3.1 Reasons

3.1.1 Warren Lawrence Wall, Shirley Joan Wall & Dual Capital Management Ltd.

ONTARIO COURT OF JUSTICE

HER MAJESTY THE QUEEN

and

WARREN LAWRENCE WALL, SHIRLEY JOAN WALL
and DUAL CAPITAL MANAGEMENT LIMITED

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REASONS FOR SENTENCE

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BEFORE THE HONOURABLE
MR. JUSTICE JON-JO A. DOUGLAS
ON OCTOBER 30TH, 2000 at Barrie, Ontario

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APPEARANCES:

J. Superina, Ms. **Prosecutor for the Ontario Securities Commission**

S. Shivarattan, Esq. **Counsel for the Accused**

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Court Room #7
114 Worsley Street
Barrie, Ontario

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REASONS FOR SENTENCE

Douglas, Jon-Jo A. (O.C.J.) Orally:

The circumstances of this sentencing are unusual in a number of respects.

First, because the sentencing involves a sentencing of accused persons who have plead guilty very near the conclusion of a trial, that trial had taken, to the point of plea, about twelve days, and was scheduled to take a further five days. A number of witness had, of course, testified.

The pleas were entered after the Crown had closed its case, meaning that the complainants that the Crown chose to call had already testified, after the defence had called four witnesses and during the re-examination of the accused Mr. Wall.

As well, the offences charged are not per se criminal offences under the Criminal Code, but quasi-criminal offences under the Securities Act of Ontario. The offences were recognized, however,

by the legislature as being very serious offences, for the penalty for each infraction can be a fine of not more than a million dollars and/or a sentence of imprisonment of not more than two years.

Also, the direct loss to the 56 members or so of the public who relied upon the accused persons can be considered, which (ignoring, for the moment, so-called repayments of interest and principal) is something in the range of 1.5 million dollars U.S., or, at a generous current exchange rate of 66 cents Canadian to the U.S. dollar, approximately $2,265,000.00 Canadian [as seen in Exhibit 17.1, Exhibit 1.1 1(d), 2(d) and (e)]. It appeared to be the position of the accused that they did not particularly profit from this mis-adventure, but that other more culpable persons did.

Finally, there is no significant appellate court guidance with respect to the appropriate disposition in these circumstances. For all these reasons, it is imperative to consider, in some detail, not only the appropriate sentencing principles, but the particular conduct of the accused in respect of this matter; over the time period of 1994 through 1996 and after.

Dealing with the conduct of the accused until January 26th, 1995, during this period of time, the accused, with others, conceived and formulated this investment scheme. They in part documented it, and, importantly, sold it to their clients. In this period of time they raised $860,000.00 U.S. or 1.3 million dollars Canadian.

Respecting the conceptualization, formulation and documentation of the investment scheme, Mr. Wall testified that the idea of the investment scheme (referenced under various headings, including the "Roll Programme" and the "International Lending Programme") came to him by way of Dennis Little and D.J.L. Limited, Bob Adams, Mr. Altman of A.A.A. Financial Services, all of which led to Mr. Poirier and Mr. Adams of Dundas and, ultimately, Mr. Huppe of Oakville.

To varying degrees, Mr. Wall pointed to these gentlemen as being to blame for this fiasco, as through counsel, so did Mrs. Wall. I utterly reject the testimony of Mr. Wall in this regard. The evidence supports only the inference of guilty knowledge respecting these events on behalf of both Mr. Wall and Mrs. Wall.

I find that the Roll Programme as conceived, was and remains utter nonsense. The programme, considered in and of itself, is a fraudulent means within the meaning of R. v. Zlatic 1993 79 C.C.C. (3d) 466 in the Supreme of Canada and Theroux, 1993 79 C.C.C. (3d) 449 in the Supreme Court of Canada and Olan 1978 41 C.C.C. (2d) 145 in the Supreme Court of Canada.

Considered objectively, I have referenced what a reasonable person would consider to be dishonest. I find that the Roll Programme was per se dishonest. I further find that both accused persons, in selling the Roll Programme subjectively appreciated the dishonesty of the Roll Programme, in the sense that in undertaking to sell the Roll Programme, they subjectively appreciated that the consequences of their conduct would be actual deprivation or risk of deprivation.

At page 13 of the Supreme Court reports in Zlatic, the Supreme Court of Canada said this:

> "The fundamental question in determining the actus reas of fraud within the third head of the offence of fraud is whether the means to the alleged fraud can properly be stigmatized as dishonest. In determining this, one applies a standard of a reasonable person. Would a reasonable person stigmatize what was done as dishonest? Dishonesty is, of course, difficult to define with precision. It does however connote an underhanded design which has the effect or which engenders the risk of depriving others of what is theirs. J.D. Ewart in his Criminal Fraud (1986) defines dishonest conduct
> "as that which ordinary decent people would feel was discreditable as being clearly at variance with straightforward or honourable dealings." Negligence does not suffice nor does taking advantage of an opportunity to someone else's detriment where that taking has not been occasioned by unscrupulous conduct regardless of whether such conduct was wilful or reckless. The dishonesty of

> other fraudulent means has at its heart the wrongful use of something in which another person has an interest in such a manner that this other interest is extinguished or put at risk. A use is wrongful in this context of it constitutes conduct which reasonably decent persons would consider dishonest and unscrupulous'."

The conduct of Mr. and Mrs. Wall meets that test.

The Supreme Court of Canada also dealt with the mental element of fraud by other fraudulent means. They said, as is pointed out in Theroux, released concurrently:

> "Fraud by other fraudulent means does not require that the accused subjectively appreciated the dishonesty of his or her acts. The accused must knowingly, ie. subjectively undertake the conduct which constitutes the dishonest act and must subjectively appreciate that the consequences of such conduct could be depravation in the sense of causing another to lose his or her pecuniary interest in certain property on placing that interest at risk. This accused knew precisely what he was doing and knew that he would have the consequence of putting his creditors' pecuniary interests at risk."

