

IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Buchanan*, 2016 NSPC 45

Date: July 15, 2016

Docket: 2694010 - 2694016

Registry: Halifax

Between:

Her Majesty the Queen

v.

Linda Buchanan

Decision on Application to Withdraw Guilty Pleas

Judge: The Honourable Judge Anne S. Derrick

Heard: June 17 and 30, 2016

Decision: July 15, 2016

Charges: section 380(1)(b) x 2; section 334(b) x 4; section 733.1(1)(a) x 1, of the *Criminal Code*

Counsel: Tanya Carter, for the Crown

Brian Church, Q.C., for Linda Buchanan

By the Court:*Introduction*

[1] On January 28, 2014 Linda Buchanan pleaded guilty to fraud, theft and breach of probation, offences alleged to have been committed between August 20, 2009 and December 31, 2011. Her guilty pleas were followed by the filing of an Agreed Statement of Facts that Ms. Buchanan and the Crown had signed.

[2] On April 15, 2016, Ms. Buchanan, through Mr. Church, gave formal notice of an application to withdraw her guilty pleas. She says her lawyer at the time, Lyle Howe, provided her with ineffective representation. She is asking to have her guilty pleas set aside and a trial scheduled.

[3] Ms. Carter, who has represented the Crown throughout, opposes the application. She submits that the legal requirements for setting aside a guilty plea have not been satisfied in this case. Ms. Carter says the guilty pleas should stand and a date set for Ms. Buchanan's sentencing.

Events Prior to the Application to Withdraw the Guilty Pleas

[4] After her guilty pleas on January 28, Ms. Buchanan had qualms about what she had done. She retained fresh counsel, Ian Hutchison, and sought advice about an application to withdraw her pleas. Ultimately, she instructed Mr. Hutchison to accept a proposal by the Crown that she plead guilty to a single count of fraud encompassing the theft counts in the Information to which she had previously pleaded guilty. Her instructions included maintaining her January 28, 2014 guilty plea to a breach of probation.

[5] A sentencing on the guilty pleas did not occur. Mr. Hutchison withdrew as Ms. Buchanan's counsel due to "an irretrievable breakdown in the lawyer-client relationship" and she went on to retain her present lawyer, Mr. Church, and file this Application.

Ms. Buchanan's Application to Withdraw Her Guilty Pleas

[6] Ms. Buchanan's Application to withdraw her guilty pleas is supported by her Affidavit (*Exhibit 3*) and a waiver of solicitor-client privilege in relation to Lyle Howe's representation of her. (*Exhibit 1*) Mr. Howe filed an Affidavit in response to Ms. Buchanan's. (*Exhibit 4*) They both testified. Theirs was the only evidence

called. Defence and Crown filed briefs and case authorities. The transcripts of proceedings were filed as Exhibits (*Exhibits 6 and 7*) as was Ms. Buchanan's November 29, 2011 statement to police (*Exhibit 2*) and the Agreed Statement of Facts presented to the court at the time of Ms. Buchanan's guilty pleas on January 28, 2014. (*Exhibit 5*)

[7] Ms. Buchanan has submitted that this application should be determined solely on the basis of what she alleges is Lyle Howe's ineffective representation of her with no consideration of Ian Hutchison's involvement and her instructions to him. The Crown emphatically disagrees and submits that the merits of Ms. Buchanan's application have to be assessed with regard to all the events that have occurred.

[8] I will now discuss the notable events leading up to Ms. Buchanan's guilty pleas on January 28, 2014 and the relevant developments that followed.

The Original Fraud and Breach of Probation Charges

[9] According to the Agreed Statement of Facts that accompanied her guilty pleas on January 28, 2014, Linda Buchanan operated a number of businesses in the Halifax area between 2009 and 2012 doing special events. She operated as Strut Modeling, Company Productions, and Buchanan and Co. and in 2009, incorporated a new company, EMPAC. She opened a Toronto Dominion bank account in May 2009 under the name EMPAC, an account that was to be used for EMPAC business purposes only. (*Exhibit 5, Agreed Statement of Facts of January 28, 2014*)

[10] Ms. Buchanan advertised shows and recruited participants/vendors to rent booths at the shows. Each participant signed a contract in relation to their participation in the event and was required to pay for their booth. Each contract indicated that if the event was cancelled by Ms. Buchanan, she would refund the participants' money in six to eight weeks. (*Exhibit 5, Agreed Statement of Facts of January 28, 2014*)

[11] From August 2009 to December 2011, Ms. Buchanan advertised various shows to participants/vendors and models who paid to participate. Each show was cancelled last minute. Deposits on venues, advertising and other show-related expenses were not paid. Ms. Buchanan used several different business addresses, names, phone numbers and email addresses over this period and did not update the individuals who, as prospective participants/vendors, had paid her money for the shows. (*Exhibit 5, Agreed Statement of Facts of January 28, 2014*)

[12] Bank records for the EMPAC account obtained by the police with a production order showed a company with no money – going into overdraft several times and with a number of NSF cheques. The Agreed Facts indicate that Ms. Buchanan used “the little bits of money coming in to pay for some rent, small personal expenses but not the business expenses she claimed.” (*Exhibit 5, Agreed Statement of Facts of January 28, 2014*)

November 2011 to May 1, 2013

[13] Linda Buchanan was originally charged in November 2011 with 14 counts of fraud alleged to have occurred between August 20, 2009 and December 31, 2011. She was also charged with 12 breaches of a probation order dated April 14, 2010.

[14] The Crown proceeded by indictment. Ms. Buchanan made an election to Provincial Court and pleaded not guilty on July 18, 2012, her fourth appearance. On July 24 trial dates of April 29 to May 3, 2013 were set. On November 29, 2012 her counsel withdrew citing a breakdown in solicitor/client communication. (*Exhibit 6, Transcript of Proceedings, page 16*)

[15] Ms. Buchanan indicated her intention to apply for representation from Nova Scotia Legal Aid. Between the next scheduled court appearance of January 22, 2013 and May 1, 2013, the processing of her legal aid application was at a standstill. Documentation required by Legal Aid, that is, Ms. Buchanan’s income tax assessments, was not yet available due to her late-filing of tax returns for previous years. (*Exhibit 6, Transcript of Proceedings*)

Lyle Howe’s Involvement as Ms. Buchanan’s Lawyer - May 1, 2013 to January 28, 2014

[16] On May 1, 2013, Lyle Howe appeared in court with Ms. Buchanan and indicated he was considering taking her case. A lawyer from Legal Aid was also present and advised that Ms. Buchanan’s legal aid application, if assessed on the basis of the financial information received to date, would be rejected for insufficient documentation. (*Exhibit 6, Transcript of Proceedings, page 58*)

[17] At the next appearance on June 4, 2013, Mr. Howe confirmed he had been retained and new trial dates of January 28, 29, February 5 and 6, 2014 were set.

