

IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Elmadani, 2015 NSPC 65

Date: October 8, 2015

Docket: 2146399

Registry: Halifax

Between:

Her Majesty the Queen

v.

Hasan Elmadani

SENTENCING DECISION

Judge: The Honourable Judge Anne S. Derrick

Heard: March 11, June 10, July 10, 23, September 25 and 29, 2015

Oral Decision: October 8, 2015

Charges: Section 380(1)(a), *Criminal Code of Canada*

Counsel: Mark Heerema, for the Crown

Hasan Elmadani, representing himself

By the Court:

Introduction

[1] On April 22, 2014 Mr. Elmadani pleaded guilty to a fraud exceeding \$5000, specifically that he by deceit, falsehood, or other fraudulent means, unlawfully defrauded David Aplin Recruiting (“DAR”) of a sum of money, exceeding \$5000, contrary to section 380(1)(a) of the *Criminal Code*.

[2] DAR was Mr. Elmadani’s employer from 2007 to 2009. Mr. Elmadani has a criminal record for fraud perpetrated in 2000/2001 against an employer. In 2007 he received an eighteen month conditional sentence. He submits that a conditional sentence is appropriate in this case as well, on strict conditions for the maximum duration of two years’ less a day, followed by two years’ probation. The Crown’s position is that Mr. Elmadani should be sentenced to twelve months in custody.

[3] These are my reasons for the sentence I am imposing on Mr. Elmadani. As the charges in this case were laid some years ago, I will start with a review of what has taken so long to bring the matter to a conclusion.

History of the Case

[4] At the end of this decision is an Appendix of the history of the proceedings. What follows now is an overview and details about developments since Mr. Elmadani entered his guilty plea on April 22, 2014.

[5] Mr. Elmadani’s offending occurred between September 30, 2008 and April 2009. He was charged in February 2010 and his first court appearance was at the end of March. Although dates were set in July 2010 for a May 2011 trial, delays for various reasons stalled the momentum of the case. An apparent resolution in 2011 which involved the charges being transferred, for a guilty plea, to British Columbia (where Mr. Elmadani has been living), unraveled. That process took two years during which time the court had no option but wait while seeking status reports from the Crown. Eventually the charges returned from B.C. to be dealt with in Nova Scotia.

[6] Relationships with various lawyers representing Mr. Elmadani also unraveled. Mr. Elmadani has had five lawyers in the course of these proceedings. For reasons unrelated to this case, Lyle Howe, a lawyer retained by Mr. Elmadani

in November 2013 was suspended by the Nova Scotia Barristers' Society in June 2014. Mr. Elmadani retained his fifth, and final lawyer in the fall of 2014.

[7] When Mr. Howe was suspended from practice in June 2014, Mr. Elmadani was awaiting a sentencing hearing in this court scheduled for July 3, 2014. A pre-sentence report was being prepared in British Columbia.

[8] Due to Mr. Howe's suspension, Mr. Elmadani's sentencing for July 3 had to be adjourned and a new sentencing date of October 30, 2014 was set once Mr. Elmadani retained new counsel, Mark Bailey. On October 6, Mr. Bailey advised that Mr. Elmadani was intending to apply to withdraw his guilty plea. Ultimately the application was never made and on January 16, 2015 a new sentencing date for March 2015 was set.

[9] On March 11 I heard the sentencing submissions of the Crown and Defence who had each also filed written briefs and cases. I also heard from Mr. Elmadani pursuant to section 726 of the *Criminal Code*. As a result of Mr. Elmadani's statements about what sounded to me like ongoing mental health issues I asked Mr. Heerema and Mr. Bailey to comment on how the sentencing should proceed. After some discussion it was agreed that Mr. Elmadani be given the opportunity to obtain and provide copies of a 2006 psychological assessment and have an updated assessment prepared. Due to the court's docket and to afford adequate time for Mr. Elmadani and counsel to deal with this new issue, the sentencing proceedings were adjourned to June 10, 2015.

[10] What followed has been more upheaval in the momentum of the case and more delay. Mr. Elmadani produced an assessment from a clinical and forensic psychologist which led to a cross-examination of the psychologist by the Crown on July 10. That cross-examination was aborted. Mr. Elmadani discharged Mr. Bailey on July 23, there then was the submission of a revised report from the psychologist, further Crown cross-examination on September 25, and submissions on this evidence on September 29. In these final stages of Mr. Elmadani's sentencing proceedings, he has represented himself.

[11] Later in these reasons, I will be discussing the psychological evidence that Mr. Elmadani brought before the court. Before doing so, I will review the facts that are relevant to the fraud charge he is being sentenced for.

Admitted Facts

[12] On April 22, 2014 when Mr. Elmadani pleaded guilty, a statement of admissions, (*Exhibit 1 with Appendices*) and additional facts, were read into the record. Although Mr. Elmadani has since said his lawyers, Mr. Howe and Mr. Bailey, should have raised issues on his behalf with respect to the facts presented by the Crown, on April 22, when he entered his guilty plea, I asked him directly if he admitted to the facts that had been recited. He said he did. (*Exhibit 12, page 264*) As I noted earlier in this recital of the history of these proceedings, Mr. Elmadani never brought forward an application to withdraw his guilty plea. I indicated, most recently on September 29, that I would not be revisiting his admissions.

[13] I will add, as a postscript to this issue that April 22, 2014 represented the date when Mr. Elmadani's trial was to commence. Mr. Howe appearing with Mr. Elmadani indicated there was a resolution and that it had been "discussed...thoroughly" by counsel. (*Exhibit 1, page 188*) In the course of the Crown reciting the facts set out in the Admissions of Fact and its appendices (*Exhibit 1*), Mr. Howe asked for a recess to permit Mr. Elmadani an opportunity to speak with him. Mr. Howe returned after about 25 minutes to advise that he didn't "anticipate any problems..." (*Exhibit 12, page 233*) with respect to the facts being relied on by the Crown. Mr. Hartlen, on behalf of the Crown, concluded his review of the facts, without any Defence objection.

[14] On April 22, 2014, Mr. Elmadani admitted to the following:

- David Aplin Recruiting ("DAR") hired Mr. Elmadani in February 2007 as a permanent, full-time recruiter ("Senior Consultant") specializing in the recruitment of professionals for permanent placement in the Engineering and Technical Fields. DAR is a nation-wide employee recruiting firm, with a local office in Halifax. Mr. Elmadani worked out of DAR's Halifax office;

- On September 30 2008, Mr. Elmadani logged onto the DAR internal tracking system to claim a commission in relation to a placement that did not materialize. The applicant Mechanical Technologist who applied through DAR for a job with Rutter Hinz, declined the job offer in an email to Mr. Elmadani on September 29. In his position with DAR, Mr. Elmadani had facilitated the application and interview process. He was not entitled to a commission for what was ultimately an unsuccessful placement;
- As a result of Mr. Elmadani's fraudulent entries into DAR's internal tracking system, including the false claim that the applicant was starting the Rutter Hines' job on March 9, 2009, DAR invoiced Rutter Hinz for the placement that failed when the applicant turned down the job offer.
- Mr. Elmadani secured a commission from DAR in the first quarter of 2009 for a placement with a DAR client that never occurred. The prospective placement, an electronic design engineer, whose interviews with a regular DAR client were arranged by Mr. Elmadani, was ultimately not hired. Mr. Elmadani knew this by January 9, 2009 by which time he had made a claim for the commission. He never informed DAR that the placement had not gone through. Mr. Elmadani was only entitled to commissions on successful placements;
- DAR, unaware that the hiring of the electronic design engineer had not gone ahead, billed their client for the placement services;
- In early 2009, Rutter Hinz Inc., a company in Newfoundland and client of DAR, hired a mechanical engineer with the assistance of Mr. Elmadani in his role as a recruiter with DAR. Mr. Elmadani billed Rutter Hinz in March 2009 in the amount of \$13,800 plus HST. He issued the invoice in the name of "Sam Elmadani and Associates, a Division of David Aplin Recruiting." DAR had no such Division. Rutter Hinz paid Mr. Elmadani's invoice by cheque which Mr. Elmadani cashed. The \$15,594.00 was never remitted to his employer, DAR, as it should have been;
- Mr. Elmadani told Rutter Hinz that he had just gone "through an acquisition" as a way of explaining his invoice and also advised that his

accountant had informed him, “for my current account the cheque needs to be made out to Sam Elmadani.”

