PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Surette*, 2019 NSPC 46

Date: 20190812
Docket: 8116434-446;
8282857, 8282859, 8282855
Registry: Dartmouth

Between:

Her Majesty The Queen

v.

Michael David Surette

Judge: The Honourable Judge Frank P. Hoskins

Decision August 12, 2019

Charge: That on or between the 1st day of February 2016 and the 31st day of October, 2016 at Dartmouth, Nova Scotia, by deceit, falsehood or other fraudulent means, did unlawfully defraud Peter Brown of a sum of money, a total value exceeding $5,000.00, contrary to section 380(1)(a) of the *Criminal Code*.

And Further, that he between May 1, 2016 and August 17, 2016 at Dartmouth, Nova Scotia did by deceit, falsehood or other fraudulent means, did unlawfully defraud Wayde Schwartz of a sum of money, a total exceeding $5,000.00, contrary to section 380(1)(a) of the *Criminal Code*.

And Further, that he between June 18, 2016 and September 20, 2016 at Dartmouth, Nova Scotia by deceit, falsehood or other fraudulent means, did unlawfully defraud Stephanie Edwards and Jay Frizzell of a sum of money, a total exceeding $5,000.00, contrary to section 380(1)(a) of the *Criminal Code*.

And Further, that he between December 1, 2015 and September 7, 2016 at Dartmouth, Nova Scotia by deceit, falsehood or other fraudulent means, did unlawfully defraud

Jude Johnson of a sum of money, a total not exceeding $5,000.00, contrary to section 380(1)(b) of the *Criminal Code*.

And Further, that he between March 4, 2016 and July 28, 2016 at Dartmouth, Nova Scotia by deceit, falsehood or other fraudulent means, did unlawfully defraud Jennifer Hughes of a sum of money, a total not exceeding $5,000.00, contrary to section 380(1)(b) of the *Criminal Code*.

And Further, that he between March 31, 2016 and July 14, 2016 at Dartmouth, Nova Scotia by deceit, falsehood or other fraudulent means, did unlawfully defraud Ashley Petrie of a sum of money, a total not exceeding $5,000.00, contrary to section 380(1)(b) of the *Criminal Code*.

And Further, that he between May 21, 2016 and August 9, 2016 at Dartmouth, Nova Scotia by deceit, falsehood or other fraudulent means, did unlawfully defraud Michelle Brake of a sum of money, a total not exceeding $5,000.00, contrary to section 380(1)(b) of the *Criminal Code*.

And Further, that he between May 31, 2016 and July 22, 2016 at Dartmouth, Nova Scotia by deceit, falsehood or other fraudulent means, did unlawfully defraud Ryan Witt of a sum of money, a total not exceeding $5,000.00, contrary to section 380(1)(b) of the *Criminal Code*.

And Further, that he between June 4, 2016 and July 13, 2016 at Dartmouth, Nova Scotia by deceit, falsehood or other fraudulent means, did unlawfully defraud Robert Gillis of a sum of money, a total not exceeding $5,000.00, contrary to section 380(1)(b) of the *Criminal Code*.

And Further, that he between June 6, 2016 and July 28, 2016 at Dartmouth, Nova Scotia by deceit, falsehood or other fraudulent means, did unlawfully defraud Philip Barnes of a sum of money, a total not exceeding $5,000.00, contrary to section 380(1)(b) of the *Criminal Code*.

And Further, that he between June 18, 2016 and July 25, 2016 at Dartmouth, Nova Scotia by deceit, falsehood or other

fraudulent means, did unlawfully defraud Paul Tingley of a sum of money, a total not exceeding $5,000.00, contrary to section 380(1)(b) of the *Criminal Code*.

And Further, that he between June 25, 2016 and July 25, 2016 at Dartmouth, Nova Scotia by deceit, falsehood or other fraudulent means, did unlawfully defraud Monica Bassett of a sum of money, a total not exceeding $5,000.00, contrary to section 380(1)(b) of the *Criminal Code*.

And Further, that he between July 17, 2016 and August 2, 2016 at Dartmouth, Nova Scotia by deceit, falsehood or other fraudulent means, did unlawfully defraud Grace Gallow of a sum of money, a total not exceeding $5,000.00, contrary to section 380(1)(b) of the *Criminal Code*.

