S.C.C. Nos. 02628 & 02633

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION
Cite as: R. v. Gaetz, 1992 NSCA 11

Jones, Chipman and Freeman, J.A.

BETWEEN:	)	
	)	
GRAHAM GAETZ	)	Douglas A. Caldwell, Q.C.
	)	for the Appellant
Appellant	)	
	)	
- and -	)	
	)	
HER MAJESTY THE QUEEN	)	John C. Pearson
	)	for the Respondent
Respondent	)	
	)	
	)	
	)	
	)	Appeal Heard:
	)	September 25, 1992
	)	
	)	
	)	Judgment Delivered:
	)	November 9, 1992

THE COURT: The appeals from both conviction and sentence are dismissed as per reasons for judgment of Chipman, J.A.; Freeman, J.A., concurring by separate reasons and Jones, J.A., dissenting by separate reasons.

CHIPMAN, J.A.:

This is an appeal by an accused from his conviction following a trial by jury on a charge of defrauding the Bank of Nova Scotia of a sum of money exceeding $1,000.00 contrary to s. 380(1)(a) of the **Criminal Code**. Both the appellant and the Crown seek leave and if granted, appeal from the sentence imposed by Mr. Justice Davison following conviction.

The appellant was the sole shareholder and President of Concept Ford Ltd. Concept was a Ford dealer in Truro in the business of sales and leasing of cars and trucks. The appellant's brother, Floyd Gaetz, was the General Manager of the dealership and Eric MacKeen was its Controller.

The operations of Concept were financed through the Bank of Nova Scotia pursuant to a credit agreement with the bank. Under that agreement the financing of the wholesale lease fleet was through a line of credit. Loan terms were for one month longer than the term of the lease between Concept and the customer, and monthly payments on the loan were geared to the length of the lease. Loans against units which had been returned from lease prior to maturity thereof were to be paid out within thirty days of the date the unit was returned from the lease or on the date sold, if earlier. The agreement further provided that all banking of Concept was to be conducted with the Bank of Nova Scotia while any of the credits authorized therein remained outstanding, and that Concept would make available to the bank all necessary information and would permit the bank to make leasing audits at any time. If an Event of Default occurred the bank, at its option, could declare all unpaid advances outstanding with accrued interest thereon to be immediately due and payable. Among the Events of Default were failure of the borrower to make any payment of interest or principal within thirty days of the due date, a breach by the borrower of any other term or condition of the agreement or any default under any security specified in the agreement or under any other

credit or loan agreement to which Concept was a party.

The credit agreement was entered into on April 30, 1986. The appellant executed it on behalf of Concept in his capacity as President. He was very experienced and knowledgeable with respect to the automotive industry and, in particular, with respect to credit arrangements which were standard in the industry.

Pursuant to the credit agreement, funds were advanced to Concept to enable it to purchase vehicles to be leased. Concept leased these vehicles out. The procedure followed upon the disposal of a leased vehicle was that funds received were deposited into Concept's current account at the bank. A cheque was then issued to the bank to repay the loan against the leased vehicle. The cheque stated the lease number and serial number of the vehicle. In this way, the bank received notice of the termination of the lease and the triggering of the obligation to pay out the loan.

Between November, 1989, and January, 1990, Concept received cheques representing the proceeds of sales of six leased vehicles, totalling approximately $246,251.00. None of these monies was repaid to the bank, but with respect to the six leases involved, Concept continued to make monthly loan payments to the bank as if the vehicles were still being leased.

While Floyd Gaetz ran the day-to-day operations of Concept, he was in constant touch by telephone with the appellant who was in Sydney managing two other car dealerships. He advised the appellant when funds were received on previously leased vehicles and of the fact that the company did not have sufficient funds in its account to pay out the obligation to the bank. The final decision not to make the payment or to advise the bank of the circumstances was made or ratified by the appellant. There was evidence that the appellant had every intention of ultimately paying out these unpaid lease loans. The appellant had told MacKeen that the decision not to use the funds received on the disposal of the vehicles to pay out unpaid lease loans was a "short term fix" or a "deferral of payment" until sufficient funds could be obtained. It was clear that the appellant's business was in great difficulty and the appellant was desperately trying to keep it afloat. At a

meeting with representatives of the bank in April, 1990, he admitted that he did not advise the bank that payment on the loans was withheld because he knew that the bank would have moved more quickly than it ultimately did to have a receiver appointed to seize the assets of Concept and put it out of business. It is to be noted that of the total amounts received for vehicles and not paid to the bank, the sum of $93,500.00 respecting one lease was paid, not into Concept's account with the bank but an account Concept maintained at Central Guaranty Trust Company. The bank was aware of the existence of this account.

