PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R v. Sponagle*, 2017 NSPC 23

Date: May 4, 2017
Docket: 2325864
Registry: Halifax

Between:

Her Majesty the Queen

v.

Quintin Earl Sponagle

DECISION ON SENTENCE

Judge:	The Honourable Judge Anne S. Derrick
Heard:	April 20, 2017
Additional Written Submissions from the Crown:	April 28, 2017
Decision:	May 4, 2017
Charge:	Section 380(1)(a), of the *Criminal Code*
Counsel:	Mark Heerema and Perry Borden, for the Crown Derek Brett, for Mr. Sponagle

By the Court:

Introduction

[1] Mr. Sponagle has pleaded guilty to defrauding investors who invested in a company he controlled, Jabez Financial Services Inc. Mr. Sponagle has admitted that he used $1,100,000 provided to him by investors in a manner unrelated to any investment purpose.

[2] The Crown and Defence have proposed that Mr. Sponagle be sentenced in accordance with a joint recommendation that has the following components: a custodial sentence of "time-served"; a twelve-month Probation Order; Restitution Orders, and a fine-in-lieu of forfeiture in relation to the proceeds of crime, that is, the $1,100,000 defrauded from the victims. This is my decision on the jointly recommended sentence.

Mr. Sponagle's Guilty Plea to Fraud over $5000

[3] Mr. Sponagle has pleaded guilty to a single count of fraud over $5000. The actual charge reads that Mr. Sponagle did,

> Between the 1st day of December 2005 and 30th day of September 2006, at or near Windsor, Nova Scotia, and elsewhere in the Province of Nova Scotia, by deceit, falsehood, or other fraudulent means, unlawfully defraud investors in Jabez Financial Services Inc., of money of a value exceeding

five thousand dollars ($5,000) contrary to section 380(1)(a) of the *Criminal Code.*

[4] Mr. Sponagle entered his guilty plea on December 22, 2016, ahead of his trial which was scheduled to take five weeks in January, February and early March 2017. At Mr. Sponagle's sentencing hearing on April 20, the Crown presented the following jointly agreed-upon facts (*Exhibit "3"*):

a) In 2006, Jabez Financial Services Inc., ("JFSI") and its related entities were created. While other principles or agents were also involved with JFSI, for all material times Mr. Sponagle controlled the decisions and activities of JFSI.

b) JFSI was incorporated in Panama and maintained an office in Windsor, Nova Scotia. Through its private website and office, JFSI offered a variety of investment options to its clientele at specified rates of return.

c) During 2006, and until the late summer/early fall of that year, approximately 201 individuals invested in JFSI. Most of the investors were residents of Nova Scotia. Many of the investors were from the immediate social group of Mr. Sponagle, or the other principles or agents of JFSI.

d) These 201 individuals invested a total of $4,365,879 with JFSI. Of these funds, approximately, $4,208,966 was directed to a bank

account of JFSI with the First Curacao International Bank (FCIB) in Curacao, Netherland Antilles.

e) Investors periodically received emailed "newsletters" and "updates" from JFSI. These documents consistently portrayed to investors how their investments with JFSI were safe, yielding positive gains, and were being utilized and traded in successful and profitable ways.

f) On October 9, 2006, the bank license of FCIB was revoked and the bank was placed under administrative control of the Central Bank of the Netherland Antilles. This revocation was unrelated to the actions of Mr. Sponagle or JFSI. Nevertheless, the JFSI bank account held by the FCIB was effectively frozen as a result of this revocation. The funds which remained in the account totaled $2,044,258.

g) As a result of emerging complaints from investors, in the Fall of 2006 concurrent investigations commenced into the activities of Mr. Sponagle and JFSI. Such investigations included provincial Securities Commissions as well as the Royal Canadian Mounted Police. On March 2, 2007, the Supreme Court of Nova Scotia appointed PricewaterhouseCoopers as Receiver of the assets and property of JFSI.

h) The $2,044,258.00 funds noted earlier remained in the JFSI account of the FCIB as of October 9, 2006. Given this amount, it can be deduced that of the $4,365,879 initially received by investors of JFSI, $2,321,621 had been used and dispersed by Mr. Sponagle.

i) An analysis of the money used or dispersed by Mr. Sponagle reveals that approximately $1,100,000 was used in a manner that was unrelated to any investment purpose. Mr. Sponagle used this $1,100,000 for purposes which included the purchase of automobiles, recreational vehicles, property, international travel, cash withdrawals, personal expenses, payments to referral agents of JFSI, payments to non-investors of JFSI, payments to law firms, payments for rental spaces, and charitable donations.

j) It is agreed that $1,100,000 does not represent the entirety of the loss left outstanding to the victims.

k) Of the remaining funds, approximately $1,221,621 of the total funds received from investors of JFSI were used by Mr. Sponagle in a manner which may have been used for legitimate investment purposes or to re-pay investors of JFSI.

l) It is agreed that restitution orders (pursuant to s. 738 of the *Criminal Code*) to the 201 victims of Mr. Sponagle are appropriate. Agreed upon restitution amounts, Appendix "A" to the admissions of fact (and marked *Exhibit "4"*), reflect a proportional equitable share of the above-noted fraud amount, though, it is expressly acknowledged by Mr. Sponagle that such amounts do not represent the entirety of the outstanding losses to each of the victims.

