PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Hayes*, 2018 NSPC 74

Date: 2018-11-27
Docket: 2998913, 2998914, 2998922
Registry: Dartmouth, Nova Scotia

Between:

Her Majesty the Queen

v.

Kellie Elizabeth Hayes

DECISION ON SENTENCE

Judge:	The Honourable Judge Jean M. Whalen
Heard:	October 22, 2018, in Dartmouth, Nova Scotia
Decision:	November 27, 2018
Charge[s]	Sections 368(1)(b), 368(1)(b), 368(1)(b) *Criminal Code of Canada*
Counsel:	Mark Heerema, for the Crown Derek Brett, for the Defence

By the Court:

FACTS

[1] Taken from Crown Brief:

- Following a 10-month RCMP Commercial Crime Investigation, charges were laid against Ms. Hayes on June 7, 2016. On August 24, 2016 she was arraigned in Dartmouth Provincial Court.

- On February 16, 2018, Ms. Hayes plead guilty in relation to three counts, as amended, on the Information between March 21, 2011 and May 16, 2015. They are as follows:

  - (Count 2 as amended) between the 21st day of March, 2011 and the 20th day of May, 2011 at or near the place aforesaid, did knowingly cause Medavie Blue Cross to act upon a forged document to wit: a doctor prescription, as if it were genuine contrary to s. 368(1)(b) of the Criminal Code;

  - (Count 3 as amended) between the 23rd day of January, 2013 and the 6tth day of May, 2015 at or near the place aforesaid, did knowingly cause Medavie Blue Cross to act upon forged documents to wit:

doctor prescriptions, as if they were genuine contrary to s. 268(1)(b) of the Criminal Code;

- (Count 11 as amended) between the 12th day of June, 2014 and the 22nd day of April, 2015 at or near the place aforesaid, did knowingly cause Medavie Blue Cross to act upon forged documents to wit: Payment Assignment Forms, as if they were genuine contrary to s. 368(1)(b) of the Criminal Code.

- In 2006, Ms. Hayes established her business, Health Solutions Just for You Inc. (Health Solutions) to sell custom made breast prosthesis, mastectomy and lymphoedema products to consumers. The business served clients in the Halifax area and was based out of her residence at 175 Joan Drive in Beaverbank, Nova Scotia. Health Solutions was an approved provider for MBC from January 2002 until June 2015.

- Ms. Hayes was the sole person responsible for the daily operations of Health Solutions, including the billing and submission of insurance claims to MBC on behalf of her clients. The few individuals who could be considered associates or employees of Health Solutions were not

involved in daily operations, nor had any familiarity with the MBC claims submissions process.

- Health Solutions became a registered provider in January 2002. The Claim process requires providers to provide prescriptions for some claims depending on the benefit. Payments are made by direct deposit to the providers business account. Payment claims are paid out once the receipts clerk verifies that the necessary paperwork has been filed. MBC has full-time auditors who verify randomly selected payouts by contacting the patients to confirm receipt of the purchased product.

- Joanne Beale, a forensic auditor with MBC, began an investigation after doing a random audit on one of Ms. Hayes' claims. Beale had spoken to a client who denied every having received a product that was claimed by Hayes

- As a result of a complaint referred to the RCMP in July 2015 by Medavie Blue Cross (MBC), the RCMP began an investigation into Health Solutions Just for You Inc. (Health Solutions).

- The RCMP interviewed the affects MBC subscribers, their physicians as well as MBC employees. RCMP collected document evidence from

MBC, their subscribers and from financial institutions of Health Solutions and Kellie Hayes. It was learned that Ms. Hayes used information she obtained from her clients to submit additional fraudulent claims under their MBC health insurance policies by forging subscriber signatures and forging prescriptions, often by changing the names and dates that were written on the original prescriptions.

- Between March 2011 and May 2015, Ms. Hayes forged a total of 10 Payment Assignment Forms and 17 doctor's prescriptions. These were the following documents that were forged.

Date Range	Document Type	Patient	**What was** Forged
March 212011 to May 20, 2011	Prescription of Dr M	P. M.	Date(s)
Jan. 23 2013 to May 8, 2013	Prescription of Dr T	K. H.	Entire scrip
March 21 2013 to Aug. 28, 2013	Prescription of Dr M	**M**	Date(s)
July 28, 2013 to Nov 20, 2013	Prescription of Dr J	L. G.	Date(s)
Jan 28, 2014 to Sept 24, 2014	Prescription of Dr C	D. W.	Date(s)
Feb 14, 2014 to July 4, 2014	Prescription of Dr W	H. P.	Date(s)
April l 12, 2014 to Jan 28, 2015	Prescription of Dr T	M. N.	Date(s)
May 15, 2014 to June 4, 2014	Prescription of Dr T	M. F.	Date(s)

May 15, 2014 to Sept 24, 2014	*Payment Assignment Form*	Pace	All personal info, including signature
June 12, 2014 to July 3, 2014	Prescription and referral letter of Dr. C	R	Date and patient info
Aug 13, 2014 to Sept 24, 2014	*Payment Assignment Form*	M. R.	All personal info, including signature
Sept 5, 2014 to Sept 24, 2014	*Payment Assignment Form*	M. F.	All personal info, including signature
Sept 9, 2014 to Sept 24, 2014	*Payment Assignment Form*	D. L.	All personal info, including signature
Sept 9, 2014 to Sept 24, 2014	*Payment Assignment Form*	D. W.	All personal info, including signature
Oct 25, 2014 to Dec 17, 2014	Prescription of Dr T	E. C.	Entire scrip
Nov 3, 2014 to April 22, 2015	Prescription of Dr W	P. M.	Date(s)
Dec 3, 2014 to Dec 17, 2014	*Payment Assignment Form*	C	All personal info, including signature
Jan 12, 2015 to April 22, 2015	Prescription of Dr B	S. E.	Date(s)
Jan 14, 2015 to Jan 1, 2015	Prescription of Dr L	J. C.	Date(s)
Jan 20, 2015 to Jan 28, 2015	*Payment Assignment Form*	M. N.	All personal info, including signature
Jan 27, 2015 to April 8, 2015	Prescription of Dr T	H	Date(s)
Feb 13, 2015 to March 31, 2015	Prescription of Dr M	J. M.	Date(s) and patient name
March 20, 2015 to April 8, 2015	*Payment Assignment Form*	H	All personal info, including signature
March 23, 2015 to April 22, 2015	*Payment Assignment Form*	P. M.	All personal info, including signature
March 26, 2015 to April 22, 2015	*Payment Assignment Form*	E	All personal info, including signature

April 20, 2015 to May 6, 2015	Prescription of Dr Jain	Gordon	Date(s)
April 20, 2015 to May 6, 2015	Prescription of Dr J	G	Date(s)

- Records showed that between March 2011 and May 2015, Health Solutions was paid $48,196.00 by MBC as a result of claims that were fraudulent and included forged documents.