In April of 1990 the bank declared Concept in default and appointed a receiver to realize on the indebtedness of the dealership.

On August 1, 1990, the appellant was charged:

> "That at or near Truro, in the County of Colchester, Nova Scotia, between the 4th day of October, 1989 and the 17th day of March, 1990, did by deceit, falsehood, or other fraudulent means defraud the Bank of Nova Scotia of a sum of money exceeding one thousand dollars ($1,000.00), and did thereby commit the offence of fraud, contrary to s. 380(1)(a) of the **Criminal Code**."

The appellant's trial took place before Mr. Justice Davison and a jury in Truro on September 4, 5, 6, 9, and 10, 1991 and following the charge to the jury, a verdict of guilty was rendered. On November 1, 1991, Mr. Justice Davison sentenced the appellant to pay a fine of $6,000.00 to be paid by December 31, 1991, with imprisonment in default of payment for a period of six months. As well, the appellant was sentenced to serve one day in prison, served by his appearance in court at the sentencing.

On the appeal from conviction, the appellant contends that Mr. Justice Davison erred in failing, at the request of counsel, to specifically instruct the jury as follows:

(a) that the jury could consider that Graham Gaetz was acting in the best interests of the company in the absence of any personal gain;

(b) that mere non-disclosure, even of a material fact, is not fraud;

(c) that fraud does not encompass depriving someone of his due, but rather, of his

property.

It is convenient to deal with these three points in reverse order.

(1) The submission that fraud does not encompass depriving one of his due, but rather of his property takes far too narrow a view of the offence of fraud. In **R.** v. **Olan, et al** (1978), 41 C.C.C. (2d) 145 (S.C.C.), Dickson, J. speaking for the court said at p. 150:

> "Courts, for good reason, have been loath to attempt anything in the nature of an exhaustive definition of "defraud" but one may safely say, upon the authorities, that two elements are essential, "dishonesty" and "deprivation". To succeed, the Crown must establish dishonest deprivation.
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> Using the assets of the corporation for personal purposes rather than **bona fide** for the benefit of the corporation can constitute dishonesty in a case of alleged fraud by directors of a corporation. This proposition finds full support in **Cox and Paton**.
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> The element of deprivation is satisfied on proof of detriment, prejudice, or risk of prejudice to the economic interests of the victim. It is not essential that there be actual economic loss as the outcome of the fraud. The following passages from the English Court of Appeal judgment in **R. v. Allsop** (1976), 64 Cr. App. R. 29, in my view correctly state the law on the role of economic loss in fraud, pp. 31-2:
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> > 'Generally the primary objective of fraudsmen is to advantage themselves. The detriment that results to their victims is secondary to that purpose and incidental. It is "intended" only in the sense that it is a contemplated outcome of the fraud that is perpetrated. If the deceit which is employed imperils the economic interest of the person deceived, this is sufficient to constitute fraud even though in the event no actual loss is suffered and notwithstanding that the deceiver did not desire to bring about an actual loss.
> >
> > We see nothing in Lord Diplock's speech [in **Scott**] to suggest a different view. "Economic loss" may be ephemeral and not lasting, or potential and not actual; <u>but even a threat of financial prejudice while it exists it may be measured in terms of money</u>.
> >
> > . . .
> >
> > Interests which are imperilled are <u>less valuable in terms of money</u> than those same interests when they are secure and protected. Where a person intends by deceit to induce a course of conduct in another which

> puts that other's economic interests in jeopardy he is guilty of fraud even though he does not intend or desire that actual loss should ultimately be suffered by that other in this context.'"
>
> (emphasis added)

It is not necessary for the Crown to show that the victim actually parted with money, property or security. It is enough if the victim is deprived, not only of that which is his but that to which he would or might, but for the fraud be entitled. Fraudulent withholding or diversion of that which is due the victim will satisfy the test. See R. v. Renard (1974), 17 C.C.C. (2d) 355 (Ont. C.A.); R. v. Kribbs, [1968] 1 C.C.C. 345 (Ont. C.A.). A dishonest diversion for purposes other than that for which money was obtained can constitute fraud. See R. v. Currie and Bruce (1984), 5 O.A.C. 280 (Ont. C.A.) and R. v. Geddes (1979), 52 C.C.C. (2d) 230 (Man. C.A.).

