) Mr. Alofs believed the prospects for Kremeko were generally positive. Her response was that she would not have. She explained that after the meeting in Markham in November 2002, there was euphoria and they were looking for a "five or six bagger". She said it would have been a big flag for her that shortly after that, Mr. Alofs was selling out for one and a half times his investment. She also said she did not understand why a change in his career would affect his investment decision.

[133] I accept Ms. Goulimis' evidence. I viewed her as an honest witness without in any way attempting to embellish her testimony. To her an important factor was that the persons who brought them by the deal were investing in it. That included Mr. Alofs. I accept that Mr. Alofs being an investor was a factor in her purchases, including her investment in the third tranche. I also accept that if she had known that Mr. Alofs had sold his shares, she would not have made her third investment.

Oppression Claim

[134] The plaintiffs claim under s. 248 of the Business Corporations Act, R.S.O. 1990, c. B.16 ("OBCA") against the directors of Kremeko. They assert that they were entitled under the [page142] by-laws of Kremeko and under a unanimous shareholder agreement (the "USA") to notice of a required resolution approving the sale of Mr. Alofs shares, and had they received such notice they would not have invested in the third tranche. Thus they seek to recover their investment in the third tranche under s. 248(2) and (3) of the OBCA.

[135] The position of the defendants is that the plaintiffs were not entitled to any notice of the sale of Mr. Alofs' shares. I have concluded that they are wrong in this and that the plaintiffs were entitled to notice and a right to vote on the resolution. It rests on the interpretation of the USA.

[136] The USA became effective as of March 9, 2001 and was signed by its original shareholders, KKDC, Bow Tie Ventures Limited (Mr. Morris's holding corporation), Robert C. Fisher and Bonnie Fisher, jointly, and GCFF-Canada LP (Richard Renis' holding corporation). These founding shareholders were given veto rights over certain shareholder decisions which required a Special Shareholders Resolution, the definition of which has given rise to the dispute.

[137] The USA restricted the right of a shareholder to transfer shares to someone else. Article 7.2 provided:

> 7.2 Transferability of Shares. Except as expressly provided for in this Article 7, each of the Shareholders shall not Transfer their Shares or any interest therein or their rights under this Agreement. The Shareholders agree that, notwithstanding any other provisions of this Agreement, none of the Shareholders shall Transfer all or any portion of the Shares owned by them without the prior written consent of the Shareholders by Special Shareholders Resolution, which consent shall not be unreasonably withheld or delayed.

(Emphasis added)

[138] Thus the prior written consent of the Shareholders by Special Shareholders Resolution was required to the transfer of Mr. Alofs' shares. Shareholders were defined in the USA as:

> "Shareholder" means each Person designated as a shareholder of the Company on Schedule A hereto [i.e., the founding shareholders], and any additional Person who acquires shares in the capital of the Company in accordance with Article 10. "Shareholders" refers to such Persons as a group.

[139] The reference to art. 10 in this definition was a drafting error. A person could become a shareholder by way of a transfer from another shareholder under art. 7.2 or upon being issued treasury shares under art. 9. It is agreed that the definition of shareholder should be read as if properly drafted and that the plaintiffs became shareholders in accordance with art. 9. [page143]

[140] Thus defined, the word Shareholders refers to all of the shareholders, and it is agreed that the word Shareholders includes the plaintiffs. It could not be otherwise, and the plaintiffs in subscribing for their shares agreed to assume all of the obligations of a shareholder under the USA.

[141] A Special Shareholders Resolution was defined in the USA as:

> "Special Shareholders Resolution" means a resolution passed which KKDC, BTVL, Fisher and Great Circle (or their permitted transferees) [i.e., the founding shareholders] have voted in favour of or a resolution in writing signed by such Shareholders.

[142] It is argued on behalf of the directors other than Mr. Alofs that the definition of Special Shareholders Resolution refers to a resolution of only the founding shareholders. Thus it is contended that a transfer of Mr. Alofs shares under art. 7.2, which required consent by way of a Special Shareholders Resolution, required a written resolution signed only by the founding shareholders and as the resolution was not one that required the vote or consent of the plaintiffs, no notice of the resolution was required to be given to them.

[143] Mr. Griffin on behalf of Mr. Alofs takes a somewhat different position. He concedes that the definition of Special Shareholders Resolution means that if the resolution is one to be voted on at a meeting, it has to include a vote of all of the shareholders, including the plaintiffs or at least notice has to be provided to them giving them the right to vote. He contends, however, that if the resolution is one in writing, it need only be signed by the founding shareholders without notice to the other shareholders.

[144] This contention on behalf of Mr. Alofs that the rights of the plaintiffs will vary depending upon whether the resolution is to be put to an oral vote at a meeting or one signed in writing makes no commercial sense and cannot be correct. There is no logical or commercial reason for the distinction between a resolution passed by vote and a written resolution. Moreover, the construction put on art. 7.2 on behalf of Mr. Alofs runs contrary to art. 5.6(2) of the USA, which provides that all actions of the shareholders may be taken by written resolution without a meeting and shall be effective only if the resolution is signed by all shareholders eligible to vote on such action. A written resolution without a meeting would not be effective unless signed by all shareholders, including the plaintiffs. This is consistent with the by-laws of Kremeko.

[145] As the word Shareholders by definition refers to each shareholder "as a group", a Special Shareholders Resolution is a [page144] resolution of all shareholders. While under the USA a shareholders resolution is one passed by a majority in interest of all shareholders voting at a shareholders' meeting, if the resolution is a Special Shareholders Resolution it requires all founding shareholders to be in favour of it. The fact that this provision requires the approval of all of the founding shareholders does not mean that it takes away the right of other shareholders to be heard on the resolution.

[146] The language of art. 7.2 is consistent with this. It provides for the need for "prior written consent of the Shareholders by Special Shareholders Resolution". If the interpretation put on the USA by the directors were correct, and a Special Shareholders Resolution meant a resolution of only the founding shareholders, there would be no purpose in the addition of the word Shareholders in art. 7.2 and it would be superfluous. Such an interpretation would require the word Shareholders in art. 7.2 to mean only the founding shareholders, which is contrary to its definition in the USA. The word Shareholders is defined in the USA to include all shareholders, including the plaintiffs. The reference in art. 7.2 to the consent of the Shareholders by Special Shareholders Resolution must include the consent of the plaintiffs.

[147] One of the fundamental rights of a shareholder is to vote on all matters properly coming before the shareholders. While a unanimous shareholder agreement may restrict the rights of shareholders, a provision taking away the right to vote would in my view have to be expressly stated. It

was not. The desire of the founding shareholders to have an effective veto is understandable but that did not require that the other shareholders should not have a voice in shareholder matters. It might be that one or more of the later shareholders would persuade one or more of the founding shareholders to his or her view on a matter. The right of a shareholder to vote does not depend upon whether his or her vote will carry the day. Many years ago, in Pender v. Lushington (1877), 6 Ch. D. 70 (Ch. Div.), Jessel M.R., in discussing the right of a shareholder to have his vote recorded, stated:

> He has a right to say, "Whether I vote in the majority or minority, you shall record my vote, as that is a right of property belonging to my interest in this company, and if you refuse to record my vote I will institute legal proceedings against you to compel you."

[148] In summary, my reading of the USA is that before Mr. Alofs' shares were transferred under art. 7.2, notice of a proposed resolution approving the transfer was required to be given to the plaintiffs who were to be given the opportunity to sign the [page145] written consent in the form of a Special Shareholders Resolution. It was the obligation of the directors who were charged with the responsibility to manage the business and affairs of Kremeko to see that the proper steps were taken.

[149] What occurred did not correspond to the protection of the plaintiffs' rights. There was no shareholders' meeting. The transfer of Mr. Alofs' shares was dealt with at a meeting of the board of directors of Kremeko on April 30, 2003. Mr. Alofs was not in attendance, having been asked by Mr. Morris when the agreement was made to acquire his shares not to attend any further meetings of directors. At the directors' meeting, a resolution was passed approving the transfer of Mr. Alofs' shares subject to certain conditions, including the condition that the founding shareholders consent to the transfer by Special Shareholders Resolution in accordance with art. 7.9 of the USA. The minutes then recorded:

> The founding shareholders were all represented at this meeting and unanimously consented to the proposed transfers in accordance with Section 7.9 of the Shareholders' Agreement.

[150] The reference to s. 7.9 of the USA was an error. Article 7.9 of the USA permitted a sale of shares to a third party subject to a right of first refusal by KKDC. It did not apply, however, to a sale of less than 10 per cent of all outstanding Kremeko shares.

[151] There was no written resolution signed by the founding shareholders. It is questionable whether the procedure followed would have satisfied the requirements of art. 7.2 of the USA even if the position of the defendants were correct. It likely would not have. That need not be decided, however, and in any event I have rejected the position of the defendants.

[152] Subsection 248(2) of the OBCA provides:

> 248(2) Where, upon an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates,
>
> (a) any act or omission of the corporation or any of its affiliates effects or threatens to effect a result;

(b) the business or affairs of the corporation or any of its affiliates are, have been or are threatened to be carried on or conducted in a manner; or
(c) the powers of the directors of the corporation or any of its affiliates are, have been or are threatened to be exercised in a manner,

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer of the corporation, the court may make an order to rectify the matters complained of. [page146]

[153] The principles involved in oppression cases were recently canvassed in BCE Inc. v. 1976 Debentureholders, [2008] 3 S.C.R. 560, [2008] S.C.J. No. 37. Principles relevant to our case extracted from BCE include:

(1) One should look first to the principles underlying the oppression remedy, and in particular the concept of reasonable expectations.
(2) Shareholder agreements may be viewed as reflecting the reasonable expectations of the parties.
(3) If a breach of a reasonable expectation is established, one must go on to consider whether the conduct complained of amounts to "oppression", "unfair prejudice" or "unfair disregard".

[154] It is contended on behalf of the directors that while evidence of bad faith is not an essential element to an oppression action, there will be few cases where an oppression remedy is ordered in their absence. I do not accept that as the state of the law either before or after BCE.

[155] It has been our law for a number of years that unfair prejudice and disregarding of interests are less rigorous grounds than oppression: see Mason and Intercity Properties Ltd. (Re) (1987), 59 O.R. (2d) 631, [1987] O.J. No. 448 (C.A.). Further, evidence of bad faith or want of probity has not been a requirement in order to rectify a complaint under s. 248 of the OBCA: see Sidaplex-Plastic Suppliers Inc. v. Elta Group Inc. (1998), 40 O.R. (3d) 563, [1998] O.J. No. 2910 (C.A.).

[156] This issue was dealt with in BCE. The court stated [at paras. 92-94]:

The original wrong recognized in the cases was described simply as oppression, and was generally associated with conduct that has variously been described as "burdensome, harsh and wrongful", "a visible departure from standards of fair dealing", and an "abuse of power" going to the probity of how the corporation's affairs are being conducted . . . . a wrong of the most serious sort.

The CBCA has added "unfair prejudice" and "unfair disregard" of interests to the original common law concept, making it clear that wrongs falling short of the harsh and abusive conduct connoted by "oppression" may fall within s. 241. "Unfair prejudice" is generally seen as involving conduct less offensive than "oppression" . . . .

"[U]nfair disregard" is viewed as the least serious of the three injuries, or wrongs, mentioned in s. 241. . . .

[157] In this case, the plaintiffs had, on a proper reading of the USA, a reasonable expectation that they would be entitled [page147] to notice of the transfer of Mr. Alofs' shares and a right to consider whether to consent in writing to the transfer.

[158] Mr. Morris was the only Kremeko director who attended the directors' meeting of April 30, 2001 and who testified at the trial. He said his intention was to have the transfer of Mr. Alofs' shares approved in accordance with the USA. He also gave evidence as to what the intentions of other directors were, but this evidence was hearsay and not admissible for its truth. While lawyers were involved in the transaction, there is no evidence what legal advice, if any, was given to the directors regarding the need to give other shareholders notice of a proposed resolution or evidence that would support a defence of due diligence under s. 135(4) of the OBCA.

[159] While it may have been Mr. Morris' intention that the transfer be handled in accordance with the USA, there is no doubt that he and the Kremeko board were concerned that no other shareholders become aware of the transfer. They wanted the shareholders to be investors in the anticipated further private placement of shares required for the Western expansion of Kremeko and they were concerned that these potential investors might try to sell their shares and not invest further. Thus their demand for a non-disclosure agreement from Mr. Alofs. Mr. Morris and Mr. Fisher were aware that Mr. Fiorillo believed Mr. Alofs still owned Kremeko. In the e-mail from Mr. Alofs to them of July 1, 2003, Mr. Alofs told them that Mr. Fiorillo wanted to go on the board to represent "his, mine [Alofs], Monty's and Breen's share position". Mr. Morris testified that when Mr. Fiorillo afterwards called him about going on the board, he did not tell Mr. Fiorillo that Mr. Alofs was required to resign or that Mr. Alofs had sold his shares. He chose to keep Mr. Fiorillo in the dark.

[160] While the conduct of the directors may not have been sufficiently harsh to constitute oppression, it was in my view conduct that unfairly prejudiced the plaintiffs and unfairly disregarded their interests. It was a breach of the USA, a document fundamental to the rights of the plaintiffs, and a breach of the basic right of a shareholder to vote on shareholder matters. The directors were required by s. 134(2) of the OBCA to comply with the USA.

[161] This includes, in my view, a finding that Mr. Alofs, too, has liability for conduct that unfairly prejudiced the plaintiffs and unfairly disregarded their interests. He was a director when he agreed to sell his shares and was bound by the USA. He had a responsibility as a director to see to the proper carrying out of his duties. While he, like the other directors, left it up to the [page148] lawyers to draft papers and close the transaction, there is no evidence that he obtained any legal advice that the plaintiffs did not have to be given notice of the sale and be given the right to sign or not sign a consent to the sale. The fact that Mr. Alofs agreed to a non-disclosure clause and stayed away from the directors' meeting on April 30, 2003 at the suggestion of Mr. Morris provides no due diligence defence under s. 135(4) of the OBCA.