[5] The Crown and Defence have agreed that Mr. Sponagle spent considerable time in custody following his arrest in Panama where he was living. This period of

custody extended from Mr. Sponagle's arrest on April 17, 2013 to December 19, 2014, a period of nineteen and a half months. During most of that time – April 17, 2013 to November 29, 2014 – Mr. Sponagle was locked up in Panama's La Joya Penitentiary while he resisted extradition to Canada. The extradition process was completed on November 29, 2014, and Mr. Sponagle was held in custody in Nova Scotia until December 19, 2014, at which time he was released on a recognizance with sureties and conditions that, for a time, included a curfew.

[6] Crown and Defence agree that La Joya Penitentiary is a notoriously terrible place to be incarcerated. As the Crown's brief indicates:

> La Joya Penitentiary is infamous for its deplorable and harsh conditions. It has been repeatedly denounced, including by the United Nations, for violating the basic human rights of prisoners. It bears the unenviable reputation as being "one of the worst jails in the world."

[7] The Crown did not object to Mr. Brett's request that a Defence Book of Documents relating to La Joya Penitentiary be filed as an Exhibit. (*Exhibit "2"*) There is material in these documents that is not directly relevant to Mr. Sponagle and the extent to which Mr. Sponagle experienced some of the conditions described has not been established. However there is no doubt that, as further confirmed by the reports and photographs in *Exhibit* 2, La Joya Penitentiary deserves the international condemnation it has received for the cruel, inhumane and degrading conditions to which its prisoners are subject.

The Components of the Joint Recommendation

[8] Mr. Heerema and Mr. Borden have provided me with a very comprehensive and helpful brief and case authorities that address the component parts of the joint recommendation. As I have noted, these component parts are: a period of custody that has already been served – what is referred to as "time-served", twelve months on probation, restitution, and a fine-in-lieu of forfeiture. Further written submissions were provided by the Crown on April 28 at my request addressing the restitution and fine-in-lieu of forfeiture aspects of the joint recommendation. I will address these supplementary submissions later in these reasons.

[9] The scale, protracted nature and premeditation that characterize Mr. Sponagle's fraudulent actions require that the sentencing principles of denunciation and deterrence are to be emphasized. Societal condemnation and the deterrence of others and Mr. Sponagle must be reflected in the sentence imposed.

Aggravating Factors

[10] The Crown has identified the aggravating factors of Mr. Sponagle's offence as:

- The large-scale nature of the fraud – over a million dollars.
- The calculation and deliberation that went into the fraud: it was, as the Crown notes, "far from spontaneous or impulsive" and there were many opportunities for Mr. Sponagle to have changed course.
- The sophistication of the fraud, ably described by the Crown in these terms: "Mr. Sponagle, and the sophisticated and professional appearance of JFSI

was a necessary tool in luring its 201 investors. Such sophistication reveals the level of planning, detail and foresight needed to complete this fraudulent scheme.". And while Mr. Brett, taking issue with the characterization of Mr. Sponagle's enterprise as "sophisticated", described the investment scheme as "a small group of investors, with the network only growing through 'word of mouth'…", the "trappings of legitimacy" developed by Mr. Sponagle included, as Mr. Heerema said in his oral submissions, a website, a local office, a company incorporated in Panama, and foreign bank accounts.

- The breach of trust, which is a codified aggravating factor pursuant to section 718.2(a)(iii) of the *Criminal Code*. Mr. Sponagle exploited his position of trust in relation to the investors against whom he perpetrated the fraud. This betrayal of trust resonates throughout the victim impact statements.

- The fact that no restitution has been made by Mr. Sponagle in the over ten years since his fraud was committed; and the number of victims. 201 individuals have been affected by Mr. Sponagle's actions which, as the Crown notes, means that these many victims have had their trust betrayed and have suffered harm, in some cases irreparable harm, to their future plans, to the security they were counting on for their retirements, and to their health, well-being and happiness.

[11] The final aggravating factor identified by the Crown is Mr. Sponagle's greed. While Mr. Brett takes exception to this characterization and the Crown's submission that it was Mr. Sponagle's sole motive, the Agreed Statement of Facts (*Exhibit "3"*) establishes that Mr. Sponagle used other people's hard-earned

money to feather his own nest. As Mr. Heerema and Mr. Borden state in their brief: "He enriched himself at the expense of the impoverishment of others. There is no altruistic or selfless motive that emerges." I will also note there is nothing to suggest Mr. Sponagle embarked upon his criminal scheme in the desperate throes of an addiction or because a legitimate venture had failed and he was trying to redeem a foundering cause. Mr. Sponagle betrayed his investors and whatever moral code he may have had, primarily so he could live the good life and enjoy material benefits that otherwise would presumably have been beyond his means.