There was more than a mere failure on the appellant's part to pay a debt due to the bank. The appellant caused Concept to withhold payments and divert the money without disclosing to the bank that the money was due, while keeping up the pretence that the leases were still in existence by continuing to make monthly payments thereon to the bank. That he knew that by so doing the bank would suffer a detriment, prejudice or a risk thereof to its economic interests could be inferred from his admission in April, 1990, that he did not tell the bank the truth because he knew they would call the loans sooner. Ewart on Criminal Fraud (1986), says at p. 120 - 121:

> "However, it is clear that in ordinary commerce economic prejudice also exists where an opportunity to prevent a loss is taken away. The law of fraud has proven capable of dealing with this as well. This second branch of the loss of opportunity doctrine has its origins in two older cases involving railroad conductors. In these cases the conductors, who at that time collected fares on the trains, arranged to buy information about planned "surprise" inspections, and to advise the conductors on the trains in question. Charges of conspiracy to defraud the railways resulted.
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> On a motion for a reserved case following the accused's conviction in the first of these, the court in **R. v. Johnston** noted that the efficiency of the company's surprise audit system depended on an "absolute lack of notice". However, the accused argued that by providing

> information that a certain train would be audited, he in fact prevented the railway company from being defrauded at that time and on that train. Rejecting this argument as "more subtle than sound", the court held that:
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> > 'the adoption of [the inspection] system was to prevent irregularities, not on the train audited, but on the others, and its effectiveness depended entirely on the secrecy as to the time when it would take place. The information sought by the accused and communicated by him to the conductor whose train was to be audited, thwarted and destroyed the object the company had in view, and this corrupt interference on his part and betrayal of his employer's secrets constituted, in my opinion an attempt to cause them a financial injury, and thereby to defraud them . . .'
> >
> > . . .
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> As a group, all of the cases reviewed in this part demonstrate the current reach of the law of fraud. They show that the term "prejudice to economic interests", which became part of the law of fraud as a result of the **Olan** decision, is to be given a generous interpretation. If the victim of an alleged fraud is denied the opportunity to make a profit, or denied the opportunity to prevent a loss, deprivation exists. Neither the profit nor the loss need be certain nor quantifiable. Regardless of whether the case involves a breach of copyright, interference with a gaming event, use of an employer's facilities for personal gain, or the sabotage of a loss-prevention system, the law of fraud provides a response."
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> (emphasis added)

A direction that fraud does not encompass depriving someone of his due but rather of his property would have been misleading, and not consistent with the principles established in the authorities I have reviewed above.

(2) With respect to the submission that mere non-disclosure is not fraud, the evidence reveals much more than mere non-disclosure. As well, there was a withholding and diversion for Concept's benefit of the money due the bank, coupled with the continuance of monthly payments on loans no longer existing - a course of action the jury could find was calculated with an intent to mislead.

The word "defraud" is not defined in the Code. The use of the words "other fraudulent means" in s. 380(1) of the Code indicates means which are not just in the nature of

falsehood or deceit, but include all other means which can properly be stigmatized as dishonest. See Olan, supra, at p. 149. These words import a wider concept than "deceit" and "falsehood". See R. v. Bank of Nova Scotia (1985), 66 N.S.R. (2d) 222 at 230. The extent to which the courts in Canada have breathed life into s. 380 and its predecessor sections can be appreciated from a review of Ewart on Criminal Fraud, supra. Broadly put, the Criminal Code prohibits dishonest dealings. Thus, to paraphrase a classic statement, the categories of fraud are never closed and it is going much too far to say that mere non-disclosure, even of a material fact, can never be fraud. It may or it may not be, depending on all the surrounding circumstances. See for example Mackrow v. R., [1967] 1 C.C.C. 289 at p. 300 (S.C.C.); R. v. Wagman (1981), 60 C.C.C. (2d) 23 (Ont. C.A.) and R. v. Rosen (1979), 55 C.C.C. (2d) 342 (Ont. Co. Ct.). It is the element of dishonesty which is key. Non disclosure, silence or concealment may amount to dishonesty. Mens rea, the intentional or reckless state of mind is, of course, an essential ingredient. Here, it was open to the jury to conclude on all of the evidence that the means adopted by the appellant to divert from the bank its due in order to keep Concept going and avoid the bank calling the loan, coupled with his silence, constituted fraudulent means.