[162] It is contended on behalf of the directors that directors are generally not personally liable for the acts of the corporation and that it is not sufficient for them to be liable that they simply acted as directors. Reliance is placed on the following statement of Spence J. in Awad v. Dover Investments Ltd., [2004] O.J. No. 3847, 47 B.L.R (3d) 55 (S.C.J.), at para. 132:

> Directors of a corporation are generally not personally liable for the acts of a corporation. For personal liability to attach, it is necessary (to state the principle in a general way) to show that the director had an interest of his or her own which was separate and

> independent of that of the corporation and that the director was acting out of that separate and independent interest.

[163] Reliance is also placed on the following statement of Doherty J.A. in Budd v. Gentra Inc., [1998] O.J. No. 3109, 43 B.L.R. (2d) 27 (C.A.), para. 52, a case dealing with pleadings against directors:

> To maintain an action for a monetary order against a director or officer personally, a plaintiff must plead facts which would justify that kind of order. The plaintiff must allege a basis upon which it would be "fit" to order rectification of the oppression by requiring the directors or officers to reach into their own pockets to compensate aggrieved persons. The case law provides examples of various situations in which personal orders are appropriate. These include cases in which it is alleged that the directors or officers personally benefited from the oppressive conduct, or furthered their control over the company through the oppressive conduct. Oppression applications involving closely held corporations where a director or officer has virtually total control over the corporation provide another example of a situation in which a director or officer may be held personally liable to rectify corporate oppression.

[164] In this case, many of the directors acquired either directly or through their holding companies shares sold by Mr. Alofs. In particular, Christiane Germaine, a director, acquired 54,500 shares through her holding company. Laurence Sellyn, a director, and his wife acquired 62,917 shares. Don Valencia, a director, and his wife acquired 20,000 shares. Rich Reinis, a director, acquired 55,000 shares through his holding company. Bill Johnson, a director, acquired 9,470 shares. KKDC, the parent company of Kremeko and its franchisor, acquired 124,579 shares. Its nominees on the board of Kremeko were Philip Waugh and [page149] John Tate. Mr. Waugh was at the directors' meeting and purported to approve the transfer on behalf of KKDC. Although Mr. Tate was not at the meeting, he agreed to the purchase by KKDC and according to Mr. Morris it was KKDC who required the non-disclosure agreement. He obviously was supportive of the transfer of the shares and there is no evidence that he dissented afterwards. Thus he is deemed to have consented by virtue of s. 135(3) of the OBCA.

[165] The directors who acquired the shares were thus personally and directly involved in the transaction. The agreement by Mr. Alofs to sell his shares reached on February 26, 2003 had been to sell all of the shares to KKDC. If the aforementioned directors had not seen themselves as obtaining a personal benefit, they would not have bought the shares. So far as Mr. Alofs is concerned, he obtained a personal benefit by selling his shares.

[166] Apart from these benefits, all of the directors other than Mr. Alofs benefited in the sense that they saw Kremeko's ability to raise further funds for its Western expansion being assisted by the non-disclosure agreement as they did not want other shareholders desiring to sell their shares and not becoming investors in the next anticipated private placement. As Mr. Morris said, the view of the Kremeko board was that they did not want widespread knowledge of the sale and a flood of potential investors wanting to redeem their shares and take their money and move on. All directors had that concern and all were shareholders of Kremeko. This was a closely held corporation and the value of their shareholdings would undoubtedly have been affected had Kremeko had difficulty in raising further capital for its anticipated Western expansion. This included KKDC, whose interest as both a 40 per cent shareholder and franchisor was being protected by the non-disclosure clause that

was seen to assist in a future equit y offering. KKDC was wholly owned by KKDI and the interest of KKDI was therefore aligned with KKDC. KKDI was represented on the board of Kremeko by Frank Murphy.

[167] The effort of the board of Kremeko to keep the sale by Mr. Alofs secret and not give notice to the shareholders was successful. The plaintiffs invested in the third tranche, which they would not have done had they been given notice of the sale to which they were entitled. Such notice and the right to consent or not was a reasonable expectation they had under the USA: see BCE, supra. Whether Kremeko would have been able to raise the needed funds from other investors is not the point. The rights of the plaintiffs were disregarded and they have suffered [page150] by making their investment without knowledge of the sale by Mr. Alofs. In these circumstances, it is appropriate that the plaintiffs be compensated by the board members in the amount of their lost investment in the third tranche.

[168] There is one defendant who should not be liable. Mr. Colin Moore had resigned as a director in February 2003 and had no involvement in the transfer of Mr. Alofs' shares.

[169] Mr. Alofs has made a cross-claim against his co-defendants in the event that he and not his co-defendants is found liable for failure to give notice of the sale of his shares or to structure the sale properly. In light of my finding that his co-defendants other than Mr. Moore are liable for these things, I need not deal with the cross-claim.

Punitive Damages

[170] The plaintiffs seek punitive damages against Mr. Alofs. They ask for $100,000. Mr. Howard advised that the plaintiffs intend to donate to charity any punitive damages they may be awarded.

[171] In Whiten v. Pilot Insurance Co., [2002] 1 S.C.R. 595, [2002] S.C.J. No. 19, at para. 36, Binnie J. stated the test for punitive damages as follows:

> Punitive damages are awarded against a defendant in exceptional cases for "malicious, oppressive and high-handed" misconduct that "offends the court's sense of decency": Hill v. Church of Scientology of Toronto, [1995] 2 S.C.R. 1130, at para. 196. The test thus limits the award to misconduct that represents a marked departure from ordinary standards of decent behaviour. Because their objective is to punish the defendant rather than compensate a plaintiff (whose just compensation will already have been assessed), punitive damages straddle the frontier between civil law (compensation) and criminal law (punishment).

[172] Binnie J. also stated the primary vehicle of punishment is through the criminal law (and regulatory offences) and that punitive damages should be resorted to only in exceptional cases and with restraint.

[173] Although Mr. Alofs was deceitful, I do not think this is a case for punitive damages. He should never have started his lie, and had he not, this case undoubtedly would not have been brought. However, once he signed his letter accepting the terms offered by Kremeko, which included a requirement that he keep the sale confidential, he was bound by it not to disclose the sale of his shares. He still should not have lied, but I am prepared to accept that he felt bound by the

non-disclosure agreement. His actions were not so malicious, oppressive or high-handed to justify a punitive damage award in this case. [page151]

Conclusion

[174] Mr. Fiorillo is entitled to judgment in deceit against Mr. Alofs for $439,243.20. He is also entitled to judgment for that amount under s. 248 of the OBCA against all other defendants except Mr. Moore. Mr. Breen is entitled to judgment under s. 248 of the OBCA against all defendants except Mr. Moore for $105,600. Ms. Goulimis is entitled to judgment under s. 248 of the OBCA against all defendants except Mr. Moore for $109,808.16. All are entitled to prejudgment and post-judgment interest in accordance with the Courts of Justice Act, R.S.O. 1990, c. C.43. The claim against Mr. Moore and the cross-claim of Mr. Alofs against the remaining directors are dismissed.

[175] The plaintiffs may make cost submissions within ten days and the defendants may make responding submission within a further ten days.

Action allowed.

Notes

1 Kremeko first acquired the rights to Eastern Canada. In April 2003, Kremeko acquired the rights to Manitobia, Saskatchewan and Alberta.

2 One half of each investment was made in the name of Mr. Alofs and the other in the name of his wife. This was primarily for tax reasons. For simplicity, I refer only to Mr. Alofs as being the investor.

3 Neither the plaintiffs nor Mr. Alofs realized that Ms. Goulimis rather her husband, Monty Gordon, was the shareholder. All of them thought that Mr. Gordon was the shareholder. For the purposes of discussing Mr. Alofs' intent, it is appropriate to consider it in relation to Mr. Gordon rather than to Ms. Goulimis.

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Print Request: Current Document: 2
Time Of Request: Friday, October 08, 2010 13:00:06

Tab 2

Indexed as:

R. v. Canadian Dredge & Dock Co.

Canadian Dredge & Dock Company Limited, Marine Industries Limited, The J.P. Porter Company Limited, and Richelieu Dredging Corporation Inc., appellants; and Her Majesty The Queen, respondent.

[1985] 1 S.C.R. 662

[1985] 1 R.C.S. 662

[1985] S.C.J. No. 28

[1985] A.C.S. no 28

File Nos.: 16422, 16425, 16435.

Supreme Court of Canada

1983: May 24, 25, 26 / 1985: May 23.

Present: Laskin C.J. * and Ritchie *, Dickson, Beetz, Estey, McIntyre, Chouinard, Lamer and Wilson JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

* The Chief Justice and Justice Ritchie took no part in the judgment.

Criminal law -- Corporate liability -- Conspiracy to defraud -- Whether or not liability arises where directing mind acting (1) in fraud of corporation, or (2) for his own benefit, or (3) contrary to instructions not to act illegally -- Criminal Code, R.S.C. 1970, c. C-34, ss. 338(1), 423(1)(d).

Four corporate appellants appealed their convictions under ss. 338(1) and 423(1)(d) of the Criminal Code. The several counts in the indictment related to contracts between certain public authorities and the accused where the bids were alleged to have been tendered on a collusive basis, with the low bidders including in their costs compensation to be paid to the "high bidders" or "non-bidders". Each company had a manager who conducted the business of the company relating to the submission of bids for tender. Corporate criminal liability was denied by the appellants, notwithstanding

the position of these managers because these managers allegedly (1) were acting in fraud of the appellant-employers, (2) were acting throughout for their own benefit, or (3) were acting contrary to instructions and hence outside of the scope of their employment with the appellants. Several companies also challenged the existence of any theory of corporate criminal liability for mens rea offences.

Held: The appeals should be dismissed.

Appellants are criminally liable in the circumstances by operation of the identification theory. The underlying premise of this theory is that the identity of the directing [page663] mind and the identity of the company coincide; the actor-employee who physically committed the offence is the ego of the corporation. Therefore, even in mens rea offences, if the court finds the officer or managerial level employee to be a vital organ of the company and virtually its directing mind in the sphere of duty assigned him so that his actions and intent are the action and intent of the company itself, the company can be held criminally liable. The wrongful action of the primary representative, by attribution to the corporation, creates primary rather than vicarious liability. The identity doctrine merges the board of directors, the managing director, the superintendent, the manager or anyone else to whom was delegated the governing executive authority of the corporation, and the conduct of any of the merged entities is thereby attributed to the corporation. A corporation may, by this means, have more than one directing mind.

The directing mind, as a prerequisite to the theory's operation, must act within the scope of his authority, that is, his actions must be performed within the sector of the corporate operation assigned to him. The sector may be functional, or geographic, or may embrace the entire undertaking of the corporation. Terminological problems arise from the use of the phrase "scope of employment".

It is no defence to the application of the identification doctrine that a criminal act by a corporate employee cannot be within the scope of his authority unless expressly ordered to do the act in question. Such a condition would reduce the rule to virtually nothing. Liability can arise whether or not there be formal delegation, awareness of the board or directors, or express prohibition.

A corporation in reality has these elements: the legal entity, the personal shareholder, and the employee. By reason of the identification theory, the criminal penalty will extend, directly or indirectly, to all three which is quite unlike the situation of a natural proprietor where only two of these elements are present. Imposition of criminal liability is tolerable for a community where reality dictates corporate criminal accountability in certain circumstances.

Each company had a directing mind and the fact that he may have defrauded the corporate employer, acted in part for his own benefit, or acted in breach of instructions did not remove the company's criminal liability in the circumstances.

[page664]

The presence of general or specific instructions prohibiting the conduct in question was irrelevant in determining the parameters of the identification theory. Since the corporation and the directing mind became one, the prohibition directed by the corporation to others is of no effect in law on the

determination of criminal liability of either the directing mind or the corporation itself by reason of the actions of the directing mind.

The outer limit of the delegation doctrine is, however, reached and exceeded when the directing mind ceases completely to act, in fact or in substance, in the interests of the corporation. The identification theory ceases to operate when the directing mind intentionally defrauds the corporation and when his wrongful actions form the substantial part of the regular activities of his office. In such a case, where his entire energies are directed to the destruction of the undertaking of the corporation, the manager cannot realistically be considered to be the directing mind of the corporation. The same reasoning can be applied to the concept of benefits. Unlike fraud, however, a benefit can be in whole or in part. Benefit, in the sense that the directing mind intended that the corporation should not benefit from any of its activities in the undertaking, is in reality quite different from benefit to the directing mind in single transactions or in a minor part of the activities of the directing mind.

Where the criminal act is totally in fraud of the corporate employer and where the act is intended to and does result in benefit exclusively to the employee-manager, the employee-directing mind, from the outset of the design and execution of the criminal plan, ceases to be a directing mind of the corporation and consequently his acts cannot be attributed to the corporation under the identification doctrine. Thus, the identification doctrine only operates where the Crown demonstrates that the action taken by the directing mind (a) was within the field of operation assigned to him; (b) was not totally in fraud of the corporation; and (c) was by design or result partly for the benefit of the company.

The factual basis for these "defences" to corporate criminal liability was not present here. The impugned activities formed a "share the wealth" project for the benefit of all concerned except the public authorities who awarded the contracts. In their activities the directing minds were acting partly for the benefit of the employing appellant and partly for their own benefit.

[page665]

Although the directing minds of all four appellants practised and benefitted from specific instances of fraud, they did not act wholly for their own benefit or wholly in fraud of their employer in the sense that the scheme was designed to deprive the appellants from all benefit. There was no evidence in the record of any plan amongst the directing minds or of a plan held by a single directing mind which involved the destruction of the undertaking of the appellant corporations or the undermining of their fiscal health. The conspiratorial directing minds, to the contrary, aimed to ensure their corporate employers an enhanced level of profits and in the process bettered themselves.