- Mr. Elmadani was paid a commission by DAR for his work on the Rutter Hinz file;
- DAR, unaware of Mr. Elmadani’s scam, and in the normal course of business, invoiced Rutter Hinz for the services rendered in relation to the hiring of the mechanical engineer;
- In April 2009, Mr. Elmadani obtained a retainer of \$2000 from a DAR client for a recruitment contract. He collected the retainer, which, at his direction, had been made payable by cheque to “Sam Elmadani and Associates – A Division of David Aplin Recruiting”, and cashed it to his personal benefit. He never entered the retainer into the DAR database and did not provide the funds to DAR.

[15] Although the charge to which Mr. Elmadani pleaded guilty refers to “between dates” of July 30, 2008 and July 5, 2009, it has been acknowledged by the Crown that Mr. Elmadani perpetrated the first fraud against DAR on September 30, 2008. This date is relevant for reasons I will be explaining.

[16] Mr. Elmadani was well-paid by DAR. The Crown’s recital of the facts included DAR indicating that Mr. Elmadani had received \$95,000 in his first year, \$150,000 in his second, and was on track to make over \$200,000 when he was fired.

[17] Mr. Elmadani’s fraud against his employer, David Aplin Recruiting, totaled \$22,700, consisting of: \$13,800 paid by Rutter Hines to Mr. Elmadani for the placement of the mechanical engineer; \$4640 paid as commission for the Mechanical Technologist who turned down Rutter Hines’ job offer; \$2250 paid as commission for the electronic design engineer who was ultimately not hired; and \$2000 for the client retainer that should have been paid to DAR.

Victim Impact Statement

[18] The Crown has advised that DAR chose not to file a victim impact statement or seek restitution and indicated in an email that they simply wanted to “wash their hands of Sam [Mr. Elmadani].”

Pre-sentence Report dated June 17, 2014

[19] Mr. Elmadani is 46 years old and married with two teenaged children. His wife remains supportive of him. The pre-sentence report notes that she acknowledges his “bad choices” and “expressed anger that he did not reach out for support.” The pre-sentence goes on to record that Mr. Elmadani’s wife: “...credits him with making a concerted effort to address the root problems in his decision making, working over sixty hours per week and supporting their children both academically and in their extra-curricular activities.”

[20] The pre-sentence report indicates that the December 2006 psychological assessment described Mr. Elmadani’s problems with “low self-esteem, tenuous self-confidence, chronic feelings of inferiority and strong feelings of shame” related to his childhood of physical and psychological abuse at the hands of his father.

[21] Mr. Elmadani is university educated with Bachelor’s and Master’s degrees in Political Science. The pre-sentence report notes that his employment history consists of “senior financial advising, in management for financial institutions and recruitment consultant for various companies.”

[22] As I noted at the start of these reasons, Mr. Elmadani received an eighteen month conditional sentence in March 2007. That sentence was transferred from British Columbia to Nova Scotia in April 2007, coinciding with the start of his employment with DAR. The author of the pre-sentence report contacted the senior probation officer at the Dartmouth Community Corrections office and was advised that Mr. Elmadani had reported as directed, abided by his curfew restrictions and successfully completed the ordered one hundred hours of community service work.

Mr. Elmadani’s Current Employment

[23] Mr. Elmadani’s current employment circumstances are detailed in the most recent psychological assessment dated September 20, 2015. (*Exhibit 14*) Mr.

Elmadani is working in his fourth job since his relocation from Nova Scotia to British Columbia in 2009. He was fired in May 2009 as a result of his employer learning about the DAR fraud, left a second company in the summer of 2011, and was fired in October 2012 because his criminal past again came to light. He was hired by his present employer in the summer of 2013. He works as a Human Resources Manager with a natural gas construction and distribution company in British Columbia. He earns a good income. Mr. Elmadani expects he would be “fired instantly” if his employer became aware of his involvement with the criminal justice system or if he was incarcerated.

Statement by Mr. Elmadani at the March 11, 2015 Sentencing Hearing

[24] At the sentencing proceedings on March 11, Mr. Elmadani spoke at length and with some emotion about the challenges he has confronted since being fired in 2009 by DAR. He commenced his remarks by saying he “accepts full responsibility” for his actions. He described the struggle to secure stable, well-paid employment in British Columbia and noted that his wife and family have suffered because of his actions. Returning to British Columbia and re-settling there was hard on his children. The family’s finances were very strained for some time.

[25] Mr. Elmadani acknowledged that he had not done “the right thing” at DAR and had been “dishonest” in his conduct. He said “instead of doing the right thing” he had gone down the path that had “got him into trouble before”. Mr. Elmadani also said he had failed to “focus on the psychological issues that had been highlighted in his previous offence”. He talked of failing to focus on “shortcomings and decision-making errors.” He apologized to David Aplin Recruiting and his former colleagues there and to his family. He said that his supervisor and colleagues at DAR had been supportive of him and had treated him well.

[26] Mr. Elmadani spoke of now being committed to doing the right thing and trying to constructively address issues that led him to make such “misguided choices” in the past. He indicated he continues to seek counselling and is trying to learn more about his psychological issues. He acknowledged that he was given a second chance in 2007 and “failed to take steps to ensure I was going to be

successful.” Mr. Elmadani also advised that he was now, finally, in a position to effect restitution.

[27] After listening to Mr. Elmadani’s “in dock” statement, I addressed with counsel the issue of his mental health and sought their submissions on how the sentencing hearing should proceed. I noted a reference in the pre-sentence report (*page 3*) that a psychological assessment had been prepared for Mr. Elmadani in December 2006, presumably for the sentencing that proceeded in March 2007. (I have no information as to how it may have been used in that proceeding.) After hearing from Mr. Heerema and Mr. Bailey, I adjourned Mr. Elmadani’s sentencing to permit him to get an updated psychological assessment to be presented in mitigation. It was agreed that the December 2006 assessment would also be provided.

[28] I indicated to counsel that I obviously could not say what effect, if any, the updated psychological assessment would have on my determination of the fit and proper sentence for Mr. Elmadani.

The Purpose and Principles of Sentencing

[29] In sentencing Mr. Elmadani I am guided by the sentencing provisions of the *Criminal Code*. Section 718 of the *Criminal Code* sets out the objectives a sentence must achieve: denunciation, deterrence – both specific and general, separation from society where necessary, rehabilitation of the offender, reparations by the offender, and the promotion of a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

[30] Section 718 also describes the “fundamental purpose of sentencing” as contributing to “respect for the law and the maintenance of a just, peaceful and safe society...”

[31] Sentencing is profoundly subjective. (*R. v. Ipeelee*, [2012] S.C.J. No. 13, paragraph 39; *R. v. Wust*, [2000] S.C.J. No. 19 paragraph 21; *R. v. M.* (C.A.), [1996] S.C.J. No. 28, paragraph 92; *R. v. Shropshire*, [1995] S.C.J. No. 52) In determining a fit sentence, “...the sentencing judge should take into account any relevant aggravating or mitigating circumstances (s. 718.2(a) of the *Criminal Code*), as well as objective and subjective factors related to the offender's personal

circumstances.” (*R. v. Pham*, [2013] S.C.J. No. 100, paragraph 8; *R. v. Nasogaluak*, [2010] S.C.J. No. 6, paragraph 44)

[32] Assessing moral culpability is a fundamental aspect of determining the appropriate sentence: a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. (*section 718.1, Criminal Code*) Proportionality is “closely tied to the objective of denunciation”, promotes justice for victims, and seeks to ensure public confidence in the justice system.