(3) Nor was it necessary that Justice Davison instruct the jury that it could consider the appellant's belief that he was acting in the best interests of his company in the absence of any personal gain as relevant to whether or not the appellant acted dishonestly. Indeed, Mr. Justice Davison charged the jury very favourably to the appellant when he said during his review of the defence position:

> "His express intention was to find the funds to pay out the Bank. The evidence was of diligent energetic conduct in attempting to find other sources of funds including investors and purchasers which efforts came to halt when bankruptcy ensued. The fact that the accused took no personal benefit from the proceeds of disposition must weigh heavily with respect to the lack of intent to defraud."

With respect to evidence of the appellant's good character, Mr. Justice Davison said:

> ". . . If that type of evidence raises a reasonable doubt in your minds, that which was said by Mr. Gorber with respect to Mr. Gaetz as to his reputation in the community, and if it raises that reasonable doubt in

> your minds that Mr. Gaetz committed fraud then you must find him not guilty."

Indirect personal gain or absence of loss to the appellant was clearly at the heart of his efforts to keep Concept afloat. Other motives, such as the welfare of his employees and perhaps in the long run even that of the bank, undoubtedly played their part, but these generally good intentions of the appellant are of no help in determining whether he intended in fact to deprive the bank by fraudulent means. It is the deception and deprivation that is the evil aimed at by the legislation, any benefit or lack of it to the accused being of no consequence. It is clear too that fraud is not negated merely because the accused does not intend or desire that actual loss be suffered by the victim.

Mr. Justice Davison very carefully instructed the jury that the Crown had the burden of establishing beyond a reasonable doubt that there was on the part of the appellant an intent to defraud the bank.

Overall, Mr. Justice Davison fully summed up the position when he said to the jury:

> "Deprivation" means to place the economic interests of another person at risk. This means that the victim does not actually have to lose any money as long as there was a risk to his or her economic interests. Deprivation in this case would be found to exist if you find that the bank's economic interest was at risk when it was not advised of the payment proceeds from the disposal of the leased units. Then if you find that the Crown has proved beyond a reasonable doubt that the failure to advise was dishonest and caused the deprivation then the fourth ingredient would be proved."

The jury, properly instructed, concluded that the appellant's dishonesty deprived the bank of money by imperiling its economic interest. This was a conclusion that it could on all of the evidence have reasonably reached. I would dismiss the appeal from conviction.

With respect to the sentence, Mr. Justice Davison heard viva voce evidence from the accused and character evidence on his behalf, as well as lengthy and helpful submissions from both counsel covering all of the relevant considerations. Mr. Justice Davison reviewed the circumstances and such recent cases as R. v. Tucker (1988), 83 N.S.R. (2d) 6 (C.A.); R. v. Chisholm (1985), 67

N.S.R. (2d) 66 (C.A.); R. v. Murdock (1980), 42 N.S.R. (2d) 90 (C.A.) and R. v. Yablon (unreported - October 17, 1991).