- Production orders were obtained in relation to several bank and credit card accounts with BMO and President's Choice Financial (PCF). The results revealed that the proceeds of all direct deposits from MBC to Health Solutions were paid into Hayes' BMO Business Account. Mr. Hayes disbursed these funds by writing cheques that were signed by and made payable to herself. Those cheques were cashed in her PCF banking accounts. The account analysis further revealed that the majority of the cheques were than may payable to Kamron and Emalie Hayes (Ms. Hayes' two young adult children), which were cashed in PCF bank accounts which they each held jointly with Kellie Hayes. The majority of the funds that were paid from Health Solutions to Emalie and Kamron

Hayes were subsequently transferred from their joint account with Kellie Hayes into an account which Ms. Hayes has sole signing authority.

- On June 12, Joanne Beale, the auditor for MBC, sent a letter to Ms. Hayes advising her that MBC had paid over $35,000 to Health Solutions for claim submissions that were either false or which contained altered documents. MBC had already received $10,440 from Ms. Hayes after she found out that Joanne Beale was doing a review of Health Solutions. Consequently, Beale requested the remaining balance of $35,178.

- On June 30, 2015, Joanne Beale received a cheque for $24,738 from Health Solutions that was subsequently returned for insufficient funds. A replacement cheque for the same amount was received in July and successfully cashed.

- On May 25, 2016, Cst. Ron Helpard spoke to Ms. Hayes via telephone requesting her presence at the police station. The next day she attended and provided a brief statement.

- On June 7, 2016, she was formally charged and released from the station on a promise to appear.

[2] Letter dated June 12, 2015.

Last Name	First Name	Date of Service	Description of Product	Balance Owing
C.	E. M.	03-Dec-14	Mastectomy Bra	128.00
C.	E.M.	03-Dec-14	Breast Prosthesis	2,360.00
G.	L.A.	30-Oct-13	Mastectomy Bra	90.00
G.	L.A.	28-Apr-15	Mastectomy Bra	180.00
G.	L.A.	28-Apr-15	Breast Prosthesis	2,850.00
H.	K.R.	22-Apr-13	Breast Prosthesis	2,280.00
H.	K.R.	20-Mar-15	Breast Prosthesis	400.00
L.	D.	09-Sep-14	Pneumatic Compression Pump	3,000.00
M.	P.E.	02-Apr-11	Breast Prosthesis	2,850.00
M.	P.E.	16-Aug-13	Breast Prosthesis	2,850.00
N.	M.	14-Jan-13	Compression Garment	260.00
P.	H.	12-Jun-14	Breast Prosthesis	2,280.00
R.	M.	04-Sep-14	Breast Prosthesis	2,280.00
W.	D.	09-Sep-14	Mastectomy Bra	80.00
W.	D.	09-Sep-14	Breast Prosthesis	2,850.0
				$24,738.00

[3] On date of sentence: $35,178 – PAID IN FULL

VICTIM IMPACT STATEMENT

[4] A Victim Impact Statement was not filed by Medavie Blue Cross or any of the defendant's clients/patients. But Dr. Murphy and Dr. White told police that forged doctor's notes are a problem in the health care sector and can be costly to the health industry.

RECORD

[5] Nil

PRE-SENTENCE REPORT (Dated 10 October 2018)

[6] Ms. Hayes reported during her formative years there was anger and physical violence in the household between her parents. She has two sisters, but she is estranged from them. She reported being bullied and physically abused by her sisters. She has limited contact with her mother and father.

[7] Discipline within the home consisted of "beatings"; she suffered bruises, marks and even a black eye. She was also verbally abused.

[8] Ms. Hayes did play piano, but no one attended her recitals. She had very few peers as she was not allowed to attend birthday parties or sleepovers.

[9] Despite struggling to fit in and being bullied, she completed high school. She has a Bachelor of Science degree in Exercise Physiology.

[10] Ms. Hayes has been married to the same person for the last 30 years and has two children (aged 22 and 20). She has experienced physical violence, verbal abuse and intimidating behaviour from her husband.

[11] She is currently employed with Manulife since February 2016 as a Functional Rehabilitation Specialist, having sold her business in December 2015 due to the matter before the court.

[12] She earns a bi-weekly salary but could disclose no further income because she and her husband do not disclose finances. She acknowledged a lifelong struggle with managing money.

[13] Ms. Hayes reported surgery in 2015. She was diagnosed with poor sleeping habits, stress, anxiety, depression, chronic insomnia and panic attacks (2014). For the past two years, she has seen a clinical therapist.

[14] Ms. Hayes accepted responsibility for the offences, stating: "At the time I wasn't aware I was doing something illegal. I now know that." She stated her mental state was damaged at the time of the events for various reasons.

CLINICAL THERAPIST

[15] Mr. Cardone prepared a report and testified. He was qualified as an expert in Mental Health Therapy, able to give opinion evidence with regard to mental health issues experienced by individuals and the prospects for successful treatment.

[16] At the time of writing the report, Mr. Cardone had seen the defendant four times. At the time of testifying, he had seen Ms. Hayes a half dozen times. He wrote:

> Specifically to her mental health, I understand Ms. Hayes to present with a history of anxiety, depression and post-traumatic stress disorder (PTSD). Based on our

conversations, I am inclined to believe Ms. Hayes to have long-standing challenges with anxiety (possibly pre-pubescent), while more depressive presentations appear to have evolved over the course of her marriage. It is in this relationship that M.s Hayes reported to have been a victim of intimate partner abuse. In her case, she recalls being physically, emotionally, and financially abused by her husband over an extended timeframe (20+ years). It is highly likely that these latter experiences (various forms of abuse) have likely brought on symptoms of PTSD.

It is vital to note here that symptoms of one diagnosis seldom present in isolation from symptoms of another diagnosis. The interplay of various undesired thoughts, feelings and behaviours is often difficult to discern in their origin. The presence and severity of the range of symptoms from these disorders are likely also overlapping, but also contribute as something akin to a 'negative feedback loop'. For example: pre-existing depression around the failure/unhappiness of one's marriage may lead to decreased social confidence; 'feeling low' may increase symptoms of worry/anxiety; this in turn may affect one's ability to interact effectively with a client; possibly exacerbating worries about financial stability should a 'sale' not be made, leading to a reminder of how one's husband has withheld financial support to gain 'control' over a spouse.