In short, again, citing from the Supreme Court of Canada:

> "There is nothing in the evidence which negates the natural inference that when a person gambles with funds in which others have pecuniary interests, he knows that he puts that interest at risk."

I make these findings because the Securities Act, while regulatory (in the sense of allowing conduct to continue, provided it is done within certain fixed parameters) and hence creative of a regulatory regime, has, as the purpose of that regulatory regime (as stated in the legislation):

> "To provide protection to investors from unfair, improper or fraudulent practices", (section 1.1).

It does this by means of putting:

> "restrictions on fraudulent and unfair market practices and procedures."

Breaches of the Security Act that are not merely technical, but strike at the very heart of and the purposes of the Securities Act and the means chosen by the legislature to enforce those purposes, that is, means that are unfair, improper and fraudulent must be punished appropriately.

Regarding the Roll Programme this is described in a number of places. For example, one might have reference to Exhibit 11 tab three, what I call the "First Offering Memorandum", Exhibit 15 tab 2 the "Second Offering Memorandum", and Exhibit 6 tab 12, the "First International Lending Programme", Exhibit 8 tab 16 the "Second International Lending Programme", and Exhibit 15 tabs one and two certain "Summaries." In each of these, other than the First and Second Offering Memorandum, the Role Programme is described differently and without due regard for the enormous risks it entailed.

Any complete reading of the Investor Lending Programme One or Investor Lending Programme Two will show the nonsensical nature of the proposal.

Under cross-examination, Mr. Wall was forced to admit that many of the eight representations numbered and contained in each of these were essentially false throughout the time-frame of the Programme.

Referencing the investment concept provisions of the two Offering Memoranda leads one to a similar conclusion. I reject utterly that Mr. Wall, a seasoned business man, trained in the arcane of

insurance contracts and insured investments, and Mrs. Wall, similarly exposed and trained and also licensed, at least from June 1995 to sell mutual funds, did not recognize the significant risks associated with the concept, even as it was described in the Offering Memoranda.

For example, at page five of the First Offering Memorandum, under the heading Investment Concept, the following is stated:

> "The business of the limited partnership is to realize profits on trades of financial instruments such as bank debentures and thus provide income for the limited partners. To this end, the net proceeds of the offering will be placed through an intermediatory company on deposit with Canadian or international bank. The trading company; the trading partners will be selected by the general partner will arrange for the purchase and sale by an international bank financial institution or brokerage firm, the financial institution, a financial instrument such as bank debentures without placing the limited partners' funds at risk. The funds placed on deposit by the limited partnership together with funds from other sources will serve as a guarantee to the other contracting party that the transactions will be effected. The trading partner will seek to provide an annual rate of return to the limited partner and related parties equal to 30 percent of the amount of funds placed on deposit by the partnership. The annual rate of return to the limited partners is expected to be 14 percent. The rate of return ultimately realized will be based on the performance of the trading partner which will be on a best efforts basis. The limited partnership will not buy or sell financial instruments and it is not expected that the funds placed on deposit will be used directly in such transactions, rather the trading partner will seek a potential purchaser of the financial instrument, and at such time as the purchase is confirmed will then identify the seller. The limited partnership's funds on deposit will be combined with funds from other sources and serve as a guarantee to the seller that the financial institution will be able to effect the purchase. The trading party will not arrange for the purchase of a financial instrument unless the ultimate purchaser has been identified and payment effected by that party. The financial institution will realize a profit on the transaction based on the spread between the price at which the financial institution buys the financial instrument and the price at which it immediately thereafter sells the financial instrument. A similar process will be followed when the trading partner first identifies a potential seller of the financial instrument as opposed to a purchase."

Apart altogether from the nonsensical notion that international banks, financial institutions or brokerage firms would need the assistance of a yet to be created or found trading partner to effect trades in financial securities such as bank debentures, the Offering Memorandum, itself, contradicts itself. It first states: (1), the transaction will occur "without placing the limited partnership funds at risk": because (2), these funds will be placed, "On deposit with a Canadian Bank."; and (3), only "serve as a guarantee that the transactions will be effected." Funds on deposit are at risk to the viability of the institution to which they are deposited. More importantly, if on deposit, once they guaranteed transactions, to use the language of the offering memorandum, they, as collateral, are at further risk to those transactions, which, here, included, at a minimum, equity risk, interest rate risk and currency risk -- only the latter of which is mentioned in the Offering Memoranda, if at all.

I simply reject that Mr. and Mrs. Wall had any belief in the viability of this scheme based on this fundamental contradiction between the assertion of no risk and the assertion of placing these funds on guarantee.

I find that Mr. and Mrs. Wall made a series of misrepresentations designed to mislead investors with respect to this risk, and indeed to take the risk.

Turning to the sale of the investment scheme, to sell this scheme, the Investment Lending

Programme and Summaries were prepared either in the Wall's office or forwarded from there. They were forwarded to clients and various brokers. No effort was made to screen the investment so that only sophisticated investors were solicited. No effort was made to ensure that only those who could afford such significant losses were solicited.

Indeed, the evidence is conclusive and nearly complete that all of the investors were neither sophisticated (but naive), nor rich (but poor) or, at least, dependent upon the little money they had.

The Secretary at the time testified, for example, that some people were to be told the minimum was $10,000.00 while others were to be told the minimum was $40,000.00. No doubt the reason to tell these people different stories was based on the assessment by the Walls of what they thought they could talk these people into.

The Walls told some people that they were themselves investing in this. They were not. Others were told to borrow money to invest in this scheme.