In his remarks on sentencing, Mr. Justice Davison said:

> "In my view there is merit to the argument advanced by Mr. Caldwell, on behalf of Mr. Gaetz, which distinguishes the circumstances of this crime from other convictions of fraud which involved intentions to permanently deprive the victim of funds often in circumstances involving trust relationships. It should not be inferred that in any way the findings of the Jury should be minimized. The Jury found that the acts of Mr. Gaetz were dishonest and fraudulent but on the issue of sentencing I can consider many facts which were not available to the Jury. I can consider evidence to the effect that Mr. Gaetz became involved in rather acute financial difficulties at the time and elected, albeit quite improperly, to withhold payments to the Bank of Nova Scotia in order to generate cash for the survival of the company. The amounts due to the Bank of Nova Scotia continue to be due and owing and even during the period when Mr. Gaetz failed in his duty to disclose the receipt of funds the company continued to make monthly payments on the vehicles all of which served to decrease the indebtedness to a certain extent. I would advise that I have also considered motive and in this respect I was referred to the decision of the British Columbia Court of Appeal in R. v. Schell and Moran (1981), 32 B.C.L.R. 334 at 342 wherein it stated,
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> > '... there is a vast difference between a case where the accused intends to steal from his victim and cause him immediate loss with no real intention of repayment and a case such as the present, where the object of the accused was to obtain a loan by deceit but not to cause any loss to his victim.'
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> Before imposing a custodial term upon a first offender the court should explore other dispositions that are available. Incarceration should only be imposed if the circumstances or the gravity of the offence requires it. There is support for this principle in R. v. Stein (1974), 15 C.C.C. (2d) 376."

Mr. Justice Davison went on to observe that the court had sympathy for the plight in which the appellant found himself. He recognized that the appellant was paying heavily for this, the only criminal offence of which he had ever been convicted. He recognized too that the court cannot treat persons convicted of so-called "white collar crime" with different standards than others who may come in contact with the law who do not have the same advantages of the appellant. Moreover, he considered that, having regard to the principles of deterrence, he could not grant a discharge or

suspended sentence as requested. He thereupon imposed a sentence of a fine of $6,000.00, with six months imprisonment in lieu of payment and one day in jail.

The diversions in question were not planned, but rather came about on the opportune occasions when leases unexpectedly terminated. This is not the case of a carefully orchestrated fraud designed by the perpetrator to enrich himself with complete indifference to the welfare of the victim. Although he acted dishonestly, the appellant appears to have felt, in his own mind at least, that what he was doing was best for all concerned, and did not involve any immediate and direct personal gain to himself. He was 45 years of age and of good previous character.

I recognize as did Mr. Justice Davison that so-called "white collar crime" is not to be treated lightly. However, I am not satisfied that Mr. Justice Davison failed to apply the proper principles of sentencing or that the sentence was, in the circumstances, so manifestly inadequate that we must interfere, even though we might have decided differently were we in the trial judge's position.

I would dismiss the appeal from conviction. I would grant leave to appeal sentence to both the appellant and the Crown, and dismiss the appeals.

J.A.

FREEMAN, J.A.:

(GAETZ v. R.) S.C.C. No. 02628 and S.C.C. No. 02633

I concur with Mr. Justice Chipman's statement of the law and his conclusions, but I wish to address the important issue raised by Mr. Justice Jones that the indictment did not identify the offence of which the appellant was convicted.

Mr. Gaetz was charged:

> That he at or near Truro, in the County of Colchester, Nova Scotia, between the 4th day of October, 1989 and the 17th day of March, 1990, did by deceit, falsehood, or other fraudulent means defraud the Bank of Nova Scotia of *a sum of money exceeding one thousand dollars ($1,000),* and did thereby commit the offence of fraud, contrary to Section 380(1)(a) of the **Criminal Code.** (Italics added)

The arguments of counsel and the trial judge's charge to the jury focused on the deprivation of an economic interest rather than a sum of money. As Mr. Justice Davision expressed it: "Deprivation in this case would be found to exist if you find that the bank's economic interest was at risk when it was not advised of the payment proceeds from the disposal of the leased units."

The appellant acknowledged that if the bank had been advised of the true state of affairs it could have protected its interests by placing the company in receivership at an earlier date.

If deprivation of the bank's right to protect itself was the main element of the fraud with which Mr. Gaetz was charged, that should have been clearly stated in the indictment to identify the subject matter of the offence. It is one thing to make full answer and defence to an indictment charging fraud of a sum of money. It is another to meet an indictment charging fraud resulting from the deprivation of an economic interest. An indictment which describes an offence involving the one does not fairly identify an offence involving the other.