Additional Sentencing Guidelines – Relevant Principles and Factors

[33] With proportionality as the guiding principle of sentencing, the *Criminal Code* (*section 718.2*) also directs judges to take into account a number of other considerations. These are aggravating and mitigating factors which should increase or reduce a sentence, and the principles of parity and restraint. Additionally there is the issue of how the *Criminal Code* views imprisonment as a sentencing option -- as a last resort. An offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances, and all available sanctions other than imprisonment that are reasonable in the circumstances should be considered. (*sections 718.2(d) and (e), Criminal Code*)

[34] A breach of trust is a statutorily-mandated aggravating factor in sentencing. (*section 718.2 (a)(iii), Criminal Code*) Section 718.2(b) addresses the parity principle, requiring that "a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances." The individualized nature of offenders and offending always makes sentencing a challenge, notwithstanding the principle of parity. And the range of sentences in fraud cases is broad, from non-custodial sentences to prison time.

[35] The balancing of the sentencing principles to craft an appropriate sentence is always a fraught exercise. While the sentencing court must choose how to most appropriately weigh the various sentencing principles for the particular offence and offender, some cases, breach of trust amongst them, are subject to an emphasis on denunciation and deterrence.

Aggravating Factors

[36] Mr. Elmadani's frauds at DAR came on the heels of Mr. Elmadani completing the conditional sentence he had received for defrauding a previous employer. DAR hired Mr. Elmadani in February 2007, unaware of his fraudulent past and the eighteen month conditional sentence imposed in March.

[37] As a consequence of the earlier breach of trust, Mr. Elmadani has a criminal record consisting of one count of fraud and 17 counts of forgery, occurring during the period of September 6, 2000 and January 4, 2001. The fraud and forgeries were perpetrated against a bank where Mr. Elmadani was employed as a manager. Mr. Elmadani's actions defrauded the bank of \$139,424.88. Mr. Elmadani pleaded guilty to these offences in 2004.

[38] Although on March 11, 2015 Mr. Bailey indicated on Mr. Elmadani's behalf that he had made full restitution in relation to his 2000/2001 offences, there has been no evidence provided to establish this. I would have thought this could have been confirmed through documentation but Mr. Elmadani has not produced any.

[39] Mr. Elmadani's eighteen month conditional sentence ended on September 29, 2008. The very next day – September 30, 2008, he logged into the DAR system with the fraudulent entry and netted the \$4640 commission on the placement that actually never occurred because the Mechanical Technologist applicant turned down the Rutter Hinz job offer. The applicant emailed Mr. Elmadani on September 29 to advise that she was declining the Rutter Hinz offer.

[40] Mr. Elmadani's criminal record for defrauding an employer and his resumption of criminal offending immediately after his conditional sentence concluded are very significant aggravating factors.

[41] The frauds Mr. Elmadani committed against DAR were deliberate and well-planned. They involved him deceiving his employer and his employer's clients. Mr. Elmadani used diverse methods for perpetrating the frauds: making false entries in DAR's internal software tracking system (the fraudulent claims for unearned commissions); creating and sending out a false invoice to a DAR client with a fabricated explanation for why payment should be made to "Sam Elmadani and Associates" (invoices to DAR clients were the responsibility of DAR's head office in Edmonton); inputting false information into DAR's internal system so

that the inevitable DAR invoice would not go to the same person Mr. Elmadani had invoiced fraudulently; and creating a fraudulent invoice for securing a retainer fee from a DAR client that should have been paid to DAR.

[42] As a result of the frauds perpetrated by Mr. Elmadani, all of the companies involved, established clients of DAR, ended their business relationships with DAR.

[43] Mr. Elmadani's frauds caused DAR to make certain changes to its own practices. Whereas previously, employees including Mr. Elmadani, received their commissions before DAR billed the clients for the recruitment services provided, now DAR employees have to wait until the clients have paid DAR to receive their commissions. A system that had operated on the basis of employee honesty had to be scrapped.

[44] It is also aggravating that Mr. Elmadani continued to defraud DAR until he was discovered and fired. He did not stop before his fraudulent activities came to light although of course he could have done so.

Mitigating Factors

[45] Mr. Elmadani submits there are a number of mitigating factors in his case that should operate to permit him to receive a conditional sentence rather than straight jail time. He points to his guilty plea, his remorse, the mental health issues that have led him to commit these crimes of fraud, and his commitment to rehabilitating himself through therapy directed at dealing with the underlying causes for his criminal offending.

Accepting Responsibility, Guilty Plea and Remorse

[46] It took Mr. Elmadani a considerable amount of time to own up to his criminal acts. His guilty pleas came four years after he was charged and on the morning his trial was scheduled to finally start. Although he has said he accepts full responsibility for what he has done, the history of this case reveals him pondering in the fall of 2014 an application to withdraw his guilty plea and subsequent occasions when his acceptance of responsibility has the appearance of being qualified. Even in his section 726 remarks on March 11, Mr. Elmadani spoke

of “shortcomings and decision-making errors.” Some victim-blaming also emerges in the most-recent psychological assessment he provided to the court.

Financial Problems

[47] Mr. Elmadani has offered various reasons for his offending. For example, in the pre-sentence report dated June 17, 2014, Mr. Elmadani pointed to financial difficulties as the cause, indicating that DAR had provided a second mortgage on his home and garnished his wages when he defaulted.

[48] Mr. Elmadani obtained an \$80,000 loan from DAR when he purchased a home in Nova Scotia in September 2008. The Crown tendered a Promissory Note (*Exhibit 3*) dated September 30, 2008 and signed by Mr. Elmadani in which he promised to repay DAR \$80,000 on or before November 17, 2008. Emails submitted by the Crown (*Exhibit 5*) indicate that DAR required a “Collateral Mortgage” to advance Mr. Elmadani the \$80,000. It was not routine for DAR to advance financing to an employee. As DAR said to Mr. Elmadani in an email, “We are not a financial institution.” (*Exhibit 4, page 1*)

[49] The \$80,000 was not repaid. At the end of January 2009, DAR started garnishing Mr. Elmadani’s commissions. When Mr. Elmadani was fired by DAR he still owed nearly \$50,000 on the Promissory Note.

[50] The date Mr. Elmadani signed the Promissory Note is the same date he logged into DAR’s internal tracking system and recorded a placement of the applicant Mechanical Technologist who had turned down the job offer, entitling himself to a commission he had not earned. What this indicates is that even before Mr. Elmadani defaulted on the Promissory Note, he had started to steal from his employer. Perhaps he anticipated he would not be able to make ends meet. If that was the case, he could have arranged his personal finances differently rather than creating conditions that could subject him to financial strain and the temptation to deal with his problems through dishonesty.

[51] In his submissions on March 11 Mr. Bailey explained that Mr. Elmadani had been trying to make ends meet because of the unfavourable financial circumstances he found himself in after starting his employment with DAR. That being said, Mr. Elmadani, an obviously intelligent and well-educated professional who was

making a good income resorted to fraud rather than exploring any lawful options to deal with his financial situation.

[52] I will be examining Mr. Elmadani's description of financial stresses further, when I discuss the psychological assessments presented in mitigation.

Mental Health Issues

[53] Mr. Elmadani has presented a psychologist's opinion that his dysfunctional, criminal behaviour emerges from deeply-seated psychological issues and trauma. I will now discuss the evidence that is directed at this issue, how it came into being, and the weight to be given to it.