Victim Impact Statements

[12] Only a few victim impact statements – thirteen in total – were filed for this sentencing. They all speak to the harm caused by Mr. Sponagle. It was a repeated theme in these statements that Mr. Sponagle's betrayal affected not only his victims' ability to trust others but shook their confidence in their own decisions and judgment. It is apparent that many of the victims were ordinary people - unsophisticated and vulnerable. Victims commented on how Mr. Sponagle traded on his apparent good character and his membership in a shared church community to separate people from their money. One victim put it like this: "My life savings would be trusted in Mr. Sponagle as he was an investment genius who was a man of faith." Another victim noted what made Mr. Sponagle seem so trustworthy: "…also loss of faith in supposedly Christian people as Quintin E. Sponagle was a devoted member of church in [Lower] Sackville." Stress affected victims emotionally, mentally and physically. Victims have described feeling violated, embarrassed, angry and depressed. One victim wrote about the humiliation of

losing her home and having to declare bankruptcy. Another disclosed the damage done to his marriage: "I felt like a failure and the cause of the rift in my marriage."

[13] The victim impact statements show that the pain and distress caused by Mr. Sponagle's greed is still raw and that much of the harm he has inflicted cannot be repaired.

Mitigating Factors

[14] I agree with the Crown submission that the most significant mitigating factor in this case is Mr. Sponagle's guilty plea. It was not timely, which attenuates its significance, but it did come ahead of the scheduled trial and saved witnesses from testifying and considerable judicial resources. The trial was scheduled to last 25 days, starting on January 9 and ending on March 3, 2017. The Crown intended to call 30 – 40 witnesses, including multiple experts. Especially as Mr. Sponagle was unrepresented, it had the potential to extend well beyond its docketed dates.

[15] Mr. Sponagle was unrepresented as we proceeded toward trial and had indicated he was expecting to represent himself at trial. On several occasions during pre-trial conferences - there were 12 of them - he mentioned his hope that the case could be resolved with the Crown. Perhaps if he had been represented by counsel a guilty plea would have come sooner.

[16] A related factor is the acceptance of responsibility signified by Mr. Sponagle's guilty plea. Mr. Heerema and Mr. Borden have explained in their brief why this acceptance of responsibility is significant in this case:

> Through his guilty plea Mr. Sponagle has accepted responsibility for certain allegations that the Crown may have had difficulty proving. While certain complainants were cooperative with the prosecution/investigation, many were not. In such circumstances, the ability to prove a matter beyond a reasonable doubt becomes more difficult. In the case-at-bar, Mr. Sponagle's acceptance of responsibility is of more importance/significance to the Crown than many other cases.

[17] Mr. Heerema pointed out in his oral submissions that Mr. Sponagle knew the Crown's case had weaknesses and pleaded guilty anyway, which is a meaningful acknowledgement of responsibility.

[18] I will conclude this issue by noting Mr. Brett's submission that some JFSI investors continue to openly support Mr. Sponagle as evidenced by *Exhibit "1"*, a series of eight Affidavits that express belief in Mr. Sponagle's good character and his *bona fides*. The authors of these Affidavits are aware of Mr. Sponagle's admission of guilt and notwithstanding that, stand by him.

[19] There is a further factor which, in most criminal sentencings, is highly relevant to mitigation. Mr. Sponagle has no criminal record. This suggests he has led an otherwise pro-social life. But in white collar crimes the absence of a criminal record does not have the significance it often does in criminal cases. (The Crown cites *R. v. Lee*, 2011 NSPC 81 as a case that discusses this principle at paragraphs 40 and 41.) As Mr. Heerema and Mr. Borden note: "Good reputations are often necessary pre-conditions to earning the trust/position to perpetrate the fraud." I have no doubt that Mr. Sponagle was seen by his hapless investors as an

upstanding fellow citizen who provided no reason for anyone to mistrust him. And while he has no record coming into this sentencing he perpetrated countless criminal transactions as he fraudulently misused $1,100,000 of other people's money.

[20] Mr. Brett has submitted there are additional mitigating factors to be noted in Mr. Sponagle's case – the lasting impact of his experiences in La Joya Penitentiary and his age. I am satisfied the effects on Mr. Sponagle of his incarceration in Panama have been factored into the remand credit calculation that is being jointly recommended and, at 52, I do not consider Mr. Sponagle to be an elderly or particularly vulnerable offender.