As noted above, the Investment Lending Programme One and Two and Summaries were finally admitted, for the most part, to be misrepresentations.

By way of a limited example, I'm looking at the first International Lending Programme document in Exhibit 6 tab 12. I look to the third page of that document in its heading, "High Annual Returns With Absolutely <u>No</u>, underlined, Risk." These words are, of course, in bold black print.

It then begins, "if you qualify for this exclusive offering". By way of comment, they pick through their client lists and sent out potentially hundreds of pieces of paper to clients and agents to get people into this exclusive group.

Most importantly item one, "worry free. Your investment is on account with an assured major U.S. brokerage firm." This was false. From the beginning it was false and it never changed in its falsity, it was false.

Item two, "no market risk. Your investment will not fluctuate in value like the stock market, real estate or bond investments." This is a lie. Anyone with a modicum of interest in investments knows that all investments fluctuate in value. One can go on and on and again, note at item eight, the exclusivity, "This offering will be made only to certain qualified investors through selected dealers."

The short point, here, was that the documentation was prepared, either by the Walls or someone else, but it was accepted by the Walls, reviewed by the Walls and went out on their letterhead. It went to their clients. It was prepared, in my view, quite deliberately to highlight the selling points. Those selling points were false. The Walls knew they were false.

The Summaries, similarly, are similar. Exhibit 15 contains an example of that Summary at Tab One. Under the head, "Summary of Offering", it says "Your money is guaranteed by a major world bank." At no time was this ever true, it was false. The document was used to support the falsity.

The Programme was not only sold by written falsehoods, but also orally, and, here, the evidence dramatically points to the equal participation of both Warren and Joan Wall. Mrs. Wall, on that evidence, perhaps played somewhat of an unique role in convincing people, particularly women, to invest in this programme.

Given the pleas, I do not intend to refer to all the evidence, but some pointed references are noted.

Ethel White, now 79 invested nearly her full life savings of $10,000.00 U.S. based on an

introduction to the Walls by her daughter Linda White. Her source of funds for this particular investment was the sale of her highly secure segregated fund investments, which she had made with Empire Life.

Mrs. Wall told her this deal was so good the Walls were going to invest themselves. They, of course, did not. This was confirmed by Linda White. The dollars were invested because they trusted the Walls and this was an investment in government securities. Such trust was obviously ill placed and it was never an investment in government securities. She did not know it was long term or risky and said, "She didn't know a lot of things about a lot of things." The impact on Mrs. White was significant as the dollars were earmarked for her grandchildren and the monies are gone. Her health suffered from stress.

Francis Gibney came to court for Betty Ann. He was introduced to the deal by Ben Poirier. Mr. Gibney now a 70 year old retired labourer invested U.S. $25,000.00. These funds came from mutual funds. Interestingly enough, having been introduced by Mr. Poirier, they came to Barrie to meet the Walls.

> After Joan had coffee with them, Mr. Warren Wall came in and did much of the talking from that point on. They were told it was guaranteed. As a result of their loss, his wife was sick, they couldn't eat, sleep.

Laurie Neill and Paul Neill had a difficult experience. After losing her job, she moved to Barrie with her husband. Both are now self-employed, met Joan Wall at the Barrie Business Women's organization, moved her severance money to Dual, bought segregated funds from Empire Life, bought into and was sold on the Montabello deal. She was told "100 percent guaranteed, investment in U.S. dollars." It's the "sort of deal to move your segregated funds for." She says that they are hard working couple. Certainly they could have used the money to live on over the last few years, and now they cannot retire when they wanted to.

Ann O'Donnell was told by Joan that she could make her rich. She first sold her segregated funds in the amount of $25,000.00. Ms. O'Donnell worked part-time in a store, if I recollect. She was told "No risk, risk-free. It's an elite little group." Joan told her they were getting the people together so these "little people' in this group could act like the "big players." She says she's in no desperate need, but could certainly use the money.

Zelda Olsen $25,000.00 U.S. "100 percent guaranteed" said Joan, "100 percent secure, money back in 30 days, no risk." She "went by what I was told. I know it was stupid, but I was trusting."

And then there is Denis Leveille. He's a disabled heavy equipment operator. As a result of his settlement from a law suit, he received about $650,000.00 Canadian in order to live on for the rest of his life and support his family. He ended up putting $370,000.00 Canadian into this deal. Now, he was introduced by Ms. Gingas through Mr. Little. But who should come to his house in Northern Ontario but Warren Wall to get more money. He was told that it's a "safe 14 percent and the money is in the bank." To him, the impact was quite simply as he put `a nightmare.' He uses that word with respect, Mr. Wall's use of that word shows disrespect for the people he has victimized.

Hinirka Coort got a severance package, $50,000.00 "all we had", put it in segregated funds. The Walls advised them to mortgage their house. Warren arranged it, got $40,000.00 U.S. for their house. They were told it was a "real good real estate investment."

Interestingly enough, they had some doubts. On the way to carry the cheque to close the deal, they stopped the car, they were so worried about it. They sat in the car and said, "Should we do it" to one another. And when they got to the Walls, they said to Warren, "This is all we have, are you sure?" And he said, "Sure, it's going to the Bank of America."

This took a significant toll on their marriage. It made them sick, they had to sell their home. They will not be taking their boat to the Bahamas, thanks to the Walls.

My point, here, is, of course, that all of these people and, indeed, many more were lied to by Joan Wall and Warren Wall to get their money. They were lied to in writing, they were lied to in person.

Now, that is bad enough, but these were not any sophisticated people, these were the vulnerable people. These were unsophisticated people. They were people who relied on you, and what didn't you tell the people?

Well, let's take a look at some of the non-disclosures that came out in the course of this trial.