The Genesis of the Opinion Evidence of Dr. Robert Ley

[54] I will step back for a moment to explain how this sentencing ended up with assessments of Mr. Elmadani from Dr. Robert Ley, a clinical and forensic psychologist, cross-examination of Dr. Ley and submissions on his evidence. In response to the opportunity I afforded Mr. Elmadani on March 11 to provide me with some evidence in mitigation about his mental health issues, he ultimately produced three assessments from Dr. Ley: an assessment dated December 9, 2006 (the "December 2006 assessment"); an updated assessment dated June 5, 2015 (the "June 2015 assessment"); and a revised assessment dated September 20, 2015 (the "September 2015 assessment"). All the assessments are psychological evaluations and risk assessments and have been admitted into evidence by consent. As I will be discussing, it is the Crown's submission that, for reasons I will discuss, Dr. Ley's assessments should be accorded little weight.

[55] I also have two letters from Mr. Elmadani's psychotherapist, Dr. Stephen Rochefort, both of which have been entered by consent. (*Exhibit 15 – letter dated June 5, 2015 and Exhibit 16 - letter dated September 29, 2015*)

[56] As I have mentioned, there was cross-examination by the Crown of Dr. Ley's June 2015 psychological assessment. It is relevant that I explain what happened in relation to his cross-examination. It has been quite convoluted, which was not anticipated.

[57] The cross-examination by Mr. Heerema of Dr. Ley on his June 2015 assessment of Mr. Elmadani was conducted on July 10, 2015. Dr. Ley appeared by consent via video-link from British Columbia. The cross-examination had been underway for about an hour when Mr. Bailey requested a recess to make a necessary personal call. During that recess Mr. Elmadani instructed Mr. Bailey to abandon any reliance on the June 2015 and December 2006 psychological reports. This brought an abrupt end to Dr. Ley's cross-examination. Mr. Bailey advised that in light of Mr. Elmadani's instructions, there was no need for any further examination of Dr. Ley or any additional submissions. I confirmed this with Mr. Elmadani directly, that he did not want me to consider either of Dr. Ley's reports or the evidence adduced during the truncated cross-examination. Mr. Elmadani acknowledged his understanding of the effect of his instructions: that I would be proceeding to decide his sentence as though none of the Dr. Ley evidence had happened. As I said to him in part: "This was a detour...and I won't be taking any of it into account, you understand that?" Mr. Elmadani indicated he did. I set July 31 for my decision on sentence.

[58] As I noted at the start of these reasons, the July 31 date for the decision on Mr. Elmadani's sentence was adjourned. Mr. Elmadani severed his relationship with Mr. Bailey on July 23. It had been apparent from the Crown's cross-examination of Dr. Ley that Dr. Ley had prepared his June 2015 assessment without being aware of the factual underpinnings of Mr. Elmadani's guilty plea, the Admissions of Fact. (*Exhibit 1*) He also had not seen the pre-sentence report. On July 23, Mr. Elmadani requested an adjournment to enable him to resurrect Dr. Ley's evidence with a revised assessment that was to be prepared once Dr. Ley had an opportunity to review the materials he had not seen, and conduct a further interview with Mr. Elmadani. Mr. Elmadani also indicated he was endeavouring to retain new counsel.

[59] In the circumstances, I permitted Mr. Elmadani the opportunity to obtain a revised assessment from Dr. Ley. Mr. Elmadani confirmed that the sole purpose for the adjournment was to re-present evidence from Dr. Ley and Dr. Rochefort and not to undo or change any aspect of the Admissions of Fact, call additional evidence or submit any additional documents unrelated to Drs. Ley and Rochefort. (*Transcript of the July 23, 2015 court appearance, page 50*) This also meant that

Dr. Ley's June 2015 assessment and his July 10 cross-examination were back on the table for me to consider.

[60] Dr. Ley's revised report was not available as soon as had been hoped. It has been placed in evidence by consent as Exhibit 14 and is dated September 20, 2015. Dr. Rochefort's letter-form report of June 5, 2015 (*Exhibit 15*) was also admitted although as the Crown noted, Dr. Rochefort's opinion about the inappropriateness of incarceration in Mr. Elmadani's case is not a proper consideration for me in determining Mr. Elmadani's sentence.

[61] Dr. Ley was cross-examined on video-link by Mr. Heerema on September 25 and submissions by Mr. Heerema and Mr. Elmadani in relation to his evidence were made on September 29.

[62] A further skirmish ensued. Mr. Elmadani raised concerns that during final submissions on September 29 Mr. Heerema had mis-stated something said to him by Dr. Rochefort in a telephone conversation. A clarifying letter from Dr. Rochefort to Dr. Ley about that telephone conversation has been entered by consent as Exhibit 16.

[63] In sum then, I have received three assessment reports prepared by Dr. Ley and two letters from Dr. Rochefort. Dr. Ley underwent a partial cross-examination on July 10 (*Exhibit 13*) and was questioned further on September 25.

The Qualifications of Dr. Ley

[64] Dr. Ley has frequently been qualified as an expert witness in forensic and clinical psychology in courts in British Columbia, and other provinces, including Nova Scotia and Newfoundland. He has over the 30 years of his practice "conducted comprehensive psychological assessments (like the present one) on more than 2,000 criminal offenders." He notes that he has had "a great deal of experience in assessing individuals who are not anti-social people but who nonetheless defraud or steal from others, whether employers or commercial or retail enterprises." (*June 2015 assessment, page 9*) Dr. Ley also has considerable experience conducting risk assessments.

[65] Dr. Ley's qualifications were not contested by the Crown. He was qualified as a clinical and forensic psychologist to give opinion evidence about Mr. Elmadani's diagnosis, treatment and prognosis.

Dr. Ley's June 2015 Assessment – Exhibit 11

[66] In his June 5, 2015 assessment, Dr. Ley indicated that his December 2006 assessment of Mr. Elmadani had been prepared in relation to the earlier fraud charges. He acknowledged that in December 2006 he had assessed Mr. Elmadani as representing "a low risk of future criminal offending." Dr. Ley now says that risk appraisal was "in error given that Mr. Elmadani has now committed subsequent fraud crimes." (*page 2*)

[67] In Dr. Ley's December 9, 2006 assessment of Mr. Elmadani he had this to say about Mr. Elmadani's risk profile: "Other than Mr. Elmadani's history of severe physical and psychological abuse, he has few of the historical, clinical or behavioral indicators of criminality. Thus, Mr. Elmadani represents a very low risk of future criminal offending. *This risk level will be reduced even further if Mr. Elmadani participates in psychological treatment.*" (*page 13, 2006 assessment report*) (*emphasis added*)

[68] Dr. Ley indicated in his June 2015 report that his December 2006 risk estimate "was contingent on Mr. Elmadani involving himself in psychological treatment, which would address the psychological factors that were implicated in his offending" and which Dr. Ley identified. (*page 2*) He noted that Mr. Elmadani's "emotional problems and psychological conflicts" were "never psychotherapeutically addressed by Mr. Elmadani." (*page 2*) Had Dr. Ley known that Mr. Elmadani would not follow through with obtaining appropriate psychological treatment, he would have assessed him as "a high risk for recidivism, particularly for fraud crimes..." (*page 2*)

[69] In his June 2015 assessment Dr. Ley reported that Mr. Elmadani attributed his fraudulent conduct to desperate financial circumstances. (*page 6*) Dr. Ley expressed his opinion that Mr. Elmadani's fraud crimes

...are maladaptive stress reactions, which are linked psychologically to his abusive childhood and

dysfunctional family environment, which has caused him long-standing conflict, which he has yet to address and resolve. (*page 9*)

[70] Noting the discrete periods when Mr. Elmadani perpetrated his crimes, Dr. Ley expressed the opinion that Mr. Elmadani has

...shown a capability to function in pro-social, legal ways for many years in various kinds of employment...However when he is overwhelmed emotionally and situationally, and particularly when he feels victimized, then Mr. Elmadani is very prone to poor judgment that will inevitably have a self-defeating aspect to it. (*pages 14 – 15*)

[71] In Dr. Ley's opinion, Mr. Elmadani's risk of recidivism could be "almost eliminated" if he remained committed to the psychotherapy he has been receiving from Dr. Rochforte. (*page 14*)

