IN THE PROVINCIAL COURT OF NOVA SCOTIA

R. v. Naugler, 2011 NSPC 68

Date: October 4, 2011

Docket: 2201066, 2201070, 2201074

Registry: Halifax

Her Majesty the Queen

v.

Arlene Patricia Naugler

SENTENCING DECISION

Judge:	The Honourable Judge Anne S. Derrick
Heard:	September 30, 2011
Decision:	October 4, 2011
Charges:	section 380(1)(a) x2 and section 368(1)(a)
Counsel:	Andrew MacDonald - Crown Attorney
	Patrick MacEwen - Defence Counsel

By The Court:

Introduction

[1] Arlene Naugler's twenty-three year employment with the Dalhousie Faculty Association ("DFA") came to an end on August 13, 2009 when she was fired. On April 30, 2010 Ms. Naugler was charged with defrauding the Dalhousie Faculty Association and committing forgery in doing so. Ms. Naugler pleaded guilty on June 2, 2011 to two (2) counts of fraud over $5,000 and one (1) count of uttering forged documents.

Facts

[2] Ms. Naugler was employed as a Secretary/Bookkeeper with the DFA from April 15, 1986 to August 13, 2009. Among her responsibilities was reconciliation of bank transactions and cheques. At the time of her termination her authorized annual salary was $79,328 although she was, in fact, receiving a salary of $83,817 per year.

[3] Over the time period reviewed by the accounting firm of Smith and Touesnard (April 1, 2006 to July 31, 2009) there were 34 instances where Ms. Naugler received an "extra" pay cheque in the amount of her full monthly salary. The total amount misappropriated by way of these "extra" pay cheques was $136,456.

[4] Smith & Touesnard was also the firm who audited the books of the DFA in the regular course of business. Ms. Naugler provided them with false documentation characterizing the extra money she received as a "loan" so it would not be detected by the regular audit of the DFA books. She presented the auditor with documents bearing forged signatures of DFA Presidents.

[5] Three false Confirmation Letters for 2007, 2008 and 2009 were provided to the auditors explaining the extra monies were an "employee loan" with no interest or repayment scheme. None of the DFA Presidents whose signatures appeared on these Confirmation Letters had actually signed them. Their signatures had been forged by Ms. Naugler.

[6] Ms. Naugler began the practice of remitting to herself an extra monthly pay cheque in April, 2006. These extra cheques mirrored Ms. Naugler's actual pay cheque amounts, in that each cheque was an exact replica of Ms. Naugler's authorized, regular monthly pay cheque, after deductions.

[7] In September 2008, due to the DFA initiating payment of its employees by direct deposit, Ms. Naugler's monthly pay began to go directly into her bank account. Despite this, Ms. Naugler managed to convince her supervisors to sign an additional ten cheques, to which she was not entitled, for her full monthly salary.

[8] The DFA's original financial statements for the year end March 31, 2008 which references the "employee loan" was provided by the auditor to Ms. Naugler. Ms. Naugler altered the statement to redact any mention of the "employee loan" and the altered copies were provided to the DFA Executive for approval. The original portion which was redacted noted "other receivables" of $57,122 for an employee advance which was "non-interest bearing" with "no terms of repayment."

[9] Ms. Naugler also initiated a fraudulent scheme in relation to her pension. On July 26, 2007 Ms. Naugler wrote to Gordon Piche, Associate Executive Director of the Canadian Association of University Teachers advising that effective July 1, 2007 the employer's portion of the pension for Ms. Naugler would be 13%. She enclosed a cheque from the employer to cover the cost. After that time the 13% was sent monthly in accordance with Ms. Naugler's instructions.

[10] The DFA contribution to Ms. Naugler's pension had been 10% of her salary; the additional 3% was reported to the administrator of the pension plan, Manulife Financial, as a voluntary contribution. Ms. Naugler had no authority to increase the DFA contribution to her pension and her supervisors were unaware that she had done so.

[11] At the time the fraud was uncovered, the total unauthorized overpayment to Ms. Naugler's pension plan was $5,175.56.

Pre-Sentence Report

[12] A pre-sentence report dated July 28, 2011 was prepared for this sentencing. It confirms that Ms. Naugler is 50 years old. She and her husband of eight years live in the family home with her 86 year old father, Douglas Grant, and her younger brother. Ms. Naugler is her elderly father's caregiver, a role she also discharged when her mother was ill. Ms. Naugler's mother died in 2002 of a stroke. At that time, Ms. Naugler had been back at home looking after her mother for about a year. Prior to returning to the family home, she had lived on her own from approximately 1996 until 2001.

[13] Ms. Naugler married in 2003. Her husband works full-time as a project manager in the Halifax Dockyard. He and Ms. Naugler have no children. The marriage has been described by Ms. Naugler's family doctor as stable and supportive.

[14] Ms. Naugler has two other brothers from whom she is estranged due to what the pre-sentence report describes as a "bitter family dispute" over the ownership of her father's business, the Midtown Tavern. Ms. Naugler reported to the author of the pre-sentence report that "we went to court for years and spent a fortune trying to protect Dad's interests." In his sentencing brief on Ms. Naugler's behalf, Mr. MacEwen explains that the dispute over control of the Midtown Tavern was before the Courts in this province for a number of years. During this time Ms. Naugler was under a great deal of stress as the legal proceedings became protracted and she tried to care for her father as his health declined.

[15] Ms. Naugler's husband, Robert Naugler, was interviewed for the pre-sentence report and indicated that he had been "shocked" by his wife's offences. He said that he "now understands better the stress and anxiety that [she] was experiencing on a daily basis" during the period when she was misappropriating funds from the DFA. In her husband's words, Ms. Naugler "would come home from work in tears on a regular basis."