The Range of Sentence

[21] The Crown's submissions satisfy me that, as they have indicated in their brief, taking the aggravating and mitigating factors into account, the appropriate range of sentence for a fraud of the nature perpetrated by Mr. Sponagle is three to six years in prison. In support of the three to six year range, Mr. Heerema and Mr. Borden provided me with ten cases in total from various levels of court in Ontario, British Columbia, Alberta, Nova Scotia and Saskatchewan. I find there is nothing about Mr. Sponagle or his offence that takes him out of this range. (*R. v. Mazzucco, 2012 ONCJ 333; R. v. Khan, 2012 BCCA 703; R. v. Rao, 2013 ONCJ 807; R. v. Topp, [2008] O.J. No. 1766 (S.C.J.); R. v. Chamczuk, 2010 ABCA 380; R. v. Davis, 2014 ABCA 115; R. v. Link, 2013 SKQB 163; R. v. Banks, 2010 ONCJ 339; R. v. Adams, 2015 CarswellOnt 4002 (C.J.)* and the unreported case, *R. v. Schriver, Nova Scotia Provincial Court, October 5, 2015*)

The Appropriate Credit for Pre-trial Custody

[22] The Crown, as part of the submission on the joint recommendation for a sentence of time-served, has calculated that Mr. Sponagle is entitled to be given credit for the equivalent of three years, four months and six days in custody, a figure arrived at by doubling the amount of actual time he spent in prison in Panama. There are several analytical steps taken by the Crown to arrive at this calculation. The Crown submits that, in relation to the issue of calculating the credit to be assigned for time spent in pre-trial custody, Mr. Sponagle's case falls under the pre-2009 regime which allowed judges broad discretion in determining the amount of credit. The Supreme Court of Canada has said in *R. v. Summers*, 2014 SCC 26 that under that regime when an offender was subjected to "particularly harsh conditions" elevated ratios for calculating the remand credit were sometimes applied.

[23] The application of an "elevated ratio" to Mr. Sponagle for his time in the notorious La Joya Penitentiary could have meant his actual time in custody would entitle him to be credited at a ratio of 3 to 1 or even 4 to 1 to reflect the dreadful conditions of his imprisonment. Mr. Heerema and Mr. Borden have said in their brief that the "deplorable and depraved conditions [in La Joya] are presumably non-existent in Canada. If they existed it is likely that a remanded prisoner in Canada would receive a credit of 4:1; a ratio the Supreme Court of Canada [in *R. v. Summers*] acknowledged as valid, though rare."

[24] Mr. Sponagle's case raises the question of why he should get any credit for his time in pre-trial custody, an issue the Crown addressed in formulating its position on the joint submission on sentence. Awarding credit for time spent in

pre-trial custody is discretionary. Where an offender has chosen to make himself unavailable to the Canadian courts in relation to criminal charges he knows are pending there is a good case to be made for no or little credit being given. This was the view of the British Columbia Court of Appeal in *R. v. M.(R.E.)*, 2008 BCCA 516 and *R. v. Valois*, 2000 BCCA 18 and the Alberta Court of Appeal in *R. v. Millward*, 2000 ABCA 308. These cases all dealt with pre-trial custody in the United States and United Kingdom.

[25] In *R. v. M. (R.E.)*, the British Columbia Court of Appeal held that, "…what, if any consideration should be given with respect to extradition custody in another jurisdiction should depend on the circumstances of the particular case." (*para. 10*) The Alberta Court of Appeal in *R. v. Millward* found no error in the sentencing judge's decision to give little credit for time in custody in Nevada prior to extradition. The Court said of the policy reasons for giving little or no credit, "An offender should not be rewarded for taking flight, indeed he or she should be discouraged from doing so." (*para. 4*)

[26] The Crown acknowledges that Mr. Sponagle's case is not the same as *M.(R.E.)*, *Valois*, and *Millward*. Mr. Sponagle did not take flight to Panama from Canada having been charged here: he was not arrested until April 2013 and had been living in Panama since 2006. However, the move to Panama could have been related to Mr. Sponagle's criminal enterprise: I note the between dates of his offence - December 1st, 2005 and September 30th, 2006. Mr. Heerema did indicate in his submissions the Crown has reason to believe it was not coincidental that Mr. Sponagle relocated to Panama from Nova Scotia in November 2006 and that he would not have been oblivious to the fact that an investigation into JFSI was

underway. And it is an established fact that Mr. Sponagle did not acquiesce to extradition once he was arrested, obliging Canada to undertake the time-consuming process of getting him back here to face the music.

[27] That being said, Mr. Sponagle did endure, while presumptively innocent, a long period of being detained in a prison that has been denounced on various occasions, including by the UN Commission on Human Rights, for its violation of the basic human rights of its prisoners.

[28] Considering all of this, I agree with the Crown's view that notwithstanding what are said to be horrific conditions in La Joya Penitentiary, the full credit Mr. Sponagle might get for experiencing deplorable conditions in pre-trial custody should be reduced given his role in forcing Canada to extract him by extradition. A reduction in the calculation for credit for pre-trial custody reflects the fact that Mr. Sponagle made the choice to resist extradition and remain in La Joya Penitentiary. It has been jointly recommended that Mr. Sponagle receive a limited credit of 2:1 for the time he spent in custody in Panama.