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Q.B. 666; R. v. J.J. Beamish Construction Co., [1966] 2 O.R. 867; R. v. St. Lawrence Corp., [1969] 2 O.R. 305; R. v. Spot Supermarket Inc. (1979), 50 C.C.C. (2d) 239; R. v. P.G. Marketplace and McIntosh (1979), 51 C.C.C. (2d) 185; R. v. Martin, [1932] 3 W.W.R. 1; R. v. McDonnell, [1966] 1 All E.R. 193; R. v. Fell (1981), 64 C.C.C. (2d) 456; New York Central and Hudson River Railway Co. v. United States, 212 U.S. 481 (1909); Egan v. United States, 137 F.2d 369 (1943); United States v. Basic Construction Co., 711 F.2d 570 (1983); The People v. Canadian Fur Trappers Corp., 248 N.Y. 159 (1928); State of Idaho v. Adjustment Department Credit Bureau, Inc., 483 P. 2d 687 (1971); State of Louisiana v. Chapman Dodge Center Inc., 428 S. 2d 413 (1983); Commonwealth of Massachusetts v. Beneficial Finance Co., 275 N.E. 2d 33 (1971); R. v. Australian Films Ltd. (1921), 29 C.L.R. 195; Mousell Brothers, Ltd. v. London and North-Western Railway-Co., [1917] 2 K.B. 836; Morgan v. Babcock and Wilcox Ltd. (1929), 43 C.L.R. 163; Australian Stevedoring Industry Authority v. Oversea and General Stevedoring Co. (1959), 1 F.L.R. 298; Grain Sorghum Marketing Board v. Supastok Pty. Ltd., [1964] Qd.R. 98; Lamb v. Toledo-Berkel Pty. Ltd., [1969] V.R. 343; Kehoe v. Dacol Motors Pty. Ltd., [1972] Qd.R. 59; Universal Telecasters (QLD) Ltd. v. Guthrie (1978), 32 F.L.R. 361; [page666] Trade Practices Commission v. Annand and Thompson Pty. Ltd. (1978), 19 A.L.R. 730; United States v. Hilton Hotels Corp., 467 F.2d 1000 (1972); Upholsterers International Union of North America, Local 1 v. Hankin & Struck Furniture Ltd. (1964), 49 W.W.R. 33; R. v. Waterloo Mercury Sales Ltd., [1974] 4 W.W.R. 516; Old Monastery Co. v. United States, 147 F.2d 905 (1945); United States v. Empire Packing Co., 174 F.2d 16 (1949); Standard Oil Co. of Texas v. United States, 307 F.2d 120 (1962); United States v. Carter, 311 F.2d 934 (1963); United States v. Ridglea State Bank, 357 F.2d 495 (1966); United States v. Beusch, 596 F.2d 871 (1979); United States v. Cincotta, 689 F.2d 238 (1982); United States v. Richmond, 700 F.2d 1183 (1983), referred to.

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APPEALS from judgments of the Ontario Court of Appeal, sub nom. R. v. McNamara (No. 1) (1981), 56 C.C.C. (2d) 193, dismissing appeals from convictions. Appeals dismissed.

Douglas Laidlaw, Q.C., and Roy Stephenson, for appellant Canadian Dredge & Dock Company, Limited. John Sopinka, Q.C., and James Woods for appellant Marine Industries Limited. Marcel Piché, Q.C., and J. O'Reilly for appellants The J.P. Porter Company Limited and Richelieu Dredging Corporation Inc. Edward Then, Q.C., and John C. Pearson, for the respondent.

Solicitors for the appellant Canadian Dredge & Dock Company, Limited: McCarthy and McCarthy, Toronto. Solicitors for the appellant Marine Industries Limited: Clark, Woods & Partners, Montréal. Solicitors for the appellants The J.P. Porter Company Limited and Richelieu Dredging Corporation Inc.: Blain, Piché, Emery & Associates, Montréal. Solicitor for the respondent: Ministry of the Attorney General for Ontario, Toronto.

[page668]

The judgment of the Court was delivered by

1 ESTEY J.:-- The complex of convictions and acquittals which led to this appeal raises important issues fundamental to the liability of a corporation in criminal law. The procedural history from trial through appeal of some twenty accused on an indictment containing seven counts is not relevant to the disposition of the four appeals now before this Court. These are appeals by four cor-

porate appellants from convictions under ss. 338(1) and 423(1)(d) of the Criminal Code, R.S.C. 1970, c. C-34. Following a trial of some fifteen months duration, including an eleven-day charge to the jury by the learned trial judge, Parker A.C.J.H.C., five accused were acquitted, the jury was unable to reach a verdict concerning two accused, and convictions were entered against the remaining thirteen accused on one or more of the seven counts. The thirteen accused who were convicted appealed convictions and sentences to the Court of Appeal. The Attorney General of Ontario appealed the sentence imposed on three of the accused. The Court of Appeal dismissed eight appeals completely and ordered new trials in the case of five appellants on some or all of their respective counts. Four appellants now appeal as follows:

(a) The appellant Canadian Dredge and Dock Company Limited (hereinafter referred to as "CD") appeals against the convictions entered at trial and confirmed by the Court of Appeal on counts 1, 3, 4, 5 and 6 and asks that the conviction be quashed or in the alternative that a new trial be ordered;
(b) The appellant Marine Industries Limited (hereinafter referred to as "MIL") appeals against conviction on count 2 and asks that the conviction be quashed and a new trial ordered;

[page669]

(c) The appellant The J.P. Porter Company Limited (hereinafter referred to as "Porter") appeals against the convictions entered at trial and confirmed by the Court of Appeal on counts 1, 4, 5, and 6 and asks that the convictions be quashed or in the alternative that there be an order for a new trial;
(d) The appellant Richelieu Dredging Corporation Inc. (hereinafter referred to as "Richelieu") appeals against convictions entered at trial and confirmed by the Court of Appeal on counts 1 and 3 and asks that the convictions be quashed or in the alternative that a new trial be ordered.

There is no cross-appeal by the Crown against the order of the Court of Appeal for a new trial on count 7 in the case of the appellant MIL.

2 Leave to appeal to this Court was granted on the following questions of law:

> Re: Canadian Dredge & Dock Company Limited v. The Queen and Marine Industries Limited v. The Queen:
>
> > Is the criminal liability of a corporation, when it is based on the misconduct of a directing mind of the corporation, affected because the person who is the directing mind is at the same time acting, in whole or in part, in fraud of the corporation, or wholly or partly for his own benefit or contrary to instructions that he not engage in any illegal activities in the course of his duties?

Re: J. P. Porter Company Limited and Richelieu Dredging Corporation Inc. v. The Queen

> Was there any evidence that a directing mind of the applicant corporation was acting wholly or in part in fraud of the corporation during the period covered by the indictments herein or acting wholly or in part for his own benefit during that period or contrary to instructions that he not engage in illegal activities in the course of his duties and, if so, is the criminal liability of the corporation affected by any one or more of such circumstances?

[page670]

3 These questions raise squarely the issue of corporate criminal liability in our law by reason of the so-called identification theory or otherwise. CD, particularly, does not accept the proposition that a corporation can be liable in criminal law for a mens rea offence by reason of the identification doctrine. It is submitted on behalf of CD and MIL that this is a doctrine originating in civil law and has not been properly and authoritatively brought into Canadian criminal law. Alternatively, the appellants CD and MIL submit that a corporation is not liable in criminal law when the directing mind of the corporation is, at the material time:

1. acting in fraud of the corporation; or,
2. acting wholly or partly for his or her own benefit; or,
3. acting contrary to instructions that he not engage in illegal action in the course of his duties.

4 In the case of the appellants Porter and Richelieu the submission is made that there is evidence to support a finding that the directing minds of the corporation were, at the times in question, acting in fraud of the corporation or wholly or partly for their own benefit or contrary to instructions not to commit illegal activities in the course of employment, or any one of these circumstances; and therefore the answer to the second question, supra, is said by these appellants to be the same as the answer to the first question.

5 In none of these appeals does the Crown concede that there is any evidence in respect of any of the appellants in support of any of the three separate defences alleged by these appellants to exist in law; or that these defences are known to the law.

6 The several counts in the indictment relate to contracts between certain public authorities and [page671] the accused for dredging in the St. Lawrence River and in some of the Great Lakes in the years 1967-73 inclusive. Many issues were raised and disposed of at trial and in the Court of Appeal which are not covered by the two questions now brought before this Court. Only the issues raised in the two questions, supra, as they relate to these four appellants remain to be settled. It is not necessary in dealing with these remaining issues of law to restate the complex corporate history of the appellants, their ownership from time to time, the evidence concerning each appellant on each count, or the details of the operation of the bidding system with reference to which these charges

arose. The judgment of the Court of Appeal examines all such matters in both a detailed and comprehensive manner and may be found at [sub nom. R. v. McNamara (No. 1)] (1981), 56 C.C.C. (2d) 193. The essential facts as seen by the Crown are summarized at pp. 249-51.

7 Each of the appellants had a manager who conducted the business of the company relating to the submission of bids for tender dredging work. These managers were:

(a) for MIL, Louis DeRome who was the General Manager of dredging operations and who became Vice-President of the company in 1967. He died in 1970 before these proceedings commenced;
(b) for Porter, Horace Rindress who became Vice-President of Porter in 1959 and thereafter was made a Director in 1961 and President in 1969. Rindress testified for the Crown;
(c) for Richelieu, Rindress who became President after the company was acquired by Porter in 1972;
(d) for CD, Robert Schneider who was at various times a Director and Officer and the person in charge of dredging for the appellant. He held similar positions with the [page672] appellant's predecessor companies prior to that. Schneider testified for the Crown.

The respondent Crown asserts that bids were submitted in response to calls for tender by the Government of Canada or its agencies on a collusive basis. "Low bidders" were said to have included in their bids "costs" which would cover compensating payments to be made to co-operating "high bidders" or in some cases, "non-bidders". Other forms of compensation were sometimes arrangements which included subcontracts by successful bidders to the accommodation bidders or to other members of the alleged conspiracy.

> It was the theory of the Crown that the consideration given for these co-operative bids or withholding of competitive bids was included in the cost estimates of the successful bidders so that the public agency was paying a higher price for the work than it would have paid if the job had been bid competitively. When money was offered as the form of consideration, the amount was recorded on documents known as "score sheets" which were kept by Rindress, Quinlan[1] and Schneider; they would meet periodically to reconcile the commitments recorded on the "score sheets" and to settle accounts. If there remained a balance owing by one corporation to another, on some occasions a false invoice would be issued by the corporation to whom the money was owing or by some other corporation designated by it, which would then be paid by a cheque from the debtor company. In some cases, however, the balance was merely recorded and carried forward. As previously mentioned, in some cases Schneider and Quinlan devised schemes whereby they personally obtained the benefit of the pay-offs without the knowledge of the corporation which they represented. From time to time the "score sheets" were destroyed when the accounts were settled.
>
> (At pp. 250-251.)

8 The theory of the defence to these charges, as advanced by the appellants, is simply that whatever may be the position of the guiding managers [page673] of the four appellants personally at criminal law, no criminal liability attaches to these appellants under any of the counts because these managers were either acting in fraud on the appellant-employers, were acting throughout for their own benefit, or were acting contrary to instructions and hence were acting outside the scope of their employment with the appellants in question. As noted earlier, in this Court at least, several of the appellants also challenged the existence of any theory of corporate criminal liability for mens rea offences.

9 In his charge to the jury, the learned Chief Justice discussed the three defences put in issue by the appellants and as set out in questions 1 and 2, supra, together with the application of the identification theory in Canadian criminal law. The Court of Appeal reviewed the law and concluded that none of these defences was known to the law or, alternatively, none was, on the evidence, applicable, and consequently the appellants CD and MIL were guilty as charged on counts now in issue. In the case of the appellants Porter and Richelieu, the Court of Appeal found that whether or not these defences existed in law, there was no evidence that the directing mind of these appellants, Rindress, had conducted himself so as to raise such defences.

10 The position of the corporation in criminal law must first be examined. Inasmuch as all criminal and quasi-criminal offences are creatures of statute the amenability of the corporation to prosecution necessarily depends in part upon the terminology employed in the statute. In recent years there has developed a system of classification which segregates the offences according to the degree of intent, if any, required to create culpability.

(a) Absolute Liability Offences

11 Where the legislature by the clearest intendment establishes an offence where liability arises [page674] instantly upon the breach of the statutory prohibition, no particular state of mind is a prerequisite to guilt. Corporations and individual persons stand on the same footing in the face of such a statutory offence. It is a case of automatic primary responsibility. Accordingly, there is no need to establish a rule for corporate liability nor a rationale therefor. The corporation is treated as a natural person.

(b) Offences of Strict Liability

12 Where the terminology employed by the legislature is such as to reveal an intent that guilt shall not be predicated upon the automatic breach of the statute but rather upon the establishment of the actus reus, subject to the defence of due diligence, an offence of strict liability arises. See R. v. City of Sault Ste. Marie, [1978] 2 S.C.R. 1299. As in the case of an absolute liability offence, it matters not whether the accused is corporate or unincorporate, because the liability is primary and arises in the accused according to the terms of the statute in the same way as in the case of absolute offences. It is not dependent upon the attribution to the accused of the misconduct of others. This is so when the statute, properly construed, shows a clear contemplation by the Legislature that a breach of the statute itself leads to guilt, subject to the limited defence above noted. In this category, the corporation and the natural defendant are in the same position. In both cases liability is not vicarious but primary.

(c) Offences Requiring Mens Rea

13 These are the traditional criminal offences for which an accused may be convicted only if the requisite mens rea is demonstrated by the prosecution. At common law a corporate entity could not generally be convicted of a criminal offence. Corporate criminal immunity stemmed from the abhorrence of the common law for vicarious liability in criminal law, and from the doctrine of ultra vires, [page675] which regarded criminal activities by corporate agents as beyond their authority and beyond corporate capacity. At the other extreme in the spectrum of criminal offences there are certain crimes which cannot in any real sense be committed by a corporation as a principal, such as perjury and bigamy, whatever the doctrine of corporate criminal liability may be. As a corporation may only act through agents, there are basically only three approaches whereby criminal intent could be said to reside or not reside in the corporate entity:

> (i) a total vicarious liability for the conduct of any of its agents whatever their level of employment or responsibility so long as they are acting within the scope of their employment;
> (ii) no criminal liability unless the criminal acts in question have been committed on the direction or at the request, express or clearly implied of the corporation as expressed through its board of directors;
> (iii) a median rule whereby the criminal conduct, including the state of mind, of employees and agents of the corporation is attributed to the corporation so as to render the corporation criminally liable so long as the employee or agent in question is of such a position in the organization and activity of the corporation that he or she represents its de facto directing mind, will, centre, brain area or ego so that the corporation is identified with the act of that individual. There is said to be on this theory no responsibility through vicarious liability or any other form of agency, but rather a liability arising in criminal law by reason of the single identity wherein is combined the legal entity and the natural person; in short, a primary liability. This rule stands in the middle of the range or spectrum. It is but a legal fiction invented for pragmatic reasons.