Compounding matters, according Ms. Hayes, she also suffers from chronic insomnia – another likely contributor to any worsening symptoms of mental illness. Finally, stress and worry in dealing with financial limitations (as a function of her husband's limited financial support in the family), as well as her daughter's struggles with mental health, let alone her own physical health conditions (dental infection, elbow surgery and cancer diagnosis) in recent years.

While the range and depth of symptoms for these diagnosis can be varied from person to person, how they tend to manifest, and one's ability to 'manage' varies according to a vast array of life conditions. In our therapeutic relationship, Ms. Hayes and this writer have sought to:

1. Increase awareness of her current mental health status
2. Exploration of her skills, abilities, resources and supports in managing those symptoms, increasing daily functioning, and avoiding/minimizing similar experiences (those within her control).

As per the DSM-V, ***cognitive disfunction*** is a common symptom present in the mental conditions listed above for Ms. Hayes – anxiety, depression and PTSD – with more specified effects on the following:

- Memory
- Concentration
- Physical and psychological actions (psychomotor skills)

- Speed of thought (reduced brain processing speed)
- Decision-making

[17] Mr. Cardone testified he and Ms. Hayes have worked on several strategies:

1) acceptance of what can't change
2) emotional realities
3) self-reflective practice

[18] He recommended:

1) Continued therapy
2) Continue to explore issues already revealed and disclosed by Ms. Hayes so they don't continue to manifest
3) Continue her employment – it gives her some sense of meaning; a professional calling

MS. HAYES TESTIFIED

[19] She accepted the "errors I had made." She did not want to hurt anyone – her judgement was off. She had no idea what she did would be the subject of arrest or prosecution.

[20] She outlined her health and family concerns since 2014 and her marital/family situation over the past 30 years, which was also outlined in the pre-sentence report. She has experienced both physical and verbal abuse from her husband since they began dating. Police have even been involved.

[21] She has no contact with her family and no friends as her husband controls who she associates with.

[22] Ms. Hayes described what she did as an "error", that it was a misunderstanding of the billing procedures. She did not fully understand the legality. If people were eligible for a second prosthetic, she thought a new prescription was not required. It was an industry practice to photocopy and change date(s), although she could not provide a name/policy for the practice. She did not raise this with Medavie Blue Cross.

[23] Once she was made aware, she paid back in full, so no one was harmed. She sold her business so it wouldn't happen again. She found the error and made payments not because of audit but because a client contacted her to ask if she made an error.

WHAT IS AN APPROPRIATE SENTENCE FOR MS. HAYES?

[24] *R. v. Donovan*, 2012 NSPC 16 at paragraph 14:

> **VI. What is an appropriate sentence for this defendant?**
>
> [14] Ruby, 6th Ed. at para 2.1 states:
>
> It is a basic theory of punishment that the sentence imposed bear a direct relationship to the offence committed. It must be a fit sentence

> proportionate to the seriousness of the offence. Only if this is so can the public be satisfied that the offender deserves the punishment received and feel confidence and fairness in the rationality of the system. To be just, the sentence imposed must also be commensurate with the moral blameworthiness of the offender. A sentence that is not just and appropriate produces only disrespect for the law. These common-law principles have been codified in sections 718, 7218.1 and 718.2 of the *Criminal Code*.

[15] Parliament has codified a number of important values to help sentencing judges give effect to the fundamental principles of proportionality. The articulated principles however, are general in form, and moreover they provide no mechanism for resolving the inevitable conflicts that arise between these various principles in individual cases. Sentencing judges are simply told to weigh and balance the competing principles and fashion an appropriate sentence.

[16] In crafting the appropriate sentence the Court must have regard to the factors set out in the *Code* as well as the nature of the offence committed and the personal circumstances of the offender. According to the Supreme Court of Canada, the appropriate sentence will also depend on the circumstances of the community in which the offence took place.

> "It must be remembered that in many offences there are varying degrees of guilty and it remains the function of the sentencing process to adjust the punishment of each individual offender accordingly.
>
> The appropriate sentence for the specific offender and the offence is therefore determined, having regard to the compendium of aggravating and mitigating factors present in the case. It is the weight attached to the aggravating and mitigating factors which shape and determine the sentence imposed and this is an individual process. In each case the court must impose a fit sentence for this offence in this community.
>
> The nature and gravity of the offence is properly the central factor in sentencing. It is and must be the first rule that prompts the court. The concern behind this consideration is that there should be a just proportion between the offence committed and the sentence imposed. Our basic notion of fairness demands that every sentence be primarily and essentially appropriate to the offence committed having regard to the nature of the crime and the particular circumstances in which it was committed."
>
> *Sentencing*, Ruby, 6th Ed.

[17] Other common law principles of sentencing must also be appropriately applied. In the end, the punishment must be proportionate to the moral blameworthiness of the offender. The public must be satisfied that the offender deserved the punishment received and must feel a confidence and fairness and rationality of the sentence. This principle of proportionality is fundamentally connected to the general principal of criminal liability which holds that the

criminal sanction may be imposed only on those who possess a moral culpable state of mind. The cardinal principles that the punishment shall fit the crime.

[18] s. 718.2€ of the *Criminal Code* requires a judge to consider all available sanctions that are reasonable. That is jail, probation, fine or some combination.

[19] s. 718.2(a) now entrenches the common-law by requiring judges to increase or reduce a sentence by taking into account aggravating or mitigating circumstances relevant to the offence or the offender and, in particular, s. 718.2(a)(iii) states evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim must be considered.

[25] **Aggravating Factors:**

1) The defendant used patient and doctor information; breach of trust

2) The offence occurred between 2011 – 2015 (4 years)

3) Significant amount - $35, 178. If it was an industry practice (not sure), then knowing this was an "industry practice", she used it to her advantage.

- Breach of trust. There is "expectation of integrity and honesty."
- Clearly at the time "no insight" saying she had no idea she'd be arrested and prosecuted.
- She received a letter on June 12, 2018. Medavie Blue Cross spoke to a client – routine audit. Her licence number was revoked.
- This was not an error in paperwork <u>but</u> error in her judgement of producing forged documents to get money.

[26] **Mitigating Factors:**

1) Change of plea to guilty

2) No criminal record

3) Restitution paid in full

4) Remorse expressed

5) Attending counselling with clinical therapist for the last couple of years.

