NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Dawson; R. v. Ross*, 2021 NSCA 29

Date: 20210317
Docket: CAC 497744 and CAC 497762
Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

Harold Dawson

Respondent

and

Between:

Her Majesty the Queen

Appellant

v.

Bry'n Ross

Respondent

Judge:	The Honourable Justice Anne S. Derrick
Appeal Heard:	December 4, 2020, in Halifax, Nova Scotia
Subject:	Sentencing. Large-scale fraud. Conferring an advantage or benefit on a government employee contrary to s. 121(1)(b) of the *Criminal Code*. Conditional sentencing. Proportionality. Parity. Denunciation and deterrence. Whether the sentence was the result of error or manifestly unfit.
Summary:	The Crown appealed the conditional sentence orders imposed on the respondents for a systematic and protracted fraud that took place over a four-year period. With the exception of community service hours, the conditions in the conditional sentence orders were compulsory conditions mandated by the

Criminal Code, s. 742.3(1). A concurrent conditional sentence order was imposed on Mr. Dawson for conferring an advantage or benefit on a government employee, contrary to s. 121(1)(b) of the *Criminal Code*. Mr. Dawson and Mr. Ross were convicted following a judge-alone trial. The trial judge found that Mr. Ross and Wayne Langille, another civilian employee of the Department of National Defence, had directed contracts for part of the Shearwater heating plant to four companies connected to Mr. Dawson. Three of Mr. Dawson's companies were established by him for the purpose of monopolizing the contracting process for the heating plant. The companies were made to appear to be bidding against each other, creating the appearance of a legitimate and fair bidding process for heating plant parts. Mr. Dawson provided illegal benefits to Wayne Langille to grease the wheels of his companies' business dealings with DND. Mr. Ross, a long-time employee at DND, was largely responsible for issuing contracts at the heating plant. Over the four-year period, Mr. Ross awarded over 640 contracts to Mr. Dawson's businesses, valued at approximately two million dollars. He knew the Dawson companies had common ownership. He favoured the Dawson companies with contracts over competitors and camouflaged his actions to avoid detection.

Issues:

(1) Did the trial judge make errors in principle that impacted the sentences he imposed?
(2) Were the sentences demonstrably unfit?
(3) If so, what are the fit and proper sentences?

Result:

Leave to appeal granted. The trial judge made critical mistakes in his application of the sentencing principles of proportionality and parity, and in any event, imposed demonstrably unfit sentences. He erred in principle by failing to account for the magnitude of the frauds, mischaracterizing their complexity, and under-emphasising their duration and the moral culpability of the offenders. He over-emphasised the offenders' personal circumstances. He did not emphasise denunciation and deterrence, the primary sentencing objectives in cases of large-scale, premeditated fraud. The sentences were not proportionate to the gravity of the offences

and the degree of responsibility of the offenders. The conditional sentences were demonstrably unfit. Penitentiary sentences substituted of 42 months for Mr. Dawson and 36 months for Mr. Ross for their fraud convictions, and a concurrent 42-month sentence for Mr. Dawson's s. 121(1)(b) conviction. Messrs. Dawson and Ross to be given credit on a 1:1 basis for time served under the conditional sentence orders.

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Respondent

Judges: Bryson, Scanlan, Derrick JJ.A.

Appeal Heard:	December 4, 2020, in Halifax, Nova Scotia
Held:	Appeal allowed, per reasons for judgment of Derrick, J.A.; Bryson and Scanlan, JJ.A. concurring
Counsel:	Scott Millar, for the appellants Brian Casey, Q.C., for the respondent Mr. Dawson Peter Kidston, for the respondent Mr. Ross

Reasons for judgment:

Introduction

[1] Mr. Harold Dawson (Mr. Dawson) and Bry'n Ross (Mr. Ross) were convicted on September 16, 2019, by Justice Jamie Chipman of fraud over $5000, contrary to s. 380(1) of the *Criminal Code*. Mr. Dawson was also convicted of conferring an advantage or benefit on a government employee (Wayne Langille), contrary to s. 121(1)(b) of the *Code* (*R. v. Ross and Dawson*, 2019 NSSC 275, "Conviction Decision").

[2] The offences occurred between April 1, 2008 and May 9, 2012. The Crown sought prison sentences of three and a half to four years for Mr. Dawson and three years for Mr. Ross. The defence sought conditional sentences, which were available when the offences were committed.[1]

[3] On February 25, 2020, Justice Chipman imposed conditional sentence orders of two years less a day for the fraud convictions. Mr. Dawson received a concurrent conditional sentence of the same duration for the s. 121(1)(b) offence (*R. v. Ross and Dawson*, 2020 NSSC 70, "Sentencing Decision"). The Crown had sought consecutive sentences for Mr. Dawson, but is not appealing the trial judge's rejection of this option.

[4] The Crown seeks leave to appeal the conditional sentence orders, arguing they are the result of errors in principle and woefully inadequate. This Court is asked to substitute federal penitentiary terms.

[5] The Crown says the trial judge erred in principle by failing to appreciate the magnitude of the frauds, mischaracterizing their complexity, and under-emphasising their duration and the moral culpability of the offenders. And further, that he made critical mistakes in his application of the principles of sentencing and, in any event, imposed demonstrably unfit sentences.

[6] For the reasons that follow, I agree. I would grant leave to appeal, allow the appeal, set aside the trial judge's sentences and impose new sentences of 36 months' incarceration for Mr. Ross and 42 months' incarceration for Mr. Dawson

[1] Since November 20, 2012, with the coming into force of Bill C-10, amending s. 742.1 of the *Criminal Code*, conditional sentences are no longer available for offences, prosecuted by indictment, which carry a maximum penalty of 14 years imprisonment, such as fraud over $5000.

for their fraud convictions and a concurrent 42-month sentence for Mr. Dawson's conviction on the s. 121(1)(b) offence.

The Trial Judge's Decision on Sentence

[7] The trial judge included as background to his Sentencing Decision (at para. 4) what he had said in his Conviction Decision about the large-scale defrauding of the Department of National Defence through a manipulated procurement process for the heating plant at the Shearwater military base:

> [1] In late 2011, file reviews conducted by the procurement office at the Shearwater military base raised concerns about certain contracts awarded respecting the heating plant. Following an investigation known as Operation Aftermath, it emerged that two civilian employees, Wayne Langille and the accused, Bry'n Ross, directed contracts to four companies connected to the co-accused, Harold Dawson. In 2016, the three men were charged with fraud, along with Kimberley Dawson. Mr. Langille pleaded guilty to a s. 121(1)(c) count in relation to this matter in Provincial Court. The charge against Ms. Dawson was eventually dropped.