[page676]

14 The position of the corporation in criminal law has been under examination by courts and law makers for centuries. The questions which arise are manifold and complex. They are not likely to be answered in a permanent or universal sense in this appeal, or indeed by the courts acting alone. Proceeding through the history of these issues in the criminal law adds perspective but no clear answer to the problem. The first edition of Halsbury's (1909) summarizes the position of the law up to that point at vol. 8, p. 390, paragraph 858:

> 858. By the general principles of the criminal law, if a matter is made a criminal offence it is essential that there should be something in the nature of mens rea, and therefore, in ordinary cases, a corporation aggregate cannot be guilty of a criminal offence.

There were four exceptions in the early common law to corporate immunity: (1) public nuisance, (2) criminal libel, (3) absolute liability offences created by statute and (4) contempt of court. See also vol. 9, pp. 235-36, paragraph 503.

15 The second edition of Halsbury's, published in 1933, is in precisely the same words as the earlier edition. By the time of the publication of the third edition in 1954 the law had moved along.

> 521. Corporations. A corporation aggregate cannot be guilty of any offences (such as bigamy or perjury) which by their very nature can only be committed by natural persons; nor can a corporation aggregate be found guilty of a crime where the only punishment is death or imprisonment.
>
> Apart from these exceptions, a corporation may be guilty both of statutory and of common law offences, even though the latter involve mens rea; and in the construction of any enactments relating to an offence punishable on indictment or on summary conviction, the expression "person" includes a body corporate unless the contrary intention appears. A corporation can only commit crimes by or through its agents, some of whom must themselves be responsible for the crime. It is a question of fact in each particular case whether the criminal act of its agent is the act of the corporation, and whether the agent's state of mind, intention, knowledge or belief can be imputed to the corporation. It depends on the nature of the charge, the position of the [page677] officer or agent relative to the corporation and the other relevant facts and circumstances of the case.
>
> (Vol. 10, pp. 281-82, paragraph 521.)

See also Halsbury's (3rd ed.), Vol. 9, p. 90, paragraph 183. By the time the fourth edition appeared in 1974 the law had changed a little more. The learned authors of this edition had this to say (Vol. 11, p. 30, paragraph 34):

> 34. Corporations. In general, a corporation is in the same position in relation to criminal liability as a natural person and may be convicted of common law and statutory offences including those requiring mens rea. There are, however, crimes which a corporation is incapable of committing or of which a corporation cannot be found guilty as a principal ...
>
> Criminal liability of a corporation arises where an offence is committed in the course of the corporation's business by a person in control of its affairs to such a degree that it may fairly be said to think and act through him so that his actions and intent are the actions and intent of the corporation. It is not enough that the person whose conduct it is sought to impute to the corporation is a manager or responsible agent or high executive; whether persons are the "directing mind and will" of a corporation, so that their conduct in its affairs becomes the conduct of the corporation, must depend on all the circumstances.

See also Halsbury's (4th ed.), vol. 9, p. 804, paragraph 1379.

16 At common law there was no difficulty in finding liability in a corporation in the law of torts, even though the state of mind of the corporation was established by imputing to that corporation the intentions and the conduct of its servants and agents. Thus, in the law of torts, the courts from the earliest times found vicarious liability in the corporation on the principles of agency. On the other hand, the common law of England has shrunk back from the application of the doctrine of vicarious liability for the determination of corporate liability in criminal law for the acts of its [page678] agents (with the four exceptions already noted). This led to an irrational result, namely: general corporate immunity from liability under the criminal law at a time when the corporation, for a variety of reasons, had become the principal vehicle of commerce in the community. The state itself, through corporate and taxation legislation particularly, had actually promoted or at least facilitated this result. Early in the century the courts began to dismantle the principle of corporate immunity in the criminal law. Procedural and other obstacles to the imposition of corporation criminal liability were overcome. See Leigh, "Criminal Liability of Corporations and Other Groups" 1971, 9 U. Ott. L.R. 247, at pp. 248-49. Perhaps the last major procedural impediment, the impossibility, as seen by some courts, of punishing a corporation when the only statutory sanction imposed was imprisonment (for example, R. v. Great West Laundry Co. (1900), 3 C.C.C. 514 (Man. Q.B.)), was removed in 1909 by The Criminal Code Amendment Act, 1909, 1909 (Can.) c. 9, s. 2 (the predecessor to the present s. 647 of the Criminal Code) which allowed the substitution of a fine in lieu of any punishment where a corporation is convicted. Ironically, the destruction of the most difficult barrier, the attribution of mens rea to a corporation, began in earnest in a case in civil law: Lennard's Carrying Co. v. Asiatic Petroleum Co., [1915] A.C. 705. The House of Lords was concerned with a corporation's civil liability for damages under a statute which afforded a defence where such loss occurred without its "fault or privity". At issue was whether the "fault" of a director who was active in the operations of the corporation, was in law the fault of the corporation itself. The Lord Chancellor, Viscount Haldane, laid down the general principle of corporate liability which is still the guiding principle in United Kingdom law, (at pp. 713-14):

[page679]

> ... a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation. That person may be under the direction of the shareholders in general meeting; that person may be the board of directors itself, or it may be, and in some companies it is so, that that person has an authority co-ordinate with the board of directors given to him under the articles of association, and is appointed by the general meeting of the company, and can only be removed by the general meeting of the company ... . [W]hatever is not known about Mr. Lennard's position, this is known for certain, Mr. Lennard took the active part in the management of this ship on behalf of the owners, and Mr. Lennard, as I have said, was registered as the person designated for this purpose in the ship's register. Mr. Lennard therefore was the natural person to come on behalf of the owners and give full evidence not only about the events of which I

> have spoken, and which related to the seaworthiness of the ship, but about his own position and as to whether or not he was the life and soul of the company. For if Mr. Lennard was the directing mind of the company, then his action must, unless a corporation is not to be liable at all, have been an action which was the action of the company itself within the meaning of s. 502. It has not been contended at the Bar, and it could not have been successfully contended, that s. 502 is so worded as to exempt a corporation altogether which happens to be the owner of a ship, merely because it happens to be a corporation. It must be upon the true construction of that section in such a case as the present one that the fault or privity of somebody who is not merely a servant or agent for whom the company is liable upon the footing respondeat superior, but somebody for whom the company is liable because his action is the very action of the company itself.

17 Convictions were thereafter sustained under a variety of statutes including those establishing offences requiring proof of the element of mens rea, the courts applying the words of the House of Lords in Lennard's case, supra, in attributing to the accused corporation the actions of the "directing mind". See Director of Public Prosecutions and Kent & Sussex Contractors Ltd., [1944] K.B. 146, at pp. 155-56, where Viscount Caldecote C.J. said:

[page680]

> The offences created by the regulation are those of doing something with intent to deceive or of making a statement known to be false in a material particular. There was ample evidence, on the facts as stated in the special case, that the company, by the only people who could act or speak or think for it had done both these things, ...

Macnaghten J., in a concurring opinion, expressed the principle in broader terms (at p. 156):

> If the responsible agent of a company, acting within the scope of his authority, puts forward on its behalf a document which he knows to be false and by which he intends to deceive, I apprehend that, according to the authorities that my Lord has cited, his knowledge and intention must be imputed to the company.

See also R. v. I.C.R. Haulage, Ltd., [1944] K.B. 551 to the same effect.

18 These general principles found application in the courts of this country in a series of cases. In R. v. Fane Robinson Ltd., [1941] 3 D.L.R. 409, the Court of Appeal of Alberta set aside an acquittal of two companies where two of its directors and officers conspired with another to defraud an insurance company by inflating the charges made by the defendant company to the insurance company for automobile repairs. Ford J.A., for the Court, found, at p. 415, that the two officers were the:

> ... acting and directing will of [the accused corporation] generally and in particular in respect of the subject-matter of the offences with which it is charged, that their culpable intention (mens rea) and their illegal act (actus reus) were the in-

> tention and the act of the company and that conspiracy to defraud and obtaining money by false pretences are offences which a corporation is capable of committing.

In so doing the Court followed the United Kingdom authorities, including Lennard, supra, and found the company criminally liable stating, at p. 410:

> ... if the act complained of can be treated as that of the company, the corporation is criminally responsible for all such acts as it is capable of committing and for which [page681] the prescribed punishment is one which it can be made to endure.

The Court expressly avoided finding criminal liability through the doctrine of respondeat superior. See also the later cases: R. v. Ash-Temple Co. (1949), 93 C.C.C. 267 (Ont. C.A.), per Robertson C.J.O., at pp. 279-80; R. v. Electrical Contractors Association of Ontario and Dent, [1961] O.R. 265 (C.A.), per Laidlaw J.A., at p. 280; R. v. H.J. O'Connell Ltd., [1962] Que. Q.B. 666 (Q.C.A.), at p. 667; R. v. J.J. Beamish Construction Co., [1966] 2 O.R. 867 (H.C.) at p. 891, per Jessup J. as he then was; R. v. St. Lawrence Corp., [1969] 2 O.R. 305 (C.A.), per Schroeder J.A. at p. 320; R. v. Spot Supermarket Inc. (1979), 50 C.C.C. (2d) 239 (Q.C.A.), per Lamer J.A., as he then was, at p. 252; and R. v. P.G. Marketplace and McIntosh (1979), 51 C.C.C. (2d) 185 (B.C.C.A.), per Nemetz C.J.B.C. at pp. 187-188.

19 The transition from virtual corporate immunity from criminal liability to virtual equality with humans in like circumstances under the criminal law is traced in greater detail by Jessup J., as he then was, in R. v. J.J. Beamish Construction Co., supra. Three years later Schroeder J.A., of the Court of Appeal of Ontario, in R. v. St. Lawrence Corp., supra, at pp. 315-21, again reviewed this transition. In the end Schroeder J.A., at p. 320, adopted the same statement of the governing principle as Jessup J. had in Beamish, supra, although the earlier case is not cited:

> While in cases other than criminal libel, criminal contempt of Court, public nuisance and statutory offences of strict liability, criminal liability is not attached to a corporation for the criminal acts of its servants or agents upon the doctrine of respondeat superior, nevertheless, if the agent falls within a category which entitles the Court to hold that he is a vital organ of the body corporate and virtually its directing mind and will in the sphere of duty and responsibility assigned to him so that his action and intent are the very action and intent of the company itself, then his conduct is sufficient to render the company indictable by reason [page682] thereof. It should be added that both on principle and authority this proposition is subject to the proviso that in performing the acts in question the agent was acting within the scope of his authority either express or implied.

Counsel for MIL submitted that St. Lawrence, supra, does not extend to the facts here before the Court; and counsel for CD submitted that if it does so extend to the facts of this appeal, it was wrongly decided.

20 This rule of law was seen as a result of the removal of the officer or managerial level employee from the general class of "inferior servants or agents" for whose acts the corporate employer continued (as in the case of the human employer) to be immune from vicarious liability in criminal

law. This result is generally referred to as the 'identification' theory. It produces the element of mens rea in the corporate entity, otherwise absent from the legal entity but present in the natural person, the directing mind. This establishes the "identity" between the directing mind and the corporation which results in the corporation being found guilty for the act of the natural person, the employee. Such is the power of legal reasoning. It is the direct descendant of Blackstone's famous theorem: "The husband and the wife in law are one and that one is the husband". It is a full brother of the dictum in corporate law that merging corporations cease to exist but find a continuance in the amalgamated company. In order to trigger its operation and through it corporate criminal liability for the actions of the employee (who must generally be liable himself), the actor-employee who physically committed the offence must be the "ego", the "centre" of the corporate personality, the "vital organ" of the body corporate, the "alter ego" of the employer corporation or its 'directing mind'. Schroeder J.A. in St. Lawrence, supra, for example, refers to the officer or senior management employee as the corporation's "primary representative ... through whom the company acts, speaks and thinks" (p. 317). The terminology "primary representative" comes from, or is coincidentally used in, C.R.N. Winn., " The Criminal Responsibility of Corporations" [page 683] (1929), 3 Camb. L.J. 398, where it is stated at p. 404:

> ... the conspiring minds are in fact the minds of the directors, or other primary representatives. It is submitted that no mere conspiracy of inferior agents could affect the corporation with criminal guilt. If the guilty intention in the minds of the primary representatives is attributed to the corporation in this case where, more than anywhere, it is the vital element of the offence, it seems that it will always be proper to attribute to a corporation the guilty state of mind of its primary representatives when they do criminal acts on its behalf in the exercise of its powers.

At p. 407 the learned author continues:

> It is clear, on the one hand, that to seek to hold a corporation criminally liable for the acts of all its servants within the scope of their employment would be an innovation. The criminal law has never applied the maxim 'respondeat superior,' and to seek to ingraft from without what has not taken spontaneous growth might prove an experiment foredoomed to failure.

It is the wrongful action of the "primary" representative which by attribution to the corporation creates 'primary' rather than 'vicarious' liability, according to the identification theory. This article is aptly described by Jessup J. in Beamish, supra, as "a prophetic article". Lord Reid in Tesco Supermarkets Ltd. v. Nattrass, [1972] A.C. 153 (H.L.), challenged the accuracy of the expression "alter ego" and so joins Viscount Haldane in the use of the expression 'ego' of the corporation. It follows that the management officer is not guilty additionally of the offence of conspiring with the employer to commit the wrongful act in question because in the identification theory there is only one entity, the natural, and legal person having merged into one identity, and hence the basic requirement of two persons in a conspiracy is not met. See R. v. Martin, [1932] 3 W.W.R. 1 (Man. C.A.), per Dennistoun J.A., at p. 8; R. v. McDonnell, [1966] 1 All E.R. 193, at p. 201; Leigh, "The Criminal Liability of Corporations and Other Groups" supra, at p. 257; and Ewaschuk, "Corporate Criminal Liability and Related Matters" (1975), 29 C.R.N.S. 44, at pp. 62-64; but see also [page684] R. v. Electrical Contractors Association of Ontario and Dent, supra, at p. 272.

