

PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R v Barker*, 2019 NSPC 24

Date: 2019-07-16

Docket: 8277642, 8277643, 8277632, 8277633

Registry: Pictou

Between:

Her Majesty the Queen

v.

Beverly Ann Barker
and
David Anthony Barker

SENTENCING DECISION

Judge:	The Honourable Judge Del W Atwood
Heard:	2019: 26 June, 16 July in Pictou, Nova Scotia
Charge:	Paragraph 380(1)(a), <i>Criminal Code of Canada</i>
Counsel:	Jody McNeill for the Nova Scotia Public Prosecution Service Douglas Lloy QC for Beverly Ann Barker and David Anthony Barker

By the Court:

Synopsis

[1] This is a case of elder abuse. Although there are no publication bans in place, I shall refrain from naming the victim, as those who have been exploited financially once often get targeted for serial scamming by criminal organizations.

[2] Beverly Ann Barker and David Anthony Barker are charged each with two counts of fraud exceeding five thousand dollars (Mrs Barker in cases 8277642, 8277643; Mr Barker, cases 8277632, 8277633). Their informations have been joined by consent of counsel, as authorised in *R v Clunas*, [1992] 1 SCR 595 at ¶ 33. These are indictable offences, pursuant to ¶ 380(1)(a) of the *Criminal Code*. The Barkers elected trial in this court and pleaded guilty.

[3] The victim is Mrs Barker's elderly mother, RFM.

[4] The facts are relatively uncomplicated. Over a period of about nine months, the Barkers' got Mrs Barker's now-83-year-old mother, who has dementia and dysphasia and needs around-the-clock care, to sign a number of lending and financing documents. This lady had no capacity to enter into financial-services contracts, but gave in to the pressure the Barkers laid upon her; she did not derive

one cent of benefit from the deals she was coaxed and cajoled into signing. The Barkers, on the other hand, made out handsomely: Mr Barker, to the tune of \$36,000; Mrs Barker, \$15,519.55. I would add here that it would seem beyond dispute that these putative contracts were likely void *ab initio*, having been entered into nominally by a party who had no capacity to contract; one would assume that the counterparties would, once made aware of these frauds, recognize that fact, void the contracts, and relieve Mrs Barker's mother of her obligations under them.

[5] The prosecution seeks a sentence of ninety days for each of the Barkers, along with restitution and probation. Defence counsel urges terms of probation, and agrees to the restitution amounts claimed by the prosecution.

[6] For the reasons that follow, I suspend the passing of sentence and place each of the Barkers on probation for three years. There will be restitution orders, as agreed upon. These are my reasons.

Circumstances of the offences

[7] To the synopsis I would add the following details.

[8] The Barkers got these contracts signed while RFM was living with them and dependent upon them for her care.

[9] The recital of facts read into the record by the prosecution pursuant to § 723-4 of the *Code* did not reveal whether any steps have been taken to try to have these loans and financing deals set aside as void or unconscionable. It would seem to me that there exist very good grounds for seeking to so do. However, that does not diminish the criminality of the Barkers in any way. Their actions constituted consummate frauds, as they dishonestly jeopardised the economic interests of, not only Mrs Barker's mother, but also those of the other contracting parties, all of whom clearly had the assurance of the Barkers that RFM had the capacity to contract. Accordingly, these are frauds well within the scope of *R v Zlatic*, [1993] 2 SCR 29. I would have been prepared, pursuant to § 601(2) of the *Code*, to amend each count to include each contract counterparty; however, in the absence of an application, I decline to do so at this late stage. The counterparties involved and the amounts of the transactions were as follows:

Counterparty	Amount
Fairstone Financial	\$3,976.00
Cartes Desjardin	\$9,389.50
Scotiabank	\$36,000.00
Money Mart	\$1,656.00
Eastlink	\$274.88
Bell Aliant	\$222.32

The parties agree that it is Mr Barker who was responsible primarily for the fraud in relation to the Scotiabank loan; Mrs Barker admits responsibility for the rest.

Governing legal principles

[10] In *R v MacIntosh*, 2018 NSPC 45 (*MacIntosh*), I reviewed the principles of sentencing which I considered applicable in a case of breach-of-trust theft. Ms MacIntosh was employed in a financial-management capacity at publicly run home for special care; without authorisation, she drew for her own use a number of cheques against the operating account of her employer, to the tune of \$27, 676.08. I imposed a conditional discharge for the one count of theft. It is not necessary to recite the principles reviewed in that case; however, some additional issues have been raised in this one.

[11] Counsel for the Barkers made submissions that the court ought to treat as mitigating the fact that these were not crimes of violence; the prosecution replies that the lack of violence is the absence of an aggravating factor rather than the presence of a mitigating factor, and so of neutral effect. In my view, the real issue is one of offence seriousness, which, as analysed in *MacIntosh*, is an integral part of the assessment of proportionality. A non-violent theft or fraud will be regarded typically as less serious than a violent one.

[12] But not always.

[13] As in this case, violence or threats of violence are not needed when one seeks to exploit someone who is elderly and infirm or incapacitated. Breach of trust which enables elder abuse may be as serious as employing violence against someone capable of putting up a fight.

[14] Furthermore, a cataloging of bad things an offender could have done, but did not do, constructs the informal fallacy of a straw-man argument. By such a line of reasoning, the court is asked to consider an imaginary worst-case offender, against whom almost anyone would compare well. And so, no, the Barkers did not employ violence. Nor did they exploit children, nor plunder cultural property, nor act on behest of a criminal organization.