Pre-trials were conducted with Mr. Howe on September 26, October 7, November 1, 2013 and January 2, 2014. (*Exhibit 6, Transcript of Proceedings*)

[18] On October 7 Mr. Howe said he thought there was a possibility the case would resolve but on November 1 he advised that he was no longer so optimistic this would happen. (*Exhibit 6, Transcript of Proceedings, pages 91 and 98*) On January 2, 2014 Mr. Howe indicated that he had reviewed a draft statement of agreed facts prepared by the Crown to dispense with having to call out-of-province witnesses at trial and did not anticipate “any major issues with it” although he needed to discuss it with Ms. Buchanan. (*Exhibit 6, Transcript of Proceedings, page 115*)

[19] At the next pre-trial on January 10, 2014, Mr. Howe advised that Ms. Buchanan “wasn’t inclined to agree” to the facts proposed by the Crown in relation to out-of-province witnesses. Mr. Howe said he and Ms. Buchanan had had discussions “about resolution” as a consequence of which he had made a proposal to the Crown. He was cautiously optimistic that a resolution was possible. (*Exhibit 6, Transcript of Proceedings, page 125*)

[20] Mr. Howe appeared on January 17, 2014 to advise that a resolution of the case was not likely. He explained that Ms. Buchanan “had an issue with some of the facts in...some of the statements made by some of the [Crown] witnesses.” He advised that intent “remains the main issue.” (*Exhibit 6, Transcript of Proceedings, pages 134 - 136*)

[21] Mr. Howe went on to indicate that he could make certain admissions on Ms. Buchanan’s behalf, and the following exchange occurred:

Mr. Howe: ...Ms. Buchanan is not going to dispute the fact that she received funds for services that were either delayed or not provided and that those funds weren’t returned to...the payers.

Obviously, when I say intent is the issue, certain elements of Ms. Buchanan’s business are going to be brought to light and certain factors are going to be indicated to the Court in terms of the circumstances of the receipt of those funds and the

circumstances of either the delay or the lack of providing of the services that were paid for.

The Court: So Ms. Buchanan is not here, and I presume I won't see her again until the first day of the trial.

Mr. Howe: Yes.

The Court: But I take it that if I put it to her that she has conceded that she received funds for services that were delayed or not delivered and those funds were not returned to the payers, that she will acknowledge on the record...

Mr. Howe: Yes.

The Court: ...that she is admitting those facts?

Mr. Howe: Yes, Yes definitely... (*Exhibit 6, Transcript of Proceedings, page 137*)

[22] In addition, Mr. Howe confirmed that the admissibility of Ms. Buchanan's banking records was not in issue. (*Exhibit 6, Transcript of Proceedings, page 139*) He had previously advised, at the pre-trial on October 7, 2013, that Ms. Buchanan would not be contesting the voluntariness of her November 2011 statement to police. (*Exhibit 6, Transcript of Proceedings, page 89*) In her police statement Ms. Buchanan admitted to facts that ultimately made their way into the January 28, 2014 Agreed Statement of Facts. (*Exhibit 2, Linda Buchanan's November 29, 2011 Statement to Police and Exhibit 5, Agreed Statement of Facts*)

The Guilty Pleas – January 28, 2014

[23] On the morning of the first day of trial, January 28, 2014, Crown witnesses were present and the Crown was prepared to proceed. The expected trial did not get underway. Mr. Howe advised it would not be going ahead as Ms. Buchanan would be pleading guilty. He stated that:

...So what I can tell you is that I've had extensive discussions with my friend and with my client and...I'm supremely

confident that we will resolve the matter without a trial.
(*Exhibit 6, Transcript of Proceedings, page 142*)

[24] Mr. Howe said he needed “less than” five minutes to speak to Ms. Buchanan whom he had “met at the door” when he was coming into the courtroom, noting that he and Ms. Buchanan “did discuss the matter last night.” (*Exhibit 6, Transcript of Proceedings, page 142*)

[25] I wanted to ensure whatever was unfolding was not rushed and said:

...this matter was scheduled to go forward for trial, so I certainly want to be sure that if there’s going to be a change of direction that Ms. Buchanan is fully committed to that and fully understands the consequences of changing her plea and what that means, et cetera. (*Exhibit 6, Transcript of Proceedings, page 143*)

[26] After a recess of 45 minutes, the Crown advised that a new, more concise Information would be sworn “rolling a bunch of charges together...” (*Exhibit 6, Transcript of Proceedings, page 145*) I directed that a written statement of agreed facts be prepared rather than the Crown simply reading the facts into the record. I viewed this as preferable and stated:

...my preference would be to see a written set of agreed facts that Ms. Buchanan signed...I say that, in part, because this is resolving at the very last minute...And the last time we were in court, which wasn’t very long ago, there was no resolution. That was January 17th...So it’s only, you know, 10 days ago there was no resolution and the issue of intent was being disputed...So I really don’t want to leave any potential for loose ends. (*Exhibit 6, Transcript of Proceedings, page 146*)

[27] I adjourned the proceedings to the afternoon, a recess of four hours, at which time the new seven-count Information was placed before the Court. The new Information charged two (2) counts of fraud (section 380(1)(b)), four (4) counts of theft under \$5000 (section 334(b)), and a single count of breaching a probation order of April 14, 2010.

[28] Mr. Howe indicated he had just reviewed the new Information “a moment ago” but stated:

...What I did review with my client thoroughly, though, is the facts, and she has signed them. We don't have any issues as it pertains to the Agreed Statement of Facts at this point, and Ms. Carter had made some amendments to it, as per our request, so we've worked that out...(Exhibit 6, Transcript of Proceedings, page 148)

[29] The amendments to the Agreed Facts were initialed by Ms. Buchanan, the Crown and Mr. Howe. After a further recess of 17 minutes to enable Mr. Howe to review the new Information with Ms. Buchanan, he advised that he had instructions to enter guilty pleas to one (1) count of fraud (Count 1, a rolled-up charge) and the four (4) counts of theft (Counts 3, 4, 5, and 6.) He indicated he had reviewed section 606 (1.1) of the *Criminal Code* with Ms. Buchanan and that she understood she was giving up her right to a trial. He said: “From what I can gather, she's doing so freely and voluntarily.” He advised that Ms. Buchanan understood that the sentencing Court was not bound to follow any joint recommendation on sentence made by Crown and Defence. (Exhibit 6, Transcript of Proceedings, page 150)

[30] After some further discussion and a consultation with Ms. Buchanan, Mr. Howe advised that she would also be pleading guilty to Count 7 on the new Information as well, a breach of a probation order with the condition to keep the peace and be of good behaviour, which as Mr. Howe put it, was “a tagalong in light of the pleas on the other counts.” (Exhibit 6, Transcript of Proceedings, page 154)

[31] I conducted the section 606 (1.1) inquiry of Ms. Buchanan directly as follows:

The Court: ...So I have before me this seven count Information, and I understand from Mr. Howe you don't require that to be read out.

Ms. Buchanan: No, that's fine.

The Court: You've had a chance to review that?

- Ms. Buchanan: Um-hmm, that's correct.
- The Court: And I understand, as well, that you're pleading guilty to the 1st, 3rd, 4th, 5th, 6th, and 7th counts on the Information?
- Ms. Buchanan: That's the Information that Lyle gave me?
- The Court: Yes, correct. And you're entering those guilty pleas voluntarily?
- Ms. Buchanan: Absolutely, yes.
- The Court: And you understand you're giving up your right to have a trial on any of those charges?
- Ms. Buchanan: Absolutely.
- The Court: And that's because you're admitting to the elements of those offences. So where it says that you did unlawfully defraud certain named individuals and where there are allegations or where there are charges here of theft, and the breach of probation charge, you're admitting to having unlawfully defrauded, stolen, and breached your probation? That's, that's what you're admitting to?
- Ms. Buchanan: I guess.
- The Court: Is that, is that clear to you?
- Ms. Buchanan: Yes, it's clear to me.
- The Court: You're admitting, you're admitting to those?
- Ms. Buchanan: Yeah, okay.
- The Court: To the elements of those offences?
- Ms. Buchanan: Yeah, um-hum.