[16] Ms. Naugler was diagnosed with clinical depression in about 2004. Her family doctor, Dr. Scovil advised the author of the pre-sentence report that Ms. Naugler, his patient for 20 years, has been compliant with the medication he has prescribed for her depression. Dr. Scovil observed that: "Arlene has been under

tremendous stress and pressure for the last decade." He told the author of the pre-sentence report that Ms. Naugler's offences came as "a great surprise to everyone."

[17] Dr. Scovill also treats Ms. Naugler for high blood pressure for which she has been prescribed cholesterol medication.

[18] Ms. Naugler has been seeing a psychologist, Carol Shirley, who confirmed in the pre-sentence report that Ms. Naugler experiences clinical anxiety and depression as well as what she termed as "burn-out." She observed that the criminal proceedings are causing Ms. Naugler "a great deal of additional stress", including around the issue of how her sentence may impact on her ability to care for her elderly father. Ms. Shirley indicated that Ms. Naugler "has a huge amount of regret and remorse over what happened and if it wasn't for her husband she may not be here right now."

[19] The pre-sentence report also contains the comments of Brigitte Schotch, a friend of Ms. Naugler's who worked with her at the Dalhousie Faculty Association for approximately 20 years. She remarked on Ms. Naugler's profound remorse and said the following: "Arlene believed she would pay back the money when the family matters were settled. I feel she really believed that." Ms. Schotch was familiar with Ms. Naugler's family responsibilities, observing that her dedication to her parents had meant she "never had a life of her own." Ms. Schotch indicated that Ms. Naugler's stress "was noticeable and obvious at work during the years of the family dispute with her brothers."

[20] Ms. Naugler indicated in her pre-sentence report interview that her firing from the DFA was the only instance in her employment history when she was terminated from a position or disciplined. Prior to her job with the DFA, Ms. Naugler worked for The Bay, starting in 1978, when I note, she would have been 17 years old. During the period of 1987 to 2004, Ms. Naugler also worked as a bookkeeper and secretary at her father's business.

[21] Ms. Naugler is now compensated for the care she provides to her father and is afforded approximately 10 hours per week of respite during which time she attends to household errands.

[22] The author of the pre-sentence report observed that Ms. Naugler demonstrated remorse to him during their interview and did not at any time try to minimize or rationalize her conduct. She told him that she had honestly believed she would repay her employer. She did not displace her culpability on to anyone else, stating: “I take full responsibility for what I have done.”

Letters from Ms. Naugler’s Family Doctor and Therapist

[23] In addition to being interviewed for the pre-sentence report, Dr. Scovil and Carol Shirley also provided letters to Mr. MacEwen which were filed at the sentencing hearing by consent as Exhibits 2 and 3. Dr. Scovil referred to the “significant amount of stress” Ms. Naugler has been under “particularly over the past six years.” He described her role as the main caregiver to her father as “exemplary” and “diligent” and noted that he has required “constant supervision and assistance with all activities of daily living.” He also confirmed that Ms. Naugler’s emotional state has been “compromised” by the tensions in the family that have been ongoing for a number of years.

[24] Ms. Shirley has been Ms. Naugler’s therapist since July 2010, taking over from a previous counselor whose health issues required him to transfer Ms. Naugler’s care. Ms. Shirley described a constellation of symptoms related to Ms. Naugler’s anxiety and depression: excessive worry, social isolation, lack of interest and pleasure in activities that were previously enjoyed, feelings of hopelessness and worthlessness, feeling very self conscious with others, and a fear of and need to avoid public places. Ms. Shirley also indicated that Ms. Naugler has attention and concentration problems and “is consumed repeatedly by unpleasant thoughts.” She predicted that Ms. Naugler will continue to struggle with anxiety and depression “until such time as the issues before the Court have been resolved and full restitution has been made.”

[25] Ms. Shirley indicates in her letter that Ms. Naugler has “suffered greatly” and “has accepted responsibility for her choices and the fact that she cannot change what she has already done.” She says Ms. Naugler’s greatest fear is that she will be prevented from continuing to care for her father with the result that his health will deteriorate.

The Civil Judgment

[26] The Crown advises that Ms. Naugler has consented to a civil judgment being entered against her. The pre-sentence report indicates that she has begun repaying the Dalhousie Faculty Association through a garnishment of her wages at a rate of $463.50 per month which represents 15 percent of her gross monthly income.

The Issue of Restitution

[27] The Crown submits that a "free standing" restitution order in the amount of $145,409.05 should be made against Ms. Naugler. The amounts recovered pursuant to the civil judgement are to be deducted from this.

[28] The Crown has indicated that the total amount defrauded by Ms. Naugler is $153,757. This is made up of the $136,456 she obtained through the 34 extra net salary payments, the $5,175 in pension overpayments, and the salary overpayment Ms. Naugler achieved by raising her annual salary from the approved level of $79,328 to the unauthorized amount of $83,817. The $145,409.05 represents the balance remaining after deduction of the amount recovered to this point through the garnishment of Ms. Naugler's current wages.

[29] Mr. MacEwen has advised that Ms. Naugler takes no issue with a free-standing restitution order in the amount of $145,409.05 being imposed against her.

Victim Impact Statements

[30] Before I proceed any further, I want to address the victim impact statements that were provided to me at the sentencing hearing. Five representatives of the DFA prepared statements and three of these were read by the authors at the hearing. These authors were two previous DFA Presidents, David Tindall and David Mensink, and the DFA President who was in office when Ms. Naugler's fraud was uncovered, Terry Mitchell.