[8] The Crown's expert witness at trial, Lori Shea (Ms. Shea), a forensic accountant, identified four companies set up by Mr. Dawson: Atlantic Measuring Technologies Ltd., Harbourside Controls, Colonial Industrial Supplies, and M.E. Robar Industries Ltd. Ms. Shea concluded from an analysis of the bank accounts of the four companies that the only company selling products other than to DND was Atlantic Measuring Technologies.

[9] Although the trial judge did not settle on a precise amount of the fraud, he viewed the loss associated with the fraud as considerable, using such language as "an actual loss of well in excess of $5,000.00 on account of the manipulated procurement process" (Conviction Decision, at para. 378) and "it is easy to conclude the loss was far greater than $5,000.00" (Conviction Decision, at para. 381).

[10] Ms. Shea's evidence established that during the relevant period, 3,246 cash withdrawals totalling $1,010,859.90 were made from the four Dawson companies. Ms. Shea testified "it's unusual for a company to withdraw so much cash".

[11] The trial judge noted that Mr. Dawson and Mr. Ross were first-time offenders with supportive families and pro-social histories. At the time of sentencing, they were 60 and 65 years old respectively. Mr. Ross was retired and

reported a stable financial situation. Mr. Dawson was commuting to a job in Ontario and told the author of the pre-sentence report that he and his wife were "stretched" financially. Mr. Dawson advised he suffered from high blood pressure and back problems (paras. 9 and 10).

[12] The trial judge identified different aggravating circumstances for each offender. In Mr. Ross' case it was the abuse of his employer's trust "on a regular basis for just over four years", actions the judge said had "worked against the Treasury Board rules designed to promote fair competition amongst Canadian businesses" (para. 15).

[13] In Mr. Dawson's case, the trial judge cited the benefit Mr. Dawson derived from the fraudulent transactions. He found:

> [16] Mr. Dawson's companies benefitted from the transactions. I found that well in excess of $5,000.00 of the approximately $1 million he drew from his companies was attributable to Mr. Dawson's fraud and the benefit he gave to Mr. Langille.

[14] As for mitigation, the trial judge found that both men had served their bail without incident, were first-time offenders, had positive pre-sentence reports, were pro-social and supported by family and friends, and showed remorse. He included as a mitigating factor for Mr. Ross that he "was not shown to have benefitted from the profit from the fraud" (para. 17).

[15] The trial judge reviewed the relevant *Criminal Code* provisions governing sentencing, including ss. 718, 718.1, and 718.2 that set out the purpose and applicable principles. He addressed the positions of the parties, and reviewed a number of fraud cases, including some he distinguished, such as this Court's decision in *R. v. Potter*; *R. v. Colpitts*, 2020 NSCA 9, a large-scale stock market manipulation fraud.

[16] The trial judge also distinguished *R. v. Pavao*, 2018 ONSC 4889, where a five-year prison sentence was imposed for ten counts of fraud against unsophisticated investors and one count of defrauding the public. The fraud, which involved the sale of shares in gold mining companies, was found to have exceeded 1.1 million dollars. The trial judge viewed the Dawson and Ross fraud as not "anywhere approaching this magnitude" (para. 36).

[17] The trial judge encapsulated his assessment of the offences in paragraphs 37 to 38 of his decision:

> [37] When I consider all of the authorities submitted by the Crown and Defence along with the Court of Appeal's recent decision in *R. v. Potter; R. v. Colpitts*, I cannot equate what happened here to the "large-scale fraudsters" cases. While it is true that Mr. Ross and Mr. Dawson committed the offences over a relatively lengthy period of time, I do not regard their scheme as being very complicated or sophisticated. Indeed, I venture to say that had the late 2011 file reviews been carried out earlier, and in the same fashion, I have no doubt that the crimes would have been detected much earlier.
>
> [38] While in no way excusing the planned fraudulent behaviour of the offenders, I regard their activities as having far less impact than what occurred in several of the cases submitted by the Crown. By way of example, whereas the figures of $2 million and $1 million find their way into my trial decision and the briefs, it is important to put these numbers in context. As the Crown clarified in their sentencing brief, the totality of the value of the 640 contracts over the four year period was approximately $2 million. Of this amount, roughly half was extracted by the Dawson companies. Further, this amount must again be considered in the four plus year context such that Mr. Dawson's companies received on average less than $250,000.00 per annum and given the expert opinion evidence of Ms. Shea, this figure in no way equates with profit.

[18] Citing this Court's decision in *R. v. Wheatley*, 1997 NSCA 94, and *R. v. Proulx*, 2000 SCC 5, from the Supreme Court of Canada, the trial judge observed that a conditional sentence is a punitive measure. He found conditional sentences to be the "proper sentences for Messrs. Ross and Dawson" and held:

> [42] …I am of the overwhelming view that it would not be in the interests of justice to commit Messrs. Ross and Dawson to a prison environment. In this regard, I have considered their ages and circumstances along with authority from our Court of Appeal. With respect to the latter, I am especially mindful of Justice Farrar's comments in *R. v. Livingston*; *R. v. Lungal*; *R. v. Terris*, 2020 NSCA 5 at paras. 57 and 58.
>
> [43] Whereas on the first count Mr. Ross' (then) employment with DND means he was in a trust position as opposed to his co-offender, Mr. Dawson obviously gained financially in a way that Mr. Ross did not. To my mind these features tend to "even out" their respective crimes of fraud.
>
> [44] Mr. Dawson was also convicted on the s. 121(1)(b) offence; however, I regard this crime as part of the continuing criminal fraud venture such that I am not prepared to entertain the Crown's argument that it should be dealt with by way of consecutive sentence.

[19] As noted above, in deciding against incarceration for Mr. Dawson and Mr. Ross, the trial judge made reference to being "especially mindful" of what was said by this Court in *R. v. Livingston*; *R. v. Lungal*; *R. v. Terris*. In *Livingston* and

Terris, this Court overturned suspended sentences for drug trafficking, finding that these offenders should have received 18 months' imprisonment. (The Crown appeal of Ms. Lungal's suspended sentence was dismissed.) However, *Livingston* and *Terris* addressed the issue of whether incarcerating those offenders following a successful Crown appeal was in the interests of justice. At paragraphs 57 and 58 of the decision, rendered on January 23, 2020, Justice Farrar identified specific factors to be considered and determined that Messrs. Livingston and Terris should not be incarcerated. Mr. Livingston had been originally sentenced on December 11, 2018, Mr. Terris on April 25, 2019.