The Court: Because if you weren't, then there'd be a trial.

Ms. Buchanan: Right.

The Court: And the Crown would be required to prove beyond a reasonable doubt the elements of those offences.

Ms. Buchanan: Um-hum.

The Court: But I understand you're not requiring the Crown to be put to that proof.

Ms. Buchanan: No.

The Court: You're admitting...

Ms. Buchanan: Yeah.

The Court: Is that correct?

Ms. Buchanan: Okay. Yes.

The Court: Yes. And you understand as well, that the consequence of guilty pleas are criminal convictions? Yes?

Ms. Buchanan: Yes.

The Court: And criminal record?

Ms. Buchanan: Yes. (*Exhibit 6, Transcript of Proceedings, pages 155 - 157*)

[32] Ms. Buchanan also indicated that she understood the court did not have to follow a joint sentencing recommendation from Crown and Defence. (*Exhibit 6, Transcript of Proceedings, page 157*)

[33] This was followed by the Crown reading the three (3) page written Statement of Agreed Facts into the record. (*Exhibit 5*) Ms. Buchanan then confirmed her signature on the Agreed Statement of Facts and her agreement with those facts. (*Exhibit 6, Transcript of Proceedings, pages 160 - 170*)

[34] A pre-sentence report was ordered and a sentencing hearing scheduled for April 7, 2014. The Crown indicated there had been discussions about presenting a joint recommendation. (*Exhibit 6, Transcript of Proceedings, page 174*)

April 7 to October 30, 2014

[35] On April 7, the Crown advised that Mr. Howe had requested an adjournment to afford additional time to prepare for the sentencing. The Crown was not opposed as there were ongoing discussions although no agreement about a possible joint recommendation, and a very recent “substantial change in Ms. Buchanan’s circumstances”. Ms. Carter indicated there would be no victim impact statements. (*Exhibit 6, Transcript of Proceedings, pages 178 - 179*) It was agreed that on April 29 a new sentencing date would be set.

[36] On April 29, Laura McCarthy, who had appeared for Mr. Howe on April 7, again appeared for him. A new sentencing date was set for July 11 to permit counsel to prepare written submissions and case authorities. (*Exhibit 6, Transcript of Proceedings, pages 186 - 189*)

[37] The matter of Ms. Buchanan’s sentencing came back to court unexpectedly on July 3. (*Exhibit 6, Transcript of Proceedings, pages 190 - 202*) Mr. Howe had been suspended by the Nova Scotia Barristers’ Society following his conviction for sexual assault. Ms. McCarthy was assuming carriage of Ms. Buchanan’s file. She required an adjournment. (I will note here that Mr. Howe’s conviction was overturned by the Court of Appeal and a new trial ordered that did not proceed. He was reinstated by the Barristers’ Society in September 2015 but did not have any further involvement representing Ms. Buchanan.)

[38] Ms. McCarthy advised on July 3 that she was waiting for Ms. Buchanan’s file to be returned from the receiver handling Mr. Howe’s practice. (*Exhibit 6, Transcript of Proceedings, page 197*) A return date of August 14 was set. On August 14 Ms. McCarthy confirmed she had received Ms. Buchanan’s file from the receiver and was in a position to re-schedule the sentencing. (*Exhibit 6, Transcript of Proceedings, page 203*) October 30 was set and an update of Ms. Buchanan’s pre-sentence report was ordered. The Crown indicated there might be a joint recommendation. (*Exhibit 6, Transcript of Proceedings, page 207*)

[39] Ms. Buchanan's pre-sentence report sent the proceedings once again off the rails. As I previously noted, she indicated in it that she was "troubled by her decision" to enter guilty pleas and was "looking to make an application to change her plea." (*Exhibit 6, Transcript of Proceedings, page 209*) In light of this, Ms. McCarthy withdrew as Ms. Buchanan's counsel and Ms. Buchanan advised she was applying to Legal Aid for representation. Ms. Carter indicated the Crown would be opposing Ms. Buchanan's application to withdraw her guilty plea and expected that Mr. Howe would have to testify. (*Exhibit 6, Transcript of Proceedings, pages 211 - 212*)

November 25, 2014 to September 24, 2015 – Ian Hutchison's Representation of Ms. Buchanan

[40] On the next scheduled date, November 25, 2014, Ian Hutchison appeared and said he was considering accepting a Legal Aid certificate to represent Ms. Buchanan but required time to speak to Legal Aid about the terms of the certificate. (*Exhibit 6, Transcript of Proceedings, page 223*) At the return date of December 19 Mr. Hutchison confirmed he was retained on certificate. (*Exhibit 6, Transcript of Proceedings, page 228*) His brief was in relation to the six offences to which Ms. Buchanan had pleaded guilty on January 28, 2014 – a fraud charge, four theft charges and a breach of probation.

[41] Time had to be allowed for Mr. Hutchison to have transcripts prepared and review them and the file. At court appearances between February 20 to June 2, Mr. Hutchison advised of unforeseen delays as he sought approval from Legal Aid for the cost of obtaining the transcripts. (*Exhibit 7, Transcript of Proceedings, pages 3 - 32*) On June 2 he indicated that he had been provided with a series of emails Ms. Buchanan had sent Mr. Howe "setting out her thoughts in relation to her case." (*Exhibit 7, Transcript of Proceedings, page 35*) It was Ms. Carter's position that Mr. Hutchison should be afforded sufficient time to review everything thoroughly and provide a proper opinion to Ms. Buchanan as to her options. (*Exhibit 7, Transcript of Proceedings, page 39*)

[42] On June 26, 2015 Mr. Hutchison advised that he had obtained a copy of the transcripts for all of the proceedings "to date." He indicated he had gone through

the disclosure and the transcripts at an in-person meeting with Ms. Buchanan. According to Mr. Hutchison,

...It became apparent to me that, during the course of our meeting, that Ms. Buchanan had a misapprehension in terms of the meaning of fraud under section 380 of the Criminal Code and I reviewed with her the decision from the Supreme Court of Canada of *The Crown v. Zlatic*...It's a 1993 decision which explains the meaning of fraud by other means under section 380 of the *Criminal Code* and how that decision interacts with or how that decision applies in her case given her statements to the police. Mrs. Buchanan has provided me with instructions which she confirmed again yesterday that she will maintain her guilty plea to Count one which is the offence under section 380 (1)(b) of the *Criminal Code*. (*Exhibit 7, Transcript of Proceedings, pages 49 – 50*)

[43] Mr. Hutchison went on to say that based on Ms. Buchanan's November 2011 statement to police and the *Zlatic* decision, "the Crown can clearly make out a case under [section] 380 of the Criminal Code and Ms. Buchanan accepts that's the case...we're very clear in relation to that." (*Exhibit 7, Transcript of Proceedings, page 51*) He confirmed Ms. Buchanan was maintaining her guilty pleas to the fraud charge (Count 1) and to the breach of probation charge (Count 7). (*Exhibit 7, Transcript of Proceedings, pages 51 and 54*)

[44] Mr. Hutchison advised that he required a little further time to consider what Ms. Buchanan had told him at their meeting and to review "certain documents" provided by Ms. Buchanan in relation to the theft charges, Counts 3, 4, 5, and 6 in the Information. Mr. Hutchison explained:

...The law in relation to this case is perhaps a little more complicated than your average fraud case and has required a little bit of thought and time on my part and I just want to clarify my thought process before I finalize my advice in respect of those... counts. (*Exhibit 7, Transcript of Proceedings, pages 52 – 54*)

[45] A further date was set of July 10 for Mr. Hutchison to return with Ms. Buchanan's instructions concerning whether she would be proceeding with an application to withdraw her January 28, 2014 guilty pleas to the theft counts or not. Mr. Hutchison expressed optimism that if there was to be a sentencing on all charges a joint recommendation would be presented. (*Exhibit 7, Transcript of Proceedings, page 57*)

[46] For various unavoidable reasons, the matter of Ms. Buchanan's instructions could not be addressed until August 14. At that appearance, Mr. Hutchison advised that Ms. Buchanan was maintaining her instructions that she wanted to proceed with an application to withdraw her guilty pleas to the theft charges, Counts 3, 4, 5 and 6. This had been communicated to Ms. Carter which had led to a proposal that Mr. Hutchison said, "may resolve this matter without the need to pursue that application." However Mr. Hutchison needed time to discuss Ms. Carter's proposal with Ms. Buchanan. (*Exhibit 7, Transcript of Proceedings, page 66*) He subsequently requested for Ms. Buchanan clarification from the Crown of two issues. (*Exhibit 7, Transcript of Proceedings for August 27, 2015, page 80*)

[47] On September 8, 2015, Mr. Hutchison advised that Ms. Carter had offered to accept a guilty plea to one count of fraud that would encompass the original rolled-up fraud charge (Count 1) and the four theft counts (Counts 3, 4, 5, and 6) to which Ms. Buchanan had pleaded guilty on January 28, 2014. (*Exhibit 7, Transcript of Proceedings, pages 85 – 86*) As Mr. Hutchison put it: "...in effect, it will reflect the guilty pleas previously entered to the dishonesty offences." (*Exhibit 7, Transcript of Proceedings, page 88*) Ms. Buchanan was maintaining her guilty plea to the breach of probation charge. Mr. Hutchison confirmed that:

I have instructions from Ms. Buchanan to indicate that the resolution is acceptable to her and that she will enter a guilty plea to one count of fraud encompassing all the counts that I have just read into the record and maintain her guilty plea to the breach of probation.

...

...given the nature of Ms. Buchanan's statement to the police and her admissions during the course of that statement, it seems

to both Ms. Carter and I that Ms. Buchanan [has] clearly admitted the offence of fraud and in order to resolve the matter, Ms. Carter has suggested a guilty plea to one count of fraud in excess of \$5000 because that will reflect the total sum of money that's owed to all the complainants or was taken from the complainants in this matter. (*Exhibit 7, Transcript of Proceedings, pages 88 – 89*)

[48] I confirmed with Mr. Hutchison that Ms. Buchanan had instructed him that she would be pleading guilty to, by deceit, falsehood or other fraudulent means, having unlawfully defrauded all the named individuals - the complainants identified in the Counts 1, 3, 4, 5 and 6 in the Information – of a total value exceeding \$5000 contrary to section 380(1)(a) of the *Criminal Code*. Mr. Hutchison advised that he and Ms. Carter were working on the terms for a joint recommendation for a conditional sentence and a lengthy period of probation and restitution. (*Exhibit 7, Transcript of Proceedings, pages 91 – 93*)

[49] Although at the conclusion of proceedings on September 8, 2015 it was anticipated that Ms. Buchanan's sentencing would proceed on October 8, this was not to be. On September 24, Mr. Hutchison appeared and withdrew as Ms. Buchanan's counsel for "ethical reasons." He advised there had been an "irretrievable breakdown in the lawyer/client relationship." (*Exhibit 7, Transcript of Proceedings, pages 97 and 98*) Brad Sarson, a managing lawyer for Nova Scotia Legal Aid, was also in attendance to advise that Legal Aid was prepared to issue one more certificate to Ms. Buchanan for counsel to represent her "with respect to her outstanding matters." (*Exhibit 7, Transcript of Proceedings, pages 99 – 100*)

October 8, 2015 to the present - Brian Church's Representation of Ms. Buchanan

[50] Since October 8, 2015, Mr. Church has been representing Ms. Buchanan on a certificate from Nova Scotia Legal Aid. Ms. Buchanan's interest in bringing an application to withdraw her guilty pleas has been a consistent theme throughout Mr. Church's involvement. In November Mr. Church indicated that he expected Lyle Howe would be a witness. By email on December 8, Mr. Church advised that Mr. Howe would be available in June 2016 and on December 15, Mr. Church and Ms. Carter agreed that June 10 should be held for the application.

[51] Mr. Church's formal written notice on Ms. Buchanan's behalf was provided on April 15. The notice indicated that Ms. Buchanan would be making an application to withdraw her guilty plea "based on the ineffective assistance of Lyle Howe..." Ms. Buchanan's Affidavit and a brief were filed on June 1 as was Ms. Buchanan's signed waiver of solicitor-client privilege. In light of Ms. Buchanan's allegations against Mr. Howe, Mr. Church contacted Stacey Gerrard of Lawyers' Insurance Association of Nova Scotia (LIANS).

[52] On June 9, I was informed by emails from Mr. Church, Ms. Carter and Ms. Gerrard that Mr. Howe was seeking an adjournment of his anticipated evidence on June 10 in order to prepare. An email sent by Ms. Gerard to Ms. Carter and Mr. Church indicated:

I have had another opportunity to speak with Mr. Howe and he is currently retrieving his file from storage and information from his computer software system. Unfortunately this means he has not had an opportunity to conduct a fulsome review of his file in preparation for tomorrow's application.

[53] Although both Ms. Carter and Mr. Church had been expecting to proceed with Ms. Buchanan's application on June 10, they viewed having Mr. Howe's Affidavit in response to Ms. Buchanan's as important. The hearing of the evidence scheduled for June 10 – the evidence of Ms. Buchanan and Mr. Howe – was therefore adjourned to the afternoon of June 17 when Mr. Howe indicated he was available. It was agreed that Ms. Buchanan would testify that morning with Ms. Gerrard attending to take notes so she could brief Mr. Howe in advance of his testimony in the afternoon. (Mr. Howe had advised he was not available on the morning of June 17 but was available in the afternoon at 1:30 p.m.)

Linda Buchanan's Evidence

[54] Ms. Buchanan indicated in her Affidavit (*Exhibit 3*) that Mr. Howe had been recommended to her. She paid him a \$1000 retainer. She says Mr. Howe initially advised her,

...we could win this case. He advised me that he had taken on a number of high profile cases and represented to me that they had always worked out successfully. (*Exhibit 3, Affidavit of Linda Buchanan sworn June 1, 2015, paragraph 5*)

[55] Ms. Buchanan says in her Affidavit that she consistently told Mr. Howe she did not want to plead guilty and “wanted to go to trial to clear my name.” (*Exhibit 3, Affidavit of Linda Buchanan, paragraph 5*)

[56] Ms. Buchanan has acknowledged in her Affidavit that Lyle Howe did the following in relation to her case:

- Had a number of meetings and telephone conversations with her;
- Discussed some of the disclosure;
- Reviewed her November 2011 statement to police with her;
- Explained what fraud was;
- Discussed resolution of the case with the Crown;
- Reviewed the career profile Ms. Buchanan provided to him to demonstrate that she was an accomplished professional who would not “deliberately commit fraud and so destroy everything [she] had worked for.”
- Promised to prepare her for testifying in her own defence at trial;
- Indicated he was prepared to take the case to trial;
- Reviewed “in general terms” the provisions of section 606(1.1) of the Criminal Code before she entered her pleas on January 28, 2014;
- Acted on her instructions that she would plead guilty on January 28, 2014 “provided the facts were accurate.” (*Exhibit 3, Affidavit of Linda Buchanan*)

[57] The central complaint expressed by Ms. Buchanan about Mr. Howe’s representation of her is that he never prepared her for the trial she wanted to have. Ms. Buchanan testified that although preparation was promised by Mr. Howe, it never came to fruition. There was never any discussion about preparing her defence nor did they discuss the individual charges. Ms. Buchanan claims that Mr. Howe told her he didn’t put a lot of work into “building a defence” until he knew the Crown was going through with the case.