[72] Dr. Ley diagnosed Mr. Elmadani with "a major depressive disorder and a generalized anxiety disorder." Dr. Ley also noted "clear, vivid signs of trauma symptoms that date from Mr. Elmadani's abusive childhood..." (*page 12*) Mr. Elmadani has a "very tenuous...chronically low and unstable" self-esteem and "low self-confidence." Dr. Ley found Mr. Elmadani's "mood, presentation and circumstances" in May 2015 "were markedly similar" to what Dr. Ley observed when he assessed Mr. Elmadani in 2004 and 2006. (*page 10*)

[73] Other than his review of a police summary of the investigation, Dr. Ley's June 2015 assessment of Mr. Elmadani relied exclusively on information Mr. Elmadani provided to him. (*Exhibit 13, page 18*) Dr. Ley did not see either Exhibit 1, the Admissions of Fact with the attached exhibits or the transcript (*Exhibit 12*) of the Crown's recital of the facts on April 22, 2014 when Mr. Elmadani pleaded guilty. He testified that he thought Mr. Elmadani was "candid and frank and forthcoming." Had he not thought so, he would have indicated his reservations in his report. (*Exhibit 13, page 19*) Cross-examination brought out discrepancies

between what Dr. Ley was told by Mr. Elmadani in May 2015 and the admissions he made at the time of his guilty plea in April 2014.

[74] Cross-examination also revealed that Mr. Elmadani had told Dr. Ley that DAR had unilaterally imposed on him a 100 percent garnishment of his commissions when he defaulted on the loan they had extended to him. (*Exhibit 13, page 32*) Dr. Ley reported the facts he was given by Mr. Elmadani about the loan default: “To Mr. Elmadani’s credit he explained his financial circumstances and loan payment failure to a senior executive in the company [DAR], who informed [him] that his commission structure would be changed that Aplin would take 100 percent of Mr. Elmadani’s commission rather than the 10 percent that they had taken through his course of employment to date.” (*Exhibit 11, page 5*) Dr. Ley testified that according to Mr. Elmadani the development with respect to his commissions was part of a constellation of intense financial pressures that led to him defrauding DAR. Dr. Ley indicated in his June 2015 assessment that Mr. Elmadani perpetrated his first fraud against DAR due to his “desperate financial circumstances” which caused him not to notify the DAR accounting department when a recruiting placement that he had claimed a commission for had backed “out of the deal.” (*Exhibit 11, pages 5 – 6*)

[75] However as pointed out to Dr. Ley by the Crown, Mr. Elmadani had known on September 29, the day before he fraudulently accessed the commission payment, that the candidate had turned down the job offer. (*Exhibit 13, pages 36 – 37*) Dr. Ley agreed with Mr. Heerema that the email exchange between the prospective hire and Mr. Elmadani did not disclose a successful placement and a forfeited deal. (*Exhibit 13, page 37*)

[76] Dr. Ley also had not known that September 30, 2008, the date of the first fraud against DAR, was also the date when Mr. Elmadani secured the \$80,000 loan. Contrary to what Dr. Ley had understood when he prepared his June 2015 assessment, Mr. Elmadani was not in default of a loan from DAR when he perpetrated his first fraud against the company. (*Exhibit 13, page 39*) He had in fact only just secured it.

[77] The Crown established that admitted facts directly contradict what Mr. Elmadani presented to Dr. Ley as factors in his desperate financial circumstances.

(*Exhibit 13, pages 39 – 40*) Provided with the admitted facts, Dr. Ley acknowledged that when Mr. Elmadani first defrauded DAR on September 30, 2008, the desperate financial circumstances he claimed to have been experiencing did not exist. (*Exhibit 13, page 40*)

[78] Dr. Ley was also not informed by Mr. Elmadani that the garnishment of his commissions had not occurred by September 30 and was instituted only on January 31, 2009. Dr. Ley told the Crown that he had understood the garnishment had started earlier “and was creating financial stress for him.” Presented with the facts by the Crown, Dr. Ley agreed that what Mr. Elmadani had told him, sounded “inaccurate.” (*Exhibit 13, page 42*)

[79] Dr. Ley testified that Mr. Elmadani had told him the decision by DAR to impose a 100 percent garnishment was unfair. “That was his belief and his experience” said Dr. Ley. He expressed surprise at being told by Mr. Heerema that it was Mr. Elmadani who proposed a “surrender of part or all of my commissions effective January 30th, and all future commissions if the amount [the \$80,000 loan] remains unpaid.” (*Exhibit 13, pages 44 – 45*) Whereas Mr. Elmadani portrayed DAR to Dr. Ley as harsh and punitive, the evidence indicates, as Dr. Ley acknowledged, “a more benevolent attitude.” (*Exhibit 13, page 47*)

[80] Informed by the Crown that Mr. Elmadani perpetrated a second fraud against DAR before the January 31, 2009 garnishment of his commissions, Dr. Ley described what he was learning as: “...inconsistent with the sort of total picture that was created regarding Mr. Elmadani’s financial stresses.” (*Exhibit 13, page 48*)

[81] With the information provided by the Crown about the September 30 fraud against DAR, Dr. Ley agreed that his explanation of Mr. Elmadani’s offending being linked to feelings of victimization, anger, and resentment was no longer appropriate. (*Exhibit 13, page 57*) The narrative supplied by Mr. Elmadani had indicated to Dr. Ley that DAR had treated him unfairly, triggering a maladaptive response. In fact, DAR never treated Mr. Elmadani unfairly.

[82] I will be making some comments about Dr. Ley’s September 2015 assessment but I will note here that Dr. Ley’s “victimization” explanation for Mr.

Elmadani's crimes is reiterated in his September report (*Exhibit 14, page 16*) notwithstanding his acknowledgement in cross-examination in July that the foundation for his opinion had been dismantled.

[83] At the point when Dr. Ley's cross-examination was truncated it was apparent, as it must have been to Mr. Elmadani, that the value of his opinion had been substantially diminished.

Dr. Ley's September 20, 2015 Assessment – Exhibit 14

[84] Dr. Ley testified on September 25 that prior to preparing his June 2015 assessment he had requested information about Mr. Elmadani's offences from his lawyer but never received anything. This was not noted in the June 2015 assessment although cross-examination made it obvious. Equipped with the Admissions and subsequent interviews with Mr. Elmadani, including an in-person interview on August 11, 2015, Dr. Ley made some revisions to his June 2015 assessment. (*page 1*)

[85] Dr. Ley's September 2015 assessment is not significantly different from the assessment he prepared in June. There is some new content which includes a narrative from Mr. Elmadani, not previously in evidence, that the financial difficulties he experienced leading up to his DAR fraud offences included the transfer of an Aplin employee from Ottawa to Nova Scotia. According to what Dr. Ley was told by Mr. Elmadani, this led to a diminishment in his earnings. Mr. Elmadani told Dr. Ley he compounded a precarious financial situation by purchasing a house he could not afford, creating "a big crisis" for himself. (*page 6*) He described being aggravated with DAR and sought the \$80,000 loan to see how committed the company was to retaining him as an employee. Dr. Ley reported Mr. Elmadani telling him he was sufficiently disenchanted by DAR during August and September 2008 that he had been looking for another job in the recruiting field. (*page 6*)

[86] Dr. Ley's September assessment details Mr. Elmadani's default on the \$80,000 loan and says that as a result "his commission structure was changed, such that Aplin would take 100 percent of Mr. Elmadani's commission rather than the 10 percent that they had taken through his course of employment to date." The

assessment makes no mention of the discrepancy between what Mr. Elmadani told Dr. Ley for the June assessment about how the garnishment came about and what emerged during cross-examination in July. And in the September assessment is a new allegation by Mr. Elmadani that he was embarrassed when during a November 2008 telephone conversation about the outstanding loan a senior executive at DAR was “furious” and threatening toward him. This claim stands in stark contrast to the email Mr. Elmadani received from the same senior DAR executive in December 2008, an email referenced in Mr. Heerema’s July cross-examination of Dr. Ley. In his September assessment Dr. Ley does not mention the Crown making him aware of DAR’s apparently more “benevolent” attitude toward Mr. Elmadani which involved Mr. Elmadani being told, “As per our previous discussion, I would like to see the loan being reduced by means other than your commissions... I know this is a challenging situation, however, I know we’ll get through to the other side.” (*Exhibit 4, page 15; Exhibit 13, page 46 – 47*)

[87] Dr. Ley’s response to being asked in cross-examination on September 25 about this contrast was that it did not seem incongruent to him.