[20] The conditions attached to the Dawson and Ross conditional sentences were modest. Mr. Dawson and Mr. Ross were ordered to: keep the peace and be of good behaviour; appear before the court when required to do so by the court; report to a supervisor at probation services on or before February 28, 2020 and as directed; notify the court or the supervisor in advance of any change of name or address and promptly notify the court or the supervisor of any change of employment or occupation; and perform 120 hours of community service work as directed by their supervisor, to be completed within eighteen months. A remain-in-Nova Scotia condition exempted Mr. Dawson who had the court's written permission to travel to Ontario for work.

[21] With the exception of the community service hours, the conditions imposed by the trial judge were compulsory conditions mandated by the *Criminal Code*, s. 742.3(1).

Issues

[22] In its factum, the Crown states four issues:

1) Did the judge err in his consideration of the principle of proportionality, and did that error have an impact on the sentence imposed?

2) Did the judge err in his consideration of the principle of parity, and did that error have an impact on the sentence imposed?

3) Did the judge commit one or more other errors in applying the principles of sentencing, and did those errors have an impact on the sentence imposed?

4) Having regard to the circumstances of this offence and these offenders, what is a fit and proper sentence?

[23] I would restate these issues as follows:

1) Did the judge make errors in principle that impacted the sentences he imposed?

2) Were the sentences imposed demonstrably unfit?

3) If so, what are the fit and proper sentences?

Standard of Review

[24] Sentencing decisions are accorded a high degree of deference in appellate review. Appellate intervention is warranted if (1) the sentencing judge has committed an error in principle that impacted the sentence or, (2) the sentence is demonstrably unfit. Errors in principle include "an error of law, a failure to consider a relevant factor, or erroneous consideration of an aggravating or mitigating factor" (*R. v. Friesen*, 2020 SCC 9, at para. 26; *R. v. Espinosa Ribadeneira*, 2019 NSCA 7, at para. 34).

[25] If appellate review determines that a consequential error in principle has been made, or that a sentence is demonstrably unfit, then the court performs its own sentencing analysis to determine a fit sentence (*R. v. Lacasse*, 2015 SCC 64, at para. 43). As *Friesen* directs, in conducting the fresh sentencing analysis,

> …the appellate court will defer to the sentencing judge's findings of fact or identification of aggravating and mitigating factors, to the extent that they are not affected by an error in principle…
>
> (at para. 28)

[26] A variety of terms have been used to describe a sentence that is manifestly unfit: "demonstrably unfit"; "clearly unreasonable"; "clearly or manifestly" excessive or inadequate; or representing a "substantial and marked departure" from the cardinal principle of proportionality (*Lacasse*, at para. 52, citing Laskin, J.A. in *R. v. Rezaie* (1996), 31 O.R. (3d) 713 (C.A.)).

[27] As *Lacasse* explains, the focus of an inquiry into whether a sentence is manifestly unfit is on the principles and objectives of sentencing. The gravity of

the offence, the offender's degree of culpability, and parity must be reconciled in the crafting of a fit sentence (*Lacasse*, at para. 53).

[28] Appellate review in this case is to be confined to an examination of the judge's sentencing analysis for material errors and the question of whether the sentence fails to hold Mr. Dawson and Mr. Ross sufficiently accountable for the serious offences they committed.

Analysis

[29] The sentences imposed on Mr. Dawson and Mr. Ross were a product of the trial judge's mischaracterization of their offences and their moral culpability, and his over-emphasis on their personal circumstances. The sentences do not adhere to the fundamental principle of proportionality stated in s. 718.1 of the *Criminal Code*: a sentence must be proportionate to the seriousness of the crime and the degree of the offender's responsibility. Proportionality is determined by reconciling individualized assessment – an examination of the offender in relation to their offence – and assessing parity, a comparison with sentences imposed for similar offences committed in similar circumstances. The Dawson and Ross sentences, aptly described by the Respondent Crown as little more than probation, are an "unreasonable departure from this principle" and therefore, demonstrably unfit (*Lacasse*, at para. 53).

[30] The judge's findings at trial on the gravity of the offences and the culpability of Messrs. Dawson and Ross were damning. His reasons for conviction indicate the commission of a lengthy, systematic, and complex fraud. The highlights of the fraud and the roles played by Messrs. Dawson and Ross are set out below.

Gravity of the Offence

[31] The fraud was committed over a four-year period. It involved the efforts of Mr. Dawson, a businessman; his friend, Mr. Ross, who worked as a contracts officer for DND at Shearwater; and Wayne Langille (Mr. Langille), an employee of DND responsible for requisitioning the heating plant parts supplied by Mr. Dawson's companies.

[32] Prior to the period in question, Mr. Dawson created the three separate businesses mentioned earlier, in addition to the legitimate business (Atlantic Measuring Technologies) he operated. The new businesses were established for the purpose of monopolizing the contracting process for the Shearwater heating plant.

They had separate bank accounts, fax numbers, and telephone lines, fostering the illusion of being unrelated to each other.

[33] Mr. Dawson arranged for the businesses to appear to bid against each other, setting all of the prices with each company "winning" different bids. He knew the Dawson companies' bids were not legitimate. He admitted coming up with the pricing and knowing his lowest quotes would be accepted over the higher bids submitted. These machinations created the appearance of a legitimate and fair bidding process. The trial judge found the manipulation of the bidding process created "an artificial market" (Conviction Decision, at para. 381).

[34] On a number of occasions, Mr. Dawson charged significant markups for the heating plant parts his companies were supplying.

[35] In addition to the three shell companies, the fraud involved forged signatures, fraudulent contracts, phony invoices, and various other ruses to disguise the manipulated bidding and supply process.

[36] The fraud Mr. Dawson committed on the government (*Criminal Code*, s. 121(1)(b)) was the provision of illegal benefits to Mr. Langille to grease the wheels of the Dawson companies' business with DND. These benefits included: providing Mr. Langille a company debit card that he used, with Mr. Dawson's knowledge, to withdraw cash to pay personal expenses; and paying, with Dawson company cheques and credit cards, for new windows and doors to be installed in Mr. Langille's home.

[37] Mr. Ross had been employed by DND for 30 years. During the period in question, he was largely responsible for issuing contracts at the Shearwater heating plant. He had taken courses and completed written exams on the government procurement process and acknowledged in cross-examination that the bid solicitation process was designed to ensure fair competition amongst independent businesses. He agreed he was a "guardian" of the taxpayer (Conviction Decision, at para. 280).

[38] Mr. Ross knew the Dawson companies had common ownership. He favoured the Dawson companies over competitors and camouflaged his actions to avoid detection.