POSITION OF PARTIES

[27] Crown – Initially recommended a custodial sentence of 6 to 12 months but on the date of oral submissions, the Crown recommended a 6-month conditional sentence order, citing jail was still appropriate because:

(1) sophisticated fraud
(2) breach of trust
(3) money was used to fund her adult children and other personal expenses
(4) denunciation and deterrence must be emphasized,

but because of her health, personal circumstances and restitution being paid, it could be served in the community.

[28] Defence – Argues that the defendant should receive a conditional discharge, that a breach of trust is not an automatic disqualifier. She has been impacted by her mental health, physical health and personal circumstances. Deterrence has occurred and rehabilitation is important. The public interest has been served as she has learned from this and accepted responsibility.

[29] *R. v. Donovan*, 2013 NSPC 183 at paragraphs 24 to 32 states:

> [24] When the subject of punishment for any criminal offence is mentioned many people think of imprisonment. However, jail is but one form of punishment that can be imposed as a consequence of a conviction for a criminal offence. "The ultimate goal of our judicial system is not uniform sentences, for that is impossible. What is needed is a uniform approach to sentencing" [Ruby, 6th Ed.]
>
> [25] Here the crown and defence are at different ends of the spectrum. The crown seeks a period of custody followed by a period of probation. Defence counsel seeks a conditional discharge.
>
> [26] Regarding the latter, the seminal case is *R. v. Fallofield,* 13 C.C.C. (2d) 450.
>
> C.J. Farris states at para 21:
>
> > 21. From this review of the authorities and my own view of the meaning of s. 662.1 I draw the following conclusions, subject, of course, to what I have said above as to the exercise of discretion:
> >
> > (1) The section may be used in respect of any offence other than an offence for which a minimum punishment is prescribed by law or the offence is punishable by imprisonment for 14 years or for life or by death.
> >
> > (2) The section contemplates the commission of an offence. There is nothing in the language that limits it to a technical or trivial violation.
> >
> > (3) Of the two conditions precedent to the exercise of the jurisdiction, the first is that the court must consider that it is in the best interests of the accused that he should be discharged either absolutely or upon condition. If it is not in the best interests of the accused, that, of course, is the end of the matter. If it is decided that it is in the best interests of the accused, then that brings the next consideration into operation.
> >
> > (4) The second condition precedent is that the court must consider that a grant of discharge is not contrary to the public interest.
> >
> > (5) Generally, the first condition would presuppose that the accused is a person of good character, without previous conviction, that it is not necessary to enter a conviction against him in order to deter him from future offences or to

rehabilitate him, and that the entry of a conviction against him may have significant adverse repercussions.

(6) In the context of the second condition, the public interest in the deterrence of others, while it must be given due weight, does not preclude the judicious use of the discharge provisions.

(7) The powers given by s. 662.1 should not be exercised as an alternative to probation or suspended sentence.

(8) Section 662.1 should not be applied routinely to any particular offence. This may result in an apparent lack of uniformity in the application of the discharge provisions. This lack will be more apparent than real and will stem from the differences in the circumstances of cases.

[27] a) Discharges

MANSON, *The Law of Sentencing* at page 211:

"Enacted in 1972, the discharge provisions gave courts the power to relieve against both the fact and stigma of a criminal conviction...The only offences excluded from the discharge provisions are those requiring a minimum penalty or those punishable by life or fourteen years imprisonment. There are no strict pre-requisites except that a discharge must be in the offender's best interest and not contrary to the public interest. While one would assume that a discharge would always be beneficial to the offender, this has been interpreted as requiring a finding that the case presents no concern about individual deterrence and the offender appears to be a person of good character. In other words, 'it is not necessary to enter a conviction against him in order to deter him from future offences or to rehabilitate him'...A common reason for requesting a discharge is the desire to avoid specific consequences of a conviction, often relating to immigration status, professional qualifications or other employment issues."

Later at page 212:

"The role of the public interest is difficult to define...The genesis for the discharge sanction was the concern that the negative consequences of a conviction, whether immediate or potential, would outweigh any value to be gained from the formal stigmatization of the offender as a convicted person. Accordingly, it should be the individual consequence which is evaluated in the circumstances of the offence. There is no need to show that the public interest would be promoted or enhanced by a discharge. The test is simply whether permitting the offender to avoid the stigma of a conviction undermines the public interest in some definable way."

Ruby, *Sentencing*, 6th Ed. at page 350, para 9.7 addresses the "Best Interests of the Accused":

"...The Ontario Court of Appeal has said that this means

> ...that deterrence of the offender himself is not a relevant consideration, in the circumstances, except to the extent required by conditions in a probation order. Nor is his rehabilitation through correctional or treatment centres, except to the same extent. Normally he will be a person of good character, or at least of such character that the entry of a conviction against him have significant repercussions.

If it is not in the best interests of the accused, then that is the end of the matter so far as the discharge is concerned."

Later at para 9.8:

"It is the total picture that must be examined."

Later at para 9.10:

> "Evidence of a direct and immediate impact on employment is not necessary; an adverse effect would be sufficient in terms of an adverse impression on an employer, or a diminishing ability to travel abroad, or the chances of obtaining promotion."

Later at para 9.13:

PUBLIC INTEREST

> "The court must consider whether or not a discharge would be contrary to the public interest, and it is not sufficient to ask whether a discharge would be in the best interests of the community."

Later at paragraph 9:15:

> "Discharges may be refused where the court finds that it is in the public interest to see that future or potential employers or social organizations know of the criminal activity and have a chance evaluate it."

[28] Finally, it's commonly assumed that a discharge does not produce a criminal record. That is not quite correct. It does produce a record of a "criminal conviction" and a record of a discharge.

[29] This is not a joint recommendation and since s. 718(2)(E) requires me to consider all available sanctions, I will also turn my mind to the possibility of a jail sentence to be served in the community pursuant to s. 742.1 of *C.C.C.*

[30] Judge Derrick sets out the principles to be considered in R. v. Lee, 2011 NSPC 81 at para 56 to 61:

> 56 I noted in my reasons in *Naugler*:
>
> > **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 misrepresenting 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*)
>
> 57 I went on in *Naugler* to make the following comments that are relevant to repeat in this sentencing:
>
> > **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*)

58 The Supreme Court of Canada's authoritative findings in *Proulx* that conditional sentences are not lenient sentences and with strict conditions can satisfy the sentencing imperatives of denunciation and deterrence and be sufficiently punitive and stigmatizing is still good law. Despite a sustained political campaign against conditional sentences and much public misunderstanding about their suitability as a sentencing option, there is no reasoned basis for challenging the continued legitimacy of the Court's statements. However, *Proulx* must be carefully read to fully appreciate what it is saying.