[31] David Mensink was one of the DFA Presidents during the time Ms. Naugler was committing her offences. He spoke about his experience of being both "personally and professionally hurt" by Ms. Naugler's deceit. His views about "professional openness and trust in the workplace" have been altered and he felt a sense of "severe betrayal" on discovering that his signature had been forged. He

also noted that he felt personally betrayed by Ms. Naugler as he had “worked hard to provide the individual help she needed and to facilitate her work with the association as much as possible.” He spoke of many people being “negatively affected” by Ms. Naugler’s actions and how the lost trust in “personal and interactional integrity” can never be restituted.

[32] David Tindall was second Vice-President when the DFA Executive learned of Ms. Naugler’s embezzlement. He described his vivid memories of being “devastated, speechless, and, initially, in a state of shock and disbelief” by Ms. Naugler’s betrayal. He had worked with Ms. Naugler and trusted her without reservation for over twenty years. He had always “sincerely believed [Ms. Naugler] was a competent, reliable and trustworthy person.” Mr. Tindall has had his ability to trust eroded and for him, “the betrayal is the worst aspect by far.”

[33] Terry Mitchell also spoke of the significant breach of trust committed by Ms. Naugler. Ms. Mitchell had known Ms. Naugler since she was hired by the DFA and they enjoyed a friendly, empathetic relationship. As President of the DFA when Ms. Naugler’s offences came to light, Ms. Mitchell shouldered the burden of managing the fall-out. She experienced the atmosphere of distrust that descended on the DFA staff, Executive, former Presidents and Treasurers and the auditor, all of whom had been deceived. Ms. Mitchell described how time, resources and finances were consumed dealing with the case and how the DFA had to re-align its priorities and focus. She described the additional expenditures that were the direct result of Ms. Naugler’s offences and the extra time commitment that was demanded of DFA volunteers in their aftermath.

[34] Carrie Dawson and Pierre Stevens also submitted victim impact statements which I have reviewed. Ms. Dawson noted that the credibility of the DFA amongst its members and in the university administration and broader community suffered as a result of Ms. Naugler’s actions. She observed that the DFA has “created a very vigilant workplace” which has “exacted a serious cost in terms of morale and camaraderie.”

[35] Mr. Stevens explained in his victim impact statement that the DFA has an office staff of three employees and a volunteer executive. He was a volunteer member of the DFA executive and had to continue as Treasurer to deal with the

"fallout" of Ms. Naugler's fraud. He and other volunteer members of the Executive had to commit considerable time and effort to sorting through the DFA's financial procedures and policies. Mr. Stevens noted that these additional hours and the souring of trust were also part of the loss experienced by the DFA members dealing with Ms. Naugler's crimes.

The Crown's Position on Sentence

[36] The Crown submits that Ms. Naugler's sentence should be a custodial one, in the range of 12 to 18 months, followed by a period of probation.

[37] In the Crown's submission it is denunciation and deterrence that must be emphasized by the sentence imposed on Ms. Naugler. The Crown asserts in its written submissions that the need for a sentence that denounces and deters is grounded in the following features of Ms. Naugler's offences:

(1) The amount of money embezzled: Ms. Naugler embezzled $136, 456 from the Dalhousie Faculty Association, defrauded the DFA of another $5,175 in pension overpayments, and also paid herself an annual salary in excess of that approved for her under the DFA collective agreement.

(2) The duration of the crimes: Ms. Naugler engaged in the embezzlement and fraud over a 39 month period from April 1, 2006 to July 31, 2009. She only stopped her criminal activities when she was discovered.

(3) The number of transactions: Ms. Naugler's embezzlement involved 34 extra monthly pay cheques. She took methodical steps to deceive the DFA and its auditors so that she could continue to siphon off money. She orchestrated an arrangement that would see her later receive increased pension benefits. The Crown notes that there were many opportunities for Ms. Naugler to reconsider what she was doing and stop.

(4) The degree of planning, deliberation and sophistication: The Crown submits that Ms. Naugler "exploited vulnerabilities in the internal controls of the financial administration system of the DFA." She increased her annual salary and her employer's contribution to her pension plan. She obtained additional monthly pay cheques, forged the signatures of DFA presidents and misled the auditors and the DFA Executive.

(5) Motive: The Crown submits that Ms. Naugler's motive appears to have been "lifestyle and greed."

The Defence Position

[38] In written submissions, Mr. MacEwen suggested that a fit and proper sentence for Ms. Naugler is a conditional sentence pursuant to section 742.1 of the *Criminal Code* of a duration somewhere in the range of one year to two years less a day. In oral submissions, the Defence position was recalibrated somewhat with a proposal for a conditional sentence of two years less a day, the maximum period allowable for such a sentence, with strict house arrest conditions in place for the first twelve months only.

[39] Mr. MacEwen submits that Ms. Naugler poses no risk to the community. He says the mitigating factors in the case make a conditional sentence appropriate. Ms. Naugler has no criminal record, was under great stress when the offences were committed, is deeply remorseful and accepts full responsibility for her actions. In Mr. MacEwen's submission, a conditional sentence in this case is consistent with the purpose and principles of sentencing, the requirements for denunciation and deterrence being satisfied by house arrest with limited exceptions.

The Purpose and Principles of Sentencing

[40] The purpose of sentencing as set out in section 718 of the *Criminal Code* is to contribute to "respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives":

(a) to denounce unlawful conduct;
(b) to deter the offender and other persons from committing offences;
(c) to separate offenders from society, where necessary;
(d) to assist in rehabilitating offenders;
(e) to provide reparations for harm done to victims or to the community; and
(f) to promote a sense of responsibility in offenders, and an acknowledgement of the harm done to victims and to the community.