[39] Mr. Ross split contracts on a revolving basis amongst the four Dawson businesses, knowing the bids to be illegitimate, to make it appear that one person

or company was not getting the vast majority of the contracts issued in relation to the heating plant. Splitting the contracts also avoided having to send contracts in excess of $5000 to the Department of Public Works and Government Services Canada for review.

[40] Mr. Ross awarded over 640 contracts to Mr. Dawson's businesses, valued at approximately two million dollars. During this period, only 17 contracts were awarded to unrelated businesses.

[41] The trial judge's trial findings indicate the serious and protracted nature of the offences committed by Mr. Dawson and Mr. Ross. They were anchored in a comprehensive examination of the witness and documentary evidence. As the Crown states in its factum, the judge made "significant trial findings that demonstrate the complexity, sophistication, and premeditation involved in the commission of these frauds over four years".

[42] At sentencing, however, the judge found the Dawson and Ross frauds were not comparable to "large-scale fraudsters" cases and neither very complicated or sophisticated (para. 37).

[43] What Messrs. Dawson, Ross and Langille perpetrated over the four-year period can only be described as complicated and sophisticated. It is beyond dispute that it was a large-scale fraud, carefully planned, deliberately executed and painstakingly disguised. Messrs. Dawson, Ross and Langille continued their fraudulent scheme until they were caught.

[44] Fraud over $5000 is a very significant offence. It attracts a maximum penalty of 14 years in prison. At sentencing, the trial judge mischaracterized the scale of the fraud perpetrated by Mr. Dawson and Mr. Ross. The analysis he adopted distorted his sentencing calculus.

[45] In his conviction decision, the trial judge noted that Mr. Dawson had withdrawn approximately one million dollars from his companies over the four years of the fraud. The trial judge found on the totality of the evidence that "much of this is attributable to Mr. Dawson's fraud and the benefits he gave Mr. Langille…" (Conviction Decision, at para. 383). This alone justifies the Dawson and Ross fraud being viewed as large-scale.

[46] At sentencing, the trial judge de-valued the one million dollars by amortizing it over the four years it was perpetrated and taking into account that it

did not represent profit for the Dawson companies. In making this finding, the judge referred to a response made in cross-examination by the forensic accountant, Ms. Shea, on which he had commented in his trial decision: "Ms. Shea said that the difference between what the Dawson Companies received from DND and paid out to the suppliers would be akin to "gross profit" and would not account for other expenses such [as] gas, insurance and the like" (Conviction Decision, at para. 203).

[47] Calculating the size of the fraud on the basis of net profit was an error. A significant fraud is not rendered less significant where there were expenses associated with perpetrating it. The operating expenses of the Dawson companies – three of which were sham companies – were irrelevant and should have had no bearing on the trial judge's assessment of the magnitude of the fraud.

[48] Whether the Dawson companies incurred expenses as their ill-gotten gains rolled in was not a material consideration. As the Crown states in its factum: "The magnitude of this fraud was the value of those fraudulent contracts: $1,984,807.83".

[49] In any event, an exact amount of loss does not have to be established in order for a fraud to qualify as a large-scale fraud. The Ontario Court of Appeal made this point in *R. v. Drabinsky*, 2011 ONCA 582 (Leave to appeal refused: [2011] S.C.C.A. No. 491) finding that:

> …the inability to place a dollar figure on the fraud does not mean that it was wrongly characterized as a "large scale" commercial fraud. The fraud went on for years and involved the systematic misrepresentation of the financial statements well into the millions of dollars…(at para. 181).

[50] Furthermore, the offence of fraud is made out in the absence of proof of economic loss: "the imperilling of an economic interest is sufficient even though no actual loss has been suffered". It is "an offence of general scope capable of encompassing a wide range of dishonest commercial dealings" (*R. v. Théroux*, [1993] 2 S.C.R. 5, at para. 17).

[51] The fraud perpetrated by Messrs. Dawson and Ross was a harm caused to Canadian taxpayers and to public trust in public institutions and officials. The trial judge had found the government policies intended to ensure "a transparent and open bidding process" were, "particularly in the wake of the sponsorship scandal, … designed to protect the Canadian taxpayer" (Conviction Decision, at para. 369). The evidence at trial indicated the very strict policies on procurement were

intended to enhance access, promote fairness in competition and obtain the best value in the expenditure of public funds. Those policies were deliberately circumvented in order to perpetrate the fraud.

[52] Every corrupt transaction with the Dawson companies had the potential for a loss to DND. Mr. Dawson exercised complete control over how much he charged for each contract and whether, in the artificial market he had created, he provided the fairest price for the government.

[53] In convicting Messrs. Dawson and Ross, the trial judge had recognized the impact of their dishonesty, concluding: "Given that the proper bidding arrangement was not followed [over the 640 contracts] it is a fair observation that the best or fair price was never realized" (Conviction Decision, at para. 378). The trial judge found:

> [381] While Mr. Dawson went to great lengths to emphasize his right to charge what he wanted in a free market, this evidence ignores the fact that he did this in an artificial market. The market was artificial because of [Mr. Dawson's] manipulation which excluded true competitors. This resulted in a true monetary loss to the government. In the result, when Mr. Dawson acknowledged charging up to 15 times what he paid (wholesale) for a part, this amounts to more than an extremely high profit. It represents a stark example of the deprivation to the government…

[54] Mr. Dawson was also guilty of the offence of providing benefits to Mr. Langille, the s. 121(1)(b) offence. This too was very serious. As the trial judge found, Parliament's goal in enacting s. 121 was the preservation of the integrity of government, and the appearance of integrity as well (Conviction Decision, at paras. 352 and 353, citing *R. v. Hinchey*, [1996] 3 S.C.R. 1128, at paras. 13 and 16).

[55] The trial judge diluted the scope and impact of the Dawson and Ross offences, a minimization of their gravity that reflected error and directly influenced his determination that conditional sentences were the appropriate penalty.

Moral Culpability of the Offenders

[56] Messrs. Dawson and Ross can only be described as having a very high degree of moral culpability for their offences. This was not represented in the trial judge's analysis at sentencing, amounting to an error in principle.

[57] I have already detailed the roles played by Mr. Dawson and Mr. Ross in the perpetration of their crimes. These crimes were very deliberately embarked upon and characterized by systematic planning and execution. The trial judge found that Mr. Dawson's dishonesty enabled him to engineer an "artificial market" that "excluded true competitors" (Conviction Decision, at para. 381). Mr. Ross was a long-serving, trusted government employee. The trial judge described him as having engaged in contract-manipulating strategies "on an almost daily basis" (Conviction Decision, at para. 371).