[58] Ms. Buchanan disagreed with Mr. Howe’s description, contained in his Affidavit, of his conduct of her case:

During my representation of Ms. Buchanan, we discussed and reviewed the charges against her at length. I communicated with her in a timely and effective manner and addressed concerns as they were raised by her. She was fully informed throughout the entire process. I exercised my professional judgment when advising her of her options so she entered a

voluntary, unequivocal, and informed pleas to the charges against her. (*Exhibit 4, Affidavit of Lyle Howe, affirmed June 15, 2016, paragraph 21*)

[59] Ms. Buchanan had moved to Cape Breton in the spring of 2013 which made it difficult to have in-person meetings with Mr. Howe. Even he had acknowledged that in-person meetings were a challenge to arrange. (*Exhibit 6, Transcript of Proceedings for September 26, 2013, page 83*)

[60] Ms. Buchanan states in her Affidavit that she came to Halifax in January 2014 to meet with Mr. Howe several weeks prior to the scheduled start date for her trial but he only managed to see her on the Saturday she was leaving to go home. Ms. Buchanan told Ms. Carter on cross-examination that although she delivered information for her case to Mr. Howe that day on a flash drive, there was never any “formal conversation” with him about it. She testified: “I feel I should have been sitting down with Lyle Howe to prepare for trial.”

[61] Ms. Buchanan says Mr. Howe did not communicate with her following that brief meeting even though the start of the trial was looming. She describes in her Affidavit how this led to her pleading guilty on January 28:

I felt at a loss to understand why Mr. Howe would not call and communicate with me. There was never any calls about how much money it would cost for that trial. I felt abandoned by Mr. Howe and felt that I was being pressured to change my “not guilty plea” to one of guilt. I did not know how much it was to cost and how long the trial would take. I felt hopeless about my situation and thought that a change of plea was the only answer. There was (sic) no calls to me up until 4 p.m. the Friday before the trial was to start. I called his office but could not get hold of him. I spoke with Mr. Howe’s office assistant Tara who said she would get ahold of Mr. Howe immediately. When Mr. Howe returned my call I told him we would plead guilty but we had to meet. (*Exhibit 5, Affidavit of Linda Buchanan, paragraph 14*)

[62] Ms. Buchanan testified that she felt “pressured into making a guilty plea.” She says she did not know how the trial would unfold or who the witnesses would be. She says she did not want to plead guilty on January 28 and felt “forced to do

it.” According to Ms. Buchanan, it was “the most stressful decision I have ever made in my life.”

[63] Ms. Buchanan’s Affidavit contains her version of what transpired on January 28 when the Agreed Statement of Facts were negotiated and she entered her guilty pleas. She acknowledges that she read the Agreed Statement of Facts and signed it. She acknowledges responding to the section 606 (1.1) inquiry I made of her. She states:

I knew I was waiving my rights, however...I felt that if I had stepped beyond these agreed Statement of Facts with the lawyers, that Judge Derrick could have said we are going to have a trial which I wanted but which we were not prepared for.
(Exhibit 5, Affidavit of Linda Buchanan, paragraph 17)

[64] Ms. Buchanan has not identified anything in the Agreed Statement of Facts as inaccurate. She says the Facts are not the whole picture: that there was more information about each client and what was happening “when it was starting to fall apart”. She testified that she read the facts over, she was not forced to sign the Agreed Statement and she heard Ms. Carter read it into the record. She says of the Facts she accepted “it doesn’t mean that I intended to commit fraud with them,” meaning the complainants.

Lyle Howe’s Evidence – The Absence of Any File Documentation

[65] Mr. Howe prepared his Affidavit and testified without the benefit of his file. As I noted earlier, when on his behalf Ms. Gerrard sought the adjournment of his testimony from its long-scheduled date of June 10, she advised by email of June 9 that she had had “another opportunity to speak with Mr. Howe and he is currently retrieving his file from storage and information from his computer software system.” To give Mr. Howe the opportunity to locate his file and prepare an Affidavit in response to Ms. Buchanan’s, the proceedings for June 10 were adjourned to June 17.

[66] Mr. Howe’s Affidavit of June 15 indicated the following about his file:

Since my time representing Ms. Buchanan, I was suspended for 15 months and returned to my practice in September 2015 during which time I was not permitted to have possession of my client files, including Ms. Buchanan’s. As a result, I have not been able to locate and review Ms. Buchanan’s file in

preparation for this application. (*Exhibit 4, Affidavit of Lyle Howe, paragraphs 5 and 6*)

[67] I was somewhat mystified by this statement in light of what Ms. McCarthy, who is Mr. Howe's wife and practices with him, advised me while she had carriage of Ms. Buchanan's case in the wake of Mr. Howe's suspension by the Barristers' Society. In July 2014 Ms. McCarthy was waiting for Ms. Buchanan's file to be returned by the receiver. (*Exhibit 6, Transcript of Proceedings for July 3, 2014, page 197*) On August 14, 2014 she told me that she had received it. (*Exhibit 6, Transcript of Proceedings, page 203*) I further note that Ms. Buchanan's subsequent counsel, Ian Hutchison, advised me on February 20, 2015 that he had obtained "a copy" of Ms. Buchanan's file "from her previous counsel" which would have been Ms. McCarthy. (*Exhibit 7, Transcript of Proceedings, page 3*)

[68] On June 17 when he testified, Mr. Howe said he had been unable to locate Ms. Buchanan's file. He said he was unsure if it had come back from the receiver and indicated that he had not really been monitoring what files had been returned or where they were stored.

[69] As I have noted, the transcripts of the court appearances in this case confirm that Ms. Buchanan's file was returned from the receiver to Mr. Howe's law office. And Mr. Howe's evidence on June 17 clearly indicates that he did not make a diligent effort to find the file as I would have expected him to for such a hearing as this. He testified as follows in response to my questions about his efforts:

And I should tell you this, like, if I was – if I worked harder to look for her file I might be able to find it, to be honest, but I had my staff sort of looking for it and me and Ms. McCarthy did a cursory look through the office, but we didn't go through each and every box. We didn't look at all the correspondence from the Receiver either. So if we would, you know – if I put all of my effort into retrieving her file, likely I could find it – so, when I said that I couldn't find it, I mean, that's my caveat, that I didn't sort of overturn every box in my office looking for it.

[70] Mr. Howe confirmed he reviewed no file documentation in preparation for these proceedings. He made no mention of trying to locate information from his "computer software system" which his counsel, Ms. Gerrard, had understood he would be doing. It is difficult for me to understand why Mr. Howe did not make a

rigorous effort to find Ms. Buchanan's file and any related documentation in circumstances where his professionalism and competence was under attack and the court was being asked to set aside his former client's guilty pleas.