[15] But they did abuse the trust of an elderly and vulnerable family member who was dependent upon them for her care; they exploited her to their gain and to her great financial detriment. That is serious enough.

[16] Not only was this a breach-of-trust offence, engaging the principles of ¶ 718.2(a)(iii) of the *Code*, the victim-impact statement submitted by RFM through her younger daughter proves the existence of substantial victim impact upon someone who is elderly, trusting, and income insecure, so that ¶ 718.2(a)(iii.1) applies as well.

[17] Defence counsel urged the court to take into account the fact that the guilty pleas entered by the Barkers spared a frail and vulnerable victim the ordeal of a trial. That might be true; however, once again, there is an equal and opposite counterpoint: it was that frailty and vulnerability that allowed the Barkers to perpetrate these frauds in the first place, so that the supposed benefit of an obviated trial is somewhat of an illusion.

Range of penalty and sentence parity

[18] Indictable fraud-over \$5000 under ¶ 380(1)(a) of the *Code* carries a maximum potential penalty of 14-years' imprisonment; as a result, it is not eligible for a conditional sentence, given ¶ 742.1(c) of the *Code*; similarly, it is discharge ineligible, given § 730 of the *Code*. However, it is eligible for a number of purely non-custodial sentences: a fine alone (§ 734); a suspended sentence (¶ 731(1)(a)); a fine and probation (¶ 731(1)(b)).

[19] The recommendation made by the prosecution for 90-day sentences is reasonable, and well within the range of decided cases in Nova Scotia. The following list is not exhaustive:

- *R v Taylor*, 2014 NSPC 75: joint recommendation for 6-month conditional sentence accepted by the sentencing judge; accused was the supervisor of a group home who stole from a number of residents.
- *R v Cain*, 2016 NSPC 54: 3-month prison sentence with probation imposed on an accused who bilked an elderly person in her care out of \$3617 through unauthorised ATM withdrawals.
- *R v Elmadani*, 2015 NSPC 65: 12-month prison term imposed for \$22K fraud against an employer; the sentencing judge found highly aggravating the fact that the offender commenced the offence the day after completing a conditional sentence for another breach-of-trust fraud.
- *R v Delgado*, 2017 NSPC 74 (*Delgado*): accounts clerk for a rental-property company siphoned off \$80K of business revenue; accused was treated for gambling addiction; no prior record; found by the court as unlikely to re-offend; 24-month conditional-sentence term imposed, followed by three years of probation. (Some of the misappropriations occurred after the coming into effect of SC 2012, c 1, s 34, an amendment which eliminated, as in this case, a conditional sentence as a legal sentence for a theft or fraud over five thousand dollars. However, the sentencing judge found that the application of ¶ 11(i) of the *Charter* and the

constitutionally protected benefit of lesser penalty preserved a conditional sentence as a legal outcome. Nevertheless, the upper limit of a conditional sentence under the statute,² as it was worded both prior to and after the in-force date of the amendment—“a sentence of imprisonment of less than two years”—would place into question the legality of a conditional sentence of 24 months. Still, *Delgado* is useful in helping define a parity range.)

[20] At the other end of the spectrum is *MacIntosh*, which ended up with a conditional discharge.

Circumstances of Mr and Mrs Barker

[21] Mr and Mrs Barker have come into the criminal-justice system late in life. Mr Barker is 80 years old; Mrs Barker, 58. They have been married five years. Neither one has a criminal record. Their financial means are limited; Mr Barker went through bankruptcy about seven years ago. According to letters from their physicians exhibited in court, their health is compromised, but not beyond the endurance of a short-term prison sentence. Jail is not ruled out merely in virtue of poor health: *R v Stewart*, 2013 NSPC 34 at ¶ 15-16. A doctor’s note might excuse an absence from school or work; it will not keep someone from being imprisoned, should prison be an appropriate sentence.

[22] As in *MacIntosh* and *Delgado*, the Barkers are unlikely to reoffend; their allocutions and the submissions of defence counsel have impressed upon the court their wish to make amends for what they have done.

Sentence of the court

[23] Sentences of probation served in the community can carry significant deterrent effect when jam-packed with restrictive conditions: *R v Barrons*, 2017 NSSC 216; further, a probationary sentence can put the Barkers to work right away on doing right by Mrs. Barker's mother, precisely as they have said they want to do.

[24] Therefore, I suspend the passing of sentence upon Mr Barker and Mrs Barker, and place them on probation for terms of three years each, commencing immediately. In addition to the mandatory statutory conditions, the Barkers shall:

- Cooperate fully with any attorney, counsel, representative, guardian or trustee of RFM in any and all formal or informal proceedings or negotiations to have the liabilities or obligations of RFM, as arising from the offences to which you have pleaded guilty, set aside or voided.
- Enter into such contracts or agreements with counterparties to the transactions that form the subject matter of the charges to which you have

pleaded guilty to assume from RFM the liabilities and obligations arising under those transactions.

- Have no contact or communication with RFM unless with her prior approval *and* with the prior approval of her lawful attorney, representative, guardian or trustee *and* only in accordance with terms agreed upon by RFM and her lawful attorney, representative, guardian or trustee.
- For the first 6 months of each probation order, be subject to house arrest, subject to exceptions which will be outlined in the sentencing checklist.
- Prove compliance with house arrest and be subject to voice-recognition or other monitoring.
- Not borrow money or enter into financial transactions or guarantees except in your own names.

[25] There will be stand-alone s 738 restitution orders as agreed upon by counsel, \$36,000 against Mr Barker, \$15,519.55 against Mrs Barker.

[26] The court is grateful to counsel for the very thorough submissions prepared for this case.

JPC