[29] The application of the double-credit for time in pre-trial custody produces the calculation I mentioned earlier of 3 years, 4 months and 6 days. It is the joint submission of Crown and Defence that Mr. Sponagle has served the equivalent of 3 years, 4 months and 6 days in prison and that this falls within the range for a fraud of the scale, protracted nature and premeditation that characterize Mr. Sponagle's fraud. It is jointly submitted, based on an analysis of the amount of time spent by Mr. Sponagle in pre-trial custody and the nature of that time, that Mr. Sponagle be sentenced to "time-served."

Probation

[30] There is a joint submission for Mr. Sponagle to serve a twelve-month probationary period with conditions that include the usual statutory conditions and additional conditions jointly recommended by the Crown and Defence.

Forfeiture Order/Fine-in-lieu of Forfeiture of Proceeds of Crime

[31] As Mr. Heerema and Mr. Borden have pointed out in their brief, the forfeiture provisions in the *Criminal Code* were enacted to ensure that crime does not pay. Forfeiture is separate and distinct from the goal of punishing crime. As the Supreme Court of Canada has said in *R. v. Lavigne*, 2006 SCC 10:

> Parliament's intention in enacting the forfeiture provisions was to give teeth to the general sentencing provisions. While the purpose of the latter provisions is to punish the offender for committing a particular offence, the objective of forfeiture is rather to deprive the offender and the criminal organization of the proceeds of crime and deter them from committing crimes in the future. The severity and broad scope of the provisions suggest that Parliament is seeking to avert crime by showing that the proceeds of crime themselves, or the equivalent thereof, may be forfeited. (*para. 16*)

[32] An order for forfeiture or a fine-in-lieu does not reduce what is otherwise an appropriate sentence and plays no role in a totality analysis. The policy reason is simple: "…people with property might be able to avoid jail or receive reduced custodial terms, while those without property would not." (*R. v. Craig, 2009 SCC 23, para. 34*)

[33] Where an offender has had control of proceeds of crime but no longer possesses them, a forfeiture order or fine-in-lieu of forfeiture can still be ordered. The Agreed Facts in Mr. Sponagle's case establish that he had control of $1,100,000 which he used in a manner unrelated to any investment purpose.

[34] Where the proceeds of crime are no longer available to be forfeited – they may have been "used, transferred or transformed, or may simply be impossible to find" (*R. v. Lavigne, para. 18*) – a fine-in-lieu may be imposed. As the Supreme Court of Canada has held: "It is therefore from the perspective of the objective of the forfeiture provisions that the fine instead of forfeiture must be considered." (*R. v. Lavigne, para. 18*) A fine is a surrogate for forfeiture. (*R. v. Angelis, 2016 ONCA 675, para. 72*)

[35] The Supreme Court of Canada has clearly established that ability to pay is not a consideration in determining whether to order a fine-in-lieu of forfeiture or in the determination of the amount of the fine. (*R. v. Lavigne, para. 37*) It is a relevant factor in fixing the amount of time an offender has to pay the fine. That period of time should be what is reasonable in all the circumstances. Sections 734.8(2) and (3) of the *Criminal Code* provide that as the fine is paid down the amount of potential default time of imprisonment is proportionately reduced.

The Joint Recommendation Relating to the Proceeds of Crime

[36] Mr. Sponagle has agreed by way of the Agreed Statement of Facts (*Exhibit "3"*) that the proceeds of crime in his case - $1,100,000 "does not represent the entirety of the loss left outstanding to the victims." In their brief, Mr. Heerema and Mr. Borden have indicated the Crown is seeking this amount in forfeiture (that is a fine-in-lieu), as it is "the amount the Crown can quantify with respect to the offence…"

Restitution

[37] $1,100,000 is also the total amount for the jointly recommended restitution orders. Exhibit "4" is a listing of all the victims and the proportionately allocated restitution amounts. Exhibit "4" has been sealed as it contains the civic addresses for all the victims. This information would have to be redacted before Exhibit "4" could be made public.

Where Both Restitution and a Fine-in-Lieu of Forfeiture are Ordered

[38] Following the oral submissions of Mr. Heerema and Mr. Brett on April 20, I asked Mr. Heerema to explain the legal basis for the joint submission that any payment made by Mr. Sponagle on the fine-in-lieu of forfeiture would automatically reduce <u>both</u> the fine and the restitution. (The Crown refers to this as "double-reduction.") This has been the clear position of the parties: that any amount paid on the fine-in-lieu of forfeiture reduces both the fine and the restitution amount and is to be paid to the victims owed restitution. This is

expressed in the Crown's sentencing brief, citing *R. v. Khatchatourov*, 2014 ONCA 464, at paras. 55 and 58.

[39] The reason for my query was section 740 of the *Criminal Code* which states:

> Where the court finds it applicable and appropriate in the circumstance of a case to make, in relation to an offender, an order of restitution under section 738 or 739, and
>
> (a) an order of forfeiture under this or any other Act of Parliament may be made in respect of property that is the same as property in respect of which the order of restitution may be made, or
>
> (b) the court is considering ordering the offender to pay a fine and it appears to the court that the offender would not have the means or ability to comply with both the order of restitution and the order to pay the fine,
>
> The court shall first make the order of restitution and shall then consider whether and to what extent an order of forfeiture or an order to pay a fine is appropriate in the circumstances.