59 *Proulx* held that there is no presumption in favour of conditional sentences: the fact that the prerequisites for a conditional sentence have been met, as they have been here, does not presume that a conditional sentence is consistent with the fundamental purpose and principles of sentencing. "The particular circumstances of the offender and the offence must be considered in each case." (*Proulx, paragraph 85*)

60 Two main objectives underpinned the sentencing amendments that produced the conditional sentencing regime: (1) reducing reliance on incarceration as a sanction, and (2) amplifying the role for restorative justice in sentencing as exemplified by the objectives of rehabilitation, reparation to the victim and the community, and the promotion of a sense of responsibility in the offender. (Proulx, paragraph 98) The Supreme Court of Canada described how the conditional sentencing option can "facilitate the achievement" of these objectives:

> 99 ... It affords the sentencing judge the opportunity to craft a sentence with appropriate conditions that can lead to the rehabilitation of the offender, reparations to the community, and the promotion of a sense of responsibility in ways that jail cannot ...

> 100 Thus, a conditional sentence can achieve both punitive and restorative objectives. To the extent that both punitive and restorative objectives can be achieved in a given case, a conditional sentence is likely a better sanction than incarceration. Where the need for punishment is particularly pressing,

> and there is little opportunity to achieve any restorative objectives, incarceration will likely be the more attractive sanction. However, even where restorative objectives cannot be readily satisfied, a conditional sentence will be preferable to incarceration in cases where a conditional sentence can achieve the objectives of denunciation and deterrence as effectively as incarceration. This follows from the principle of restraint in s. 718.2(d) and (e), which militates in favour of alternatives to incarceration where appropriate in the circumstances.

61 *Proulx* determined that the need for denunciation, one of the sentencing objectives to be achieved by an offender's sentence, may in some cases be "so pressing that incarceration will be the only suitable way in which to express society's condemnation of the offender's conduct." (*Proulx, paragraph 106*) Likewise, *Proulx* acknowledged that "there may be circumstances in which the need for deterrence will warrant incarceration" depending "in part" on whether there is the prospect of incarceration being likely to have a "real deterrent effect." (*Proulx, paragraph 107*) In *R. v. Wismayer*, [1997] O.J. No. 1380, Rosenberg, J. for the Ontario Court of Appeal regarded the general deterrence issue in the context of conditional sentencing as follows:

> General deterrence, as the principal objective animating the refusal to impose a conditional sentence, should be reserved for those offences that 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. *(paragraph 50*)

And later at paragraph 63, 64, 65:

63 The Supreme Court of Canada in *Proulx* recognized the deterrence issue expressly in the context of that case, which involved dangerous and impaired driving causing death. These offences were described as "often committed by otherwise law-abiding persons, with good employment records and families." Such persons, it was suggested by the Court, "are the ones most likely to be deterred by the threat of severe penalties." (*Proulx, paragraph 129*) Offenders in fraud cases are likewise not oblivious to the consequences of their choices. As noted by the Ontario Court of Appeal:

> ... there are few crimes where the aspect of deterrence is more significant. It is not a crime of impulse and is of 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. *R. v. Gray*, [1995] O.J. No. 92, paragraph 32, (Ont. C.A.))

> 64 What conditional sentences are best at accomplishing is an effective balancing of the sentencing objectives of denunciation and deterrence with the objectives of rehabilitation, reparation and promotion of a sense of responsibility. Where those restorative objectives can be realistically achieved, "a conditional sentence will likely be the appropriate sanction ...", provided that denunciation and deterrence are not left out of the calculus. (*Proulx, paragraph 109*) In *Proulx*, the Supreme Court of Canada delineated the approach to be taken in deciding what type of sentence is the appropriate option:
>
> > 113 ... In determining whether restorative objectives can be satisfied in a particular case, the judge should consider the offender's prospects of rehabilitation, including whether the offender has proposed a particular plan of rehabilitation; the availability of appropriate community service and treatment programs; whether the offender has acknowledged his or her wrongdoing and expresses remorse; as well as the victim's wishes as revealed by the victim impact statement (consideration of which is now mandatory pursuant to s. 722 of the Code). This list is not exhaustive.
>
> 65 Determining a fit and proper sentence requires that the sentencing judge assess "which sentencing objectives figure most prominently in the factual circumstances of the particular case before them." (*Proulx, paragraph 113*)

[30] In *R. v. Zachar*, 2018 ONCJ 631 paragraph 43 states:

> 43 "Where the principle of proportionality can be honoured without resort to imprisonment, various trail and appellate courts have since relied on suspended sentences and substantial terms of probation to achieve a similarly just non-custodial result."

[31] Later at paragraph 44 it states:

> 44 Several observations as to the meaning and implication of a suspended sentence are here apposite. First, Parliament, with an identical pen-stroke, could have as readily precluded the availability of a suspended sentence for Schedule I drug traffickers as it did conditional sentences in 2012 amendments many offences. Instead, it elected to preserve this non-custodial sentencing option. And second, a suspended sentence and probation, while often viewed as a lenient disposition, carries a potent, if under-underutilized, mechanism of deterrence. My earlier comments in McGill, at paras. 47-51 and here abbreviated, remain apt:
>
> > …[A] suspended sentence is not a lawful substitute for a conditional sentence . … A suspended sentence is not a sentence of imprisonment. …Accordingly the

> threshold question that must be addressed by any judge charged with sentencing a person convicted of trafficking cocaine [or heroin] is whether the gravity of the offence and the moral responsibility and individual circumstances of the offender are such that, in the language of Proulx, supra, at para. 36. "no other sanction … is appropriate "other than a sentence of imprisonment. If so, …a suspended sentence cannot be substituted for a conditional sentence where imprisonment is the only fit sanction. Conversely (and fines aside), where imprisonment is not warranted, there is but one correct alternative: a suspended sentence and associated period of probation: R. v. Wu, 2003 SCC 73, [2003] 3 S.C.R. 530. [See also, R. v. Proulx, supra, at para. 37.]
>
> … [S]uspended sentences are recognized as having a very significant deterrent element.
>
> … As s. 731(1)(a) of the Code makes clear, a "suspended sentence" is one in which it is the "passing of the sentence" that is suspended – not [the sentence or] service of the sentence itself. Where a person is bound by a probation order attaching to a suspended sentence is convicted of a breach of his or her probation order or … any other offence, a court may, as with breaches of … a conditional sentence, amended the optional conditions of the order. However , unlike the case of conditional sentences, the court may instead extend the duration of the order for up to an additional year [or] … revoke the suspended sentence initially imposed and levy any sentence it could have imposed in the first instance [as] "if the passing of the sentence had not been suspended".
>
> … In *R. v. Voong*, 2015 BCCA 285, 325, C.C.C. (3d) 267, the Court, at para. 39, added:
>
> > Because a breach of the probation order can result in a revocation and sentencing on the original offence, it has been referred to as the "*Sword of Damocles*" hanging over the offender's head.