Lyle Howe's Evidence on the Application

[71] The evidence establishes that Ms. Buchanan paid Mr. Howe a retainer of \$1000 and there is no evidence of additional payment being requested. In providing his testimony about the work he did on Ms. Buchanan's behalf, Mr. Howe did not produce or refer to any statement of account that should have itemized the services rendered for the \$1000.

[72] Mr. Howe confirmed on cross-examination that although when he was suspended his diaries and calendars were sent to the receiver, he retained copies of them. He says he doesn't think he looked at his calendar for dates relevant to working on Ms. Buchanan's case.

[73] Mr. Howe's evidence about his representation of Ms. Buchanan in 2013 and January 2014 was based exclusively on his recollection. At the time he was representing Ms. Buchanan, Mr. Howe says he had "hundreds" of files.

[74] It is Mr. Howe's evidence that he "felt well prepared" for Ms. Buchanan's trial. He had received the disclosure well in advance. Contrary to Ms. Buchanan's description of his services, Mr. Howe says they had "some pretty long meetings" of at least an hour and a half to two hours in length. He testified that he reviewed with Ms. Buchanan the disclosure, including the bank records, and discussed it and her defence and prepared for trial. He does not believe she sent him anything that would have "refuted" the Crown's case.

[75] Mr. Howe testified that he told Ms. Buchanan he would go through with a trial if that is what she wanted, and advised her about the difficulties they would face. He says he left it up to Ms. Buchanan to decide. He viewed Ms. Buchanan as "very smart" and did not have any concerns that she did not understand his explanation of what constitutes fraud. It was Mr. Howe's evidence that he,

...would have talked to her extensively about her mind state at the time, her intentions at the time, if there was recklessness on her part, just to try to determine what I had to do to prepare to potentially call her to the stand or refute the Crown's evidence.

[76] It was Mr. Howe's evidence that discussions about a guilty plea took place with Ms. Buchanan "long before the trial date." He says she had wanted to explain herself and "have her say" about "where her mind was" at the time. He says he thinks that was "part of her hesitation about the plea." He testified to his impression that pleading guilty was not the issue for her, "it was more that she wanted an opportunity to speak to this."

[77] Mr. Howe says "definitely" he was preparing for trial right up to the trial date and didn't stop preparing. He stated: "I am going to come prepared for a trial even if a client tells me they might change their plea." Mr. Howe says the Friday phone call by Ms. Buchanan could have happened although he does not really remember it but that he was prepared for trial. Mr. Howe testified: "I run trials to a fault. I wouldn't push her to plead guilty."

[78] Mr. Howe rejects Ms. Buchanan's allegations that he provided ineffective and inadequate representation to her. He says in response:

...I fought vigorously for Ms. Buchanan. I worked extremely hard on her file. I met with her. I made myself available any time that she called. I felt prepared on the day of trial. In retrospect, I know I could have proceeded to trial and I would have told her that. At no point did she ever express to me that she was concerned about my preparation. At no point did she ever express any concerns about my ability to run a trial...There was never a concern about whether I was ready. I was absolutely ready.

[79] Mr. Howe recalls reviewing the Agreed Statement of Facts with Ms. Buchanan on January 28, 2014. He says they may have made some amendments. (Indeed, as the transcript for January 28 indicates, Mr. Howe advised that Ms. Carter had made some amendments to the Agreed Statement of Facts "as per our request, so we've worked that out.") (*Exhibit 6, Transcript of Proceedings for January 28, 2014, page 148*)

[80] Mr. Howe says that Ms. Buchanan was coherent and emotionally stable on January 28 and never expressed any concerns to him about his competence. He says he would express his concern to the court if he felt a client was not committed to a guilty plea. He testified that Ms. Buchanan would have understood the benefits of entering guilty pleas – the reduction in the number of counts and the mitigating value at sentencing of having pleaded guilty. Mr. Howe was anticipating the

Crown would be prepared to recommend a conditional sentence if Ms. Buchanan accepted responsibility. He says he had told Ms. Buchanan that if convicted there was a possibility that she would receive a jail sentence. Mr. Howe testified that he believes he was aware at the time that Ms. Buchanan has a prior criminal record for fraud.

[81] Mr. Howe testified that Ms. Buchanan's decision to plead guilty "definitely wasn't from lack of preparation on my part. I was prepared and ready to do whatever had to be done with this trial."

[82] Although, according to Mr. Howe's Affidavit, Ms. Buchanan told him she used the money from her clients to pay her business-related expenses and not for her personal use (*Exhibit 4, Affidavit of Lyle Howe, paragraph 8*) this is not what she said in her November 2011 police statement or when responding to Ms. Carter's cross-examination. In responding to Ms. Carter's questions about the money she received from the complainants and what use she made of it, Ms. Buchanan acknowledged that it may have been applied to purchasing groceries, "Yes, I had to feed myself", and paying her power bill and rent. Alluding to the collapse of her marriage and its effects on her business, Ms. Buchanan said: "Nobody else was going to help me." It was her evidence that: "The money was keeping me afloat while I tried to keep the business going. I needed to eat." Ms. Buchanan testified that she did not want to walk away from her business and chose not to declare bankruptcy despite her dire financial circumstances.

Applying the Law to the Facts of this Case

[83] Ms. Buchanan's application rests exclusively on her claim that Mr. Howe provided her with such poor representation that, with her trial looming, she felt she had no alternative to pleading guilty. She says that she stayed the course of pleading guilty and agreeing to the Statement of Facts because she feared if she didn't the trial she had not been properly prepared for by Mr. Howe would proceed. She also says a psychiatrist subsequently advised her that at the time she was "in a disassociated state of mind as I was in an extreme state of stress." (*Exhibit 5, Affidavit of Linda Buchanan, paragraph 17*) There is however no evidence of this beyond Ms. Buchanan's statement which is inadmissible hearsay.

[84] The law is clear that where incompetence of counsel has been raised in relation to a conviction, such allegations are only to be examined by the court where there is evidence of a miscarriage of justice. Otherwise, "in the absence of a miscarriage of justice, the question of the competence of counsel is usually a

matter of professional ethics...” (*R. v. B.(G.D.)*, [2000] S.C.J. No. 22, paragraph 5)

[85] This principle is echoed in our Court of Appeal’s decision in *R. v. Messervey*, [2010] N.S.J. No. 341:

21 The principles are uncontroversial. For a claim of ineffectiveness of counsel to succeed, it must be established that trial counsel's acts or omissions constituted incompetence, and a miscarriage of justice resulted. Incompetence is to be determined by application of a reasonableness standard. There is a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. The conduct of counsel is not to be assessed with the benefit of hindsight. If no prejudice can be demonstrated, it is appropriate to dispose of the claim on that basis and leave the issue of counsel's conduct or performance to the profession's self-governing body. (See *R. v. G.D.B.*, 2000 SCC 22, [2000] 1 S.C.R. 520 at paras. 26-29.)

[86] This principle applies to Ms. Buchanan’s application. It means that if she has failed to establish that her guilty pleas led to a miscarriage of justice any complaint she has with the representation provided to her by Mr. Howe is a matter for the Nova Scotia Barristers’ Society which has a mandate to regulate the conduct of its members.