[41] It is a fundamental principle of sentencing that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. (*section 718.1, Criminal Code; R. v. Naugle, [2011] N.S.J. No. 165 (N.S.C.A.), paragraph 31*) In other words, the "severity of sanction for a crime should reflect the ... seriousness of the criminal conduct." (*R. v. Arcand, [2010]A.J. No. 1383, paragraph 48*) *Arcand,* a recent and comprehensive analysis by the Alberta Court of Appeal of the purpose and principles of sentencing, also notes that as just sanctions are the "goal of sentencing, proportionality must be the overarching principle since a disproportionate sanction can never be a just sanction." (*Arcand, paragraph 52*) *Arcand* recognizes that the disproportionately high sanction is not the only sentence that fails to satisfy the proportionality standard; it is also the sentence that does not adequately speak to the serious nature of the offence. (*Arcand, paragraph 54*)

Additional Sentencing Guidance -- Relevant Principles and Factors

[42] 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, and the principles of parity, restraint and totality. 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*) *Arcand* notes that restraint, as illustrated by sections 718.2(d) and (e) of the *Code*, does “not conflict with the proportionality principle" but is "firmly imbedded within, and central to [proportionality]." (*Arcand, paragraph 62*)

[43] Pursuant to section 718.2, relevant aggravating or mitigating circumstances relating to the offence or offender should increase or reduce a sentence. The sentencing court is statutorily mandated to treat the breach of a position of trust as an aggravating factor in sentencing. (*section 718.2 (a)(iii), Criminal Code*) Section 718.2(b) requires that “a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.”

[44] 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, have been assessed as meriting a special emphasis on denunciation and deterrence.

Breach of Trust Cases and the Principles of Sentencing

[45] The Crown, in seeking a jail sentence for Ms. Naugler, does not attempt to suggest that a conditional sentence cannot be ordered in a case where money has been embezzled in the context of a breach of trust. The Crown's submission is that this would not be an appropriate sentence in this case. Simply put, the Crown argues that a conditional sentence in this case would not be "consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2…" (*section 742.1, Criminal Code*)

[46] In some breach of trust cases, submissions might be made that the service by the offender of his or her sentence in the community would endanger the community's safety or that the appropriate length for the sentence is two years or more, placing the case beyond the scope of conditional sentencing. (*section 742.1, Criminal Code*) These issues are not what concerns the Crown in this case: what the Crown says here is that Ms. Naugler's case requires an emphasis on denunciation and deterrence that a conditional sentence cannot provide.

[47] The stern 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.*

[48] 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.

[49] 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.

[50] 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. The courts in Alberta seem to be particularly hardline in this regard, (*see for example, R. v. Miles, [2011] A.B.C.A. 133; R. v. Stirling, [2010] A.J. No. 1297 (C.A.); R. v. Westerson, [2008] A.J. No. 1047 (Alta. P.C.); R. v. Toews, [2007] A.J. No. 944 (Alta. P.C.); R. v. Bracegirdle, [2004] A.J. No. 827 (Alta. C.A.)*), but they are not alone. (*see, for example, R. v. Lamoureux, [2011] P.E.I.J. No. 6 (S.C.); R. v. Williams, [2007] O.J. No. 1604 (Ont. S.C.J.); R. v. Korol, [2007] B.C.J. No. 2719 (B.C.S.C.); R. v. Coxall, [2006] B.C.J. No. 107 (B.C.P.C.); R. v. Reid, [2004] Y.J. No. 3(Y.T.C.A.); R. v. Stewart, [2002] B.C.J. No. 2456 (B.C.S.C.); R. v. Stoutley, 2002 CarswellOnt 7759 (O.C.J.); R. v. Sequin, [1977] O.J. No. 5439 (Gen. Div.)*) Moral blameworthiness in breach of trust cases is seen as being high and jail sentences have been imposed even where the offender has accepted responsibility and started paying restitution.

[51] In Nova Scotia, 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. 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)

[52] Conditional sentences have been ordered in cases where the breach of trust fraud has been very significant. In *R. v. Ferguson*, for example, the offender defrauded his employer between September 1995 and April 1998 of $390,000 consisting of bogus salary and increased pension contributions. Hundreds of premeditated fraudulent transactions were involved. The company was left with a very significant shortfall after Mr. Ferguson declared bankruptcy. Prospects for further recovery beyond what the trustee in bankruptcy was able to collect were found to be dim. (*Ferguson, paragraph 5*) Mr. Ferguson's theft from his employer fueled unrestrained spending: at the time of his bankruptcy he had $470,000 in debt of which $220,000 was on credit cards. A conditional sentence of eighteen months was imposed on the basis that "the imposition of appropriately harsh and meaningful conditions will serve both the rehabilitation of Mr. Ferguson and send a message of deterrence to Mr. Ferguson and others." (*Ferguson, paragraph 18*)

[53] The Crown in *Ferguson* had been looking for a three year penitentiary term to satisfy the sentencing imperatives of denunciation and deterrence. (*Ferguson, paragraph 3*) The judge's decision to impose a conditional sentence was not appealed.

[54] The *Matheson* case involved a lawyer who pleaded guilty to stealing over $117,000 of clients' money. The offences were committed over a significant period of time and involved planning and premeditation. The grave nature of the breaches of trust was noted. Mr. Matheson's remorse, lack of criminal record and his guilty plea were all considered to be mitigating factors. The Supreme Court of Canada decision in *R. v. Bunn, [2000] S.C.J. No. 10*, also involving a lawyer stealing from clients, was reviewed in detail. MacAdam J. in *Matheson* concluded that since "…the advent of the Legislative mandate and statement of principles and factors to be considered in the imposition of a sentence that would involve the 'least intrusive measure', periods of incarceration in an institution are no longer called for in circumstances where they have been in the past." (*Matheson, paragraph 81*) Mr. Matheson's diagnosis of ADHD was held to be "relevant in helping to explain the why of these offences and as such is a factor to be considered." (*Matheson, paragraph 86*) Mr. Matheson received a sentence of two years less a day to be served in the community.