It is trite to say that the evidence must prove the indictment beyond a reasonable doubt. If the evidence against Mr. Gaetz related only to a deprivation of economic interest rather than deprivation of a sum of money I would incline to Mr. Justice Jones' conclusion following the reasoning in **Regina v. Rooke and DeVries (R. v. Saunders)** (1990), 56 C.C.C. (3d) 220 (S.C.C.).

However, I cannot agree that the duty to pay the bank the money received by the appellant and his company from the payout of the vehicle leases was simply a debt, the failure to do so merely a breach of a civil contract. The dealership of which Mr. Gaetz was principal had placed itself under a duty to pay over the money representing the value of leased vehicles as soon as it was received. It did not do so. The bank was deprived of funds clearly identifiable as due to it on the day they came into the hands of Concept Ford Sales. There was evidence upon which a properly instructed jury, acting judicially, could have concluded that the bank was deprived of a sum of money exceeding $1,000.

Under the appellant's company's credit agreement with the bank "loans against units which have been returned from lease prior to maturity of the lease are to be paid out within 30 days of the date the unit was returned from lease *or on the date sold--if earlier.*" (Italics added.) That is, the dealer was given a 30-day period in which to sell vehicles returned at the expiration of their leases before becoming liable to pay out the bank loan. That period of grace ended on the day the company came into possession of the money that represented their sale value. There was no period of grace for dealing with the money, only for dealing with the vehicle, a tangible asset.

The leased vehicles themselves were security for the loans related to them. Under the credit agreement, security documents which Concept Ford Sales agreed to provide to the bank for the loans included an assignment of leased vehicles under s. 178 of the **Bank Act**, rental agreement and assignment of rentals, and prepayment premium agreement. The agreed practice was that upon disposal of a leased vehicle funds were paid into the company's current account and a cheque was issued to pay the bank. The cheque stated the lease number and the serial number, which served as notification to the bank of the termination of the lease. The payment and the notice of termination were one and the same.

The actual documents of assignment do not appear to be in evidence. However, in the documents executed by Concept Ford Sales requesting funds upon the leasing of the various units the company states:

> The Lessor acknowledges that the Lessor's obligation described in the next paragraph is secured by all security granted by the Lessor to the Bank (the "Security"), and that the Motor Vehicle(s) and any rents payable under any leases of the Motor Vehicle(s) are secured by the Security.

Once a leased vehicle was sold, the loan secured by that vehicle ceased to be secured. Therefore payment on the date of sale was an important protection to the bank. This was not a general obligation to pay money on or before a due date. It was a specific duty to pay a clearly identified sum upon the occurrence of agreed events.

By its agreement with the bank the company not only bound itself to make the payments, but by implication renounced the right to use the money for any other purpose. If it was not a trustee for the monies, it was under a very heavy duty to account for them at once and in good faith.

The required payment was not merely a sum of money; it was also the form of notice terminating the lease and the security arrangements made with respect to it which had been agreed upon by the bank and the company. Concept Ford Sales assumed a burden to disclose termination of the lease by accounting immediately to the bank. The appellant cannot assert that by its failure to pay over the money due to the bank Concept Ford Sales thereby relieved itself of the duty to disclose. Payment and disclosure were to be one and the same act.

In my opinion the bank was dishonestly deprived of the sums of money for the leased vehicles, exceeding in value $1,000. Thus, there was evidence relating to the fraud described in the indictment upon which a jury could reasonably have found the appellant guilty.

I concur in the result with Mr. Justice Chipman and would dismiss the appeal.

Freeman, J.A.

JONES, J.A. (Dissenting) (S.C.C. Nos. 02628 & 02633)

I have read the reasons for judgment of Mr. Justice Chipman. Since the decision of the Supreme Court of Canada in **Olan, Hudson and Hartnett**, 41 C.C.C. (2d) 145 it has been assumed that failure to disclose may constitute evidence of fraud. The difficulty is that it leaves open the argument that any failure to disclose can be fraudulent. This is apparent from the following passage from **Olan** at p. 150:

> "Courts for good reason, have been loath to attempt anything in the nature of an exhaustive definition of 'defraud' but one may safely say, upon the authorities, that two elements are essential, 'dishonesty' and 'deprivation'. To succeed, the Crown must establish dishonest deprivation.
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> Using the assets of the corporation for personal purposes rather than **bona fide** for the benefit of the corporation can constitute dishonesty in a case of alleged fraud by directors of a corporation. This proposition finds full support in **Cox and Paton**.
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> The element of deprivation is satisfied on proof of detriment, prejudice, or risk of prejudice to the economic interests of the victim. It is not essential that there be actual economic loss as the outcome of the fraud. The following passages from the English Court of Appeal judgment in **R.** v. **Allsop** (1976), 64 Cr. App. R.29, in my view correctly state the law on the role of economic loss in fraud, pp. 31-2:
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> > 'Generally the primary objective of fraudsmen is to advantage themselves. The detriment that results to their victims is secondary to that purpose and incidental. It is "intended" only in the sense that it is a contemplated outcome of the fraud that is perpetrated. If the deceit which is employed imperils the economic

> interest of the person deceived, this is sufficient to constitute fraud even though in the event no actual loss is suffered and notwithstanding that the deceiver did not desire to bring about an actual loss.
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> We see nothing in Lord Diplock's speech [in **Scott]** to suggest a different view. "Economic loss" may be ephemeral and not lasting, or potential and not actual; but even a threat of financial prejudice while it exists it may be measured in terms of money.
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> Interests which are imperiled are less valuable in terms of money than those same interests when they are secure and protected. Where a person intends by deceit to induce a course of conduct in another which puts that other's economic interests in jeopardy he is guilty of fraud even though he does not intend or desire that actual loss should ultimately be suffered by that other in this context.'"

Olan was not a case of non-disclosure. The argument that non-disclosure is included stems from the broad language used in **Olan**. That conflicts with the general rule that unless there is a duty to act imposed by the criminal law, then failure to act cannot be a criminal offence. See Mewitt and Manning, **Criminal Law**, 2nd ed. p. 78. No such duty is imposed by the **Criminal Code** in the case of fraud. In this regard it is important to note s. 9 of the **Code**. As noted by the majority of the Manitoba Court of Appeal in **R.** v. **Thornson** (1977), 39 C.R. N.S. 7 at p. 19 every act of dishonest non-disclosure cannot be criminal. I agree with Chipman, J.A. that there were positive acts in this case which the jury could have regarded as deceitful.

In his first ground of appeal the appellant contends that the learned trial judge erred in instructing the jury with reference to the meaning of fraud. The following is from the appellant's factum:

> "Section 380(1)(a) requires that the accused defraud someone of his 'property, money or valuable security'. While the courts have considered that proof of deprivation requires proof of detriment, prejudice or risk of prejudice to the economic interest of the victim (**R.** v. **Olan** (1978), 2 S.C.R. 1175), there clearly was not a deprivation of any of those three things, - property, money or valuable security. The Bank's entitlement and interest was solely to be paid on the disposal of the used vehicles."

In view of the broad language in **Olan** it is imperative that an accused be informed of the specific acts of "dishonesty" or "deprivation" on which the Crown relies, in order to make full answer and defence. This is provided for in s. 587(1)(b) of the **Code** which states that a Court may order the prosecutor to furnish particulars of any false pretense or fraud that is alleged. The Indictment in this case was specific, it alleged that the appellant "did by deceit, falsehood or other fraudulent means defraud the Bank of Nova Scotia of a sum of money exceeding $1,000.00". The theory of the Crown on the trial was not clear. Counsel for the Crown stated:

> "Graham Gaetz was aware and indeed directed as president and sole shareholder of this company to deprive the Bank of Nova Scotia of funds that were required to be paid to them. It was a conscious decision made on his part and the cheques were not issued to the Bank. He decided that those monies from those various leases were to go into daily operating expenses and, as you can see from the bank account, as soon as the monies came in they went out just as fast. This is money in excess of $450,000.00."

The trial judge stated the Crown's theory as follows:

> "Graham Gaetz directed that the above payments not be made so as to provide his company with the cash flow to satisfy the everyday operating debts of Concept Ford."