[58] In sentencing, the trial judge simply failed to account for the significant degree of moral responsibility borne by Mr. Dawson and Mr. Ross in their collaboration to perpetrate this large-scale fraud over a four-year period.

[59] Although the trial judge did not examine the issue of motive, in Mr. Dawson's case the only reasonable inference is that his motivation was greed. The manipulation of the procurement process enabled him to reap sizeable benefits in the absence of any competition. Mr. Ross' motive remains unclear, but his participation in the fraud was essential to its success. He knew what he was doing and in doing it, he "favoured his good friend Harold Dawson" (Conviction Decision, at para. 376).

[60] The sentences imposed by the trial judge failed to serve the fundamental sentencing principle of proportionality. Even with house arrest and other restrictions on liberty, conditional sentences would not have been proportionate to the gravity of the offences committed by Mr. Dawson and Mr. Ross and their high degree of responsibility for them.

[61] Not only were the sentences out of step with the proportionality principle, as I will discuss shortly, the trial judge in his analysis did not factor in the sentencing objectives of denunciation and general deterrence.

[62] The conditional sentences reflect an overemphasis by the trial judge of the personal circumstances of Messrs. Dawson and Ross. Although he acknowledged "the very important sentencing objectives of denunciation and general deterrence", this was immediately followed by a focus on "the current plight of both men":

> [39] In sentencing Mr. Ross and Mr. Dawson I am cognizant of the very important sentencing objectives of denunciation and general deterrence. In my view, specific deterrence is not an issue as there is essentially no chance of either Mr. Ross or Mr. Dawson re-offending. In coming to my decision I have borne in

> mind the current plight of both men. Mr. Ross is in his mid-sixties and helps with the care of his wife who has mobility issues. Mr. Dawson is sixty and has ongoing back pain. Owing to financial challenges Mr. Dawson has put off retirement. He presently commutes to his job in Ontario.

[63] Denunciation and general deterrence were not mentioned further by the judge.

[64] The trial judge crafted sentences that were heavily influenced by "the current plight" of Messrs. Dawson and Ross and the mitigating factors he found in relation to both offenders – bail without incident over the lengthy course of the proceedings (eight years), no criminal records, positive pre-sentence reports confirming otherwise pro-social lives, and support of family and friends. He also cited acceptance of responsibility and remorse. The record indicates this mitigating factor actually applies only to Mr. Ross. I will explain.

[65] After describing Mr. Ross as having "accepted responsibility for his actions and shown remorse", the trial judge said the same was true of Mr. Dawson. However, only in Mr. Ross' case was there any real acceptance of responsibility. He is reported by the author of the pre-sentence report as having said:

> …In discussing the offence, Mr. Ross stated "looking back, there probably was something I shouldn't have done, but there were no thoughts of doing something wrong. I thought I was helping a friend, as I would for anyone".

[66] At sentencing, Mr. Ross accepted the invitation to address the court:

> …it's been a long road and I do feel that I did make mistakes and I'd like to apologize if I could to the…I suppose to the Government of Canada for that and for the taxpayers for causing all this curfuffle [*sic*] and all this money that would have to be wasted or put towards this trial and the investigation, all those other things. That's…it's a terrible cost to have to pay for some lack of wisdom on my part…I'm truly sorry for these things and mistakes we make often live after us, I suppose, in that way…

[67] There is nothing in the record to support the trial judge's finding that Mr. Dawson responded to his conviction in the same spirit. As the Crown notes in its factum:

> [Mr. Dawson] did not speak at his sentencing. There was no acceptance of responsibility or expression of remorse provided on his behalf by counsel. His sole comment in evidence on the issue is recorded in his pre-sentence report: "When asked about the offense before the court the subject advised he was

> surprised and upset and that the whole process has been shocking to him and his family…"

[68] There is no indication that Mr. Dawson expressed remorse for his crimes. Surprise, upset and shock at "the whole process" is not remorse. How he viewed his involvement should have been a neutral, not a mitigating, factor in his sentencing.

[69] The mitigating circumstances identified by the trial judge should not have led him to conclude that conditional sentences were appropriate. Crimes such as those committed by Mr. Dawson and Mr. Ross are often committed by people without criminal records, who have otherwise been pro-social and enjoy the support and respect of family and friends. As Justice Coady concluded in *R. v. Colpitts*, 2018 NSSC 180, such mitigating factors are attenuated by the fact that a lack of criminal record and prior good character "aided them in committing the offences" (at para. 146).

[70] The "current plight" of Mr. Dawson and Mr. Ross and the mitigating circumstances described by the trial judge occluded the aggravating circumstances of the offences. In Mr. Ross' case, there was the betrayal of the trust placed in him by his employer and his exploitation of that trust. These factors were not accorded appropriate attention by the trial judge.

[71] In cases of large-scale premeditated fraud, denunciation and general deterrence are the most important sentencing objectives (*Potter and Colpitts*, at para. 837). This is where the trial judge should have trained his focus.

Denunciation and Deterrence

[72] The trial judge's statement that he was "cognizant of the very important sentencing objectives of denunciation and general deterrence" (para. 39) was not followed by him actually giving effect to these important sentencing principles.

[73] The role of denunciation and deterrence was eloquently described by Ross, P.C.J. in *R. v. Wilson*, 2008 NSPC 68, a sentencing for an over $5000 fraud case:

> [16] ... Sentences have an [exemplary] aspect. They serve in part to fix the seriousness of the crime in the mind of the public. They serve as public pronouncement of just how wrong certain behaviours are. Law makers intend that a court should in passing sentence give voice to the thinking of reasonable and upright people to reflect to some degree how they would view the conduct in

> question. The public look to criminal sentences for authoritative pronouncements on what is right and what is wrong. Certainly they have many other sources for their values but the justice system is an important source. By doing so a sentence may properly brand certain conduct as reprehensible and in doing so reinforce the morally correct behaviour of the vast majority of citizens ...

[74] The emphasis in serious fraud sentencing on denunciation and deterrence is long-standing. Large scale, premeditated frauds involving a breach of trust are most often perpetrated by offenders who "are likely to be affected by a general deterrent effect" (*R. v. J.W.*, [1997] 33 O.R. (3d) 225 (ONCA), at para. 50; see also: *R. v. Gray*, 1995 CanLII 18 (ONCA), at para. 32 (Leave to appeal refused: [1995] S.C.C.A. No. 116). This Court in *Potter* endorsed the views of the sentencing judge in *Pavao*:

> [23] The *Criminal Code* requires that the principles of denunciation, deterrence and rehabilitation be considered in sentencing. There is considerable legitimate debate as to whether significant sentences imposed on offenders truly have a deterrent effect, either for the individual offender or for others who might be tempted to commit similar crimes. **However, it is well recognized that if deterrence is relevant at all, it is particularly so for crimes of this nature, involving individuals who are intelligent and who deliberately set out to plan and execute sophisticated frauds. It is important that such individuals be aware that the significant risk of a long jail term outweighs any benefit or financial reward they may obtain from the fraud. This is relevant to the individual offender, and also to others in the community who are tempted towards such crimes.** (emphasis added) (*Potter*, at para. 918)

[75] The conditional sentencing regime was intended to emphasize the laudable goals of restorative justice (*Proulx*, at para. 19). By introducing conditional sentencing, Parliament was mandating the "expanded use …of restorative principles in sentencing as a result of the general failure of incarceration to rehabilitate offenders and reintegrate them into society" (*Proulx*, at para. 20).