[88] Dr. Ley’s September 2015 assessment restates his understanding that Mr. Elmadani perpetrated the first fraud against DAR – the September 30, 2008 fraud - while he was “having financial problems.” (*page 7*) Dr. Ley also reports Mr. Elmadani now saying not that the placement “backed out of the deal” but that he “ignored” the candidate refusing the job offer hoping to “change her mind...and save the deal.” (*page 7*)

[89] The September 2015 assessment notes Mr. Elmadani’s explanation for continuing to defraud DAR – desperate financial circumstances. Also reported in the September 2015 assessment is a description, obviously supplied by Mr. Elmadani to Dr. Ley, that he explored the possibility of a legal remedy to DAR’s decision to garnish 100 percent of his commissions. These descriptions – Mr. Elmadani’s claim of teetering on the brink of financial ruin and his exploration of a possible lawsuit against DAR – are taken verbatim from Dr. Ley’s June 2015 report. (*Exhibit 14, page 9; Exhibit 11, page 6*)

[90] The September 2015 assessment makes no mention of Dr. Ley’s concessions in the July cross-examination that I discussed earlier in these reasons.

[91] Dr. Ley repeated in his September 2015 assessment precisely what he stated in his assessment of June 2015, that Mr. Elmadani's "fraud crimes are maladaptive stress reactions, which are linked psychologically to his abusive childhood and dysfunctional family environment, which has caused him long-standing conflict, which he has yet to address and resolve." (*Exhibit 14, page 12*)

[92] On September 25, in response to questions from Mr. Elmadani, Dr. Ley described him as having been angry at DAR, dissatisfied with his relationship with his employers and experiencing feelings of being under-appreciated. Dr. Ley linked Mr. Elmadani's present fraud offences to this psychological profile. As the Crown pointed out when cross-examining Dr. Ley, an entirely different attitude was portrayed in the June 2015 assessment where Dr. Ley indicated, presumably on the basis of what Mr. Elmadani told him, that at DAR he was "happy at work and performing at a high level where he was earning maximum commissions as an executive recruiter..." (*Exhibit 11, page 5*)

[93] It is Dr. Ley's opinion that Mr. Elmadani's "happy at work" description that informed the June 2015 assessment and the "angry, dissatisfied" description that he presented for the preparation of the September 2015 assessment are simply "a perfect illustration" of Mr. Elmadani being "a neurotic mess" whose internal state and external presentation are in conflict. Dr. Ley testified: "He's a textbook case of conflict."

[94] The cross-examination of Dr. Ley did not shake his confidence in his assessment of Mr. Elmadani. In his words: "I feel I've nailed it."

The Opinions of Dr. Ley and Dr. Rochefort on the Issue of Mr. Elmadani's Treatment

[95] Dr. Ley has identified what in his opinion are the psychological underpinnings to Mr. Elmadani's offending and describes in his assessments what Mr. Elmadani must address to reduce or eliminate his risk to re-offend. In Dr. Ley's opinion, Mr. Elmadani's risk assessment "is very simple". In his September 2015 assessment he states that despite being a repeat offender, Mr. Elmadani "still represents a good candidate for a community-based sentence", with strict

conditions compelling him to “participate in psychological treatment for a lengthy period of time.” (*Exhibit 14, page 17*)

[96] Dr. Ley notes that Mr. Elmadani has been actively engaged in therapy with Dr. Rochefort although as a result of Dr. Rochefort starting an internship, Dr. Ley has accepted a request from Mr. Elmadani to become his therapist. (*Exhibit 14, page 18*) Dr. Rochefort’s two reports detail the nature of the issues to be addressed in psychotherapy and the therapeutic course that has been undertaken to date. Mr. Elmadani is described as highly motivated and working hard in therapy. (*Exhibit 16*) Although Dr. Rochefort indicates that Mr. Elmadani’s therapy could be conducted “at any time”, he states that “incarceration would create a significant negative impact and setback on Mr. Elmadani’s therapeutic progress.” (*Exhibit 16, page 2*) Like Dr. Ley, Dr. Rochefort endorses a community-based sentence as the best option for Mr. Elmadani’s “successful rehabilitation and the lowest risk of recidivism.” (*Exhibit 16, page 2*)

The Psychological Evidence and the Issue of Mitigation

[97] Dr. Ley’s psychological assessments of Mr. Elmadani and the testimony he gave in relation to them are before me to be considered in mitigation. Dr. Rochefort’s reports have this same purpose. In short, Mr. Elmadani has put forward this evidence in support of his submission that a conditional sentence should be imposed. Mr. Elmadani relies on Dr. Ley’s opinion that continued psychotherapy in the community offers the best potential for his rehabilitation and the elimination of his risk factors.

[98] Mr. Heerema submits that I should give Dr. Ley’s opinions little or no weight. He correctly observes that the probative value of an expert’s opinion is directly related to the quality of the admissible evidence on which it relies. His reference to the Supreme Court of Canada’s decision in *R. v. Lavallee*, [1990] S.C.J. No. 36 at paragraph 84 is apt in Mr. Elmadani’s case:

Where, however, the information upon which an expert forms his or her opinion comes from the mouth of a party to the litigation, or from any other source that is inherently suspect, a court ought to require independent

proof of that information. The lack of such proof will...have a direct effect on the weight to be given to the opinion, perhaps to the vanishing point. But it must be recognized that it will only be very rarely that an expert's opinion is entirely based upon such information, with no independent proof of any of it. Where an expert's opinion is based in part upon suspect information and in part upon either admitted facts or facts sought to be proved, the matter is purely one of weight...(paragraph 84)

[99] Dr. Ley prepared his June 2015 assessment based on what Mr. Elmadani told him. What Dr. Ley took to be facts related to him by a “candid and forthcoming” subject were shown, by cross-examination, to be untrue. I cannot accept the explanations that Dr. Ley offered for why Mr. Elmadani would not have made disclosures that accorded with the admitted facts. The discord between the assessments and the Admissions of Fact and between the June 2015 and the September 2015 assessments cannot be explained, as Dr. Ley has suggested, by memory deficits, impression management, or avoidant and self-defeating tendencies. I am simply not satisfied that Mr. Elmadani was really trying to equip Dr. Ley with the truth. Mr. Elmadani is described by Dr. Ley as highly intelligent, well-educated and capable. (*Exhibit 14, pages 14, 17*) Both Mr. Elmadani and Dr. Ley spoke about the psychometric tools he has encountered through his current employment in human resources management that, as Dr. Ley testified, have helped Mr. Elmadani gain insight about his significant psychological issues and the utility of psychological intervention. Mr. Elmadani has been well aware how high the stakes were for him this time. But his engagement in the process of obtaining what was intended to be mitigating evidence was anything but straightforward.

[100] Dr. Ley seems to have been satisfied with his impressions of Mr. Elmadani and was obviously bolstered by his confidence that he knew him “very well” and had him all figured out. Mr. Elmadani’s failure to be forthright does not appear to have troubled Dr. Ley at all, not even to the extent of remarking on it or analyzing it when he had the opportunity to do so in the September 2015 assessment.

[101] Expert witnesses are fixed with “a special duty to the court to provide fair, objective, and non-partisan assistance.” (*White Burgess Langille Inman v. Abbott and Haliburton Co.*, [2015] S.C.J. No. 23, paragraph 2) I expect, given his long experience as a clinical and forensic psychologist, that Dr. Ley has satisfied this special duty in other cases where he has appeared over the years. However his objectivity was not in evidence here and he instead slipped into a role that has more closely resembled that of an advocate.