[55] The *Decoff* case involved the manager at a small business. Soon after assuming this position Ms. Decoff began to take money from deposits slated for the bank. A jury found Ms. Decoff to have taken $44,000 over a period of eight months. (*Decoff, paragraphs 12 and 16*) During this time she had a new baby and a disabled spouse. She apologized to her employers and voluntarily returned to them over $17,000.

[56] The Crown sought to have Ms. Decoff incarcerated. A conditional sentence of eighteen months was imposed. The Court determined that Ms. Decoff did not pose a threat to the community and took account of the mitigating factors, including Ms. Decoff's responsibilities to her disabled partner and baby. She was ordered to pay $26,480.73 in restitution.

[57] In 2003, Clifford Pottie was sentenced for having stolen $46,475 from the Nova Scotia Hockey Council. This breach of trust came late in Mr. Pottie's uneventful tenure with the organization as Secretary Manager. He held the position for fifteen years without incident and then resorted to embezzlement through a forgery scheme that was, as the Court described it, "thinly disguised [and] unsophisticated." Mr. Pottie refused to accept responsibility however, and the Crown, citing the amount of money involved and the breach of trust, sought a jail sentence of 6 to 12 months. Mr. Pottie proposed a conditional sentence, indicating his poor health and the fact that he was the primary daytime care giver for his five year old grandson.

[58] The Court determined that a conditional sentence was consonant with the purpose and principles of sentencing, observing that the Supreme Court of Canada had recognized in *R. v. Proulx, [2000] 1 S.C.R. 61* that "…a conditional sentence can provide significant denunciation and deterrence, particularly when onerous conditions are imposed…" In sentencing Mr. Pottie to an 18 month conditional sentence, the Court found that Parliament had intended through the use of conditional sentencing to "…encourage the courts to reduce the reliance upon incarceration of offenders where appropriate." (*Pottie, paragraph 14*)

[59] None of these Nova Scotia cases – *Ferguson, Matheson, Decoff,* and *Pottie* – went on appeal. An earlier case, *R. v. Hill,* decided on February 17, 1997, was appealed and a sentence of 12 months in jail was upheld. (*R. v. Hill, [1997] N.S.J.*

No. 236 (C.A.)) Ms. Hill had worked as a clerk in the Administration Office of Dalhousie University. She succeeded in defrauding the University of more than $144,000 through a "well devised scheme" involving bogus invoices. Her fraud was eventually discovered and she pleaded guilty. She admitted to being motivated by greed and envy. At her sentencing, Gruchy, J. addressed the issue of denunciation:

> It is essential that the court should openly pronounce disapproval of the criminal actions of the accused. She set about to design a scheme to cheat the University – ultimately the public – out of its funds. It was not an impulsive, greedy grab. It was not the result of foolish or negligent behaviour. It was not an assault brought about by a provoked or unseen impulse. It was a crime requiring planning and deliberation in its execution and subsequent behaviour… (*unreported decision of Gruchy, J., paragraph 13*)

[60] Gruchy, J. also recognized that Ms. Hill would have suffered consequences, such as public humiliation and disgrace, that would deter most people from the commission of crimes. But he observed that in her planning of her crime, "she must have factored into her considerations the very consequences she now suffers." (*unreported decision of Gruchy, J., paragraph 14*) He fixed a sentence of 12 months incarceration and declined to order that it be served in the community. He was of the view that a conditional sentence gave the wrong message to the community and held that, "The public must be assured that thefts and fraud of the nature and magnitude of this case will ordinarily result in a jail sentence." (*unreported decision of Gruchy, J., Hill, paragraph 30*) The Court of Appeal reviewing Gruchy, J.'s decision was satisfied that he had "considered all the appropriate principles in imposing sentence…and [had] committed no error." (*Hill, paragraph 5*)

[61] More recently, Teresa Cox-Kubas was incarcerated for 12 months for defrauding her employer, a dentist, of $103,293. While working as a receptionist/bookkeeper she engaged in hundreds of transactions over a four year period to achieve her objectives. Initially she had taken money and returned it and

then she just started taking it and keeping it. She manipulated the books to avoid detection. Her motive was greed.

[62] Ms. Cox-Kubas was described as expressing remorse that was "clouded somewhat by concern for her own predicament." (*unreported decision of MacDougall, P.C.J., page 2*) Her crimes occurred in a working environment where her employer was described as "fair" and treated "his employees with respect and friendship that went beyond business",

> ...The sense of betrayal was described as particularly cutting and certainly aggravating not only by the amount of the theft but also the number of transactions and the time over which they occurred. (*unreported decision of MacDougall, P.C.J., page 2*)

[63] MacDougall, P.C.J. considered a number of cases, including the Supreme Court of Canada decisions in *Bunn* and *Proulx* and concluded that the duration of the fraudulent activity, the hundreds of fraudulent transactions, the greed that motivated Ms. Cox-Kubas, and the breach of trust combined to make a conditional sentence unsuitable in the circumstances. Ms. Cox-Kubas received 12 months in jail, a denunciatory sentence intended "to deter others." (*unreported decision of MacDougall, P.C.J., page 8*)

Analysis – Determining a Fit and Proper Sentence for Arlene Naugler

[64] Crown and Defence provided me with many cases to consider. I have read them all but do not find it necessary to review the details of each. While the cases are of assistance and I appreciate receiving them, I must sentence Ms. Naugler through an application of the principles of sentencing to the facts and circumstances in her case.