Between the 22nd day of February, 2018 and the 25th day of September, 2018 at or near Lower Sackville, Nova Scotia did by deceit, falsehood or other fraudulent means, did unlawfully defraud Allen Phillips of a sum of money, a total value not exceeding $5,000.00 contrary to section 380(1)(b) of the *Criminal Code*.

And Further that he at the same time and place aforesaid, being at large on his Recognizance entered into before a Justice or Judge on the 20th day of June, 2017, and being bound to comply with a condition of that Recognizance to wit., "do not be employed in any capacity where you handle financial transactions", without lawful excuse fail to comply with that condition, contrary to section 145(3) of the *Criminal Code*.

Between the 8th day of April, 2018 and the 20th day of April, 2018 at or near Dartmouth, Nova Scotia did, being at large on his Recognizance entered into before a Justice or Judge on the 20th day of June, 2017, and being bound to comply with a condition of that Recognizance to wit., "do not be employed in any capacity where you handle financial transactions", without lawful excuse fail to comply with that condition, contrary to section 145(3) of the *Criminal Code*.

Counsel: William Mathers for the Crown
J. Patrick Atherton for the Defence

By the Court:

Introduction:

[1] Mr. Surette is a 53 year-old recidivist, convicted of fraud. He had been working in the car dealership industry, for most of his adult life.

[2] Between February 2016 and September 2018, Mr. Surette was employed as a sales representative with Used Car Factory 21 in Nova Scotia. During that time, Mr. Surette defrauded numerous customers of their monies by not providing them with the vehicle they thought they had purchased. The total monies defrauded amounts to $43,310.53.

[3] At the time of some of the offences, Mr. Surette was serving a Conditional Sentence Order, from March 10, 2016 through March 10, 2017, following convictions on a variety of fraud-related offences. He also breached his recognizance on two occasions, which prohibited him from being employed in any capacity where he was required to handle financial transactions.

[4] On January 18, 2019, Mr. Surette elected Provincial Court and pleaded guilty to two indictable offences, namely, fraud-under and breach of recognizance. These offences occurred between February 22, 2018, and September 25, 2018.

[5] He also re-elected from Supreme Court to Provincial Court and pleaded guilty to two counts of fraud-over and 11 counts of fraud-under, which occurred between February 1, 2016, and October 31, 2016.

[6] On February 27, 2019, Mr. Surette elected Provincial Court and pleaded guilty to breaching his recognizance. This breach occurred between April 8, 2018, and April 20, 2018.

[7] In total, Mr. Surette has pled guilty to 16 indictable offences.

Circumstances Surrounding the Commission of the Offences

[8] The circumstances surrounding the commission of the offences are succinctly set out in an Agreed Statement of Facts, Exhibit 1, which is attached hereto as appendix one.

[9] In assessing the issue of what is the just and appropriate disposition for these offences and offender, Mr. Surette, I have carefully considered the following:

- The circumstances surrounding the commission of the offences and the offender, Mr. Surette;
- The relevant *Criminal Code* provisions, including ss. 718, 718.1, 718.2, 719, 738 and s. 462. 37;
- The victim impact statements;

- The Pre-Sentence Report dated February 14, 2019;
- The time that Mr. Surette spent in pre-trial custody; and
- The submissions of Counsel.

The Personal Circumstances Surrounding Mr. Surette

[10] Mr. Surette is 53 years old. He was born on June 19, 1966. The Pre-Sentence Report reveals that he was born in Halifax and maintained a positive relationship with his parents. He, apparently, enjoyed a "great childhood". He did not experience any abuse, nor were there any alcohol or illicit substance abuse issues in the family home. It would appear that Mr. Surette's upbringing was generally positive. He enjoyed a well nurtured upbringing in a supportive and loving home.

[11] Mr. Surette's mother, Mary Surette, described a close relationship with her son. She maintains daily contact with him. She characterized her son as being "quiet, not boisterous, he's thoughtful". Mrs. Surette added that her son was never a problem during his formative years. He never had any issues with substances, mental health, or anger management.

[12] Mrs. Surette commented to the author of the Pre-Sentence Report that she was "devastated" upon learning about the offences her son committed. She stated that he "knows it shouldn't have been done".