21 The principle of attribution of criminal actions of agents to the employing corporate principal in order to find criminal liability in the corporation only operates where the directing mind is acting within the scope of his authority (Beamish, supra, at pp. 890 and 892, and St. Lawrence, supra, at p. 320), in the sense of acting in the course of the corporations' business (Halsbury's 4th ed., vol. 14, p. 30, paragraph 34, supra). Scattered throughout the submissions on behalf of the four appellants, was a translation of the directing mind rule to a requirement that for its application the directing mind must, at all times, be acting in the scope of his employment. Conversely, the argument went, if the directing mind was acting totally outside the 'scope of that employment', the attribution of the acts of the directing mind to the corporate employer would not occur. The terminological problems arise from the fact that the concept of vicarious liability in the law of torts has been traditionally fenced in by the concept of the employee acting within 'the scope of his employment' and not, in the classic words, "on a frolic of his own". The identification theory, however, is not concerned with the scope of employment in the tortious sense. "Scope of employment" in the St. Lawrence judgment, supra, and the other discussions of that term in Canadian law have reference to the field of operations delegated to the directing mind. The charge by His Lordship to the jury makes this abundantly clear, as does the Court of Appeal in its analysis of this defence. The Court in St. Lawrence, supra, in describing the elements of the delegation theory. It concluded by adding that attribution to the corporation occurred only so long as the directing will "was acting in the scope of his employment." The expression comes from the law of tort and agency and from master and servant law. It is not apt in relation to the identification theory. smacks of vicarious liability and it invites the defence that criminal actions must prima facie be beyond the scope of an employee's duty and authority. The learned trial judge, in [page685] directing the jury, expressed it more accurately: "... so long as he was acting within the scope of the area of the work assigned to him." In Tesco, supra, at p. 171, Lord Reid employed the phrase acting "within the scope of delegation" of the corporation's business. The essence of the test is that the identity of the directing mind and the company coincide so long as the actions of the former are performed by the manager within the sector of corporation operation assigned to him by the corporation. The sector may be functional, or geographic, or may embrace the entire undertaking of the corporation. The requirement is better stated when it is said that the act in question must be done by the directing force of the company when carrying out his assigned function in the corporation. It is no defence to the application of this doctrine that a criminal act by a corporate employee cannot be within the scope of his authority unless expressly ordered to do the act in question. Such a condition would reduce the rule to virtually nothing. Acts of the ego of a corporation taken within the assigned managerial area may give rise to corporate criminal responsibility, whether or not there be formal delegation; whether or not there be awareness of the activity in the board of directors or the officers of the company; and, as discussed below, whether or not there be express prohibition.

22 Generally the directing mind is also guilty of the criminal offence in question. Glanville Williams, in Textbook of Criminal Law (1978), states, at p. 947:

> ... the director or other controlling officer will almost always be a co-perpetrator of or accessory in the offence ... .

In R. v. Fell (1981), 64 C.C.C. (2d) 456, Martin J.A., for the Ontario Court of Appeal, quoted the foregoing excerpt with approval but was there [page686] concerned with determining whether the directing mind was also guilty of the offence and not with the question as to whether or not this was a condition precedent to corporate liability. It may well be inevitable that guilt of the directing mind

is a condition precedent to corporate guilt, but this has yet to be stated judicially. This discussion is directed to the corporate responsibility in criminal law where its directing mind has committed an offence.

23 The route which was taken in this country and in the United Kingdom is not that which has been followed by the federal courts of the United States. Criminal responsibility in the corporation has for many years, in those courts, been placed upon the basis of the doctrine of respondeat superior. The resultant vicarious liability seems to arise in the corporation out of the criminal acts of any employee, supervisory, menial or otherwise. The United States Supreme Court expounded this principle as far back as New York Central and Hudson River Railway Co. v. United States, 212 U.S. 481 (1909). Although the statute there before the court specifically imposed liability in the corporation for the acts of its employees (without limitation), the courts have construed the case as establishing vicarious criminal liability in a corporation for the wrongful acts of its employees of all grades and classes. The rule was restated by the Court of Appeal of the 8th Circuit in Egan v. U.S. 137 F.2d 369 (1943), per Thomas J., at p. 379:

> The test of corporate responsibility for the acts of its officers and agents, whether such acts be criminal or tortious, is whether the agent or officer in doing the thing complained of was engaged in "employing the corporate powers actually authorized" for the benefit of the corporation "while acting within the scope of his employment in the business of the principal." If the act was so done it will be imputed to the corporation whether covered by the agent or officer's instructions, whether contrary to his instructions, and whether lawful or unlawful. Such acts under such circumstances are not ultra vires even though unlawful. There is no longer any distinction in essence between the civil and criminal liability of corporations, based upon the element of [page687] intent or wrongful purpose. Malfeasance of their agents is not ultra vires.

These principles have been restated as recently as the judgment in United States v. Basic Construction Co., 711 F.2d 570 (1983) (5th CCA).

24 The state courts have not as consistently pursued the course of vicarious liability of corporations in the criminal law. In The People v. Canadian Fur Trappers Corp., 248 N.Y. 159 (1928), the New York Court of Appeals, Crane J., speaking for a court that included Chief Justice Cardozo, rejected vicarious liability as a basis for corporate criminal responsibility and seemed to adopt, at pp. 163 and 169, something akin to the identification theory. To the same effect is State of Idaho v. Adjustment Department Credit Bureau, Inc., 483 P. 2d 687 (1971), at p. 691, where corporate liability was found only if:

> ... the commission of the offense was authorized, requested, commanded or performed (i) by the board of directors, or (ii) by an agent having responsibility for formation of corporate policy or (iii) by a 'high managerial agent' having supervisory responsibility over the subject matter of the offense and acting within the scope of his employment in behalf of the corporation.

State of Louisiana v. Chapman Dodge Center Inc., 428 S. 2d 413 (1983) at pp. 419-20, is to the same general effect. For a position midway between the Canadian Fur Trappers, supra, and these cases, see Commonwealth of Massachusetts v. Beneficial Finance Co., 275 N.E. 2d 33 (1971).

25 At the present time, therefore, the common law in the United States seems to be based, in the federal courts on the doctrine of vicarious liability, and in many of the state courts on something akin to the identification doctrine. Court decisions are not a complete guide to the state law on this matter, however, as some states have adopted the American Law Institute Model Penal Code, which at para. 2.07 attributes criminal liability to the [page688] corporation on much the same basis as did the Court in State of Idaho v. Adjustment Department Credit Bureau, Inc., supra. On the other hand, at least one state has by statute applied the doctrine of vicarious liability without a limitation as to the level of responsibility of the employee or agent. See Maine Criminal Code, 9 Maine Rev. Stats. Anno., Title 17-A, para. 60.

26 Australian jurisprudence on the subject of corporate liability in criminal law offers little guidance in the settlement of the issues these appeals throw up. In the Australian Commentary on Halsbury's Laws of England (Fourth Edition) vol. D, p. 31, paragraph C1379, it is stated: "With two exceptions, the law in Australia is the same as that in England." This would indicate that liability is imposed on the basis of the identification theory. However, this work goes on to state:

> In the Code States (Queensland, Tasmania and Western Australia) ... corporations are not liable for simple offences committed by their servants in the course of their duties unless it can be shown that the servant was acting under instructions from the company.

It is at least clear that criminal responsibility does not arise on the basis of vicarious liability. However, the concept that Australian courts are following the United Kingdom identification doctrine is shattered by some of the Australian law literature. The following is found in the text Howard, Criminal Law (4th ed. 1982), at pp. 379-80:

> In Australia this problem has been solved by borrowing from the civil law the notion of scope of employment: E's actions are those of the corporation if they may reasonably be regarded as within the scope of his employment. The scope of E's employment for this purpose is not necessarily limited by what he has express authority to do, for if it were, at least in the case of junior employees, it frequently would be possible to exclude the operation of the criminal law by arguing that E had no authority to commit an unlawful act. On the contrary, it has been held that the knowledge of a junior employee may be the knowledge of the corporation even though he has been forbidden by a senior employee to act in the manner to which the knowledge relates.

[page689]

> The scope of employment doctrine has enabled the courts in a number of cases to convict corporations for the actions of quite junior employees.

Perhaps this conclusion simply illustrates the elasticity in each of these two doctrines with the result that they tend to merge, overlap and blur on application to specific sets of facts or under the word-

ing of a particular statute. The above text finds support in the judgment of the High Court of Australia in R. v. Australian Films Ltd. (1921), 29 C.L.R. 195, where the Court found the accused corporation vicariously liable, relying at p. 217 on Mousell Brothers Ltd. v. London and North Western Railway Co., [1917] 2 K.B. 836. The statute there, however, required no mens rea and the Court equated the corporation in that circumstance with a human employer-defendant. This uncertainty of doctrine to be applied is not cleared away by the decision in Morgan v. Babcock and Wilcox Ltd. (1929), 43 C.L.R. 163 (H.C. of Aus.) A passage in the judgment at pp. 173-74 appears to apply without limit the principle of vicarious liability. However, the offending agent in that case was the managing director of the corporation and at p. 182 it would appear that the Court in the end swung around to the application of the identification theory as the basis of corporate guilt. The dissent of Starke J. appears to apply both doctrines without favour in attributing the actions of the employee to the corporation. Isaacs J. concurred with the majority in the result but found a liability by reason of express authorization of the wrongful acts by the board of directors of the company. At least one commentator takes the view that these two cases leave open the issue in Australian law as to whether corporate liability is determined in criminal law on the basis of vicarious liability or as a primary liability through the identification theory: W.B. Fisse, "The Distinction Between Primary and Vicarious Corporate Criminal Liability" (1967), 41 A.L.J. 203, at p. 205. It would appear that some of the lower court decisions favour vicarious liability as a source of criminal responsibility in a corporation. See Australian Stevedoring Industry Authority v. Oversea and General Stevedoring Co. (1959) 1 F.L.R. 298. On the other hand, other judgments would appear to apply the [page690] narrower rule of attributed acts under the identification theory. See Grain Sorghum Marketing Board v. Supastok Pty. Ltd., [1964] Qd.R. 98; Lamb v. Toledo-Berkel Pty. Ltd., [1969] V.R. 343 at pp. 347-48; Kehoe v. Dacol Motors Pty. Ltd., [1972] Qd.R. 59; Universal Telecasters (QLD) Ltd. v. Guthrie (1978), 32 F.L.R. 361; cf. Trade Practices Commission v. Annand and Thompson Pty. Ltd. (1978), 19 A.L.R. 730.

27 It may be that Fisse, supra, is correct when the learned author says, at p. 210, that the predominant overtone in the judgments to date favours the identification or primary liability doctrine over vicarious liability as the source of corporate criminal liability under Australian law, but the margin is at best narrow. See also H.A.J. Ford, Principles of Company Law (3rd ed. 1982), at pp. 133-138.

28 New Zealand has followed the same course as the courts of the United Kingdom in adopting the principle of identification to overcome problems of finding criminal liability in a corporation where the older common law doctrines of rejection of respondeat superior in criminal law, course of employment, and ultra vires combine to create a substantial corporate immunity. The law of New Zealand is reviewed by J.C. Clad in "The Criminal Liability of Companies", [1977] N.Z.L.J. 420, particularly at p. 424. See also Nordik Industries Ltd v. Regional Controller of Inland Revenue, [1976] 1 NZLR 194. A commentary on Tesco Supermarkets, supra, by I.A. Muir in (1973) 5 N.Z.U.L.R. 357, on the contrary, concludes that in New Zealand law the source of corporate criminal liability is shifting towards vicarious liability.

[page691]

29 In summary, therefore, the courts in this country can be said to this date to have declined generally to apply the principle of respondeat superior in the determination of corporate criminal responsibility. Criminal responsibility in our courts thus far has been achieved in the mens rea offences by the attribution to the corporation of the acts of its employees and agents on the more limited basis of the doctrine of the directing mind or identification. Corporate responsibility in both strict and absolute liability offences has been found to arise on the direct imposition of a primary duty in the corporation in the statute in question, as construed by the court. By what appears to be the same purely pragmatic reasoning, the courts of the United Kingdom find criminal liability in a corporation only by the attribution to it of the conduct of its employees and agents where those natural persons represent the core, mind and spirit of the corporation. The United States federal courts are inclined, as we have seen, to find criminal liability in the corporation by vicarious liability where any employee-agent commits, in the course of his employment, the criminal act.

30 The criticisms of the United States federal court doctrine are manifold. The net is flung too widely, it is said. Corporations are punished in instances where there is neither moral turpitude nor negligence. No public policy is served by punishing shareholders where the corporate governing body has been guilty of no unlawful act. The disparity between the treatment of the corporate employer and the natural employer is wide and wholly without a basis in justice or political science. The test as applied in the United States federal courts may be on the broad basis above indicated because so many of the federal statutory crimes are regulatory in nature. See Leigh, supra, p. 267, footnote 134.

[page692]

31 In the criminal law, a natural person is responsible only for those crimes in which he is the primary actor either actually or by express or implied authorization. There is no vicarious liability in the pure sense in the case of the natural person. That is to say that the doctrine of respondeat superior is unknown in the criminal law where the defendant is an individual. Lord Diplock in Tesco, supra, stated at p. 199:

> Save in cases of strict liability where a criminal statute, exceptionally, makes the doing of an act a crime irrespective of the state of mind in which it is done, criminal law regards a person as responsible for his own crimes only. It does not recognise the liability of a principal for the criminal acts of his agent; because it does not ascribe to him his agent's state of mind. Qui peccat per alium peccat per se is not a maxim of criminal law.

On the other hand, the corporate vehicle now occupies such a large portion of the industrial, commercial and sociological sectors that amenability of the corporation to our criminal law is as essential in the case of the corporation as in the case of the natural person.

32 Thus where the defendant is corporate the common law has become pragmatic, as we have seen, and a modified and limited 'vicarious liability' through the identification doctrine has emerged. In this context I use the word "vicarious" in the sense that it is defined in the principal dictionaries, including the Shorter Oxford English Dictionary (1959), where the term is defined: "that takes or supplies the place of another thing or person; substituted instead of the proper thing or person."