[76] In large-scale protracted frauds, such as those perpetrated by Messrs. Dawson and Ross, rehabilitation and reintegration must not be allowed to overshadow the objectives of denunciation and general deterrence. *Proulx* made the point that where the prevailing emphasis must be on denunciation and deterrence, these objectives will, in general, be most appropriately achieved through incarceration:

> Where punitive objectives such as denunciation and deterrence are particularly pressing, such as cases where there are aggravating circumstances, incarceration

> will generally be the preferable sanction. This may be so notwithstanding the fact that restorative goals might be achieved by a conditional sentence **...** (at para. 114)

[77] I find there are no restorative objectives that need to be addressed in Mr. Dawson's or Mr. Ross' case. They each know how to be law-abiding and they continue to be integrated within their families and communities. Mr. Ross is retired and Mr. Dawson is familiar with lawful business practices, having operated a legitimate company prior to these crimes.

[78] The Supreme Court of Canada recognized in *Proulx* that "Inadequate sanctions undermine respect for the law" (at para. 30). The Court understood that if a conditional sentence is not distinguished from probation, it will not be accepted by the public as a legitimate sanction. As I noted earlier, the conditional sentences imposed on Messrs. Dawson and Ross are not obviously different from probation orders.

[79] Promoting respect for the law is a fundamental purpose of sentencing (s. 718, *Criminal Code*). The conditional sentences imposed on Mr. Dawson and Mr. Ross cannot be viewed as serving this purpose.

The Issue of Parity

[80] Sentences in Nova Scotia for significant s. 380(1) frauds have typically fallen between two to five years' imprisonment. I recognize that in *Colpitts*, at paras. 77-82, the sentencing range was described as three to six years. In *R. v. Sponagle*, 2017 NSPC 23, the Crown, referencing cases from Ontario, British Columbia, Alberta and Saskatchewan, submitted the range was three to six years for a large-scale fraud (see para. 21).

[81] In sentencing Messrs. Dawson and Ross, the trial judge referred to summaries of a significant number of fraud sentencings in Nova Scotia courts between 2000 and 2019. The summaries had been prepared by Judge Hoskins of the Nova Scotia Provincial Court in *R. v. Surette*, 2019 NSPC 46, at para. 71. They describe cases plainly distinguishable from the Dawson and Ross frauds. The differences include, where conditional sentences were imposed, mitigating circumstances such as addictions and other contributing personal issues, robust expressions of remorse, and guilty pleas which eliminated the forensic challenges present in the prosecution of most fraud cases. None of the offenders sentenced to

actual incarceration, even those with prior criminal records, had perpetrated frauds as extensive and protracted as those found here.

[82] I find better analogies for the Dawson and Ross offences are found in the following cases: *R. v. Witen*, 2012 ONSC 4151 (sentence affirmed in 2014 ONCA 694 at para. 35. Leave to appeal refused: [2015] S.C.C.A. No. 287); *R. v. Bogart*, [2002] 61 O.R. (3d) 75 (Leave to appeal refused [2002] S.C.C.A. No. 398); and *R. v. Dieckmann and Salmon*, 2014 ONSC 717 (sentence affirmed in 2017 ONCA 575 at para. 75. Leave to appeal refused: [2017] S.C.C.A. No. 381).

[83] *R. v. Witen* – Mr. Witen was a tax preparer who pled guilty to defrauding the federal government of approximately one million dollars between 1998 and 2007 by facilitating the submission by his clients of false expense claims on their income tax returns which led to them paying less taxes than they lawfully owed. Mr. Witen was 61 years old at sentencing. He had no criminal record. He presented impressive letters of reference and had a supportive family. He was described as highly intelligent. He earned a substantial income in a new job. He was a care provider to his wife whose health was deteriorating due to Parkinson's disease. The court was told Mr. Witen's business would likely not survive his incarceration. The Crown sought three years' incarceration: the defence asked for a conditional sentence.

[84] Mr. Witen received a sentence of three years in prison. The court found the mitigating factors to be outweighed by the aggravating circumstances of Mr. Witen's crimes. Denunciation and deterrence were the paramount considerations on sentencing.

[85] *R. v. Bogart* – Dr. Bogart eventually pleaded guilty to defrauding the Ontario provincial medical plan (OHIP) of nearly one million dollars over seven years. He effected nearly twenty thousand fraudulent transactions. He received a conditional sentence of two years less one day and three years' probation. The sentencing judge said he could not "see how society would benefit" from Dr. Bogart's incarceration (at para. 15). Apart from the statutory conditions, the only conditions imposed under the conditional sentence order were performance of 100 hours of community service work and a no-contact clause relating to the ex-partner who reported the fraud.

[86] The Crown appealed, seeking a penitentiary term on the grounds that the sentencing judge was in error by over-emphasising the mitigating factors, under-

emphasising general deterrence, and by imposing a sentence that was demonstrably unfit.

[87] Dr. Bogart was 45 years old at sentencing with no criminal record. He had survived bone cancer that required the amputation of a leg and debilitating chemotherapy. His "perseverance and hard work" got him through medical school with a speciality in psychiatry (at para. 4). His patients, a number of whom had HIV positive or AIDS diagnoses, described him in glowing terms. He was shown to have contributed significantly to the community. He had complied with his conditional sentence order and had paid two hundred thousand dollars in restitution to date, at a rate of six thousand dollars a month. The Court of Appeal described it as "a difficult case" (at para. 1) and referred to the "powerful catalogue of mitigating circumstances" (at para. 20).

[88] That said, the court found that "[f]ive considerations, taken collectively, warrant a jail sentence" (at para. 21). The court then enumerated: the seriousness of the offence, Dr. Bogart's moral blameworthiness (which included that the fraud was a breach of trust), the need for general deterrence, parity – sentences in previous cases of large-scale fraud, and the ineffectiveness of a conditional sentence in this case.