[40] A plain reading of section 740 led to my concern that my acceptance of the joint recommendation for restitution orders totally $1,100,000 and a fine-in-lieu of forfeiture in the amount of $1,100,000 could result in an unintended doubling of

Mr. Sponagle's liability – that he would be liable to pay a combined total of $2,200,000 which was not what the joint sentencing submission contemplated.

[41] I want to express my appreciation to Mr. Heerema and Mr. Borden for their written submissions and supporting cases received on April 28 to address this issue. Their very helpful brief has been of great assistance to me.

[42] The Crown argues in its submissions that pursuant to *R. v. Khatchatourov* and its "progeny" (to borrow the Crown's terminology), I can order "double-reduction" of the restitution orders and the fine-in-lieu of forfeiture order and that section 740 of the *Criminal Code* "should not be interpreted as applying to a fine-in-lieu of forfeiture, as such an interpretation is difficult to reconcile with *Lavigne* and is at odds with s. 734(2)" of the *Criminal Code*. (I have referenced the Supreme Court of Canada decision, *R. v. Lavigne*, in paragraphs 31, 34, and 35 of these reasons, when discussing the law relating to forfeiture of proceeds of crime.)

[43] The Crown notes the Ontario Court of Appeal in *Khatchatourov* held that the reason a restitution order is reduced by payments on the fine-in-lieu is "not because these orders are imposed for the same reason but that the legislation prioritizes the reimbursement of victims over collecting on fines for general revenues…" [*cites omitted*] (*para. 58*) And the Crown points to a number of cases following *Khatchatourov* where courts have imposed restitution and fines-in-lieu "with double-reduction being explicitly ordered." In *R. v. Gibb*, 2014 ONSC 5316, the court cited *Khatchatourov* and ordered restitution and a fine-in-lieu. (*paras 89 and 90*) In addendum reasons, the court ordered the inclusion of the following in the sentence order: "The restitution order shall take priority over payment of the fines in lieu of forfeiture ordered herein, and the fines-in-lieu of forfeiture shall be

reduced by any amount paid pursuant to the restitution order." (*R. v. Gibb, 2014 ONSC 7256, para. 1*)

[44] This language from the addendum reasons in *Gibb* appears to be adopted verbatim from the Ontario Court of Appeal decision in *R. v. Waxman*, [2014] O.J. No. 1606. In *Waxman*, a sentencing for a large-scale fraud, orders for both restitution order and a fine-in-lieu of forfeiture were made. The Court of Appeal said the following:

> An issue arises concerning the interplay between the restitution order and the fine-in-lieu of forfeiture order. On the current wording of the court's orders, it is theoretically possible that payment of restitution would not be credited against the fine-in-lieu of forfeiture, thus exposing the appellant to the risk of double collection of the same amount. The parties have assured us that this is not their understanding of the orders and that any payment made would be credited to both orders equally. (*para. 30*)
>
> For greater certainty, we would amend the order of the trial judge to state: "the restitution order shall take priority over payment of the fine-in-lieu of forfeiture ordered herein, and the fine-in-lieu of forfeiture shall be reduced by any amount paid pursuant to the restitution order". (*para. 31*)

[45] The Crown indicates that this "double-reduction" language appears in *R. v. Cavanagh*, 2015 ONCJ 632, para. 46. *R. v. Scribnock*, 2017 ONSC 1716, para. 22.

and *R. v. Roberts*, 2017 ONSC 1071, para. 65, all cases where both restitution orders and a fine-in-lieu of forfeiture order were imposed.

[46] Circling back to the question of what significance section 740 of the *Criminal Code* may have, I am now satisfied that it does not apply to Mr. Sponagle's sentencing. The fine-in-lieu of forfeiture that is being jointly recommended for Mr. Sponagle is governed by section 462.37(3) found in Part XII.2 of the *Criminal Code* entitled "Proceeds of Crime." Section 740 does not refer to a fine-in-lieu of forfeiture, a special sentencing option when, as here, there are no proceeds available for forfeiture. Section 740 refers to "ordering the offender to pay a fine" an obvious reference to the generic fine disposition. It is located in Part XXIII of the *Criminal Code*, entitled "Sentencing" and other proximate provisions are provisions dealing with fines - section 734 and restitution - section 737.1. And I agree with Mr. Heerema and Mr. Borden who submit that "…s. 734(2) of the *Criminal Code* would suggest that the "fine" contemplated in s. 740 is not a fine-in-lieu of forfeiture" because a "fine imposed in lieu of a forfeiture order" is specifically identified in s. 734(2) but not in s. 740." To achieve statutory coherence, section 740 would have to reference fines-in-lieu of forfeiture for it to have any application to such fines. Furthermore, as the Crown has noted, the law is clear that ability to pay is not a relevant consideration in determining whether to order a fine-in-lieu of forfeiture under section 462.37(3). Section 740 affords the opportunity to consider ability to pay in deciding whether to impose a fine. Section 740 therefore cannot be a provision that applies where the court is being asked to order a fine-in-lieu of forfeiture under the proceeds of crime provisions of the *Criminal Code*.