Lord Reid in Tesco, supra, distinguishes vicarious liability from the identity doctrine by wittingly or unwittingly sliding over into the merging doctrine of corporate law. In common law and in some provincial corporate legislation, two merging corporations find their continued existence in the merged or amalgamated corporation. In common law this was deemed so by operation of law or by a legal fiction. In this it is not alone. Consider the invocation of the rule of distinction between crimes of specific and crimes of general intent in order to limit and place on a [page693] rational basis acceptable to the community the defence of drunkenness. Also to be considered is the establishment of the doctrine of part performance in the interpretation of the Statute of Frauds, which includes no reference whatever to any such doctrine but which was created to prevent the Statute of Frauds itself being used to practice a fraud. The corporation is but a creature of statute, general or special, and none of the provincial corporation statutes and business corporations statutes, or the federal equivalents, contain any discussion of criminal liability or liability in the common law generally by reason of the doctrine of identification. It is a court-adopted principle put in place for the purpose of including the corporation in the pattern of criminal law in a rational relationship to that of the natural person. The identity doctrine merges the board of directors, the managing director, the superintendent, the manager or anyone else delegated by the board of directors to whom is delegated the governing executive authority of the corporation, and the conduct of any of the merged entities is thereby attributed to the corporation. In St. Lawrence, supra, and other authorities, a corporation may, by this means, have more than one directing mind. This must be particularly so in a country such as Canada where corporate operations are frequently geographically widespread. The transportation companies, for example, must of necessity operate by the delegation and subdelegation of authority from the corporate centre; by the division and subdivision of the corporate brain; and by decentralizing by delegation the guiding forces in the corporate undertaking. The application of the identification rule in Tesco, supra, may not accord with the realities of life in our country, however appropriate we may find to be the enunciation of the abstract principles of law there made.

[page694]

33 The corporation which set the directing mind in position to do the wrong will suffer an economic penalty. While it is true that this penalty will feed through to the stockholders, who may well be totally innocent as in the case of a large public company, it may be seen as a risk or cost associated with the privilege of operating through the corporate vehicle. In the case of personal corporations, the imposition of a criminal penalty on the corporation may be an additional penalty imposed upon the 'personal' corporate stockholder but such a result would be an acceptable part of the sentencing process as it simply reflects the economic identification, as well as the legal identification, present in such a corporation. In the case of a public corporation, the economic identification factor is absent, and in a theoretical sense there is an additional penalty for the same act which must be justified in some way other than that suggested above. This is the inevitable result of the pragmatic adoption of the attribution of the acts of its delegates to the delegating corporation in order to bring that corporation within the system of criminal justice. Whether the route taken be the doctrine of respondeat superior or identification, the result is the same. The corporation in reality has three elements: the legal entity, the personal shareholder (a natural person directly or indirectly), and the employee. Once the process is set in motion, the criminal penalty will extend directly or indirectly to all three which is quite unlike the situation of a natural proprietor where only two of these ele-

ments are present. All this, in my view, while not entirely logical, is a tolerable result for a community where reality dictates corporate criminal accountability in certain circumstances.

34 There is one threshold problem which arises before we come to the several defences advanced by the appellants. Was there, on the facts here, a "directing mind" in the case of each appellant, assuming for the purpose of answering this question only that the employee in question had not defrauded the employer corporation, had not acted [page695] in his own benefit, and had not acted in breach of instructions?

35 The issue (aside from the applicability of the above defences) was put to the jury by the learned trial judge in his direction. Only CD in its submissions to this Court challenged the status of its officer as a directing mind. CD argued that Schneider was not an officer or in the employ of the appellant CD during part of the period in which the alleged criminal acts took place.

36 The issue arose because of the complex of predecessors to the appellant CD. During the early 1960's a corporation now called Foodex Systems Ltd. (then named Canadian Dredge and Dock Co. Limited) owned all the shares of the appellant CD (then named T.C. Gorman (Nova Scotia) Limited). At that time Schneider was in charge of the dredging operations of Foodex Systems. In 1964 the shares of the appellant CD were sold by Foodex. In 1967 Foodex sold its dredging and marine assets to Bedford Construction Co. Ltd., a company now known as Albemont Ltd., but which was known from 1967 to 1972 as Canadian Dredge & Dock Ltd. Schneider moved with the dredging assets and became vice-president and general manager of Albemont. In 1969 Albemont acquired all the issued shares of the capital stock of the appellant when its name was T.C. Gorman (Nova Scotia) Limited. By a May 1971 agreement Albemont agreed to sell its dredging and marine assets to the appellant CD. By a second agreement dated October 1971 Albemont agreed to sell to the appellant CD the remaining assets of its dredging and marine construction division. Schneider later acquired a substantial block of shares in the appellant CD.

37 The question is whether Schneider was the directing mind of the appellant CD during the periods covered by counts 1 and 6.

[page696]

38 A review of the trial judge's charge to the jury reveals that he fairly put this issue to them. With respect to count 1 he charged, in part:

> The Crown alleges that the time period for Count 1 falls in the time period 3, between May '71 and December '71. The Crown submits that Schneider was an officer and director of both Canadian Dredge & Dock No. 2 [Albemont] and T.C. Gorman [the appellant CD] at the time and that the Gorman Company, which still carries on business, although it has changed its name, is still responsible for the criminal acts of Schneider.
>
> The main issue for you is whether at that time Schneider was either expressly or impliedly authorized to bid-rig or whether he was a directing mind of

Gorman, now known as Canadian Dredge & Dock, the accused. If he was the company would be responsible for his bid-rigging; if he was not, the company would not be responsible.

...

[T]he question then was, was Schneider either authorized, expressly or impliedly, by Gorman or was he a directing mind of Gorman.

If he was, then the present Canadian Dredge and Dock would be responsible for the actions of Schneider at that time.

Exhibits filed by the Crown -- you may recall certain company returns -- showed Schneider was a director of Gorman as of October 1st, 1963. For the years ending April 30th, 1966, 1967, 1968 and 1969 he is not shown as an officer or director. Then the returns filed as of March 12th, 1971, and December 31st, 1971, show him as an officer and director of Gorman.

You may recall this closing date for North Traverse was June 22nd, 1971.

Counsel for the defence submits that this evidence alone does not prove that Schneider was an officer and director of Gorman as of June 22nd, 1971, when he submitted the tender on Ile d'Orleans.

Schneider signed the tender as vice-president and general manager, but the document did not state of which company.

He submitted that it is not clear whether Schneider was authorized to submit a tender on behalf of Gorman and whether he was authorized to submit a false tender.

[page697]

Schneider's evidence in chief was he was the vice-president and general manager of Canadian Dredge and Dock number 2 [Albemont] and was also an officer of Gorman.

On cross-examination he said he presumed he was vice-president and general manager of both companies, but he did not know for certain.

> The equipment had been sold to Gorman, but Canadian Dredge [Albemont] still exercised control.
>
> The Crown submits the fact Schneider was a director and officer of Gorman on March 12th, 1971, signed the tender as of June 22nd, 1971, and was a director and officer of Gorman on March 31st, 1971, is evidence from which they may reasonably infer that he was an officer and director of Gorman on June 22nd, 1971.
>
> Whether he was or not is a question of fact for you. It is for you to decide whether or not Schneider had authority, expressed or implied, or whether or not he was a directing mind of Gorman.

The charge with respect to count 6 was given in like detail. The Court of Appeal reviewed this evidence and the judge's charge to the jury and concluded at p. 446:

> It is clear from these extracts that the learned trial Judge fairly put to the jury the defences to counts 1 and 6, namely, that Canadian Dredge No. 3 did not participate in bid-rigging at North Traverse or Hamilton Harbour, and that Schneider was neither authorized to bid-rig nor was he the company's directing mind.

39 I am in respectful agreement with the Court of Appeal that the jury must have found in the case of CD that Schneider was the directing mind of the company and that there was evidence introduced at trial in support of such a finding.

40 DeRome was said to be the directing mind of MIL. He died in August 1970. The contract in count 2, the only count in issue in this Court, was entered into in 1969. The Court of Appeal found that there was evidence to support the conclusion which the jury must necessarily have reached that DeRome was the directing mind of MIL. This is not challenged on appeal.

[page698]

41 In the case of the appellants Porter and Richelieu, Rindress was found by the Court of Appeal to be the directing mind of each of these appellants. This was not challenged in this Court.

42 I turn to the submission by the appellants that the identification theory cannot import into the criminal law a brand of vicarious liability under any of the authorities where the wrongful acts of the directing mind were done in fraud on the employer, for the benefit of the employee, or contrary to the instructions issued by the employer. Whether there be evidence to support a finding that the employee of each of these appellants acted in fraud on the employer, for his own benefit, or contrary to instructions, I set aside until after the applicability of these defences in Canadian criminal law is examined.

43 The third defence, acts carried out in the face of express instructions to the contrary, is susceptible to easy disposition. Neither the trial judge nor the Court of Appeal dealt squarely with this

issue, although it came up obliquely on the issue of authorization. This treatment of the matter could not have affected the result. The argument that actions taken by an employee contrary to express instructions cannot be attributed to the corporate employer in order to found criminal liability, was advanced most forceably by the late Mr. Laidlaw on behalf of CD with reference to counts 3, 4 and 5 only. Martin, the President of CD, testified that he warned Schneider that bid-rigging activities were not to be undertaken on pain of dismissal. These discussions were put to the jury but only in relation to the issue of CD's criminal responsibility through the authorization of Schneider to bid-rig. Martin was acquitted, CD was convicted. It follows inexorably that the jury did not find that Schneider was authorized expressly or implicitly to rig bids. It follows in turn that the jury of necessity concluded that Schneider was the directing mind of CD. Accepting that the acquittal of Martin raises a possibility that an express prohibition was issued, the failure to charge the jury with respect to the relationship between express instructions not [page699] to engage in illegal activity and the attraction of corporate criminal liability via the identification theory would only be of consequence if such instructions in law can affect corporate criminal liability. If the law recognized such a defence, a corporation might absolve itself from criminal consequence by the simple device of adopting and communicating to its staff a general instruction prohibiting illegal conduct and directing conformity at all times with the law. That is not to say that such an element is without relevance when considering corporate liability with reference to offences of strict liability, supra. Where, however, the court is concerned with those mens rea offences which can in law be committed by a corporation, the presence of general or specific instructions prohibiting the conduct in question is irrelevant. The corporation and its directing mind became one and the prohibition directed by the corporation to others is of no effect in law on the determination of criminal liability of either the directing mind or the corporation itself by reason of the actions of the directing mind. This accords with the result reached in other courts.

44 In the Australian case, Grain Sorghum Marketing Board v. Supastok Pty. Ltd., supra, at p. 105, Jeffriess J. held the company criminally liable despite the employee's breach of company instructions because the employee:

> ... represented the mind and will of the company. ... The position would be otherwise had the purchase been made by a storeman, or some servant in a similar capacity contrary to his instructions.

45 The United States federal courts, operating under the vicarious liability concept, have taken [page700] the same view. In United States v. Hilton Hotels Corp., 467 F.2d 1000 (1972) (9th CCA), at pp. 1006-07 the Court balanced the general instructions given to a manager to maximize profits against directions to the manager to obey the anti-trust provisions of the Sherman Act and concluded that the former would in reality prevail. The view was expressed that the profits from such a violation would be realized by the corporation; the isolation of the employee directly responsible for the breach is difficult in these cases; and punishment of the business entity is both appropriate and effective. Accordingly, conviction was confirmed so long as the test in vicarious liability, that the employee was acting in the scope of his employment, was met even though the employee at the time was acting contrary to general corporate policy and express instructions (pp. 1006-7). The Court added a rider that seems to leave the door open to such a defence when it said, at p. 1007:

> Appellant could not gain exculpation by issuing general instructions without undertaking to enforce those instructions by means commensurate with the obvious risks.

This hints of a shade of the strict liability defence. The defence was rejected in two Canadian courts: Upholsterers International Union of North America, Local 1 v. Hankin & Struck Furniture Ltd. (1964), 49 W.W.R. 33 (B.C.C.A.), and R. v. Waterloo Mercury Sales Ltd. [1974] 4 W.W.R. 516 (Alta. D.C.).

46 The argument of express prohibition was not made by MIL and there is no evidence to support such a submission. Reference was made to such a defence in the abstract by counsel for Porter and Richelieu but no evidence was identified in support and I can find none in the record. The last part of both questions put to this Court should accordingly be answered in the negative.

47 The two remaining issues as to the effect, if any, of the directing mind of the corporation "acting in whole or in part in fraud on the corporation" or "wholly or partly for his own benefit" raise problems both of terminology and substance. The two questions in substance raise the same legal issues. [page701] The immediate question which arises is whether or not there is, in fact and in law, any controlling difference between a directing mind acting in fraud of the corporation and a directing mind acting on behalf of the corporation as its managerial arm but doing so for his own benefit. As will be mentioned below, there are fine factual distinctions which one can make between the two concepts. In substance, however, these appeals can be more usefully analysed if the practical view is taken that the situation as between the corporation and its directing mind is the same whether the directing mind is acting in fraud of the corporation or whether he is acting against the interests of the corporation for his own benefit.

48 The identification theory was inspired in the common law in order to find some pragmatic, acceptable middle ground which would see a corporation under the umbrella of the criminal law of the community but which would not saddle the corporation with the criminal wrongs of all of its employees and agents. If there were to be no outer limit on the reach of the doctrine, the common law would have established criminal corporate liability by the doctrine of respondeat superior. What then is the appropriate outer limit of the attribution of criminal conduct of a directing mind when he undertakes activities in fraud of the corporation or for his own benefit?

49 Parker A.C.J.H.C. dealt with these issues in a single formula in his charge to the jury. He then adapted that formula to the circumstances as revealed in the evidence of each of the many accused including these four appellants. The general proposition of law relating to corporate criminal liability was expressed by the Chief Justice, in his directions to the jury, in this way:

> A company may be responsible for the criminal acts of its servant in two situations; (1) if the servant has authority, express or implied, to do the act, or (2) if the servant is virtually its directing mind in the sphere of [page702] duty assigned to him so that his actions and intent are the very actions and intent of the company itself ...