The Offering Memoranda, one and two, both describe Woodland as the Turks and Caicos company to whom the money would be remitted under the deposit agreement that would seek to safeguard the money. The ownership of Woodland is not described, but the implication is that it is either an agent of the partnership or an arms-length's entity.

Indeed, in evidence, Mr. Wall first said, attempting to lie yet again, that it was owned by the partners. That was ultimately retracted and he admitted that it was owned by he and Joan. Interestingly enough, under the Offering Memorandum, Woodland was entitled to four percent of the expected 30 percent return. Unbeknownst to the investors, this would have gone to Mr. and Mrs. Wall, not in Canada, however, but in their Turks and Caicos secret account.

Wall also testified, Mr. Wall, that is, that they were entitled to 50 percent of the 4.5 percent return due to the promoter D.J.L. who was mentioned in the prospectus, but that was not disclosed in the prospectus or the Offering Memorandum.

Of course, both these amounts are in addition to the 7.5 percent the deal describes them being entitled to.

Similarly, at page eight, under "Plan of Distribution", and it is in about as plain as English as you can get, the Offering Memorandum says, "The units will be sold directly to investors by the general partner on behalf of the limited partnership." This was false. From the beginning the Walls knew that various people would be involved in the sale of this. Indeed, they sent out all sorts of documents to all sorts of agents in order to bring in more and more participants.

It also says, "No commission will be paid in connection with the sale of the units." And, from the beginning, there was a plan to split commission payments amongst the various sellers of this transaction.

I reject the spurious reason and excuse offered to charge the commissions by Mr. Wall that is, that Mr. Little said it was okay. In testimony, Mr. Wall, in trying to deny commissions were paid, said they were calculated on their returns. This was, in part, false. They were not paid until funds were, I point out, notionally, received back as interest, but were calculated in portions as a percentage of the total investments the agents had brought to the deal. They included in that group, the Walls; more non-disclosure about who was getting what out of this deal.

One can also look at various other aspects of the Offering Memoranda. The section at page one on "Net Proceeds" and the sections on "Use" at page three and five make it quite clear that only $25,000.00 of the total was going to be used for any sort of payments, that is payment for legal and other incidental expenses. There were not to be any other expenses.

In short, in the events prior to the first investment, a fraudulent scheme was devised, false documents were prepared, false statements were made and vulnerable people were targeted. Now, why? One never knows, necessarily, the motive. In these circumstances, two present themselves: (1), that they would share in the ultimate proceeds with their criminal accomplices overseas; or (2), and, certainly one that the evidence supports completely, they were driven by greed to receive the fees.

Of course, for every `seg.' fund investment that had been made, the capacity to earn fees was steadily declining. This deal allowed them to capture something in the range of ten to 15 percent guaranteed, as a fee for the money going in.

I find that, in part, the motive here for the greed in their lives was the commissions they sought to earn.

What was the conduct of the accused on or about January the 26th and after that for a period of time? Well, they sent to the Nevis account in the name of the third party with no supporting documentation and in breach of their own business plan the $835,000.00 U.S.

Within days of that, while I find they knew in advance, within days of that, they knew the money was not coming back by way of interest payments. And what did they decide to do? Instead of saying 'Oh My God, this is a fraud, we're in the middle of this, we better call the police,' what did they do? They decided they would just simply use the capital that was left over and start making interest payments so that the con could continue.

They then, over a long period of time, started preparing false letters to consistently send to mollify the investors, and it is worthwhile looking at Exhibit Six of the nature of some of these letters. February 9th, tab one, letter to Mr. and Mrs. Neill, (this whole document deals with the Neills),

> "at this time, we are pleased to announce the U.S. investment you were involved in was successfully positioned January 20th, '95.@

This of course was a false statement because, even if the Offering Memorandum made a modicum of sense, they decided to do it completely differently than was described. Woodland Capital was not to get the money. Woodland Capital was not to put it in a Canadian account and get a guaranteed investment certificate. None of this was done. Instead, willy-nilly the money was shipped to Nevis in the name of some third party. They knew this was false and they wrote it on February 9th because they knew where they were sending it.

November 30th, 1996:

> "Dear Paul: We would like to take this opportunity to inform you there will be a hesitation in the Dual Capital Management programme."

A hesitation, at the best possible case, they knew in early 1995 that they had been conned, (that is what they would like me to believe) out of $835,000.00 U.S., but they are going to call it a hesitation.

They then continue the falsehoods. "This necessitated in the changing of our prime lending bank" -false- "and we expect to resume full distributions once the transactions have been investigated and approved." -false- "Ride out this temporary re-positioning as quickly as possible." -false.

February 4th, 1997, "We are pleased to inform you that we have successfully positioned ourself into a new trading programme." It is false unless you consider the continuing identical scam in Portugal as a new trading programme.

What is missing here? Not a reference to the fact that the Ontario Securities Commission is now investigating quite thoroughly.

On April 7th, 1997, "The hold up has been with banking and government procedures beyond our control. Mr. Huppe has been our coordinator. He is arranged interim financing to speed up the pay outs to redeem the remainder who are expecting."-false.

May 9th, 1997, "Interim financing money should be released next week." False. Good news letter here. "Constant contact with professional advisors." Well, they had not been contacting any significant counsel, and they had not been counselling with any significant accountants. They had been dealing with people who were introduced to them, by people who were introduced to them, by people who were making phone calls, and they were very close to ending the hesitation. More falsehoods.

"I just spent the last week with Allan Huppe in Los Angeles," June 23rd, 1997, "to ensure payouts of accumulated interest and principals." It must have been a nice trip, but he did not go to any meetings while in Los Angeles. Mr. Huppe went to all the meetings according to Mr. Wall, if you believe a word he says.

"We now have only one step left to take with the Bank of America and Allen is completing it this week." False.

July 31, 1997, "Bank of America following their protocol of disbursements." False. And onwards, and onwards, and onwards.