[89] The court's discussion of the ineffectiveness of Dr. Bogart's conditional sentence is relevant to the Dawson and Ross conditional sentences:

> 40 To be effective, usually a conditional sentence must be punitive. What ordinarily makes a conditional sentence punitive is house arrest or a stringent curfew. For the respondent, both of these alternatives are impractical because his medical office is in his home. Thus, even while serving his conditional sentence he continues to live and work as he did before, with virtually no restrictions on his liberty. For defrauding the public purse of nearly $1 million, his sentence amounts to little more than probation. A conditional sentence in this case sends the wrong message about health care fraud both to practitioners and the public at large.

[90] The court would have sentenced Dr. Bogart to "at least four years in the penitentiary" but for the "quite unusual mitigating factors" and the thirteen and a half months of the conditional sentence he had already served. As a consequence of these factors, he was sentenced to eighteen months in jail, going forward (at para. 42).

[91] *R. v. Dieckmann and Salmon* – Ms. Dieckmann was convicted after a four-month trial of seven counts of fraud totalling just over five million dollars. The

fraud had been perpetrated through a payroll service company she and her father operated for employers. Instead of remitting the source deductions to the Canada Revenue Agency, they pocketed them. Ms. Dieckmann received the sentence sought by the Crown, a four-year prison sentence. The court found she did not qualify for a conditional sentence as a sentence of two years less a day, given "the nature and magnitude" of the fraud, made a "two year sentence utterly inadequate" (at para. 37). Finding that Ms. Dieckmann clearly profited from her crime, but the precise amount could not be determined, the court also imposed a fine of one and a quarter million dollars.

[92] Ms. Dieckmann was described as a "critical player" in the fraudulent scheme "because she managed the money throughout", employing a variety of "creative strategies" (at paras. 12 and 14). She was 48 years old at sentencing with no criminal record. She had a supportive family and friends described her in very positive terms.

[93] The court identified aggravating factors that included: the fraud was large-scale, complex and prolonged, driven solely by greed; it ensnared a large number of innocent or unwitting parties; and the proceeds were public monies. There were no extenuating circumstances, no expression of remorse, and no recovery or any effort at restitution. Ms. Dieckmann's decision to proceed to trial in the face of an "overwhelming case" removed from consideration "what would have been a powerful mitigating feature, especially in a long, labour intense trial such as this" (at para. 40).

[94] Parity which, in practice, "gives meaning to proportionality" (*Friesen*, at para. 33), requires an assessment of the characteristics of the Dawson and Ross case and a determination of where they are reflected in other cases. There are reflections of the Dawson and Ross offences in the *Witen*, *Bogart*, and *Dieckmann and Salmon* cases where penitentiary sentences were imposed and conditional sentencing was emphatically rejected.

Imposing Fit Sentences on Mr. Dawson and Mr. Ross

[95] The trial judge's errors and the manifestly unfit conditional sentences require the conditional sentences to be set aside and penitentiary sentences substituted. I endorse the statement of Justice Campbell in *R. v. Clarke*, 2016 NSSC 101:

> [55] There are also circumstances when a sentence must simply serve as punishment. If it deterred no one it wouldn't matter. When a person cheats at a high level there have to be serious consequences. A system that incarcerates people who commit street level crime cannot cringe at the prospect of punishing people who commit their crimes in boardrooms and office towers.

[96] There are two remaining issues: (1) What length should the sentences be and should they be the same? and (2) What significance does COVID-19 have to the sentences I would impose?

What Length Should the Sentences Be and Should They be the Same?

[97] Mr. Dawson was somewhat more culpable in the commission of the fraud than Mr. Ross, although Mr. Ross was integral to the scheme. Mr. Dawson profited from the scheme he created, whereas Mr. Ross did not. Mr. Dawson was motivated by greed. Mr. Ross appears to have been motivated to assist his friend for no material benefit. Mr. Dawson was also convicted of conferring benefits on Mr. Langille. I would sentence Mr. Dawson to 42 months' incarceration and Mr. Ross to 36 months' incarceration.

The Issue of Incarceration/Reincarceration during COVID

[98] The re-sentencing of Mr. Dawson and Mr. Ross raises the issue of incarceration during the pandemic. This was not addressed at appeal. Mindful of what was said in *R. v. Kleykens*, 2020 NSCA 49, I have considered whether the sentences I would impose on Messrs. Dawson and Ross should be further reduced, beyond simply giving credit for time served on the conditional sentence orders, or stayed completely. I have concluded the sentences should not be reduced or stayed.

[99] I am satisfied in this case that incarceration is necessary. A further reduction in the sentences or a stay of the sentences would be contrary to the cardinal principle of proportionality. The sentences must be proportionate to the gravity of the offences committed by Mr. Dawson and Mr. Ross and their high degree of moral culpability. Actual imprisonment is appropriate, notwithstanding there is a pandemic.

[100] *Kleykens*, decided by this Court in June 2020 when the pandemic was in its early stages, allowed a Crown appeal of a 90-day sentence for possession of cocaine, marihuana and cannabis resin for trafficking, but stayed the substituted two-year prison term. Justice Saunders said the following:

> **[**94] While it is true that Mr. Kleykens did not file evidence to show he was particularly vulnerable to the effects of the virus, there are consequences well beyond the potential risk to Mr. Kleykens' health personally, which must be taken into account. Given the startling number of deaths seen around the world over the last four months, one can take judicial notice of the critical importance of personal hygiene and social distancing, the wearing of personal protective equipment, the prohibition or limiting of people gathering, and the many other precautions ordered by government officials and health care professionals, which are deemed absolutely necessary to reduce the risk of exposure and transmittal to others. The very real, heightened and urgent need to minimize the likelihood of exposure to and transmittal of the virus, is reflected in the cooperative effort seen over the last several weeks on the part of judges, Crown Attorneys and defence lawyers to reduce current prison populations by arranging the release of certain inmates, upon strict terms, who are deemed to be little or no threat to the public.
>
> [95] Requiring the re-incarceration of Mr. Kleykens would, in my opinion, disregard those important safeguards by exposing prison staff, correctional officers, other inmates, and the respondent to unnecessary risk. Those risks outweigh the importance of obliging Mr. Kleykens to complete a prison sentence that properly fulfils the primary objectives of denunciation and deterrence.
>
> …
>
> [98] One can reasonably expect that advances and discoveries within the medical and scientific communities will halt the spread of the coronavirus and that the COVID-19 crisis will not last forever. Accordingly, what weight, if any, will be accorded this factor in subsequent appeals can be decided by future panels of this Court on a case-by-case basis.
>
> [99] After careful consideration of the facts of this case, I have reached the conclusion that the problems currently presented by COVID-19, when viewed in light of the circumstances of this particular offence and this particular offender, martial in favour of keeping Mr. Kleykens out of jail. It would not be in the interests of justice to re-incarcerate him. I would, therefore, stay the sentence I have imposed.
>
> …
>
> [102] Given the circumstances of this offence and this offender, a fit and proper sentence ought to have been two years in a penitentiary. But for the crisis, lethality and uncertainty surrounding the COVID-19 pandemic, the respondent would have been re-incarcerated to serve such a sentence.
>
> [103] However, given the very real risk such re-incarceration would pose to the health of the respondent and others, such re-incarceration is no longer in the interests of justice. Accordingly, the sentence should be stayed.