[102] I find the merits of the psychological assessments prepared by Dr. Ley impossible to assess. The assessments are anchored in a constellation of misrepresentations and distortions about the circumstances surrounding Mr. Elmadani’s most recent offences, misrepresentations and distortions provided by Mr. Elmadani. I am left with an impression that Mr. Elmadani has some serious unresolved psychological issues but a reliable, objectively assessed connection to his offending has not been made out.

[103] If anything, what the psychological assessments reveal is Mr. Elmadani’s continued inability to fully accept responsibility for his fraudulent actions. The evidence is that Mr. Elmadani emerges from this protracted court process adhering to a notion that his actions had some partial justification. That is certainly not mitigating.

[104] And as for the issue of stress-induced offending, I refer to the comments of Ross, P.C.J., in *R. v. Wilson* [2008] N.S.J. No. 646 in the context of a sentencing for fraud:

... Most crimes are committed under stress of one kind or another. If nobody ever felt any pressure or stress it would indeed be a peaceful and law abiding society, one requiring little by way of laws or law enforcement. It is precisely when we are stressed and tempted to do something harmful to others that we are required to exert self-control and to show moral strength ... (*paragraph 20*)

[105] Mr. Elmadani has now twice failed to exert self-control and show moral strength while occupying positions of trust.

Breach of Trust Cases and the Principles of Sentencing

[106] The Crown submits that a conditional sentence in Mr. Elmadani's case would be offensive to the principles of denunciation and deterrence. The Crown also submits that specific deterrence is a relevant consideration in this sentencing.

[107] The emphasis on denunciation and deterrence in breach of trust sentencing is found in many cases. Some of the clearest expressions of what this emphasis is intended to achieve are found in decisions by the Ontario Court of Appeal. I will quote from two such decisions, *R. v. Gray*, [1995] O.J. No. 92 and *R. v. J.W.*, [1997] O.J. No. 1380.

[108] In *Gray*, at paragraph 32, the Ontario Court of Appeal made the following observation:

... there are few crimes where the aspect of deterrence is more significant [than fraud cases.] It is not a crime of impulse and is a type that is normally committed by a person who is knowledgeable and should be aware of the consequences. That awareness comes from the sentences given to others.

[109] And Rosenberg, J.A. had this to say in *J.W.* at paragraph 50:

General deterrence, as the principal objective animating the refusal to impose a conditional sentence, should be reserved for those who are likely to be affected by a general deterrent effect. Large scale well-planned fraud by persons in positions of trust ... would seem to be one of those offences.

[110] This was a point made by Mr. Heerema: as he put it, fraud is a thinking person's crime. However uncertain the deterrent effect of incarceration, those inclined or tempted to commit fraud may be more likely to be deterred from doing so by the sentences imposed on others.

[111] It is common for judges in breach of trust cases to reject the option of a conditional sentence on the basis that such a sentence is not consistent with the principles of denunciation and deterrence. I discuss this at paragraph 50 of my decision in *R. v. Naugler*, [2011] N.S.J. No. 519. As I said there, moral blameworthiness in breach of trust cases is seen as high and jail sentences have been imposed even where the offender has accepted responsibility and started paying restitution.

[112] In Nova Scotia, breach of trust fraud convictions have led to sentences of incarceration and conditional sentences. (*see, for example, R. v. Ferguson*, [1999] N.S.J. No. 481 (P.C.) -- conditional sentence; *R. v. Matheson*, [2001] N.S.J. No. 195 (S.C.) -- conditional sentence; *R. v. Decoff*, [2000] N.S.J. No. 224 (S.C.) -- conditional sentence; *R. v. Trask*, [2005] N.S.J. No. 561 (P.C.) -- conditional sentence of two years less a day, joint recommendation; *R. v. Pottie*, [2003] N.S.J. No. 543 (S.C.) -- conditional sentence; *R. v. Hurlburt*, [2012] N.S.J. No. 420 (S.C.) -- conditional sentence; *R. v. Flemming*, [2013] N.S.J. No. 633 (P.C.) -- 18 month conditional sentence, jointly recommended; *R. v. Hill*, [1997] N.S.J. No. 236 (C.A.) 12 months incarceration upheld on appeal; *R. v. Teresa Cox-Kubas*, *unreported decision of MacDougall, P.C.J., November 22, 2005* -- 12 months incarceration); *R. v. Naugler* [2011] N.S.J. 519 (P.C.) -- 8 months incarceration; *R. v. Lee*, [2011] N.S.J. No. 611 (P.C.) -- 10 months incarceration; *R. v. Connell*, [2015] N.S.J. No. 7 (S.C.) -- 2 years, joint recommendation;

[113] Mr. Bailey submitted the *Hurlburt* case as a recent example of a breach of trust case that resulted in a conditional sentence. Mr. Hurlburt's offence was a very serious breach of trust by an elected official. He had no prior record, pleaded guilty early on, was remorseful, and had paid full restitution. (*Hurlburt*, paragraph 32) As Mr. Heerema noted, another politician charged in the same investigation, Trevor Zinck, also pleaded guilty, although in his case the guilty plea came during his trial. A conditional sentence was rejected and he was sentenced to four months in jail.

[114] Mr. Elmadani, representing himself, referred to my decision in *R. v. Sheppard*, [2015] N.S.J. No. 181 where I ordered a conditional sentence for a fraud offender who had previously received a conditional sentence for fraud. *Sheppard* is

distinguishable from Mr. Elmadani's case: it was not, in law, a breach of trust case and it was a joint recommendation. At paragraphs 58 to 61 in *Sheppard* I discussed the special legal principles that apply to joint recommendations. And I noted at paragraph 36 that a jail sentence was in Ms. Sheppard's case "the more obvious sentencing option...in order to emphasize the principles of denunciation and general and specific deterrence."

[115] In Mr. Elmadani's case there is no joint recommendation to consider. He previously received the benefit of a conditional sentence in relation to a fraud he perpetrated against an employer. He is back before the courts again having betrayed the trust of yet another employer, perpetrating a fraud one day after the expiry of an eighteen month conditional sentence. An eighteen month conditional sentence is a significant conditional sentence. The maximum allowable length for a conditional sentence is two years less a day, what Mr. Elmadani is seeking here.

Respect for the Law and the Purpose and Principles of Sentencing

[116] Promoting respect for the law is a fundamental purpose of sentencing. The Supreme Court of Canada, discussing conditional sentencing in *R. v. Proulx*, [2000] S.C.J. No. 6 recognized that "Inadequate sanctions undermine respect for the law" and fail to provide sufficient denunciation and deterrence. 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. (*Proulx*, paragraph 30)

[117] *Proulx* made the point that punitive objectives are still seen as 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 ... (*Proulx*, paragraph 114)

[118] Ross, P.C.J. in *Wilson* articulated the role that sentencing plays in denouncing serious crimes:

... 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 ... (*paragraph 16*)

[119] As held in *Proulx*, determining a fit and proper sentence requires that the sentencing judge assess "which sentencing objectives figure most prominently in the factual circumstances of the particular case before them." (*Proulx, paragraph 113*) I find that in this case the sentencing objectives of denunciation and deterrence must be foregrounded.

[120] And, in light of Mr. Elmadani's prior breach of trust, there is a clear need for specific deterrence. Mr. Elmadani was apparently not deterred by the eighteen month conditional sentence he served. This is a highly relevant factor for me to take into account. (*R. v. Mahoney, [2011] B.C.J. No. 429 (C.A.)*)

[121] Mr. Elmadani committed another very deliberate breach of trust when he defrauded David Aplin Recruiting. He did not engage in a brief, impulsive act but was calculated and crafty, using various techniques to embezzle his employer over time. The desperate financial circumstances he has claimed to have been experiencing have not been established. DAR compensated Mr. Elmadani fairly with a significant income and even afforded him the benefit of an \$80,000 loan. He repaid the trust and confidence of the company by developing various bold

schemes to skim off money. I find he did this because he could. It wasn't much of a challenge to exploit the trust and access he enjoyed.