Not only did they do all of that with respect to the money they previously collected and squandered, but more money was collected under similar false pretences, and that money, in part, was used to fund the interest payments for the other people, and to suggest the return of capital and to suggest that the hesitation was over, when in fact more money was being shipped overseas on spurious reasoning with no safeguards to protect the investors.

What was the conduct after December 17th, 1996, the start of the Ontario Securities investigation? Was the conduct `Boy, I'm glad you called because I'm such an innocent guy, and I've just been feeling terrible for the last two years, and you know, there's just something going on here and I just can't --' No, that was not the conduct of Mr. Wall or Mrs. Wall.

Well, there is no doubt that there is some bad blood between the secretary, Ms. Alderman and the Walls. I accept her evidence in all essential aspects, notwithstanding the attempts by the Walls, in my view, to seduce, co-op and buy her silence over the years of her employment.

She told us the truth when she said the following. First, that the computer records were deleted to remove them from the grasp of the Ontario Securities Commission. Second, the hard copy records were put into garbage bags so they could be destroyed. Third, she was told to lie to the Ontario Securities Commission as to what happened to those records. And fourth, Exhibit Two(d) was created to falsely provide the Ontario Securities Commission with the impression there were only 24 investors, and that the Walls through D.F. Group had personally invested $440,000.00.

Conduct such as that continued as well. Jim Millson was called to the scene, a man whose credibility is only surpassed by Mr. Wall's, and whose evidence, except where it is clearly corroborated by documentation, I utterly reject. Mr. Millson, I find, was hired by Mr. Wall knowingly to prepare false financial statements for the use of the investors at the investors' meeting. He had to do this, of course, because the capacity to produce correct financial statements had been destroyed at some point, and of course, correct financial statements would not be something they would like their investors to see.

Here, I caution myself with respect to the conduct of the defence, but must comment on two other aspects, that is, in my view, by calling the investors they did to testify on their behalf, in-chief, they were willing to continue to abuse those persons who trust them. These people continue to be effectively duped by the Walls as to the legitimacy of their investments, or have escaped by their skin of their teeth from putting their money into these fraudulent programmes that are before me.

And finally, I find that Mr. Wall, quite simply, in almost every utterance, lied to this Court when he attempted to explain his conduct. I find all of the above conduct amounting to obstruction of justice, and consistent with, and in furtherance of his keeping the lid on this matter.

If it amounts to conduct after the fact of the offence, it is, in my view, relevant to the consideration of the accused's prior intention, knowledge, and degree of remorse.

There are some things that a Judge cannot take into account when sentencing. These are admirably laid out by Mr. C. Ruby in his book Sentencing [4th ed. Butterworths 1997, Toronto]. They include other offences disclosed by the evidence, and, here, I specifically caution myself that the offences before me, for which I must sentence Mr. and Mrs. Wall and their company is under the Securities Act of the Province of Ontario and not the Criminal Code, though it amounts to fraudulent conduct.

I specifically caution myself that I must not take into account the conduct of the defence, nor that according to the most recent submissions, there are ongoing civil matters outstanding [Ruby, Chapter 8, pp 245 to 260].

As well, I must be cautious with respect to the public response to any disposition, but I similarly must recognize the impact on members of the community of the conduct before me.
There are a number of factors that I must take into account in effecting a sentence. [Ruby, Chapter 5, pp 135 to 200].

These include, the method. Was there planning? Was there was deliberation? Was there continuation over a period of time? I find there was on each matter. This matter continued from '94 through '95, through '96, and with the letters seeking to subvert the course of justice or the discovery of the problem by the victims, well into '98.

I must consider, and I do, the magnitude and impact of the crime. I must consider the profits available from the crime. Here I reference both the submissions of Mr. Shivarattan, which are largely consistent with the recent Exhibit One put in on sentence, and note D.J.L. received here some $161,000.00, Dual Financial Group received at least another $56,000.00, A.A.A. Financial received $30,550.00, and although there is no evidence there of a direct connection, there's clearly a pattern that has been established.

In short, there was a significant opportunity to profit by commissions, here and at every turn, at every chance, and even though the money had disappeared, the Walls were taking their piece, off the top.

Now, some of this may have been returned as the pressure and heat mounted. I find that of very little significance, insofar as whatever payments were made back were payments to ensure silence.

The motives I have discussed. As well I must look to the conduct, character, lifestyle and vulnerability of the victims. I have largely mentioned that, but I think, given the demographic of the complainants in this area, some further comment is made.

Published in the Journal of Elder Abuse and Neglect Volume Four 1992, [The Haworth Press, Inc.] Elizabeth Podniecks, MES has done the nation a service by publishing the National

Survey on Abuse of the Elderly in Canada. She has noted, at page 15 of that article, respecting what she characterizes as material abuse, and I quote:

> "Material abuse was the most common of the four categories of abuse covered by the study, with a prevalence rate of about 25 per 2,000 elderly population in private dwellings or about 2.5 percent of the sample. It was measured by six items describing actions persons known to the victims might have taken. The most common type of action was trying to persuade the respondent to give money (1.5%)."

I mention this because I think it is appropriate to notice that, to a large extent, the victims here were elderly, or persons planning for their retirement. This, of course, makes perfect economical and demographic sense. The population is aging, those who are aging have had an opportunity to save for their retirement. If you want to steal retirement funds, go after those who have saved for their retirements. That is what happened here. This is, I believe, a significant aggravating circumstance.

I must look at whether there was a breach of trust and that is self evident. Every one of these people were in a relationship of trust which was abused and violated by the conduct of Mr. and Mrs. Wall.

I must consider whether there were others involved in the crime, and that is in some senses a significant aspect here. Yes, there is no doubt, in my view, that others were involved in the crime. How they were involved will be for others to determine. My view, as I have found, is that the Walls knew perfectly well of the significant risk that they were putting this money at by giving it to these other people.