[101] As did Justice Saunders, I find it is within the permissible scope of judicial notice to recognize the reality and impact of the pandemic. It continues to have

unprecedented effects on our society and institutions; the medical knowledge about its transmission, risks, lethality, and the efficacy of vaccines, is evolving; and only a relatively small percentage of Canadians have been vaccinated to date. The extent to which the vaccination of prisoners will be made a priority is unknown.

[102] These observations acknowledge the ongoing impact of a readily transmissible and potentially deadly virus, an impact that is amplified where there is congregate living such as there is in penitentiaries and jails. I note the comments of Harris, J. in *R. v. Kandhai*, 2020 ONSC 1611:

> [7] …The entire country is being told to avoid congregations of people. A jail is exactly that, a state mandated congregation of people, excluded from the rest of the population by reason of their crimes or alleged crimes. The situation, which has led to drastic measures in society at large, is bound to increase day to day hardship in prison and the general risk to the welfare of prison inmates…

[103] The Office of the Correctional Investigator has made comparable statements in its Third COVID-19 Status Update of February 23, 2021:

> There can be little doubt that people inside prisons, like other congregate living settings, such as long-term care facilities, shelters or group residences, are significantly more vulnerable to transmission and spread of COVID-19. The difference is that prisons are enforced congregate settings where people are held in close proximity with one another…Prisoners do not necessarily have the ability or means to practice safe distancing, and maintaining hygiene and sanitation behind bars can be challenging at the best of times. The daily movement of staff from outside communities experiencing outbreaks creates potential vectors of disease transmission inside prisons. For elderly and medically compromised inmates, the risk of contracting COVID inside prison can be life-altering, or even deadly.(pp. 22-23)

[104] That said, I would join other Canadian appellate courts that have declined to reduce otherwise fit sentences due to the pandemic (see, for example: *R. v. Lariviere*, 2020 ONCA 324, at paras. 13-18; *R. v. D.B.*, 2020 ONCA 512; *R. v. Thompson*, 2020 ONCA 361; *R. v. Morgan*, 2020 ONCA 279, at paras. 8-12; *R. v. S.C.C.*, 2021 MBCA 1; *R. v. El-Kaaki*, 2020 BCCA 183).

[105] The pandemic has not eliminated carceral sentences. Sentencing during COVID must still respect sentencing imperatives. Thoughtful consideration of the impact of the pandemic on the principles of sentencing is found in *R. v. Hearns*, 2020 ONSC 2365, which includes the following statement:

> [23] …I am not suggesting that the pandemic has generated a "get out of jail free" card. The consequences of a penalty – be they direct or collateral – cannot justify a sentence that is disproportionately lenient, or drastically outside the sentencing range. It cannot turn an inappropriate sentence into an appropriate one or justify dispositions that would place the public at risk…

[106] COVID is a relevant factor in the determination of what constitutes a fit sentence. However, the principles of sentencing, that include denunciation and deterrence, cannot be rendered meaningless. Sparing Messrs. Dawson and Ross from incarceration would have that effect. The pandemic does not create a justification for imposing a disproportionate sentence for significant fraud (*R. v. Wallen*, 2021 ONCJ 64, at para. 50; *R. v. Walker*, 2020 ONSC 7029, at para. 87).

[107] Sentencing is a highly individualized process "that requires the judge to weigh the objectives of sentencing in a manner that best reflects the circumstances of the case" (*R. v. Nasogaluak*, 2010 SCC 6, at para. 43; see also: *R. v. Suter*, 2018 SCC 34, at para. 4). During COVID, each sentencing case, whether dealt with in first instance or on appeal, must be determined according to the specific facts and circumstances of the offence and the offender. The only overarching principle is that sentencing objectives and norms must not be marginalized and made irrelevant.

[108] At the time their pre-sentence reports were prepared – February 12, 2020 for Mr. Dawson and November 5, 2019 for Mr. Ross – neither of them had any serious, underlying medical conditions. Mr. Dawson reported a diagnosis of hypertension and some back problems, but said he was otherwise in good physical health. I note, as did the Ontario Court of Appeal in *R. v. Kanthasamy*, 2021 ONCA 32, that significant health issues can be a basis for seeking early parole from the Parole Board of Canada which has the authority to act pursuant to s. 121(1) of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20.

[109] The Status Update from the Office of the Correctional Investigator reports that all four of the Atlantic Region penitentiaries have remained COVID-free since the start of the pandemic. It is hoped that whatever measures are responsible for this will continue to keep the virus at bay while the vaccination roll-out extends into our communities and institutions.

Disposition

[110] I would grant leave to appeal, set aside the conditional sentences imposed by the trial judge and substitute, in Mr. Ross' case, a 36-month penitentiary term, and in Mr. Dawson's case, a 42-month penitentiary term, for the fraud convictions. I would impose a concurrent sentence of 42 months for Mr. Dawson's conviction pursuant to s. 121(1)(b) of the *Criminal Code*.

[111] Where a conditional sentence is set aside and incarceration is substituted, the variation to the original sentence – in this case, the imposition of penitentiary terms – takes effect from the date of the original sentence. Credit is given for the time spent on the conditional sentence, the norm being one-to-one credit. (See, for example: *R. v. MacLeod*, 2004 NSCA 31, at para. 33; *R. v. Birchall*, 2001 BCCA 356, at para. 37; *R. v. Martin*, 2012 NBCA 95, at para. 13; *R. v. Ponticorvo*, 2009 ABCA 117, at para. 23; *R. v. Tuglavina*, 2020 NLCA 30, at para. 48). Although a more flexible approach allowing a court of appeal to consider all the relevant factors in determining the appropriate amount of credit has been endorsed (*R. v. G.C.F.*, [2004] 71 O.R. (3d) 771 (ONCA)), I am satisfied the customary one-to-one credit should be applied here.

Derrick, J.A.

Concurred in:

Bryson, J.A.

Scanlan, J.A.