The trial judge directed the jury as follows:

> "However, the dishonest conduct must be a cause of the resulting deprivation; therefore, you must go on to decide whether or not the dishonest conduct deprived the bank before you can decide whether or not the fourth ingredient has been proved. The word 'deprivation' also has a special meaning in criminal law. 'Deprivation' means to place the economic interests of another person at risk. This means that the victim does not actually have to lose any money

> as long as there was a risk to his or her economic interests. Deprivation in this case would be found to exist if you find that the bank's economic interest was at risk when it was not advised of the payment proceeds from the disposal of the leased units. Then if you find that the Crown has proved beyond a reasonable doubt that the failure to advise was dishonest and caused the deprivation then the fourth ingredient would be proved."

There were suggestions during the trial that the deprivation was the failure of the Bank to proceed against Concept because it did not know the true state of affairs. No reference was made to the wording in the Indictment when the trial judge instructed on this issue. There was absolutely no evidence that the Bank paid any money to Concept as a result of the fraud. The obligation of Concept to pay the funds to the Bank was merely contractual. The money received by Concept for insurance or sales did not belong to the Bank. The obligation was simply a debt. Concept did not deprive the Bank by fraud in simply refusing to pay the debt. With respect the evidence of William Assini that there was a "conversion" of these funds was inadmissible and highly prejudicial. In my view he was not qualified to express such an opinion. I do not think that the charge of the trial judge adequately purged the record of Assini's statements in view of the complicated nature of the evidence adduced. Whether the Bank suffered any prejudice is doubtful as the Bank was fully aware of the financial problems of the Company during the period that these payments were made to Concept. The defence was based on the Indictment as framed. The Indictment was not amended.

In **Regina** v. **Rooke and DeVries** (1990), 56 C.C.C. (3d) 220 (S.C.C.) the accused were charged with conspiracy to import heroin. In the course of the trial evidence was adduced of a conspiracy to import cocaine. A conviction was entered. The British Columbia Court of Appeal set aside the conviction. An appeal from that decision was dismissed by the Supreme Court of Canada. McLachlin, J. in delivering the judgment of the Court stated at p. 223:

> "I am of the view that the appeal must be dismissed. It is a fundamental principle of criminal law that the offence, as particularized in the charge, must be proved. In **R.** v. **Morozuk** (1986), 24 C.C.C. (3d) 257 at p. 262, 25 D.L.R. (4th) 560, [1986] 1 S.C.R. 31, this court decided that once the Crown has particularized the narcotic in a charge, the

accused cannot be convicted if a narcotic other than the one specified is proved. The Crown chose to particularize the offence in this case as a conspiracy to import heroin. Having done so, it was obliged to prove the offence thus particularized. To permit the Crown to prove some other offence characterized by different particulars would be to undermine the purpose of providing particulars, which is to permit 'the accused to be reasonably informed of the transaction alleged against him, thus giving him the possibility of a full defence and a fair trial': **R.** v. **Côté** (1977), 33 C.C.C. (2d) 353 at p. 357, 73 D.L.R. (3d) 752, [1978] 1 S.C.R. 8.

Crown counsel suggests that the import of the decision of the Court of Appeal is that the Crown will necessarily fail in every case if it cannot prove that the conspiracy related to a particular narcotic, as opposed to any prohibited narcotic. I cannot accept that suggestion. I agree with Crown counsel that the gravamen of the offence is conspiracy to import a narcotic, rather than a particular kind of narcotic. The purpose of specifying the narcotic in a case such as this is to identify the transaction which is the basis of the alleged conspiracy. The fundamental requirement that the charge must provide sufficient particulars to reasonably permit the accused to identify the specific transaction may be met in a variety of ways. Where the Crown has evidence of the particular drug involved, this may properly be required to be provided as a particular identifying the transaction. But where the Crown is uncertain as to the particular drug which was the subject of the conspiracy, it may properly decline to give particulars of the drug. The charge may nevertheless stand, provided that it sufficiently clearly identifies the alleged conspiracy in some other way. There must be a new trial in this case, not because a conviction for conspiracy to import a narcotic cannot be supported without proof of the type of narcotic involved, but rather because the Crown chose in this case to particularize the drug involved and failed to prove the conspiracy thus particularized."

With deference that principle applies in this case. For the reasons given in **Saunders** it would not be appropriate to amend the Indictment at this stage of the proceedings. The appellant having been put to the expense and inconvenience of a lengthy trial I would not order a new trial in this case. I would allow the appeal and set aside the conviction and sentence.

J.A.