I must consider the background and attitude of the offender and the behaviour after the offence, which I have noted. With respect to background and attitude of the offenders, as I commented earlier, it is often said that fraudsmen are generally thought of as people of good character. It is their reputation of good character that enables them to commit their frauds and, hence, having had a good character prior to being caught for incidents like this, ought not to be given particularly great weight.

There has been, under the heading, Cooperation with the police or prosecution none, I consider the issue of restitution, and from what I can make, there is no offer to make restitution, none.

There is, of course, no prior involvement with the judicial system; that is, there is no prior criminal or quasi-criminal record, and, in the words of Mr. Shivarattan, they are not recidivist.

There is no violence involved.

Then I must deal with the prevalence of the crime. Sadly, this seems to me, and I will return to this theme when I look to the authorities prepared and tendered, that this crime is growing. Again, perhaps rationally, people are getting older, people are saving their money - perhaps those who wish to get that money by criminal means will grow in population too.

The age of the offenders is not, in my view, a significant feature, given that they had to be of a certain age to get in the position to do what they did.

It is not an offence of marginal criminality.

Certainly there is an effect of stigma by way of the plea and by way of the finding on these offenders. That, in my view, pales in comparison to the effect upon the victims here.

There is no time spent in custody.

I must examine carefully the role of each and the offence and while I will comment later on it,

I see some distinction here between the roles, and in my view, Mr. Wall is the most significant offender here, but followed very closely by Mrs. Wall, with her particular expertise in talking the good people out of their money.

Looking then, to some of the authorities cited by the Crown, I note, in particular, the article referenced at Tab 11 of that Book of Authorities entitled "An Emerging Trend Toward Jail Sentences for Securities Act Violations in Ontario." This was prepared by Mr. Tim Morsley, I gather an employee of the Ontario Securities Commission, no doubt for a seminar or what not.

I note, in particular, the comment at page 15, at the bottom of the page. It says:

> "Probably the single most important development to account for the increased frequency of jail sentences in Ontario is the significant recent increase in penalties provided for under the Act. Effective February 1988 the maximum term was increased."

The legislature, that is, has spoken (about ten years ago) and said these are serious offences. I believe I owe it to that legislature to consider their penalties as they laid them down. As well at page 17, he concludes his remarks and says:

> "Whether it signals an emerging trend or an aberration will remain a particular interest to those convicted of securities offences in Ontario and a challenge to those who defend them."

I refer to that article because I think it is important to try and see what and why a trend has or has not developed in the authorities.

It is not new that people go to jail for securities frauds, indeed Bowman and Thibaudeau 1948 [Tab 1] articulated the concept that the point of securities law was protecting the "innocent abroad", and there was a need, where the conduct amounted to fraudulent conduct, as opposed to technical violation, to call for incarceration. In that context a sentence of 12 months was imposed. At page 381, the Court said:

> "When breaches of the Act such as these occur, dealing with failure to register or to file required reports designed to protect the investing public, the dividing line between imprisonment and monetary punishment as the appropriate penalty must be in which the class offender falls, merely careless a designedly evasive delinquent who has been defrauding the public unhindered by the watchful supervision of the Commission's investigators."

Coming to the 90's, the decision of Justice Harris in Hugh Betts is cited at Tab 2. This decision in 1990 was the first under the new Act with the increased penalties. Emphasizing the importance of deterrence, generally speaking, the Court imposed a six month period of incarceration.

Justice Harris returned to the issue and in the case of Edward Fuger [Tab 3] and, emphasizing the absence of remorse, and the need for deterrence, imposed another sentence of six months.

In Silver Bar Mines et al [Tab 4], a false press release case, a three month sentence was imposed, though apparently or as it appears in the decision, there was little loss in that case.

In Zodenberger 1992, [Tab 5] $850,000.00 was lost by 41 investors and. in what might be an aberration, a mere 15 days was given. It was however, done, on a early plea of guilty.

In Sisto Finance et al [Tab 6], which has been discussed extensively by, particularly, the

defendants' counsel, various people were sentenced. The most interesting comments appear, in my view, to be respecting the sentences with respect to Jasper Naude. I note the sentence with respect to Ms. Davidson was argued to be of some importance here, but I take greater comfort in Justice Babe's decision with respect to Mr. Naude's sentence.

I do not see the decision or Armough Corporation [Tab 7] or David Holden and Peter Adams [Tab 8] of being of much help.

Warrington et al, 1997 [Tab 9] involved approximately a half million dollar loss, involved fraudulent conduct and it was a late plea and resulted in a sentence of nine months.

In Thomas Lau [Tab 10], an offence of a similar nature, involving a loss of about $450,000.00, to a fraudulent type scheme, general deterrence was emphasized and a sentence of six months was considered.

In Harper, an insider trading case, Justice Sheppard, (and I will return to the theme of consecutive sentences in a moment) dealt with a sentence for a 1.7 million dollar offence, and gave an one year sentence. I note that is an event that seemed to occurred over a period of time.

Throughout these cases, in my view, there have been some developing themes. First, on their face, all of these Courts are primarily interested in the aspect of deterrence. There seems to be a sense among all Judges who look at this that the sort of people who commit these types of offences are not those that can be rehabilitated. In short, they are not people who are doing these events out of personal emotional difficulties such as we see in the family or youth area. They are doing these out of a sense of greed. For that reason, rehabilitation is less important.

They also seem to suggest that the principle of sentencing to consider is that of specific and general deterrence, that is, stopping the accused before the Court from doing it again, and stopping others, by way of example, from doing it again.