It should be noted that the appeal of each of the appellants in this Court proceeded on the basis that liability was not attracted on the first ground but on the basis of the identification theory. The Chief Justice continued:

> It is a question of fact for you whether or not a person was a directing mind of the company. A director may say that the company did not give authority to a particular employee to do a certain act. This may then negative express authority but leave untouched the scope of an agent's implied authority. If an agent is virtually the directing mind of the company, the failure of the directors to confer express authority on him to do the particular act is irrelevant.

50 The learned Associate Chief Justice applied this law to count 6, which relates to CD, as follows:

> Counsel raised two more points for your consideration. He asked, "If Schneider acted without the knowledge and consent of the directors for his own benefit, not that of the company, then how can the company be responsible?"
>
> There is no doubt Schneider was acting in his own self interest when he made a deal to take 20,000 [sic 200,000] in cash for 300,000 on the score sheet, but, nevertheless, he did agree to submit a fictitious high tender on behalf of Canadian Dredge and Dock. The company's tender went in and it accomplished the purpose it was intended to accomplish. J.P. Porter got the bid.
>
> The law is that if a corporation puts an employee in a position where he is in control of a particular sphere of its operations so that he is virtually a company mind and will in the sphere of duty assigned to him, the company is responsible for his actions within that sphere. It doesn't matter that he was acting for his own benefit.
>
> Counsel submitted that he called three directors who said that they had no knowledge; that they gave no authority to Schneider and that the by-laws required Schneider to take the direction of the board. The same [page703] law applies. If Schneider was a directing mind of the company, express or implied authority wouldn't matter.
>
> The issue is, at the time of the Hamilton bid was Schneider a directing mind. Remember that the new directors had not yet been appointed. The take-over didn't occur until December 17th. Whether or not the directors subsequently appointed knew of the bid-rigging may go to their own guilt. We are not concerned with that at this time, only the guilt or innocence of the company.
>
> If you find that Schneider submitted a fictitious bid at Hamilton and if you find that at that time he was a directing mind of T.C. Gorman, now known as Canadian Dredge and Dock Company Limited, then that accused would be responsible even if Schneider was acting in his own self interest and without express or implied authority from the company.

On the same count the jury was charged as follows with respect to the liability of the accused Porter:

> ... if the company places an employee in a certain position and gives him the authority to act legally within a particular sphere so that his acts are virtually the acts of the company and he is a directing mind of the company within that sphere of operations, then the company is responsible for his criminal acts regardless of whether or not he is acting in fraud of the company.

The learned Associate Chief Justice consistently charged the jury on the same basis.

51 The Court of Appeal, on the general principle of corporate liability in Canadian criminal law, agreed with the learned trial judge (p. 312, supra). On the effect on the criminal liability of a corporate master where the employee, the directing mind, acts in fraud upon the corporation, the Court of Appeal rejected the appellants' submissions (at p. 315):

> Where superior officers of the company who are its directing minds act dishonestly in the functions delegated to them, it seems consistent with public policy to hold the corporation criminally liable. The imposition of criminal liability on the corporation in these circumstances stimulates shareholders to exercise stricter [page704] supervision and control in the selection of its directors and compels directors to be alert to the corporate practices of its senior personnel.
>
> ...
>
> We would therefore not give effect to the argument that a finding of fraud perpetrated by these officers against their companies precluded a finding of criminal liability against those companies.

52 It has been said by many authors that no social purpose is served by convicting a corporation whose directing mind has acted throughout in fraud of that corporation and its undertaking. Similarly, where the wrongful act is conceived and designed to benefit only the directing mind and without any benefit to the corporate employer, it has been said that no social purpose is served by convicting a corporation in such a circumstance.

53 The leading case is Moore v. I. Bresler, Ltd., [1944] 2 All E.R. 515. This case was decided about the same time as the judgments came down in Director of Public Prosecutions v. Kent and Sussex Contractors, Ltd., supra, and R. v. I.C.R. Haulage, Ltd., supra, and brought into prominence in the criminal law the rationale for the identification theory established thirty years earlier in Lennard's case, supra. Moore v. Bresler, citing Kent, supra, dealt with the defence raised by the corporate accused that its agents, its officers and employees, the co-accused who actually committed the acts in question, had done so in fraud on their employer, the corporate accused. The individual accused were the corporate secretary, who was also a general manager of the company's branch in question, and the sales manager of the same branch. Acting in collusion, they sold some of the company's stock in trade and kept the proceeds without making any entry of the transaction in the corporate accounts. These sales were clearly made in fraud on the corporation and without knowledge in the board of directors or officials of the company. The two employees then filed false tax returns, no doubt reflecting only recorded sales and omitting any reference to the fraudulent

sales made by the co-defendants. From the facts revealed in the judgments, it would [page705] appear that the purchasers from the individual defendants received good title to the merchandise wrongfully sold to them. The King's Bench Division found that the employees were the directing minds, and because they were acting in the scope of their authority in making the sales which were carried out in the performance of their responsibilities and duties to the company, the company was accordingly liable for their acts.

54 On appeal, Viscount Caldecote C.J. applied the 'guiding mind of the company' theory and imputed the acts of the employee-defendants to the corporate-defendant (pp. 516-17):

> These two men were important officials of the company, and when they made statements and rendered returns which were proved in this case, they were clearly making those statements and giving those returns as the officers of the company, the proper officers to make the returns. Their acts, therefore, as, indeed, the Recorder seems to have been prepared to agree, were the acts of the company.

The Lord Chief Justice did not mention the defence of fraud on the company by its co-defendants, the directing minds. Birkett J., the third member of the Court, adopted the reasons of Humphreys J. who rejected this defence. Humphreys J. in his judgment stated at p. 517:

> ... and the sale is not less made with the authority of the master because the employee means to put into his own pocket the proceeds of the sale when he receives them. That is what the Recorder goes on to say, that those sales were made -- not that the returns were made -- in fraud of the respondents. That is perfectly true, but there is no authority that I am aware of, and there is a very great deal of authority to the contrary, for the proposition that because a servant does something in fraud of his master, although it is something which he is actually paid to do, such as a sales manager making a sale, that, therefore, the master is not responsible for the sale.

[page706]

Thus all members of the Court found the criminal actions of the co-defendant directing minds were in law imputed to the company and two members expressly rejected the defence that the corporate defendant, wholly unaware of these acts, could not be criminally responsible therefor because they were done by its employees wholly in fraud on the company. The Lord Chief Justice, by implication, also rejected this defence but apparently on the ground that the fraudulent conduct above would not take the co-defendants out of the scope of their employment and hence the corporate defendant would be criminally responsible. That result seems to be a blend of the vicarious liability and the directing mind theories. As has been seen, the term "course of employment" has a different meaning with reference to the directing mind concept than in the tracing of tortious liability in a corporation or any other master.

55 This is the case upon which the Court of Appeal below relied, as did the respondent in this Court, for the denial of the defence advanced by all four appellants of fraud on the company and the related defence that the actions in question were taken entirely for the benefit of the individual em-

ployees, the directing minds of the appellants. This case has been mentioned in a few subsequent judgments of the courts of the United Kingdom and this country but has never been applied in the Court of Appeal or the House of Lords in England or in this Court. The judgment has been decried by several authors: S.M. Waddams, "Alter Ego and the Criminal Liability of Corporations" (1966), 24 U.T. Fac. L.R. 145, at pp. 148-149; R.S. Welsh, "The Criminal Liability of Corporations" (1946) 62 L.Q.R. 345, at p. 359; John Andrews, "Reform in the Law of Corporate Liability", [1973] Crim. L. R. 91; Don Stuart, Canadian Criminal Law (1982), at p. 520; Glanville Williams, Textbook of Criminal Law (2nd 1983) at p. 973; C.M. Fien "Corporate Responsibility under Criminal Law" (1973), 5 Man. L.J. 421 at p. 427; Archbold's Pleading, Evidence and Practice in Criminal Cases (41st ed. 1982), at p. 995 [page707]; cf.: Harvey Yarosky, "The Criminal Liability of Corporations" (1964), 10 McGill L.J. 142, at p. 148.

56 Critical comments have been founded largely on the basis that acts of employees taken wholly in fraud of the corporation, done in circumstances wherein no awareness arose in the corporation of the planning and perpetration of the wrongful acts, and not occurring by reason of any failure on the part of the corporation to supervise its operations in accordance with accepted management standards of the day, should not be imputed to the corporation for the purpose of investing criminal liability. No purpose, it is said, could be served by so doing and the community would be no better protected by such a principle. See M.W. Caroline "Corporate Criminality and the Courts: Where are they Going?" (1985), 27 C.L.Q. 237, at pp. 245-46.

57 The question arises as to whether on the facts and charge of Moore v. Bresler there is a defence in respect of either a fraud charge or the Tax Act charge in the corporation by reason of the fact that the dishonest act was committed by the directing mind but in fraud on the company or wholly or partly for the benefit of the dishonest employee. Were the charge in question a charge of fraud, there would clearly be no benefit to the corporation, and indeed the design of the dishonest employee was aimed squarely at reducing the financial stature of the employer. It can hardly be said with any reality that a person designing and executing such a scheme could be, while doing so, the directing mind and the ego of the company itself. That being so, no longer would we be faced with the logical conundrum that a person however dishonest cannot defraud himself. Once the ego is split into its original two parts that problem disappears. The employee would be guilty of fraud and the victim of that fraud would be the company. The victim would, in all logic, have a defence against a charge that it too had committed fraud in its own right. Were the criminal law otherwise, it would not provide protection of any interest in the community. Punishment of the corporation for such acts of its employee would not advantage [page708] society by advancing law and order. It is otherwise, however, where there is benefit to the corporation, in whole or in part, from the unlawful acts of its directing mind. The charge with reference to the tax returns raises different considerations.

58 The Court in Moore v. Bresler was dealing with a charge under the taxing statute, not fraud charges relating to the wrongful sales. If the Court had been dealing with a fraud charge, the effect of some of the dicta would be much clearer. In this transaction, the employees were doing two things. Firstly, they filed the tax return in order to comply with a statutory requirement for annual filing and by so doing they also sought to cover their tracks so that they would not be prosecuted for theft, fraud, embezzlement, etc. at the behest of their employer. At the same time as they were furthering their dishonest scheme, they were also filing a tax return which entitled the corporation to a lower tax payment than would be the case if the total revenue, real and constructive, of the company were revealed to the revenue collector. The sales were a fraud on the company but the false tax re-

turns were not. They were a fraud on the community through the government department administering the Tax Act. The dishonest directing minds continued to act in the course of their assigned managerial duties when filing the tax returns. Thus, in a perverse way, it may be said that the company enjoyed a benefit in that the risk not only of suffering loss of revenue through embezzlement but also that the company would be taxed on the lost revenue, was somewhat reduced by the dishonest tax return. As it turned out, the company was exposed by the revenue collector to the actuality of the higher taxation. Once the dishonest employees are found to have been the directing minds of the company and once it is found that they were at the time of the commission of the dishonest acts acting in the course of their employment, in the sense that they were carrying out the enterprise and policies of the corporate employer, then their dishonest actions are attributed to the company whose liability in criminal law follows. The rule in Moore v. Bresler, if it is as broad as some have stated, may not be one which [page709] has its factual and theoretical roots in a transaction where a defence arises by reason of a total lack of benefit in the victim.

59 In R. v. Parker Car Wash Systems Ltd. (1977), 35 C.C.C. (2d) 37, Hughes J., sitting in the High Court of Justice, while not citing Moore v. Bresler, supra, (except indirectly through a reference to Tesco, supra) "reluctantly" applied the identification theory to attribute to the accused employer corporation the wrongful activities of its directing mind. In the Parker case, the company received no benefit by reason of the wrongful conduct of the directing mind and, in fact, was deprived of moneys it otherwise would have received. In the result, the corporation was convicted under the Tax Act and apparently assessed under that Act as well with reference to moneys wrongfully paid out by it through the illegal actions of its directing mind. The corporation was found criminally liable notwithstanding the resultant position of loss not only of the moneys taken from its treasury by its employee, but also the taxes payable by the corporation in excess of that which would otherwise have been payable. For a comment on this case see "A Feature of Corporate Criminal Liability or Why the Brains of a Corporation Are Not Necessarily Its 'Intimate Friend'" (1977-78), 2 Can. Bus. L.J. 474, by Dean Peter Burns.

60 Bresler, supra, finds a parallel in U.S. law in Old Monastery Co. v. United States, 147 F.2d 905 (1945) (4th CCA). The defence of the corporate accused was that the acts of conspiracy in price fixing committed by its directing officers were not of benefit to the corporation, nor were they intended to benefit the corporation. Consequently it was argued that criminal liability could not result from the attribution of such acts to the corporation. The Court found criminal liability in the corporate defendant on the basis of the doctrine of vicarious [page710] liability and specifically rejected the defence of "no benefit".

> We do not accept benefit as a touchstone of corporate criminal liability; benefit, at best, is an evidential, not an operative, fact.
>
> (Per Dobie J., at p. 908.)

The result is simple and direct vicarious liability of an otherwise innocent employer corporation.

61 In United States v. Empire Packing Co., 174 F.2d 16 (1949) (7th CCA), at p. 20 corporate liability was attracted despite the fact that the corporation employer received no benefit from the actions of its agent. However, the Court did not need to decide whether an intention on the part of the wrongdoing employee to benefit the employer corporation by his unlawful activities was required in order to infect the corporation with criminal liability.

62 These two cases were followed by Standard Oil Co. of Texas v. United States, 307 F.2d 120 (1962) (5th CCA). In that case, the Court found the corporate employer innocent because the rule of vicarious liability did not attribute to the employer the dishonest actions of its employees where those employees intended that the corporation would receive no benefit from their dishonest activities. This result was achieved by simply concluding that such acts by an employee took him outside of the scope of his employment:

> Of course the defendants do not contend, nor could they, that criminal accountability and actual benefit are equated. There have been many cases, and there may well be others in the future, in which the corporation is criminally liable even though no benefit has been received in fact. But while benefit is not essential in terms of result, the purpose to benefit the corporation is decisive in terms of equating the agent's action with that of the corporation. For it is an elementary principle of agency that "an act of a servant is not within the scope of employment if it is done with no intention to perform [page711] it as a part of or incident to a service on account of which he is employed."
>
> (Per Brown J., at p. 128.)