[87] Another issue to be addressed is whether Ms. Buchanan’s application can be assessed by exclusively focusing on the guilty pleas entered by her when Mr. Howe was her lawyer. She says this singular focus is appropriate and I should not concern myself with what happened when Mr. Hutchison assumed carriage of her case.

[88] Ms. Buchanan did not file a waiver of solicitor-client privilege in relation to Ian Hutchison’s representation of her. She makes no allegations of ineffective representation against Mr. Hutchison. In her Affidavit she acknowledges she met with Mr. Hutchison and states that “after discussions with him I confirmed my plea of guilt.” She then says the following: “...I submit that this would not have been necessary if Mr. Howe had not been ill prepared and would have defended me as he represented to me that he would.” (*Exhibit 3, Affidavit of Linda Buchanan, paragraph 18*)

[89] I will be addressing both the miscarriage of justice/Howe-incompetence issue and the Hutchison-involvement issue in the discussion that follows.

The Relevance of Ms. Buchanan Subsequently Confirming her Guilty Pleas While Represented by Ian Hutchison

[90] As observed in *Messervey*,

56 A guilty plea in open court is a formal admission of all of the essential elements of the charges. There are significant consequences that flow from such a plea. The accused has given up her right to fair trial conducted before an impartial and independent tribunal. She is no longer presumed to be innocent. There is consequently no longer a burden on the Crown to prove any aspect of the offences, save aggravating facts disputed by the accused at the time of sentence.

[91] Ms. Buchanan made formal admissions with respect to the essential elements of fraud twice, when Mr. Howe was representing her on January 28, 2014 and again when Mr. Hutchison was representing her on June 26 and September 8, 2015.

[92] What happened when Ms. Buchanan was represented by Mr. Hutchison cannot simply be ignored. (*R. v. Clermont*, [1996] N.S.J. No. 170 (C.A.)) Mr. Hutchison was advising her about an application to withdraw her guilty pleas. He discussed the elements of the offence of fraud with her and, on her instructions, explained in court on June 26, 2015 that based on Ms. Buchanan's November 2011 statement to police and the *Zlatic* decision, "the Crown can clearly make out a case under [section] 380 of the Criminal Code and Ms. Buchanan accepts that's the case...we're very clear in relation to that." (*Exhibit 7, Transcript of Proceedings, page 51*) Subsequently, on September 8, 2015, Mr. Hutchison indicated that he had instructions from Ms. Buchanan that she would enter a guilty plea encompassing the fraud and theft charges she had pleaded guilty to on January 28, 2014 and maintain her guilty plea to the breach of probation. (*Exhibit 7, Transcript of Proceedings, pages 85 – 86*) As Mr. Hutchison correctly stated, the "rolled-up" fraud charge reflected "the guilty pleas previously entered to the dishonesty offences." (*Exhibit 7, Transcript of Proceedings, page 88*)

[93] During the tenure of Mr. Hutchison's representation of her Ms. Buchanan had a second opportunity to secure the trial she says Mr. Howe's ineffective representation denied her. She could have chosen to pursue her application to withdraw her January 28, 2014 guilty pleas on the basis of Mr. Howe's conduct of her case. Instead she chose to re-commit to her guilt. She does not complain about Mr. Hutchison's representation and she does not say that he acted without her instructions on June 26 and September 8, 2015. What she does say, that she wouldn't have needed Mr. Hutchison if Mr. Howe had made it possible for her to go to trial, does not change the fact that, having decided she wanted to re-consider her January 28, 2014 guilty pleas, she chose instead to confirm them.

[94] This might not be fatal in a case where the evidence indicated a miscarriage of justice that began with one lawyer and ran through a second lawyer's involvement. But it is fatal to Ms. Buchanan's application. She has failed to show any miscarriage of justice as a result of her guilty pleas. Her November 2011 police statement, the January 28, 2014 Agreed Statement of Facts which Ms. Buchanan negotiated through Mr. Howe, read and signed, and her responses to Ms. Carter's cross-examination about her personal use of the money she had received from the complainants all support her admission of guilt for fraud.

No Miscarriage of Justice – The Actus Reus and Mens Rea of Fraud “By Other Means”

[95] It is apparent in the representations made on Ms. Buchanan's behalf on January 28, 2014 by Mr. Howe and then on September 8, 2015 by Mr. Hutchison that each of the charges she faced was reviewed with her and that she provided instructions about what she was accepting responsibility for. She has admitted that she used the money she took from the complainants for her own purposes, not the purposes for which it had been intended. She may not have received the complainants' money intending to divert it to her own personal use but what she ultimately did with it amounted to fraud.

[96] The Supreme Court of Canada in *R. v. Zlatic*, sets out the *actus reus* and *mens rea* for fraud. The *actus reus* is established by proof of: the prohibited act, which can be an act of deceit or a falsehood or some other fraudulent means and deprivation caused by the prohibited act, which may consist in actual loss or the placing of the victim's pecuniary interests at risk. *Mens rea* is established by proof

of: subjective knowledge of the prohibited act and subjective knowledge that the prohibited act could have as a consequence the deprivation of another (which deprivation may consist in knowledge that the victim's pecuniary interests are put at risk). (*Zlatic, paragraph 26*) As the Court in *Zlatic* noted:

27 Where the conduct and knowledge required by these definitions are established, the accused is guilty whether he actually intended the prohibited consequence or was reckless as to whether it would occur.

[97] Ms. Buchanan's actions establish the *actus reus* of fraud "by other means." *Zlatic* described fraud "by other means" as including "unauthorized diversion of funds" and "unauthorized arrogation of funds or property." (*paragraph 31*) Ms. Buchanan took money from the complainants which was to have been used for the shows she was promoting that the complainants wanted to participate in. The complainants did not authorize Ms. Buchanan to use their money to pay her rent or buy her food and other personal necessities. They did not authorize Ms. Buchanan to use the funds to look after her personal obligations and needs when she found herself, as she did, in a financial crisis. What Ms. Buchanan did by using the complainants' money for purposes other than what it was provided to her for was objectively dishonest. Instead of giving the money back to the people it belonged to, Ms. Buchanan put it to use personally. As held by the Supreme Court of Canada in *Zlatic*:

The dishonesty of "other fraudulent means" has, at its heart, the wrongful use of something in which another person has an interest, in such a manner that this other's interest is extinguished or put at risk. A use is "wrongful" in this context if it constitutes conduct which reasonable decent persons would consider dishonest and unscrupulous. (*paragraph 32*)

[98] The Supreme Court of Canada in *Zlatic* talked about "the critical question" in examining a case for evidence of fraud by other fraudulent means. *Zlatic* used the facts recited by the Manitoba Court of Appeal in *R. v. Geddes*, [1979] M.J. No. 125 as an instructive example of the relevant principles:

...a motorcycle dealer accepted money from a purchaser as advance payment on a particular type of motorcycle. After certain perfunctory efforts to obtain the desired motorcycle, the

dealer deposited the money into his bank account, which was at the time overdrawn. The dealer immediately wrote cheques on this account to service his personal debts. The accused argued that he fully intended to carry through his undertaking to get the motorcycle, and failed only because he was negligent in the operation of his business, in particular, in his expectation that he would shortly get a loan which would ultimately permit him to make good on his undertaking. The Manitoba Court of Appeal rejected this defence, emphasizing that there was nothing negligent or inadvertent in the dealer's use of the purchaser's money to satisfy his personal obligations. (*Zlatic*, paragraph 34)