[13] Mr. Surette is presently single and has no children. He successfully completed his grade 12 education at Bridgetown High School in 1985. While in high school, Mr. Surette participated in various sports such as baseball and soccer.

[14] Following high school, Mr. Surette completed a two-year electronics program in 1988. He also reported to the author of the Pre-Sentence Report that he has taken courses in business and computer programming. He has also completed various management courses throughout his employment over the years.

[15] Mr. Surette also reported to the author that he was employed for 12 years with a car dealership and has been employed in the car dealership industry for most of his adult life.

[16] According to Mr. Surette, he is in good physical and mental health. He has no addiction issues related to alcohol or illicit drugs. He does not belong to any groups or organizations. In his leisure time, Mr. Surette enjoys four-wheeling and doing carpentry work.

[17] The author of the Pre-Sentence Report noted that Mr. Surette stated he accepted responsibility for his actions. With respect to the offences before the Court, Mr. Surette expressed, “I guess I had no reason to do it, I shouldn’t have done it. I guess opportunity.”

[18] Mr. Surette does posses a criminal record which includes previous convictions for related offences of fraud and theft. His criminal record dates from 2015 to 2016, where he accumulated seven related prior convictions. He possesses one previous conviction for breach of recognizance, three fraud convictions and two convictions for theft of a motor vehicle.

[19] He received a conditional discharge for having been found guilty of the theft-under on March 4, 2016. He received a term of imprisonment in the community under a conditional sentence order for 12 months, from March 10, 2016 to March 10, 2017.

[20] As previously mentioned, Mr. Surette was serving a conditional sentence order while he committed the present fraud and related offences.

The Impact upon the Victims

[21] I have considered the victim impact statements that have been submitted, which include statements from Rob Gillis, Jennifer Hughes, Paul Tingley, Jay Frizzell, and Stephanie Edwards.

[22] The victim impact statements vividly describe the impact and hardship caused by Mr. Surette’s criminal behaviour. The effect of Mr. Surette’s fraud on each of the victims has been clearly described in their respective victim impact

statements. For instance, Rob Gillis described the impact of not having access to a motor vehicle to go to work, and how he suffered from anxiety worrying about the situation. Jennifer Hughes felt frustrated, angry, and embarrassed for believing and trusting Mr. Surette. She also described the financial hardship that was caused by Mr. Surette's fraudulent behaviour. Paul Tingley described how he lost his mobility which caused stress, anxiety, and financial hardship. Jay Frizzell described how the offence has caused him a lot of emotional stress and financial hardship.

[23] Stephanie Edwards described the emotional impact that the offence has had on her, including adverse impact on her on her studying and social life. The offence also caused her financial stress.

[24] There is no doubt, in my view, that the victim impact statements describe the pain and hardship caused by Mr. Surette's fraudulent behaviour. He repeatedly preyed on the vulnerability of his victims.

Positions of the Crown and Defence

[25] The Crown contends that the appropriate disposition for these offences and this offender, Mr. Surette, is a term of imprisonment in the range of five years. The Crown submits that this global sentence of five years is warranted and necessary to

adequately express society's condemnation of Mr. Surette's criminal conduct. The Crown argues that denunciation and deterrence, both specific and general, must be emphasised in this case in light of the circumstances surrounding the commission of the offences, and personal circumstances of the offender, Mr. Surette.

[26] The Crown submits that a global sentence of five years is necessary in this case because of the number of aggravating factors present, which include: the nature and number of offences committed over a lengthy period of time against numerous vulnerable victims; Mr. Surette's previous related criminal convictions; Mr. Surette was serving a term of imprisonment in the community when he committed related offences against vulnerable victims; and, he was subject to a recognizance during the commission of the current offences. The Crown contends that the number of aggravating factors present in this case requires a strong emphasis on denunciation and deterrence, both specific and general, in order to maintain public confidence in the effectiveness of the criminal justice system.

[27] The Crown is also seeking stand alone restitution orders for the victims and a fine in lieu of forfeiture.

[28] The Crown also requests a prohibition order under s. 380.2 of the *Criminal Code* for 10 years.