[32] Later in paragraph 45:

> [45] The Ontario Court of Appeal has long recognized the same principle. For example, in *R. v. Richards*, [[1979] O.J. No. 1030 (C.A.), 49 C.C.C. (2d) 517, at para. 35, Howland, C. J. O., speaking for a five-person panel, noted that,
>
> > [A] person released on a suspended sentence and probation does not go scot free. … Any wilful failure to comply with the terms of the probation order is a punishable offence …, and the court, in those circumstances, in addition to imposing punishment for the breach of a probation order, is empowered to revoke the probation order and impose any punishment that could have been imposed if the passing of the sentence had not been suspended.

[33] Later in paragraph 46:

> [46] The deterrent value of the suspended sentence regime rests not only in its potential for resentencing in case of non-compliance or fresh criminality but, as well, on the grant of a very broad jurisdiction discretion to impose not only terms of community supervision but, pursuant to s. 732.1(3)(h) of the *Code*, "such other reasonable conditions as the court considers desirable … *for protecting society*" (emphasis added). Bennett J. A., writing for the Court in *R. v. Voong, supra*, at para. 43, explained:
>
> > [I]mposing conditions for the protection of the community may have a deterrent and denunciatory effect in addition to a rehabilitative effect. Put another way, a condition need not be punitive in nature in order to achieve deterrence or denunciation.
>
> (See also paras. 40-42, for additional appellate authorities supporting the potential deterrent impact of the terms of a probation order attached to a suspended sentence.)

REVIEW OF CROWN CASES

[34] 1) *R. v. Tucker*, 1998 Carswell 261 – Crown cites this case in support of the aggravating factor: given the direction and repetition of the fraud, it cannot be said to be spontaneous or impulsive.

[35] Mr. Tucker, through his own companies, was selling equipment to himself at prices he had arbitrarily set. The defendant admitted to altering and falsifying documents. The defendant appealed. Appeal against conviction dismissed. Crown appeal against sentence allowed. Sentence varied from 9 months to 18 months.

[36] At para 93:

> This is not a case involving one or two transactions but rather is one of a continued premeditated fraud perpetrated by a knowledgeable businessman and carried out over a lengthy period of time. General deterrence must be the paramount consideration because it is of the utmost importance for the public generally and the business community in particular to understand that those who practice fraud in commercial matters will be severely punished.
>
> *R. v. Tucker*, [1988] N.S.J. No. 33 (C.A.)

[37] The Crown cites:

R. v. El Madani, 2015 NSPC 65, to emphasize the aggravating factor of breach of trust. Beginning at para 106 the court stated:

> [106] The Crown submits that a conditional sentence in Mr. Elmadani's case would be offensive to the principles of denunciation and deterrence. The Crown also submits that specific deterrence is a relevant consideration in this sentencing.
>
> The emphasis on denunciation and deterrence in breach of trust sentencing is found in many cases. Some of the clearest expressions of what this emphasis is intended to achieve are found in decisions by the Ontario Court of Appeal. I will quote from two such decisions, R. v. Gray, [1995] O.J. No. 92 and R. v. J.W., 1997 CanLII 3294 (ON CA), [1997] O.J. No. 1380.
>
> [108] In Gray, at paragraph 32, the Ontario Court of Appeal made the following observation:
>
> > ... there are few crimes where the aspect of deterrence is more significant [than fraud cases.] It is not a crime of impulse and is a type that is normally committed by a person who is knowledgeable and should be aware of the consequences. That awareness comes from the sentences given to others.
>
> [109] And Rosenberg, J.A. had this to say in J.W. at paragraph 50:
>
> General deterrence, as the principal objective animating the refusal to impose a conditional sentence, should be reserved for those who are likely to be affected by a general deterrent effect. Large scale well-planned fraud by persons in positions of trust ... would seem to be one of those offences.
>
> [110] This was a point made by Mr. Heerema: as he put it, fraud is a thinking person's crime. However uncertain the deterrent effect of incarceration, those inclined or tempted to commit fraud may be more likely to be deterred from doing so by the sentences imposed on others.

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

[36] In addition to the common-law, the *Criminal Code* codifies this circumstance as aggravating pursuant to s. 718.2(a)(iii).

MITIGATING FACTORS:

The Absence of a Criminal Record

[41] … (Crown argues), nevertheless, the absence of a criminal record in a commercial fraud is certainly less significant than in other criminal cases for two reasons: (i) good reputations are often necessary pre-conditions to earning the trust/position to perpetuate the fraud; and (ii) such offences are comprised of numerous planned and premeditated acts committed over a significant period of time.

See for e.g., *R. v. Lee,* 2011 Carswell NS 785 (Prov. Ct.), per Derrick J at paras. 40-41.

THE RANGE OF SENTENCE

[43] (Crown argues) At a very general level, for fraud/forgeries of this magnitude the general range would appear to be anywhere from 6 months to 12 months. Yet, after consideration is given to the aggravating factors and mitigating factors in the case-at-bar, including health, restitution and remorse, the Crown respectfully submits that an appropriate disposition for Ms. Hayes should be 6 months. (but could be a CSO) In support of this, the Crown relies upon the following authorities:

R. v. Biletsky, 2016 ABPC 261

12 months

"The offender pled guilty to fraud over 45,000. The accused was an executive at a not-for-profit community association. In the offices he held, he had signing authority for cheques drawn on the association's accounts. He drafted six fraudulent cheques and on at least one occasion forged a required signature.