[65] While an appropriate sentence cannot be determined in isolation, no two cases will be identical. (*R. v. Upton, [2008] N.S.J. No. 527 (S.C.), paragraph 61 (N.S.S.C.)*) Sentencing is a "profoundly subjective process" (*R. v. Shropshire, [1995] 4 S.C.R. 227, paragraph 46*) which involves having regard for all the circumstances of the offence and the offender. (*R. v. Nasogaluak, [2010] 1 S.C.R. 206, paragraph 44; R. v. Naugle, [2011] N.S.J. No. 165 (C.A.), paragraph 45*)

Determining "a just and appropriate sentence is a delicate art" which requires the careful balancing of "the societal goals of sentencing against the moral blameworthiness of the offender and the circumstances of the offence, while at all times taking into account the needs and current conditions of and in the community." (*R. v. M. (C.A.), [1996] S.C.J. No. 28, paragraph 91*)

[66] Fashioning an appropriate sentence requires consideration of the aggravating and mitigating factors which, in this case, merit careful examination.

Aggravating and Mitigating Factors

[67] The Crown has accurately identified a number of aggravating factors in this case: the fact that Ms. Naugler's actions involved a breach of trust, the amount of the fraud, the duration over which it occurred and the number of transactions it took to achieve it. In addition to the number of fraudulent cheque transactions, Ms. Naugler also took many additional steps to deceive her employers and advance her objectives. She wrote without authorization to the Executive Director of the Canadian Association of University Teachers increasing the employer contributions to her pension fund. She manipulated the financial statements to prevent her deceit of the auditors being discovered. She misled the DFA Executive and forged the signatures of its Presidents. The Crown notes that on each of these occasions Ms. Naugler had an opportunity to reconsider what she was doing. She only stopped when she was caught and fired.

[68] As far as any mitigating factors are concerned, the Crown notes that Ms. Naugler pleaded guilty, saving considerable time and expense that a trial would have involved. The Crown points out however that the evidence against Ms. Naugler – the banking records seized by police and the accountant reports – clearly show the embezzled money going into her account. This, says the Crown, makes the guilty plea a "plea to the inevitable." Nevertheless, Ms. Naugler has taken responsibility for her offences and not all offenders, even when confronted with an apparently inevitable result, do so.

[69] The Crown acknowledges that Ms. Naugler's consent to having a civil judgement registered against her in favour of the Dalhousie Faculty Association is a mitigating factor.

[70] Mr. MacEwen points to other mitigating factors, detailed by me earlier in these reasons: factors relating to Ms. Naugler's mental health at the time the offences were committed, as well as the stresses she was experiencing in her life, her great remorse over what she has done, and her commitment to repaying her victim, the Dalhousie Faculty Association.

Considering the Aggravating and Mitigating Factors More Closely

[71] Ms. Naugler has placed her offences in a context. It is submitted that this context sheds a mitigating light on Ms. Naugler's actions. She has indicated that at the time of her crimes she was experiencing deepening personal stress and a depression aggravated by family conflict over control of her father's business, his deteriorating health and escalating needs, and related financial pressures. She was not being paid to look after her ailing father and she was struggling under the burden of legal fees as well. This was described by Mr. Naugler in the pre-sentence report: "Arlene was caring for her father with no compensation, as well there were mounting legal bills due to the ongoing battle over the Midtown with her two brothers, she felt overwhelmed and got in over her head."

[72] The Crown has submitted that these circumstances merit closer examination and tendered at the sentencing hearing three volumes of documents obtained by production order during the police investigation. (Exhibit 1) Contained in these volumes are banking records for the Arlene and Robert Naugler Royal Bank of Canada joint account. They indicate that from April 2006 to July 2009, the period of time during which Ms. Naugler was embezzling money from the DFA, she was receiving regular, monthly cheques in the range of $1300 - $1500 which were indicated to be "home care – D. Grant." Mr. MacEwen advised at the sentencing hearing that these payments to Ms. Naugler were for expenses associated with caring for her father in her home. While not constituting wages for her personal-care services, these payments did represent significant payments to off-set the costs of her father's needs.

[73] An examination of the bank statements for the Naugler joint account found in Exhibit 1, Volume 1, reveals that significant amounts of money were being deposited in the years 2006 to 2009. Some of these deposits were for Mr. Grant's expenses, as I have already explained. There was also Mr. Naugler's regular pay

cheque on a bi-weekly basis. Ms. Naugler had employment income and as is now known, was also depositing money that she had embezzled from the DFA. The average monthly credits into the Naugler joint account were substantial: an average of $14,194 in 2006; $20,088 in 2007; $29, 154 in 2008; and $14,313 in 2009.

[74] During the period of April 1, 2006 to July 31, 2009, Ms. Naugler took $148,082 from the Dalhousie Faculty Association in unauthorized salary payments. (This figure does not include the $5,175 in pension overpayments.) This averages out to $3797 per month extra going into her bank account. It can readily be seen that even without this money, over the relevant 39 month period, Ms. Naugler's joint account was in robust shape on the credit side.

[75] The Naugler joint account does seem to have regularly gone into significant overdraft. The records show it see-sawing as it dipped into the red and then was topped up by substantial deposits. Considerable sums were paid out on credit cards and what appear to be other kinds of consumer debt.

[76] The banking records are not detailed in a way that enables me to precisely determine what Ms. Naugler's financial pressures were during the time she was defrauding the DFA. The evidence does indicate that she was not in dire financial straits. She received some compensation, if not wages, for having her father in her care at home and both she and her husband were employed and making good incomes. They did service substantial consumer debt. I heard no evidence that Ms. Naugler endeavoured to re-structure or moderate this debt, indeed what I did hear is that she undertook a significant home renovation sometime in the period of 2007 – 2008.