[29] In support of its position, the Crown has submitted several cases, including: *R. v. Pierce,* [1997] O.J. No. 715*; R. v. Bjellebo,* [2000] O.J. No. 478; *R. v. Thompson,*(2016), Dartmouth, NSPC (unreported)*; R. v. Cassie and Hackett,* (2018) Dartmouth, NSPC (unreported)*; R. v. Lee*, 2011 NSPC 81*; R. v. Elmadani*, 2015 NSPC*;* and *R. v. Blumenthal,* 2019 NSSC 35.

[30] The Defence submits that given the mitigating factors of Mr. Surette's guilty pleas and acceptance of responsibility, his positive Pre-Sentence Report, and his expression of remorse, as well as consideration of the parity principle, a term of imprisonment of less than two years is a fit and proper punishment for the offences and for the offender, Mr. Surette. The Defence contends that a global sentence within that range would be proportionate to the gravity of the offences and the degree of responsibility of Mr. Surette. The Defence argues that Mr. Surette was not in a position of trust and that this case does not contain the attributes of a major fraud case which usually involve substantial amounts of monies and the generally accepted sentence range is greater than two years imprisonment. Further, the Defence submits that Mr. Surette has no ability or means to compensate the victims by way of a restitution order.

[31] The Defence submitted several cases in support of its submission, including the following: *R. v. Ford*, 2012 NSSC 380*; R. v. Blumenthal*, 2019 NSSC 35*; R. v.*

Colpitts and Potter, 2018 NSSC 180 *R. v. Johnston*,2018 BCPC 227*;* and *R. v. Sheppard*, 2015 NSPC 23

[32] It should be noted that none of these cases, including those submitted by both counsel, are strikingly similar to the case at bar. However, those cases, do provide instructive guidance on the relevant principles and factors that should be considered.

[33] It should also be mentioned that of s. 742.1 (c) of the *Criminal Code* disallows a conditional sentence order for the three fraud-over offences.

The Purpose and Principles of Sentencing

[34] In sentencing Mr. Surette, I am guided by the sentencing provisions of the *Criminal Code* and mindful that sentencing is profoundly subjective.

[35] The Supreme Court of Canada has enunciated the correct approach to sentencing in *R. v. M. (C.A.),* [1996] 1 S.C.R. 500, and Parliament has enacted legislation which specifically sets out the purpose and principles of sentencing. Sections 718 to 718.2 codify the objectives and principles of sentencing and are intended to "bring greater consistency and clarity to sentencing": *R. v. Nasogaluak*, 2010 SCC 6, at para. 39. Thus, courts must turn to those sources, and the common when determining the proper sentence to impose.

[36] It is trite to say that the imposition of a just and appropriate sentence can be difficult a task. However, as difficult as the determination of a fit sentence can be, the process has a narrow focus. It aims at imposing a sentence that reflects the circumstances of the specific offence and the attributes of the individual offender. Indeed, sentencing is not based on group characteristics, but on the facts relating to the specific offence and offender as revealed by the evidence adduced in the proceedings.

[37] Generally, a fit sentence is the product of the combined effects of the circumstances of the specific offence with the unique attributes of the specific offender.

[38] Although the sentencing process is highly contextual and necessarily an individualized process, the judge must also take into account the nature of the offence, the victims, and the community. As Lamer C.J. (as he then was), noted in *M.(C.A.)*, sentencing requires an individualized focus, not only of the offender, but also of the victim and community as well. Lamer C.J. emphasized that there is no such thing as a uniform sentence for a particular crime and that sentencing is highly contextual and an inherently individualized process.

[39] As stated, sentencing is governed by the specific purpose and general principles of sentencing provided for in the *Criminal Code* under s. 718. Section 718 sets out the objectives a sentence must achieve: denunciation and deterrence – both specific and general, separation from society where necessary, rehabilitation of the offender, reparations by the offender, the promotion of a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community. Section 718 also describes the fundamental purpose of sentencing is to contribute to respect for the law and the maintenance of a just, peaceful, and safe society.

[40] Assessing moral culpability is a fundamental aspect of determining the appropriate sentence. A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. Proportionality is closely tied to the objective of denunciation. It promotes justice for victims and seeks to ensure public confidence in the criminal justice system.

[41] While proportionality is the guiding principle of sentencing, the *Criminal Code* also directs judges to take into account a number of other considerations - aggravating and mitigating factors which should increase or reduce a sentence, and the principles of parity and restraint. Further, the *Criminal Code* clearly states that

imprisonment should be considered as a last resort. An offender should not be deprived of liberty if less restrictive sanctions are appropriate in the circumstances.