He deposited the cheques into an account controlled by him and created false invoices to cover his dealings. He also destroyed many financial records of the association as part of his scheme. His resignation was demanded by the association. He sent a letter, purportedly from a lawyer but forged by him, threatening to sue the association if details of his resignation were made public. He entered a plea on the morning of trial. The offender was 41 and had a criminal record with counts of income and excise tax evasion. He falsely claimed to have paid the fines imposed for those offence. He had previously owned a company and now had a well paying job. However, he had not made restitution and lived somewhat beyond his means, paying for expensive activities for his children. The association suffered as a result of the accused's actions, and people were not willing to assist in its activities, as before. Barley Prov. J. held that denunciation and deterrence must be paramount sentencing principles for a breach of trust theft from a vulnerable non-profit victim. The brazen acts of the accused, such as destroying records after suspicions as to his actions were raised, demanded denunciation. A period of twelve months incarceration and a full restitution order of $17,797.50 were imposed." (taken from Nadin-Davis, Canadian Sentencing Digest, online)

R. v. Lam, 2014 ABPC 90

1 year conditional sentence

"The accused pleaded guilty to defrauding her employer of $44,125.54. She manipulated the victim's payroll systems to make payments for wages to fictitious or previously terminated employees. The accused had no criminal record and had made full restitution. She committed the offence because she was pathologically addicted to gambling. Before committing the fraud, she withdrew everything from her RRSPs and borrowed $50,000 from her family. She was assessed as a low risk to reoffend, as long as she abstained from gambling. She was remorseful, had insight not her behaviour and had undergone counselling. Lamoureux Prov. J. imposed a 1-year conditional sentence, with house arrest for the first 6 months and a curfew thereafter. The accused was ordered to perform 200 hours of community service." (taken from Nadin-Davis, Canadian Sentencing Digest, online)

NOVA SCOTIA CASES

[38] Crown argues:

[45] There are very few published Nova Scotia cases on major fraud relating to funds between $25,000 and $50,000. Here are the most relevant from the last 15 years:

R. v. Elmadani, 2015 NSPC 65

12 months

"The accused pleaded guilty to fraud over $5000. He had defrauded his employer of $22,700 through a combination of the wrongful taking of commissions and taking a retainer that should have been paid to his employer. He had a criminal record for fraud against another employer. He was 46, married and had two teenaged children. He held two university degrees. A psychological assessment indicated he had problems with low self-esteem and related issues. Derrick Prov. J. held that the frauds committed were deliberate and well planned, involving diverse methods to deceive his employer. He only stopped his criminal conduct after he was detected and fired. Derrick Prov. J. found that the prior breach of trust fraud showed a clear need for specific deterrence and rejected the imposition of a conditional sentence. She imposed a 12 month period of incarceration, to be followed by 18 months probation." (taken from Nadin-Davis, Canadian Sentencing Digest, online)

R. v. Wilson, 2012 NSPC 40

9 months

"Accused sentenced to nine months' incarceration followed by 18 months' probation and restitution order of $60,995 after he pleaded guilty to defrauding the government over $5,000 by submitting false and/or improper expense claims, while being Member of Legislative Assembly, committing fraud and/or breach of trust in connection with duties of his office by submitting false and/or improper expense claims and knowingly caused government to act upon forged documents relating to expense claims submitted as if they were genuine – Accused, as Member of Legislative Assembly, defrauded government over period of five years by writing off bogus expenses – Accused pleaded guilty at early opportunity and resigned from his position – Accused expressed genuine remorse – Accused used funds in question to support gambling habit." (from Westlaw headnote)

R. v. Decoff, [2000] NSJ 224

18 months CSO

"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. … 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." (quoted from summary of case in R v Naugler, 2011 NSPC 68)

R. v. Naugler, 2011 NSPC 68 (CanLII)

8 months

« The accused pleaded guilty to two counts of fraud over $5,000 and one count of uttering forged documents. She was employed by the Dalhousie Faculty Association, a non-profit organization, as a secretary/bookkeeper and was earning a salary of more than $80,000 a year. Over a period of more than three years, she remitted to herself a total of 34 "extra" pay cheques in the amount of her full monthly salary. The total amount misappropriated was $136,456. She also committed a fraudulent scheme in relation to her pension, increasing the amount of her employer's contribution to her pension plan without the knowledge or approval of her supervisors. The total unauthorized payment to her pension plan was $5,175.56. She was fired by the Faculty Association when the offences were discovered. The accused was 50 years old at the time of sentencing. She and her husband lived with and took care of her 86-year-old father. She was suffering from depression and anxiety, but Derrick Prov. J. found that that was not a mitigating factor, as depression and anxiety did not compromise her ability to calculate how to defraud the victim over a lengthy period of time. The breach of trust was a serious aggravating factor. The accused was sentenced to 8 months' incarceration followed by 1 year's probation. A stand-alone restitution order in the amount of $145,409.05 was imposed." (taken from Nadin-Davis, Canadian Sentencing Digest, online)

[39] Defence counsel cites a number of mitigating factors to consider, including:

1) The personal impact the offence has had on the defendant. He cites *R. v. Loewen*, 2002 CanLII 37336 (MBPC)

2) Pre-existing mental health issues which stem from long-term physical and mental abuse as a child and adult

3) The significant impact of incarceration at her age

[40] In support of a suspended sentence and conditional discharge, he cites *McSween*, *Sellars*, and *Thompson*, among others.

[41] I have read all the cases supplied by Crown and defence and while they are of assistance, I must impose a sentence on Ms. Hayes through the application of the principles of sentencing to the facts and circumstances of her case.

ANALYSIS AND CONCLUSION

[42] *R. v. Thompson*, 2017 NSPC 18, Judge Derrick (as she then was) stated:

> [49] It is necessary for me to ask myself in this case – given this offence and this offender, what is the proportionate response? Is it a conditional sentence or a conditional discharge?
>
> [50] In answering this question I have looked closely at the facts of this case, the purpose and principles of sentencing, and the "not contrary to the public interest" component of the test for a conditional discharge.
>
> *The "Not Contrary to the Public Interest" Criterion for a Conditional Discharge*
>
> [51] In *R. v. Sanchez-Pino*, [1973] O.J. No. 1903, the Ontario Court of Appeal held that the discretion to order a conditional discharge is "wide" and the sentencing judge "must consider all of the circumstances of the accused, and the nature and circumstances of the offence, against the background of proper law enforcement in the community, and the general criteria…" for discharges, including the "not contrary to the public interest" requirement. *(para. 19)*
>
> [52] An offender does not have to establish that a discharge is in the public interest. *(R. v. Sellars*, para. 27 (C.A.)) Our Court of Appeal explained this in *Sellars* with reference to a decision of the Nova Scotia Supreme Court, *R. v. D'Eon,* [2011] N.S.J. 466, in which LeBlanc, J. said that the 'not contrary to the public interest' component of the test for a conditional discharge means that

> imposing the discharge would not be "deleterious" to the public interest. (*D'Eon,* para. 25) That is the hurdle an offender must be able to clear – persuading the sentencing judge that a discharge will not be deleterious to the public interest.
>
> [53] A discharge will be deleterious to the public interest if it fails to satisfy the objectives being pursued in sentencing. In particular, where the principles of denunciation and deterrence can only be served by a custodial sentence, it will be deleterious to the public interest to impose a discharge.
>
> [54] In *Sellars*, our Court of Appeal found that the factors to be considered in relation to the "public interest" component and the weight to be given to them "will vary depending on the circumstances of the offence and of the offender." (para. 37) In making this statement, the Court referred to the often-cited decision of *R. v. Fallofield*, [1973] B.C.J. No. 559 where the British Columbia Court of Appeal held that the public interest in general deterrence should not preclude "the judicious use of the discharge provisions."
>
> [55] In Sellars, the Court also referenced the Newfoundland Court of Appeal's comments in *R. v. Elsharawy,* , [1997] N.J. No. 249 that the "public interest" component involves "a consideration of the principle of general deterrence with attention being paid to the gravity of the offence, its incidence in the community, public attitudes towards it and public confidence in the effective enforcement of the criminal law." (para. 3)

[43] Crown counsel argues this breach of trust is significant, too serious to impose a conditional discharge.