[77] The evidence about Ms. Naugler's home renovations came from a former President of the DFA, Professor Kevin Grundy. He testified that he had had a friendly relationship with Ms. Naugler and visited her home during his 2007 – 2008 presidency to view her recent renovations. These renovations were to her father's bedroom, the kitchen, the laundry room, and a music studio.

[78] Professor Grundy was struck by the quality and extent of the Naugler renovations. They were, in his words, "quite extraordinary" and "quite opulent." High quality materials had been used such as granite for the kitchen countertops and there were new appliances in duplicate such as two refrigerators and two

freezers and two new washers and dryers. Mr. Grant's bedroom was equipped like a hospital room with a wheel-chair accessible shower. Professor Grundy was told by Ms. Naugler during the tour she took him on that the recording studio had been constructed to a high standard. She was very proud of the high-end renovations which exceeded anything Professor Grundy had previously seen.

[79] I was not provided with any information about the cost of these renovations or how they were paid for. All I know is that they were made to the home where Ms. Naugler lived with her father and husband. What the evidence about them indicates however is that during a time when Ms. Naugler was said to be under significant financial stress, a high quality and extensive renovation was done to the home she lived in. At this same time, she was engaged in a carefully orchestrated embezzlement from her employer. Did this help to finance the renovations? Or could some of the money that was used for the renovations have been better applied to servicing stress-inducing consumer debt? I am unable to answer these questions but they raise legitimate issues.

[80] The Crown has submitted that Ms. Naugler was motivated to defraud the DFA out of greed. I have considered carefully whether this has been plainly established. I am not sure it has. I am unable to sort through what may have been Ms. Naugler wanting more than she could legitimately afford and what may have been a situation of bad financial choices and runaway costs, perhaps contributed to by the litigation over her father's business and expenses associated with his needs. While I do not find this is a case of clearly aggravating greed, I also do not find that Ms. Naugler's crimes are mitigated by desperate financial circumstances. What I do find is that she took the money because she could.

[81] There is also the matter of Ms. Naugler's psychological state during the time she was defrauding the DFA. The evidence that she was experiencing a clinical depression was not offered to suggest that she lacked criminal responsibility: indeed she has accepted full responsibility for her actions over the period of April 1, 2006 to July 31, 2009. Her mental state at the time is another context issue: it is in the context of Ms. Naugler's depression and the stress that she made terrible choices and betrayed the organization and people she worked for.

[82] In *R. v. Wilson, [2008] N.S.J. No. 646*, Ross, P.C.J. commented on the issue of stress 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)*

[83] Ms. Naugler's depression and the stress she was struggling under did not compromise her ability to calculate how to defraud the DFA over a long period of time. She was able to advance her fraudulent strategies on a number of fronts: she increased her annual pay, she secured through forgery and the fraudulent altering of documents additional salary payments, and she enriched her pension – an undertaking that involved thinking about how she might achieve a benefit in the future. She carefully covered her tracks. She knew the trust, confidence and respect the DFA executive members had for her would render her above suspicion.

[84] My closer examination of the mitigating factors advanced in this case leaves those factors in a state of diminished significance. The aggravating factors remain undiluted. Ms. Naugler defrauded the DFA, a non-profit organization run by volunteers with a minimal paid staff, over a lengthy period, using various carefully orchestrated methods involving numerous transactions. She achieved her objectives by boldly exploiting the position of trust she had in the organization and her knowledge of, and access to, the levers for obtaining money and benefits. A co-worker, Ms. Schotch, believes Ms. Naugler intended to pay the money back. But Ms. Naugler kept up her fraudulent activities for 39 months without paying back any of it at any time and it all only came to an end when she was discovered.

[85] The pension overpayments, although representing the smallest of the frauds Ms. Naugler perpetrated, are significant because of what they indicate about the calculated nature of her activities. This cannot be characterized as a desperate money-grab to keep on top of escalating bills: it involved an assessment of how to secure a more robust level of pension payments. It was a fraud where the objective

was a deferred benefit. Whatever was happening in Ms. Naugler's life at the time, she was able to see beyond immediate stresses and focus on benefitting herself in the future.

[86] The pension fraud also undercuts the suggestion that Ms. Naugler seriously believed she would be paying back what she had been taking. Not only would she have had to figure out how to repay the money she was siphoning off on a monthly basis, what kind of plan could she have had for the pension benefits she had positioned herself to receive some time in the future?

Respect for the Law and Consistency with the Purpose and Principles of Sentencing

[87] Promoting respect for the law is a fundamental purpose of sentencing. Conditional sentencing has struggled to satisfy this objective although its effectiveness in this regard has been, in my opinion, undermined by a general misunderstanding on the part of the public and also a deliberate misrepresentating of its role as a legitimate, punitive sentencing option. Conditional sentencing was intended to reflect a new emphasis on the goals of restorative justice (*Proulx, paragraph 19*) Parliament had "mandated that expanded use be made of restorative principles in sentencing as a result of the general failure of incarceration to rehabilitate offenders and reintegrate them into society." (*Proulx, paragraph 20*) A conditional sentence is a hybrid:

> ...[it] incorporates some elements of non-custodial measures and some others of incarceration. Because it is served in the community, it will generally be more effective than incarceration at achieving the restorative objectives of rehabilitation, reparations to the victim and the community, and the promotion of a sense of responsibility in the offender. However it is also a punitive sanction capable of achieving the objectives of denunciation and deterrence…(*Proulx, paragraph 22*)