[99] There was nothing negligent or inadvertent in Ms. Buchanan's use of the complainants' money to satisfy her personal obligations and needs. As she said to Ms. Carter on June 17: "The money was keeping me afloat while I tried to keep the business going. I needed to eat." She had no right to use the money to keep herself afloat where it had been paid to her for specific purposes unrelated to her personal financial situation. What the Supreme Court of Canada said about Mr. Zlatic equally applies to Ms. Buchanan:

[He] did not...have an unrestricted right to use these funds as he pleased. In accepting these goods with no concern for payment and in diverting the funds to a non-business...enterprise, he put these funds to a wrongful use...The wrongful use of money in which others have a pecuniary interest for purposes that have nothing to do with business, may however, in appropriate circumstances, constitute fraud. (*paragraph 37*)

[100] Ms. Buchanan's conduct also satisfies the *mens rea* requirements for fraud "by other means". As explained in *Zlatic*:

...fraud by "other fraudulent means" does not require that the accused subjectively appreciate the dishonesty of his or her acts. The accused must knowingly, i.e. subjectively, undertake the conduct which constitutes the dishonest act, and must subjectively appreciate that the consequences of such conduct could be deprivation, in the sense of causing another to lose his

or her pecuniary interest in certain property or in placing that interest at risk. (*paragraph 40*)

[101] As in the case of Mr. Zlatic, Ms. Buchanan knew precisely what she was doing when she used the complainants' money for her own purposes. She knew she was depriving the complainants of their money which she should have paid back to them when the purpose for which it was provided could not be fulfilled.

[102] The January 28, 2014 Agreed Statement of Facts signed by Ms. Buchanan includes the following admissions:

...She told police that she was in dire financial circumstances for the year and a half prior [to November 2011]. She said her financial crisis related largely to her marriage break-up. She said she didn't have the income to take care of herself and bills...She advised police that the money was used for her to live; she said she just had to keep going to take care of herself...her bank records for EMPAC account...show...Ms. Buchanan using the little bits of money coming in to pay for some rent, small personal items but not the business expenses she claimed.

Over a 2.5 year period Ms. Buchanan advertised these shows to participants/vendors and models who would pay to participate. Each show was cancelled last minute without paying deposits on venues, without paying for advertising for the shows or paying for other show related expenses. Ms. Buchanan used several different business addresses, names, phone numbers and email addresses over this period and did not update the complainants over time. (*Exhibit 5, Agreed Statement of Facts, page 3*)

[103] The Agreed Facts detail the payments made to Ms. Buchanan by each of the thirteen complainants who are named in Counts 1, 3, 4, 5 and 6 of the January 28, 2014 Information. The Facts establish that Ms. Buchanan's last contact with the complainants, promising refunds of their money, occurred in one case in 2009, in two cases in 2010, and in nine cases in 2011. In one case, the complainant "never received any word from Ms. Buchanan about the cancellation or the refund." (*Exhibit 5, Agreed Statement of Facts, page 2*) During 2010 and 2011 while

promised refunds remained outstanding, Ms. Buchanan continued to advertise shows and take money for them.

[104] The Agreed Statement of Facts concludes with the following:

The Crown can't say for certain at which point she realized the business was not viable, but given her experience and financial situation, it is clear she abused the position she was in and knew the shows were not viable. The money given to her by the complainants was not used for the purpose it was intended or these shows.

Ms. Buchanan continued to promise refunds to individuals, with the knowledge she could not pay, and continued to take money from more people, while having numerous debts outstanding. (*Exhibit 5, Agreed Statement of Facts, page 3*)

[105] Ms. Buchanan has emphasized that she did not take money from the complainants with the intention of using it personally and not paying it back. That is not a defence on the facts Ms. Buchanan has agreed to. It simply means the Crown at sentencing cannot characterize what she did as premeditated fraud and theft -which would be an aggravating factor - without proof beyond a reasonable doubt. The Facts establish that Ms. Buchanan knowingly used the complainants' money for unauthorized purposes and appreciated that in doing so she was depriving the rightful owners of it.

[106] I have concluded there is no evidence that Ms. Buchanan's January 28, 2014 guilty pleas, essentially confirmed on June 26 and September 8, 2015, resulted in a miscarriage of justice. There may be, as stated in *Messervey*, "instances where the seeming inability of an [accused] to identify a viable defence will not preclude relief where a court is satisfied that a plea was truly involuntary, or some other valid ground exists, such that upholding the plea would constitute a miscarriage of justice." (*paragraph 75*) This is not such a case.

Ineffectiveness of Counsel

[107] Given my finding on the miscarriage of justice issue - that there has been no miscarriage of justice in this case - I am making no finding on the ineffectiveness-of-counsel issue, especially in the absence of any file documentation about what

Mr. Howe actually did in order to be, as he testified, “well prepared for trial”. I note that in *Messervey*, the Nova Scotia Court of Appeal considered what the lawyer’s time records indicated about trial preparation. (*paragraph 54*) Here, had it been necessary for me to determine the ineffectiveness of counsel issue I would have had to do so with no documentation to consider – not only no time records, no file at all.

Ms. Buchanan’s Guilty Pleas

[108] There is nothing before me that calls into question the validity of Ms. Buchanan’s guilty pleas. As disclosed by the transcripts of the proceedings, when Mr. Howe was acting for her on January 28, 2014 and when Mr. Hutchison was acting for her on June 26 and September 8, 2015, Ms. Buchanan entered guilty pleas that were voluntary, unequivocal and informed. (*R. v. Eizenga, [2011] O.J. No. 524 (C.A.), paragraph 4*)

[109] This is not a case of an accused who never intended to admit to a fact which is an essential ingredient of the offence with which she is charged nor is it a case where an accused may have misapprehended the effect of the guilty plea or never intended to plead guilty at all. (*R. v. Adgey, [1973] S.C.J. No. 159, paragraph 5*) And there is no evidence that Ms. Buchanan was pressured into pleading guilty as occurred in *R. v. Nevin, [2006] N.S.J. No. 235 (C.A.)*. There is also no evidence that Ms. Buchanan misunderstood the basic nature of the charges nor is there any evidence that raises a serious question as to her mental state on January 28, 2014 or June 26 and September 8, 2015 when Mr. Hutchison was acting for her. (*R. v. Murphy, [1995] N.S.J. No. 41 (C.A.), paragraph 11*) The fact that she experienced the court processes as stressful is unremarkable.

[110] By her own admission, Ms. Buchanan contacted Mr. Howe with instructions that she would plead guilty. There was ample opportunity for her to have taken a different course on January 28, 2014 than she did. She could have fired Mr. Howe – she says she was dissatisfied with his services – and asked for an adjournment. She was not rushed through any of the proceedings that day and took the opportunity to provide input into the Agreed Statement of Facts that underpinned her guilty pleas. She has never disputed those facts. The Facts were then read into the record and Ms. Buchanan raised no objection to them. She gave clear responses to the section 606(1.1) inquiry. And, as I have already discussed, months later she could have pursued a different course with Mr. Hutchison that did not have her confirming her guilty pleas. As in *Messervey*, Ms. Buchanan knew the

consequences of pleading guilty. She has presented no evidence to persuade me she did not understand that she was admitting to the essential elements of the offences and the facts that supported the Crown's case against her. (*Messervey*, paragraph 79)

Conclusion

[111] Ms. Buchanan's application to withdraw her guilty pleas is dismissed. A date for her sentencing will be set.