[44] Judge Derrick continues in *R v. Thompson* at paragraphs 57, 58 and 59:

> [57] It is not necessary for an offence to be trivial in order for a conditional discharge to be the appropriate disposition. (*Sellars, para. 34 citing R. v. Sanchez-Pino, para. 18 (C.A.): see also Sellars, para. 38*) …
>
> [58] In *Sellars*, a fraud case, a conditional discharge was substituted for the original three-year suspended sentence with the Court observing that, "We live in a compassionate society; one that recognizes that for some offenders, the full weight of a criminal conviction is not necessary…" (*paragraph 41*)
>
> [59] Although that passage from *Sellars* reads as though the Court is talking about a conditional discharge being in the best interests of an accused, it is located in the Court's reasons dealing with what constitutes the "not contrary to the public interest" component. Beveridge, J.A. continued by saying: "I cannot help but think that a reasonable observer, with full knowledge of the documented

> psychiatric history of [Ms. Sellars], the role it played, and the other circumstances, would be moved to say a discharge is not contrary to the public interest." (*para. 41*)

[45] There is no dispute that Ms. Hayes forged prescriptions, payment assignment forms and referral letter by changing dates and using personal information (including signatures) of patients for the sole purpose of "double dipping". This can result in being "costly" to the health industry.

[46] To quote from Judge Derrick in *Thompson* at para 61:

> But it would be inconsistent with a proper application of the purpose and principles of sentencing to focus exclusively on the offence and fail to examine the context and circumstances in which [these offences] occurred.

[47] A history of Ms. Hayes' circumstances including her mental health and the role various factors played in her offending are outlined in her Pre-Sentence Report, Mr. Cardone's letter (dated February 19, 2017), his *viva voce* evidence and Ms. Hayes' testimony.

[48] That history includes:

1) Exposure to family violence by way of verbal and physical abuse from her parents and siblings
2) 30 years of domestic violence at the hands of her husband to whom she is still married (including physical, emotional and financial abuse)
3) Presentation of anxiety, depression and PTSD
4) Social isolation, poor sleeping habits, all of which can result in a common symptom of "cognitive dysfunction".

[49] Ms. Hayes testified she accepted the "errors" she made … her judgement was off." She didn't mean to hurt anyone. I find this was no an error in paperwork as such but an error in her judgement resulting in producing forged documents to get money – which would be consistent with her claim of always struggling financially due to a lack of contribution by her husband and his failure to share any of his financial information or circumstances.

[50] Judge Derrick stated in paragraph 67 in *R. v. Thompson*:

> [67] Factors in play in Ms. Thompson's case have been taken into account in determining that a large-scale fraud/forgery perpetrated against an employer should be dealt with by way of a conditional discharge: actions that were completely out of character and influenced by stress; an unblemished record and a productive life; true remorse; and humiliation. (*R. v. Snyder, [2011] O.J. No. 4904 (C.J.), paragraph 32*)
>
> [68] The gravity of an offence does not preclude a conditional discharge. Parliament has not decreed that a conditional discharge is incompatible with the objectives of general deterrence and denunciation: it is only offences with a mandatory minimum sentence or punishable by imprisonment for fourteen years or life that are statutorily excluded from the discharge provisions.
>
> [69] In *R. v. Fallofield*, the British Columbia Court of Appeal framed its decision to grant a discharge in these terms: "I find it difficult to believe that the deterrence of others will be in any way diminished by the failure to render a conviction against this accused." (*paras. 21 and 22*)

[51] I have reached the same conclusion. I am not satisfied that Ms. Hayes' actions after careful examination require the imposition of a conditional sentence and criminal record. There is no question Ms. Hayes failed in her moral and

professional obligations, but I cannot see how a conditional discharge is contrary to the public interest in the circumstances of this case.

[52] I am also satisfied there will be no deleterious effect to the public interest by imposing a conditional discharge in this case. I find it is not contrary to the public interest in general deterrence to grant Ms. Hayes a discharge.

[53] General deterrence supposes public awareness of the offending conduct and sending a message to the public that you will be held accountable and punished. I do not think the circumstances of this case are suitable for emphasizing general deterrence through imposition of a conditional sentence. This would give general deterrence too prominent a role and diminish other important sentencing considerations such as rehabilitation.

[54] This process is held in a public forum. Ms. Hayes has appeared on numerous occasions. She has had to bear the stress and shame of being charged and subjected to the criminal process. Submissions have been made on the record; therefore, the public would be aware of the circumstances of this offence. This goes to the issues of general deterrence and public confidence in our criminal justice system. A conditional discharge does not diminish these consequences. Judge Derrick at para 73 in *R. v. Thompson*:

[73] Parliament has established that one of the fundamental purposes of sentencing is to contribute to respect for the law by imposing just sanctions. This is reflected in the *Criminal Code* sentencing provisions. Unduly harsh or oppressive sentences that fail to acknowledge the unique circumstances and facts of a case will not be seen as fair or rational. This is relevant to the issue of maintaining public confidence in the justice system. (*Lacasse, paragraph 3*)

[74] A conditional discharge in Ms. [Hayes'] case is a proportionate sentence that best serves the purpose and principles of sentencing and maintains the principles of sentencing in the appropriate balance. It is not contrary to the public interest. A conditional discharge acknowledges the unusual circumstances of Ms. [Hayes] offending, her otherwise good character, and what she has done to rehabilitate herself. Its length and the conditions Ms. [Hayes] will be required to satisfy reflect the serious offence for which she is being sentenced.

DISPOSITION: Conditional Discharge, Probation for 18 months with conditions.

Judge Jean M. Whalen, JPC.