[47] I agree with the submission of Mr. Heerema and Mr. Borden in their brief: pursuant to *Khatchatourov* and its progeny, a court can explicitly order "double-reduction" of restitution and a fine-in-lieu of forfeiture "in line with the spirit of the joint recommendation." And, the Supreme Court of Canada's decision in *R. v. Lavigne* and section 734(2) of the *Code* lead inexorably to the conclusion that section 740 of the *Code* is inapplicable to fines ordered in lieu of forfeiture under section 462.37(3).

Jointly Recommended Sentence

[48] The global sentence being proposed for Mr. Sponagle of "time served", probation, restitution and a fine-in-lieu of forfeiture, is a joint recommendation and as such is governed by the Supreme Court of Canada's recent decision, *R. v. Anthony-Cook*, 2016 SCC 43. The Supreme Court has directed that judges are to depart from a joint submission on sentence "only rarely" (*para. 54*) and has explicitly recognized the value to the proper administration of justice of joint submissions:

> It is an accepted and entirely desirable practice for Crown and defence counsel to agree to a joint submission on sentence in exchange for a plea of guilty. Agreements of this nature are commonplace and vitally important to the well-being of our criminal justice system, as well as our justice system at large…(*para. 25*)

[49] In *Anthony-Cook*, the Court established the test that a sentencing judge must apply before departing from a joint submission. That test is whether the proposed

sentence would bring the administration of justice into disrepute, or would otherwise be contrary to the public interest. (*para. 5*) Moldaver, J. writing for a unanimous Court has said this test "helps keep trial judges focused on the unique considerations that apply when assessing the acceptability of a joint submission." (*para. 31*) Reciting a passage from one of two decisions he referenced from the Newfoundland Court of Appeal, Moldaver, J. said when assessing a joint submission, trial judges should "avoid rendering a decision that causes an informed and reasonable public to lose confidence in the institution of the courts." (*para. 33*) And this is what Moldaver, J. had to say about what he described as a "powerful" statement against the rejection of a joint recommendation on sentence:

> …Rejection denotes a submission so unhinged from the circumstances of the offence and the offender that its acceptance would lead reasonable and informed persons, aware of all the relevant circumstances, including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of the justice system had broken down. This is an undeniably high threshold…(*para. 34*)

[50] Certainty for the accused and the Crown and the value to the administration of justice were significant factors in the Supreme Court of Canada's insistence on a high threshold for the judicial repudiation of a joint submission on sentence. The Court emphasized that the parties "must have a high degree of confidence" that joint recommendations will be accepted by the sentencing judge. Otherwise "the parties may choose instead to accept the risks of a trial or a contested sentencing

hearing." (*para. 41*) And Moldaver, J. explained the benefits to the administration of justice as follows:

> In addition to the many benefits that joint submissions offer to participants in the criminal justice system, they play a vital role in contributing to the administration of justice at large. The prospect of a joint submission that carries with it a high degree of certainty encourages accused persons to enter a plea of guilty. And guilty pleas save the justice system precious time, resources, and expenses, which can be channeled into other matters. This is no small benefit. To the extent that they avoid trials, joint submissions on sentence permit our justice system to function more efficiently. Indeed, I would argue that they permit it to function. Without them, our justice system would be brought to its knees, and eventually collapse under its own weight. (*para. 40*)

[51] And Moldaver, J. further notes that Crown and Defence with their uniquely informed knowledge of "the circumstances of the offender and the offence and the strengths and weaknesses of their respective positions" are "entirely capable of arriving at resolutions that are fair and consistent with the public interest." (*para. 44*) Evidentiary weaknesses in the Crown's case can justify a joint submission that allows for some leniency toward the offender. (*para. 53*)

Applying the Anthony-Cook Principles in This Case

[52] Applying principles from *Anthony-Cook* to the joint submission on Mr. Sponagle's sentence, I do not find I have a basis for concluding that the "considered agreement" by counsel should be rejected. Crown and Defence have jointly submitted a sentence that is comprised of four main components: custodial time as "time served"; twelve months' of probation; restitution orders for 201 victims; and a fine-in-lieu of forfeiture in the amount of $1,100,00. This composite joint recommendation secured a guilty plea from Mr. Sponagle and spared the victims and the justice system from a protracted trial in circumstances where the Crown faced some acknowledged challenges of proof.