Although the Court cited Old Monastery, supra, and did not say that it was being reversed, the clear and undeniable result is that it was reversed. There have been many similar decisions in the United States federal courts:

> United States v. Carter, 311 F.2d 934 (1963) (6th CCA) at p. 942;
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> United States v. Ridglea State Bank, 357 F.2d 495 (1966) (5th CCA);
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> United States v. Hilton Hotels Corp., supra, at p. 1006n;
>
> United States v. Basic Construction Co., supra, at p. 573;
>
> United States v. Beusch, 596 F.2d 871 (1979) (9th CCA) at pp. 877-78;
>
> United States v. Cincotta, 689 F.2d 238 (1982) (1st CCA) at pp. 241-42;
>
> United States v. Richmond, 700 F.2d 1183 (1983) (8th CCA) at p. 1195n.

In all these United States Federal Court decisions the courts were determining the issue on the basis of the doctrine of vicarious liability and not on the identification theory and this is fundamental to an understanding of the treatment accorded the defences of fraud on the company for employee benefit.

63 The courts of New Zealand in Nordik, supra, were called upon to deal with almost the same factual situation as in Bresler, supra. The Court attributed to the corporation the fraudulent acts of its managing director who was virtually the sole shareholder. The tax returns in question were made properly by the company accountant from company records but because of the managing director's fraudulent conduct the company accounts did not reflect the cash receipts which had been diverted

to the managing director upon his fraudulent sale of company assets. The Court [page712] appears to apply the identity doctrine attributing this conduct to the corporation to establish its guilt, but does not purport to follow Bresler because the learned justices interpreted that case (in the light of Tesco, supra) as apparently being decided upon the basis of vicarious liability. Despite a reluctance "to impose the rather clumsy sanction of criminal liability on corporations where no blame could fairly be imputed to those truly responsible for the affairs of the corporation", the Court found corporate liability. At the conclusion of his judgment Cooke J. foreclosed any defence of fraud on the company (at p. 202):

> ... once identification has been made out, it must follow, I think, the for the purposes of the criminal law in a case of the present kind the question of fraud on the company becomes irrelevant and indeed meaningless. A person cannot defraud himself. The essence of the doctrine of identification is that the individual is treated as the company's self. They are one and the same.

64 This case, in the result, follows the popular interpretation of Bresler on the issue of the defence of fraud on the company by the directing mind by denying such a defence at least in the circumstances of that case. It must be noted that because Nordik is a case where the directing mind owned over eighty per cent of the shares, it is less than a telling comment when the Court said that a person cannot defraud himself for the purposes of the identification doctrine. Where there are several directing minds, and there is no economic identity between the directing minds and the shareholders, it is less realistic to extend the fiction of identity. The dishonest directing mind is in fact cheating the company and thereby its shareholders and not himself.

65 In my view, the outer limit of the delegation doctrine is reached and exceeded when the directing mind ceases completely to act, in fact or in [page713] substance, in the interests of the corporation. Where this entails fraudulent action, nothing is gained from speaking of fraud in whole or in part because fraud is fraud. What I take to be the distinction raised by the question is where all of the activities of the directing mind are directed against the interests of the corporation with a view to damaging that corporation, whether or not the result is beneficial economically to the directing mind, that may be said to be fraud on the corporation. Similarly, but not so importantly, a benefit to the directing mind in single transactions or in a minor part of the activities of the directing mind is in reality quite different from benefit in the sense that the directing mind intended that the corporation should not benefit from any of its activities in its undertaking. A benefit of course can, unlike fraud, be in whole or in part, but the better standard in my view is established when benefit is associated with fraud. The same test then applies. Where the directing mind conceives and designs a plan and then executes it whereby the corporation is intentionally defrauded, and when this is the substantial part of the regular activities of the directing mind in his office, then it is unrealistic in the extreme to consider that the manager is the directing mind of the corporation. His entire energies are, in such a case, directed to the destruction of the undertaking of the corporation. When he crosses that line he ceases to be the directing mind and the doctrine of identification ceases to operate. The same reasoning and terminology can be applied to the concept of benefits.

66 Where the criminal act is totally in fraud of the corporate employer and where the act is intended to and does result in benefit exclusively to the employee-manager, the employee-directing mind, from the outset of the design and execution of the criminal plan, ceases to be a directing mind of the corporation and consequently his acts could not be attributed to the corporation under the identification doctrine. This might be true as well on the American approach through respondeat

superior. Whether this is so or not, in my view the identification doctrine only operates where the Crown demonstrates that the action taken by the directing [page714] mind (a) was within the field of operation assigned to him; (b) was not totally in fraud of the corporation; and (c) was by design or result partly for the benefit of the company.

67 The factual basis for these 'defences' to corporate criminal liability raised by the appellants must now be examined. The second question in this appeal explicitly raises the issue of evidentiary support for these three defences. CD advanced the submission that the issue was also raised, at least by inference, in the first question. MIL takes the approach that the issue as to whether the directing mind of MIL acted wholly or partly in fraud of MIL or wholly or partly for his own benefit should have been left to the jury, but it was not. In essence, therefore, the submission is that there was evidence to support the position that DeRome, the directing mind of MIL, acted wholly in fraud of MIL and wholly for his own benefit, and consequently there should not be any attribution of his acts to MIL so as to raise liability in MIL for the criminal acts of its directing mind. Under the second question with reference to the appellants Porter and Richelieu, the issue as to whether there is any evidence that Rindress, their directing mind, was acting wholly or partly in fraud of these appellants or wholly or partly for his own benefit, is squarely raised.

68 It is possible, and indeed convenient, to discuss the defences of fraud and benefit in connection with all four appellants at the same time. It is evident from the record that as a result of the illegal machinations of their respective directing minds, all four appellants received contracts, subcontracts, or other benefits. In the case of CD, for example, the corporation received a subcontract under the Toronto Harbour contract, which was the subject of count 4. This was received by CD in return for its submission of an accommodation bid. In the case of MIL, it was awarded the contract at Beauport Banks, the subject of count 2, as the low [page715] bidder as the result of arrangements made by the directing mind of MIL for two accommodation bids. The "price" paid for these accommodation bids was a thirty per cent subcontract to one high bidder and a "royalty" on quantities excavated, to the other high bidder. The law does not require that the courts conduct a detailed inquiry into the minutiae of inter-conspirators' accounts in order to ascertain whether the contracts and subcontracts were profitable to the member of the conspiracy in question. Similarly, Richelieu participated in the performance of the contract which is the subject of count 1 and secured the contract in count 3. These contracts were awarded as the result of tenders made by the directing minds of the respective corporate participants. The evidence is overwhelming that as a result of the system developed by their respective directing minds, the appellants received benefits in the form of contracts and subcontracts, direct payouts and other benefits. It is also evident that the directing minds who committed this wrongful conduct benefitted themselves in a variety of ways including cash receipts, share positions in participating companies, and other arrangements. It was in fact a 'share the wealth' project for the benefit of all concerned except the public authorities who awarded the dredging contracts. It is, therefore, impossible to come to any conclusion other than that reached by the trial judge and the Court of Appeal that in these activities the directing minds were acting partly for the benefit of the employing appellant and partly for their own benefit. Accordingly the factual basis for a corporate defence of lack of intended and received corporate benefit is not present in these appeals.

69 Evidence of the same nature leading to the same result is found in connection with the defence of fraud by the directing minds of the appellants. There was an elaborate array of evidence which [page716] revealed that some of the directing minds had acquired, or otherwise put in place, corporate entities to act as fronts for them in receiving benefits from the price-rigging schemes.

70 The appellants, Porter and Richelieu in particular, pressed the argument that Rindress acted in fraud on these appellants when he diverted score sheet credits of Richelieu and Porter to the account or credit of other conspirators. This falls short of forming the base for a defence of fraud on the employer by its directing mind. Fundamental to the bid-rigging schemes was the agreement amongst participants in the conspiracy to enhance the lowest bid, which was designed to be the successful bid, by an amount at least equal to the cost of compensation to be paid by the successful bidder to the accommodation bidders, and sometimes to other conspirators who did not participate in the bidding then in question. The "score sheet" was the inter-conspirator accounting document on which was recorded the entitlement in these moneys to be wrongfully recovered from the contracting party, usually a public authority. In short, the moneys fraudulently recovered from the property owner were divided up amongst the conspirators as their share of the ill-gotten gains. Whatever property there is in a thief in the product of his theft, or whatever his ability to maintain his title against the world, a corporation cannot be said to have been defrauded in the sense herein employed when the only thing of which it is deprived is part, or indeed all, of the product of the crime of which it is charged. In the transactions now before the Court, one conspirator could not successfully recover from another conspirator the claimant's share in the proceeds of the fraud. Remarkably this was attempted indirectly by two of the conspirators, as the evidence revealed, but the matter was settled out of court and the only real result of that litigation was the use of the pleadings by the Crown as evidence of guilt here. The appellant Porter, for example, could not sue CD for funds diverted from the score sheet credit of Porter to CD. Consequently, the directing mind Rindress could not act in fraud of Porter by depriving Porter of its share of the overpricing in a dredging contract. The same applies as between Rindress [page717] and Richelieu and as between any of the directing minds and the other appellants, their respective employers.

71 Accordingly, I answer both questions in this way: all four appellants were the victims of specific instances of fraud practised by the respective directing minds who, in the course of their criminal activities, derived personal benefits therefrom. There is no evidence, however, that the directing minds in these affairs acted wholly for their own benefit, nor did any of them act wholly in fraud of their employer in the sense of designing and executing a scheme to deprive their respective employer corporations of any and all dredging business or benefit therefrom. Here the voluminous evidence paints a clear picture of a design conceived by a group of conspiratorial directing minds which was not aimed at the destruction of the respective corporate employers but rather was calculated to ensure their existence at a level of profits sustained by fraudulently enhanced prices for the work and services of the corporations. The bid-rigging scheme was indeed essentially a plan to ensure the survival of the weakest, and probably to ensure their continuance in business in much the same relative size. There is no evidence in these records of any plan amongst the directing minds or of a plan held by a single directing mind which involved the destruction of the undertaking of the appellants, or indeed which involves the undermining of the fiscal health of the appellants. That is not to say that the record does not reveal any plan amongst the conspiring directing minds to enhance their own financial and economic positions. The facts are quite to the contrary. However, the twin goals were accommodated in the plan because the bid-riggers rewarded both the appellant corporations and themselves at the expense of the contracting public agencies.

72 I therefore would answer both questions as they relate to the defences of "acting wholly or partly in [page718] fraud of the corporation", and "in whole or in part for the benefit of the directing mind", as follows:

1. On the evidence in these records, the respective directing minds of the appellants did not act wholly in fraud of their respective corporate employers;
2. Neither did the four directing minds act wholly for their own benefit in the sense that no benefit from their actions would accrue to the appellants; and in any event the record clearly reveals an intention on their part to benefit their respective corporations;
3. Express or implied instructions prohibiting the unlawful acts specifically, or unlawful conduct generally, is not a defence whether the corporate liability springs from authorization of the acts of an agent or the unlawful acts of a directing mind. In any case, only in the record relating to CD is there any evidence of any such prohibition.

73 There can be no complete rationalization of corporate criminal liability in the criminal law whether the attempt be made under the banner of vicarious liability or the identification theory or otherwise. The corporation does not have, in the human sense of the term, a mind capable of reaching the state identified in criminal law as mens rea. The criminal law does not recognize in mens rea offences criminal liability in the proprietor employer for the unlawful actions of the proprietor's employees save in the case of authorization, express or implied. A corporation, however, is found liable in some countries, as we have seen, on vicarious liability, and in other jurisdictions on the basis of the identification theory. Both doctrines are the product of judicial necessity brought on by the realities of the modern community. Our law, which in this field commenced, as we have seen, in Fane Robinson, Ltd., supra, and evolved through [page719] St. Lawrence, supra, has not yet been required to settle the outer limit of the identification theory. The identification theory, however, loses its basis in rationality when it is applied to condemn a corporation under the criminal law for the conduct of its manager when that manager is acting not in any real sense as its directing mind but rather as its arch enemy. On the facts before the jury in this case in these proceedings, as the Court of Appeal has pointed out, the directing minds were acting partly for their own benefit and partly for the benefit of the corporation, and not wholly in fraud of the employer corporation. Consequently, it is unnecessary, technically, for this Court to define the limits in our law of the so-called Moore v. Bresler rule. The case was, however, argued extensively at all levels on the basis that this rule either did not apply, or if it did it had no application where the employee in question was acting wholly in fraud of the company and wholly for his own benefit. This problem, as we have seen, has of course reared its head in the United States where the vicarious liability doctrine has been limited on occasion when the employee has acted in this extreme way. That is but another illustration of the courts adapting the common law rules of law to the changing realities of the community. In my view, the very pragmatic origins of the identification rule militate against its extension to the situation which would have existed here had one or more of the directing minds acted entirely for his own benefit and directed his principal efforts to defrauding the company. Where the corporation benefited or was intended to be benefited from the fraudulent and criminal activities of the directing mind, the rationale of the identification rule holds. Where the delegate of the corporation has turned against his principal, the rationale fades away.

74 I would therefore dismiss all four appeals.

1 Quinlan played the same role with reference to the accused, McNamara Corporation Limited, as Messrs. Rindress and Schneider did with reference to the other corporate accused. Quinlan was the General Manager and Vice President of the Marine Division of McNamara Corporation Limited.

DBDC SPADINA LTD. et al.
Applicants

-and-

NORMA WALTON et al.
Respondents

Court File No. CV13-10280-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT TORONTO

BRIEF OF AUTHORITIES
RE: SUPPLEMENTARY SUBMISSIONS OF THE APPLICANT (MOTION HEARD ON JUNE 3, 2016)

LENCZNER SLAGHT ROYCE
SMITH GRIFFIN LLP
Barristers
Suite 2600
130 Adelaide Street West
Toronto ON M5H 3P5

Peter H. Griffin (19527Q)
Tel: (416) 865-2921
Fax: (416) 865-3558
Email: pgriffin@litigate.com
Shara N. Roy (49950H)
Tel: (416) 865-2942
Fax (416) 865-3973
Email: sroy@litigate.com
Danielle Glatt (65517N)
Tel: (416) 865-2887
Fax (416) 865-2878
Email: dglatt@litigate.com

Lawyers for the Applicants