In that regard, the Thomas Lau decision [cited at tab ten (a) at page 35 of O.S.C. Bulletin] contains an interesting comment by Justice MacDonnell, referring to a decision of Justice Rosenberg in the Court of Appeal. He states:

> "I acknowledge that the effectiveness of jailing individuals in order to achieve general deterrence continues to be subject of debate. In R. v. J.W. 1997 O.J. 1380 Court of Appeal, Justice Rosenberg acknowledged the force behind the view that `the general deterrent effect of incarceration has been and continues to be somewhat speculative. He stated that in his view, `In view of this extremely negative collateral effects, incarceration should be used with great restraint where the justification is general deterrence.=@

However Justice Rosenberg went on to imply: "That for certain offences, general deterrence works. He indicated that large scale well planned fraud is one of those offences. I recognize that the defendants have not been found guilty of fraud, but a fraudsman can be generally deterred by incarceration, I see no reason why the same cannot be said for those who for financial gain, dishonestly attempt to operate outside of the restraints of this Province's securities law.'

I certainly acknowledge the authority of Mr. Justice Rosenberg noted in the comments by Justice MacDonnell. I must point to the recently published book by Mr. Nigel Walker, entitled "Why Punish? Theories of Punishment Re-Assessed." [Oxford University Press, Oxford, 1991].

Nigel Walker is no light weight. He was the Director in the Institute of Criminology and a Professor of Criminology at Cambridge, and then before that, he had been the founder of the Oxford Centre for Criminological Research. He is the author of several books.

After discussing a significant part of the literature on deterrence, at page 17, he has the following to say:

> "In plain terms, if a person is contemplating the commission of a crime, he will think above all of the likelihood of being caught; but he will also consider whether being caught is likely to lead to a prison sentence or a mere non-custodial sentence; and if a prison sentence seems likely, he may even wonder how long it will be. All of which is closer to common sense beliefs than the exaggerated doctrine that only the likelihood of being caught deters or fails to deter.

He notes that there is some difference between offences and continues [at p. 18]

> "We do know where parking fines were replaced by wheel clamping, for example, in certain part of Central London, illegal parking decreased sharply. As for driving offences, it is disqualification, not fines, which motorists are most anxious to avoid.... what is quite implausible, and supported by no evidence whatsoever, is to claim that this [that "there are people who refrain solely because they fear detection on public prosecution"] is true of all potential perpetrators of any kind of petty offence. And if we consider offences which do not stigmatize for example, illegal parking - it becomes obvious that not only the existence of the penalty, but also its nature play a part in deterrence.... Common sense says that it [deterrence] is not negligible; most of the evidence is consistent with common sense" [p.18].

The long and the short, and the importance of the reference is that there has been within the judicial authorities, some criticism with whether deterrence is actually effective, based on some early studies by criminologists. Mr. Walker believes in bringing some of that into question.

The Ontario Court of Appeal, through Mr. Justice Rosenberg is on the mark when he said that some crimes are deterrable by the size of the penalty. I believe this is one of those crimes.

In my view, one issue to determine here is the applicability of the maximum sentence provisions. The maximum here is two years. In the book on sentencing by Clewly, Gover, Humphrey and McDermott [Sentencing: The Practitioners Guide, Canada Law Book, Aurora, 1998] edition, referencing Pontello (77) 38 C.C.C. (2d) 262 Ontario Court of Appeal and Prumer (79) 9 C.R. (3d) Ontario Court of Appeal, they say that the maximum sentence ought to be reserved for "the worse sort of offence by the worse sort of offender" [p 1-22].

Another issue live in this case is the appropriateness of consecutive or concurrent sentences. In his work on sentencing the learned Mr. Ruby, citing Paul (82) 67 C.C.C. (2d) Supreme Court of Canada, notes, and I quote:

> "Consecutive sentences are to be the rule."

That of course, is the imperative stated in the Provincial Offences Act.

The totality principle is the guiding principle, of course, and not the simple issue of consecutive or concurrent. Citing numerous authorities at page 354, Mr. Ruby goes through how Courts have attempted to distinguish the circumstances of when a consecutive sentence should be imposed and when it should not be. He says that there must be a reasonably close nexus between the offences in time and place to justify a concurrent sentence. The offences must not be part of the `continuing criminal operation or transaction.' The offences must not be `part and parcel of one other' and not `multifaceted aspects of one transaction.'

In a decision he cites, Hines, dealing with, particularly, fraudulent cases, the suggestion is made that you ought to break the offences into categories, that match. Within the categories the

sentence ought to be concurrent and without the category, the sentence ought to be consecutive.

He notes some decisions particularly in Quebec, which say [Turlond being one [1968] C.L.R. 28, Court of Appeal] that the "total sentence.... should not exceed the maximum for the most serious offence." But he also references Beaupre [73] 21 C.R.N.S. 205, where the same Quebec Court of Appeal indicated that this rule is not a general rule, and to hold it to be such would mock the notion of separate offences.

The question, therefore, is, are the offences charged here so distinct, [and I draw here the distinction between the trading offences on the selling offences, and the distribution of securities offences]. In my view, the simple offence here is the trading offence; that is, the selling of securities offence prohibits a rather simple act of convincing, inducing one person to purchase or sell a particular security for a price, that is prohibited for probably self-evident reasons, unless licensed or exempt.

Distribution, however, is a far broader and different offence. It may contain aspects of the first sale of securities, but it encompasses a whole series of events that are different. To overly simplify, it involves the creation of the investment, the organization of the investment, the organization of the documentation respecting the investment. Subsequent to the sale, or at the time of the sale, it involves collection of the money from the sale. It involves the investment of that money and, to some extent, the management of the investment or the management of the business as that as created by that investment.

None of those essential elements of the offence of distribution encompassed are within the notion of the simple offence of trading. In my view, these are, and, indeed, as essentially conceded by Mr. Shivarattan, essentially different offences.