[53] I have been told, and accept, that this joint sentencing submission has come about as a result of numerous discussions. These discussions will have involved Crown counsel and Mr. Sponagle directly, and when Mr. Sponagle retained counsel in January 2017, they will have continued with Mr. Brett acting on Mr. Sponagle's behalf. I am satisfied that Mr. Heerema and Mr. Brett in their submissions have fully discharged the obligation identified by the Supreme Court of Canada in *Anthony-Cook* for counsel to "provide the court with a full account of the circumstances of the offender, the offence, and the joint submission…" (*para. 54*) I find that counsel have been transparent and fulsome in setting out the justification for the joint submission and, in Mr. Heerema's apt turn of phrase, have "shown the court the math." As Moldaver, J. stated in *Anthony-Cook*, "Sentencing – including sentencing based on a joint submission – cannot be done in the dark." (*para. 54*)

[54] The sentence proposed by the Crown and Defence of "time served" of 3 years, 4 months and 6 days - includes an agreed-upon treatment of Mr. Sponagle's

pre-trial custody in La Joya Penitentiary. In the unique circumstances of Mr. Sponagle's case, and especially considering the mitigating effect of his guilty plea, I find that while this is at the lower end of the range for a fraud such as the one he has perpetrated, it is "not so low as to bring the administration of justice into disrepute or be contrary to the public interest." (*R. v. Anthony-Cook, para. 63*)

[55] It may be that, absent Mr. Sponagle's guilty plea and the joint sentencing submission, I would have applied a different analysis to the credit to be given Mr. Sponagle for the time in pre-trial custody. But the Supreme Court of Canada has been explicit in *Anthony-Cook*: sentencing judges are not to "tinker" with joint submissions. (*para. 63*)

[56] I also accept that Mr. Sponagle should serve a twelve-month Probation Order with the following jointly recommended conditions in addition to the statutory ones:

- Report to a probation officer today (May 4) and, when required, as directed by his Probation Officer;
- Complete 100 hours of community service work as directed by his Probation Officer by February 20, 2018;
- Perform community service work under the supervision of his Probation Officer or someone acting in his/her stead. The place and times when work is to be performed are to be arranged with the Probation Officer or alternatively, designated by the Probation

Officer. All work is to be completed to the reasonable satisfaction of the Probation Officer;

- Have no direct or indirect contact or communication with any investors of Jabez Financial Services Inc. except with their express consent;

- Make reasonable efforts to locate and maintain employment or an educational program as directed by his Probation Officer;

- Not to work or volunteer in any capacity where he is receiving funds for investment purposes.

[57] I am ordering restitution in the amounts that are reflected in Exhibit "4" which contains a listing of 201 victims, the amount of restitution jointly agreed and the percentage that amount represents of the victim's loss.

[58] As for the joint submission for a fine-in-lieu of forfeiture, I find there are no "reasons or factors", to use the Crown's words, that mitigate against imposing a fine-in-lieu of forfeiture in this case pursuant to section 462.37(3) of the *Criminal Code*. The joint submission for a fine-in-lieu of forfeiture accepts that Mr. Sponagle has no funds from this fraud available for forfeiture. I order that the amount of the fine shall be $1,100,000 with five years to pay and five years' imprisonment in default.

[59] The sentence order shall state that the restitution orders shall take priority over payment of the fine-in-lieu of forfeiture ordered in this case, and the fine-in-

lieu of forfeiture shall be reduced by any amount paid pursuant to the restitution order.

[60] I do not agree that the fine order should reflect the language proposed by Mr. Brett to which the Crown objects. Mr. Brett wants the fine order to include the following:

> Notwithstanding the foregoing, the Respondent [Mr. Sponagle] will not be subject to any period of incarceration in the event that he is financially unable to render such payment – either in-part or in-full – by the close of the payment period stated, above. See R. v. Wu, 2003 SCC 73 at para. 3 ("[g]enuine inability to pay is not a proper basis for imprisonment"); Criminal Code sec. 734.7

[61] The consequences of Mr. Sponagle's failure or inability to pay the fine, should it come to that, will be determined in accordance with the applicable law at the time the issue arises, if it does. I find it is not appropriate to include in the fine order the recital sought by Mr. Brett and I decline to do so.

[62] I am not being asked to exercise my discretion to impose a victim surcharge and, in view of the considerable financial liability being ordered against Mr. Sponagle, I am not imposing one.

Conclusion

[63] Mr. Sponagle used the trust he had been accorded by vulnerable and naive victims for his personal benefit. He has paid a hard price for his greed, spending nineteen and a half months of actual time in one of the world's worst prisons. He has had to abide by bail conditions over a lengthy period and with this sentence will now be on a probation order for the next twelve months. He has a criminal record for a serious fraud. He is subject to restitution orders in favour of his victims and, hanging over his head is the risk of going to prison for failure to pay the fine-in-lieu of forfeiture. His reputation is in tatters. Hundreds of people affected by his dishonesty – his victims and their families and friends – now define him by his crime. He has fallen far and faces a long climb back to some semblance of respectability. His acceptance of responsibility and participation in this joint submission on sentence are the first steps in that rehabilitative journey.

Anne S. Derrick, JPC.