[123] I have determined that a conditional sentence for Mr. Elmadani, even with the strict conditions proposed, will not promote respect for the law or be consistent with the fundamental purpose and principles of sentencing. It would not be a sentence proportionate to the gravity of Mr. Elmadani's crimes and the degree of his moral culpability for them. It would not express adequate denunciation and ensure that public confidence in the justice system is maintained.

[124] I am sentencing Mr. Elmadani to serve a jail sentence of actual custody for a period of 12 months. This will be followed by a probationary period of 18 months with the following conditions: keep the peace and be of good behaviour, attend court as and when directed, advise the Court of any change to his name, address, employment or occupation, report to probation services within 2 business days of his release from custody and thereafter as directed, and attend for such assessment, treatment and counseling as directed by his probation officer. There is a benefit in Mr. Elmadani addressing any psychological factors that underlie his deceitful tendencies.

[125] This sentence does not immediately serve the objectives of rehabilitation in Mr. Elmadani's case. In Dr. Rochefort's opinion it is a sentence that will set back Mr. Elmadani's therapeutic progress. That is unfortunate but unavoidable. The crafting of Mr. Elmadani's sentence requires me to balance all the objectives of sentencing. That balance produces a result that does not permit Mr. Elmadani to continue, for the time being, with his psychotherapy. If this therapeutic endeavour remains important to him, he will resume it once he is released from jail.

[126] I acknowledge the genuine hardship that this sentence will cause to Mr. Elmadani's wife and their two children. Mr. Elmadani's absence will set this family back financially and emotionally. Mr. Elmadani's sentence is a sentence they will serve as well. The legal principles that must govern the outcome in this sentencing do not spare them. Mr. Elmadani has failed to persuade me that his moral culpability can be proportionately addressed by anything less than a jail sentence. I can only hope the fortitude his family has mustered throughout this long ordeal will sustain them during Mr. Elmadani's incarceration. As for Mr.

Elmadani, Ross, P.C.J. observed in *Wilson*: "Many people have paid the price of a jail sentence and then moved on." Mr. Elmadani will have to draw on his considerable gifts and abilities to do the same.

APPENDIX TO SENTENCING DECISION

R. v. Elmadani

HISTORY OF PROCEEDINGS

March 30, 2010 First appearance (Mr. Elmadani not present) represented by Kent Clarke

May 11, 2010 Election adjourned to July 5, 2010 K. Clarke

June 5, 2010 Election to Prov Court – NG plea K. Clarke

July 27, 2010 Trial dates set – May 16 – 20, 2011 K. Clarke

January 25, 2011 pre-trial CR#6 K. Clarke

Disclosure made to Defence satisfaction; No agreement on facts; No statement; No *Charter* issues; Not a large number of exhibits

April 27, 2011 Second pre-trial K. Clarke

No outstanding requests for disclosure; Crown not calling an expert; Possibility of a resolution

April 29, 2011

Email from Crown to indicate a resolution appears to have been achieved. Court free to release trial time. Mr. Elmadani will be requesting the Information be transferred to British Columbia for a guilty plea on "one all-encompassing count of fraud. He will then be subject to the sentencing process in B.C."

Formal transfer request to be dealt with on the record on May 16, 2011. One prerequisite to the ultimate resolution that Mr. Elmadani needs to meet. If the prerequisite is not met by May 16 then new trial dates will be set.

Above confirmed by Mr. Clarke by April 29 email: “Mr. Elmadani has assured me that he had taken the necessary steps to conclude the matter and confirmation of same should arrive very shortly.”

May 16, 2011 pre-trial

Breakdown in lawyer/client relationship. Mr. Clarke permitted to withdraw. Crown agrees to give Mr. Elmadani four weeks to meet “a financial prerequisite.” Counsel in B.C. has been in touch with Mr. Hartlen. If unable to satisfy, new trial dates to be set. Mr. Elmadani to attend in person at next pre-trial.

June 27, 2011 pre-trial

Mr. Elmadani appears in person.

New trial dates set – January 9 – 13, 2012. Mr. Elmadani told to get counsel. Mr. Elmadani indicates he has almost satisfied Crown’s “4th condition” – 70 percent. As not fully satisfied, Crown would not transfer file to B.C.

October 24, 2011 pre-trial

Now represented by Rob Sutherland

Court advised that Mr. Sutherland awaiting disclosure from Vancouver.

November 3, 2011 pretrial

R. Sutherland advises that Mr. Elmadani is to enter guilty pleas to all six counts through counsel. Crown consents to transfer to Vancouver for guilty pleas and sentencing.

March 6, 2012 status report

Crown advises the transfer documents have been signed – the process seems to be taking some time.

June 4, 2012 status report

September 18, 2012 status report

Crown advises that the B.C. Crown has received the file and is reviewing it. Mr. Elmadani has B.C. counsel.

November 28, 2012

Crown advises still no information from Vancouver Crown.

February 12, 2013 status report

Crown having difficulty getting a response from B.C. Crown.

April 4, 2013 status report

Crown advises that Mr. Elmadani was last in court (in B.C.) on March 15, 2013. Pre-sentence report has been ordered.

May 7, 2013 status report

Crown advises that Mr. Elmadani appeared in B.C. on April 22 and withdrew his request for the charges to be transferred to B.C.

Mr. Sutherland advises that Mr. Elmadani is retaining Pat Atherton and Mr. Sutherland will be filing an application to withdraw.

May 29, 2013 status report

Mr. Atherton has filed a designation of counsel. Has received disclosure from Rob Sutherland but has not reviewed it. No guilty pleas were ever entered.

June 27, 2013 Hearing to set a trial date

New trial dates set of January 6 – 10, 2014. October 8 set to confirm Mr. Atherton's retainer. Mr. Atherton expects to be retained but retainer being paid by installments which will not be complete by October 8.

Mr. Atherton is asked to inform Mr. Elmadani that if Mr. Atherton does withdraw the trial may proceed notwithstanding.

October 8, 2013 pre-trial

Mr. Atherton advises he has not been retained and is only appearing on a limited, per appearance retainer. Mr. Elmadani has not paid the installments for the retainer so he is very likely going to be unrepresented. According to Mr. Atherton, Mr. Elmadani is “far off the targeted amount”.

October 25, 2013 pre-trial

Mr. Elmadani attends by telephone and indicates that he plans to retain Mr. Atherton “in the next 30 days”. If not, he will be in Halifax January 6 – 10 to represent himself. Mr. Atherton says he is still prepared to do the trial if he is retained before November 29. He has kept the trial dates open.

November 28, 2013

Fax from Mr. Atherton that Mr. Elmadani has informed him he no longer requires his services. Mr. Atherton understands from him that he is in the process of retaining other counsel.

Crown emails to advise that Mr. Elmadani informed him on November 27 that he expects to retain Lyle Howe.

November 29, 2013

Lyle Howe appearing with Mr. Elmadani on the telephone. Application for an adjournment of trial made by Mr. Elmadani as Mr. Howe is unavailable for the January 6 – 10, 2014 trial dates. Adjournment application put over to Tuesday, December 3 at 1 p.m. for Mr. Howe to look at disclosure, and talk to Mr. Elmadani and the Crown. The adjournment application to be decided on December 3.

Crown advises that a draft agreement of facts was sent to Mr. Elmadani who indicated he wished to review it with counsel. The Crown is ready to proceed with the trial on January 6 – 10, 2014.

December 3, 2014

Adjournment application heard and decided. To enable Mr. Elmadani to be represented by Mr. Howe, the trial is adjourned to April 22 – 26, 2014.

April 22, 2014

Mr. Elmadani, represented by Mr. Howe, pleads guilty to a single “rolled-up” count of fraud over \$5000.