In my view, accordingly, they ought to be treated by way of consecutive periods of incarceration; that is, the offence of trading should be dealt with, as a separate sentence than the offence of distributing.

Turning then, as I must, to the ultimate disposition to be imposed here, I must recognize there are some, as I said, differences between the conduct of Warren Wall and Joan Wall.

Warren Wall, at least on the evidence I have was, as a general proposition, more involved in the details of the distribution, the various management items I mentioned before; that is, with one noticeable exception, and that was the Portugal investment. As the evidence recalls, Portugal was not in fact an investment of the limited partnership, even in name, but a personal investment of Joan Wall, using, illegally, the funds of the limited partnership.

But having said that, for the most part, on the evidence, it appears that Mr. Wall was more involved than Joan Wall in the various notions of distribution. Her expertise, if it was, came into the selling of this issue to various persons, where, no doubt, Mr. Wall's then considerable selling skills were also used. This suggests to me that there should be some distinction in the sentence.

Prior to the plea being entered, I canvassed with the defendants and with their counsel several points with respect to the freedom and voluntariness of the plea, including the fact that the sentence is ultimately in the purview of the Court. What I receive from counsel are merely recommendations or arguments, as it were, as to what the appropriate sentence should be. Here, I have received, in particular, an argument from counsel for the Ontario Securities Commission with respect to the appropriate sentence.

That argument or that suggestion by the Crown has been made, in my view, in the absence of appellant authority, and in the face of what I will call a developing trend in the law to consider these sorts of offences, with the particularly aggravating factors of this offence, in a more and more serious

light.

In my view, the sentence proposed by counsel for the Ontario Securities Commission, constrained in that nature by what has happened in the cases in the past, which to, varying degrees, are just beginning to recognize the depth of this, might I call, social problem, are too light.

In my view, an appropriate sentence for Mr. Warren Wall, for the distribution offence, is 18 months. In my view, the appropriate sentence for the trading offence is 12 months. That trading offence shall be served consecutively for an aggregate sentence of 30 months.

For Joan Wall, in my view, her significant if slightly less participation in the distribution is worth, and she is hereby sentenced to 13 months for the distribution, plus nine months for the trading offences, for an aggregate penalty of 22 months. Those sentence to be served consecutively.

In addition, each person shall be on probation for a period of two years, during which time they shall report to a probation officer, provide that person their residence, not change that residence without the prior written consent of the probation officer, surrender and not apply for any passport, and refrain absolutely from any act of trading, distributing or promoting the sale of insurance products or securities. I emphasize insurance, as well, here, because invariably in these cases, clients of their insurance business were induced into the securities business they chose to participate in.

Finally, with respect to the corporate accused, in this case being Dual Capital Management Limited, although I doubt very much whether my order will be enforceable, it was the entity in a position to control the significant flow of funds here, and I accede to the request that the maximum fine be imposed upon Dual Capital Management. I would impose a larger fine if it was available with respect to that corporate entity, but it is not.

With respect to count one of Dual Capital Management there will be a fine of $500,000.00 and with respect to count four which effects Dual Capital Management, there will be a fine $500,000.00

Are there any other probationary terms that are requested?
MR. SHIVARATTAN: Your Honour, can we plead to the Court for a deferment so they can wind up their businesses. I think the Act allows the Court to --
THE COURT: Today is the sentencing date and they have been sentenced.
MS. SUPERINA: Your Honour, I have no further submissions or requests on the probations terms. I do have, through Larry Macsi the passports and the question of what should be done with them.
THE COURT: Surrender them.

Finally before I conclude this matter completely, I think I would be neglectful in my duties if I did not comment, very briefly, on some recommendations I think should be considered as arising from this case.

First, it strikes me as self-evident that there is a problem within the country as a result of the roles of people licensed to sell one form of product being in a position to influence persons into the purchase of other products for which they are not licensed and to represent, as was clearly the case here, that they are capable of offering general financial advice, general investment advice, and indeed that that advice is in any essence independent, as opposed to fee driven. I would recommend that this matter be reviewed.

I would further recommend, if it has not already happened, that the various other players involved here, Mr. Millson, Mr. Huppe, Mr. Little, Mr. Poirier, Mr. Adams all be subject to appropriate investigation.

To the extent that the business of Dual has continued subsequent to the investigation of the Ontario Securities Commission and any licensing has remained in place with respect to insurance or otherwise, I am, frankly, shocked. No licensing authority, if I am correct, should have allowed this to continue in the face of these sorts of charges, and I fear for the security of any investments made through that agency. I would recommend strongly that the Insurance Commission consider its position there.

I would further recommend that the Securities Act or the Provincial Offences Act be amended so that the issue of restitution, forfeiture and seizure of property could be dealt with by the Court who tries this matter. As I understand it now, and it is conceded as a matter of law, I have no power to order restitution to the victims. Instead, costly, complex civil litigation is going to ensue unless the position of the defendants clearly changes. It ought, in my view, to be within my purview to order their assets seized, their assets sold, and restitution made to the people - having made the findings of fact I have.

I further recommend that the limited partnership method of sale and, particularly, its use or abuse under 72 of the Securities Act be reviewed. The authorities cited refer, in large part, to that sort of exemption being used or, more accurately, abused. When asked in the stand as to why the limited partnership method was chosen, Mr. Wall's sole response was that, `it was a vehicle to raise the money.'

And finally, and with some trepidation, I suggest that inquires should be made into the role and liability of law firms and accounting firms who assist in the preparation of documentation so obviously fraudulent as occurred in this case.

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THIS IS TO CERTIFY that the foregoing is a true and accurate
transcription from recordings
made herein, and as reviewed by
the Court to the best of my
skill and ability.

Cathy Knelsen
Certified Court Reporter

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