[88] The Supreme Court of Canada discussing conditional sentencing in *Proulx* 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*)

[89] The punitive effect of a conditional sentence is to be achieved through the use of punitive conditions, such as strict house arrest, to constrain the offender's liberty. (*Proulx, paragraph 36*) Another feature of conditional sentencing is its ready conversion to a sentence in a jail cell. As noted by the Supreme Court of Canada in *Proulx*: "…where an offender breaches a condition without reasonable excuse, there should be a presumption that the offender will serve the remainder of his or her sentence in jail." (*Proulx, paragraph 39*)

[90] However, punitive objectives are still seen as most appropriately achieved through incarceration. This point was made in *Proulx*:

> 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*)

[91] Ms. Naugler's case is one where there are significant aggravating factors. As I have indicated in these reasons, the mitigating factors are, in my view, not particularly compelling when set against the nature and extent of her crimes. The breach of trust that enabled her to carry out these offences over such a protracted period demands a sentence that acknowledges the vulnerability of victims to well thought-out fraudulent schemes and the imperative of denouncing and deterring such offences.

[92] Ross, P.C.J. in *Wilson* gave an eloquent articulation of 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*)

[93] Although I do not subscribe to the uncompromising approach to fraud sentencing apparently taken by the Alberta courts, at least according to their reported decisions, the words of the Alberta Court of Appeal in *R. v. Fletcher, [2007] A.J. No. 1323* express what sentencing in fraud cases will sometimes need to reflect:

> In crimes of embezzlement, the sentencing goals of denunciation and deterrence take on a particular importance. If this conditional sentence were left standing, anyone else working in a similar capacity of trust for a similar employer could readily see an obvious blueprint for quick wealth. It shows how to get hundreds of thousands of dollars almost effortlessly with only the potential burden of a conditional sentence of house arrest to fear. (*Fletcher, paragraph 44*)

[94] Notwithstanding my view that fifteen years ago Parliament advanced legitimate and quantifiable criminal justice objectives in Canada by emphasizing the need to move away from a reliance on jail sentences, Ms. Naugler's case is not one where I can be satisfied that a conditional sentence is appropriate. Although she did not get her hands on "hundreds of thousands of dollars" like Mr. Fletcher, she perpetrated a significant and very deliberate fraud over many months against a vulnerable organization. This is not a case like *Pottie* where the breach of trust

occurred over “several months” and was exposed by nothing more sophisticated than the year-end audit. (*Pottie*, *paragraph 2*)

[95] The facts in this case leave me no option but to emphasize denunciation and deterrence and acknowledge that sentencing Ms. Naugler to serve her sentence on house arrest in her home looking after her father would 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 Ms. Naugler’s crimes and the degree of her moral culpability for them. It would be a sentence that looked too much like probation, represented too closely the life Ms. Naugler has been living, and did not reflect the punishment that is warranted here. It is my decision that a sentence of 8 months in jail is the appropriate sentence for Ms. Naugler followed by 12 months probation.

[96] In imposing this sentence I have taken into account the principles of rehabilitation and reparations to the victim. These are significant sentencing principles that in this case do not outweigh the requirement that Ms. Naugler’s high level of blameworthiness be sanctioned through a complete deprivation of her liberty. (*R. v. Williams, [2007] O.J. No. 1604 (S.C.), paragraph 40*) Ms. Naugler has been engaged in counseling which will have been having rehabilitative effects: she will presumably resume this counseling once she is released from jail. And whether a jail sentence was imposed or not, the reparations to the DFA will be a lengthy process and not significantly disrupted by her incarceration.

[97] I will indicate that the mitigating factors in Ms. Naugler’s case, principally her guilty plea, her mental health issues, and her remorse, have served to reduce the length of the sentence I might have otherwise imposed. I agree with the words of Wilkie, J. in *R. v. Stoutley*:

> Jail is always a last resort, and where it is imposed…principally to satisfy the need for general deterrence and denunciation, its impact, in my view, comes from the fact of meaningful incarceration, rather than its precise length. (*Stoutley, paragraph 69*)

[98] I consider this to be a significant sentence, particularly given the fact that Ms. Naugler was not, until these events, previously in conflict with the law. Ms.

Naugler will have to recognize that, to borrow the words and insight of Ross, P.C.J. in *Wilson*, “Many people have paid the price of a jail sentence and then moved on.” However I am acutely aware that a jail sentence is a heavy penalty for her to bear. She has mental and physical health issues that must be appropriately managed and treated while she is incarcerated. Her anxiety and depression will potentially be exacerbated by jail and correctional officials must see to it that she receives prompt and proper care in custody.

[99] I also recognize that Ms. Naugler’s father will be affected by this sentence, which is most unfortunate but this is not a case where the impact on a third party can be a determinative or even an influential factor. The evidence indicates that Mr. Grant has means to provide for his care. His needs will have to be met through alternative care arrangements while Ms. Naugler is incarcerated. It is apparent that Ms. Naugler has been a loyal and devoted daughter. She will also have been well aware that she faced the real risk of being incarcerated. I am confident she will not have neglected to address the issue of her father’s care in the event of a jail sentence.

[100] I am also imposing a stand-alone restitution order for the amount of $145,409.05 to be reduced by any amounts recovered from Ms. Naugler through the civil judgment.

[101] The conditions of Ms. Naugler’s 12 months of probation to follow her jail sentence will be: to keep the peace and be of good behaviour, attend court as and when directed, advise the Court of any change to her name, address, employment or occupation, report to probation services within 2 business days of her release from custody and thereafter as directed, remain in Nova Scotia unless permission is obtained from the Court to leave, and attend for such assessment, treatment and counseling as directed by her probation officer.