[42] Sentences must promote one or more of the six objectives identified in s. 718, (a) to (f), inclusive.

[43] The purpose of sentencing is achieved by blending the various objectives identified in s. 718(a) to (f). The proper blending of those objectives depends on the nature of the offence and the circumstances of the offender. Thus, the judge is often faced with the difficult challenge of determining which objective or combined objectives deserve priority. Section 718.1 directs that the sentence imposed must fit the offence and offender. Section 718.1 is the codification of the fundamental principle of sentencing - the principle of proportionality. This principle is deeply rooted in notions of fairness and justice.

[44] I have considered the fundamental purpose of sentencing as clearly and succinctly expressed in s. 718 of the *Criminal Code*, the fundamental principle as stated in s. 718.1 of the *Criminal Code*, and the other sentencing principles as set out in 718.2 the *Criminal Code*, all of which stipulate that a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or offender. Section 380.1 of the *Criminal*

Code, which sets out the statutorily aggravating factors in relation to the offence of fraud, has also been considered and applied, particularly subsections (1) (a), (c), and (c.1), which are relevant in this case.

[45] I am also mindful of the principle of restraint which underlies s. 718 of the *Criminal Code*.

[46] In accordance with s. 726.2 of the *Criminal Code*, what follows are my reasons for imposing the sentence I view as just and appropriate, for Mr. Surette, and for these offences.

[47] As previously mentioned, Mr. Surette has pled guilty to numerous offences contained on three separate Informations. Thus, the principle of totality must be considered in this case.

The Principle of Totality

[48] Closely connected with the principle of proportionality is the principle of totality. The totality principle ensures that the sentence imposed is proportionate to the gravity of the offence and the degree of responsibility of the offender. It is within the context of consecutive sentences that the principle of proportionality expresses itself through the more particular form of the totality principle. This

principle is well established in sentencing jurisprudence. It is codified in s. 718.2 (c) of the *Criminal Code*, which provides:

> Where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh.

[49] The totality principle requires a sentencing judge who has imposed consecutive sentences for multiple offences to ensure that the cumulative sentence imposed does not exceed the overall culpability of the offender. Clayton Ruby articulated the totality principle in the following terms in his treatise, *Sentencing* 3rd*:* (Toronto: Butterworths, 1987) at 27:

> The purpose is to ensure that a series of sentences, each properly imposed in relation to the offence to which it relates, is in aggregate "just and appropriate". A cumulative sentence may offend the totality principle if the aggregate sentence is substantially above the normal level of a sentence for the most serious of the individual offences involved, or if its effect is to impose on the offender "a crushing sentence" not in keeping with his record and prospects. The first limb of the principle can be seen as an extension of the central idea of proportionality between offence and sentence, while the second represents an extension of the practice of mitigation.

[50] Similarly, Professor Allan Manson described the principle of totality in his treatise, *The Law of Sentencing*, (Toronto: Irvin, 2001) at p. 102, wherein he wrote:

> The global effect of consecutive sentences cannot produce excessive punishment, regardless of the number of offences... In determining whether a merged sentence is excessive, courts usually consider the age and rehabilitative prospects of the offender. Even when there is little evidence of positive rehabilitative prospects,

> total sentences should not be so long as to crush optimism about eventual re-integration. It is also relevant to consider the relative gravity of the underlying offences. For example, it would be extremely unusual if a string of "theft under" convictions, no matter how long, would warrant a penitentiary term of imprisonment.
>
> There has been some controversy over how to calculate individual sentences when the totality principle operates to cap the global sentence. One method would be to artificially reduce the duration of the component sentences so that when grouped together consecutively they add up to the appropriate global sentence. This has been rejected by most courts which prefer to impose appropriate individual sentences and then order that some, or all of them, be served concurrently to reach the right global sentence. The latter method is preferable because it ensures frankness in that each conviction will generate an appropriate sentence, whether served concurrently or consecutively. Moreover, the impact of individual sentences will be preserved even if an appeal intervenes to eliminate some of the elements of the merged sentence.

[51] In *R. v. Adams*, the Nova Scotia Court of Appeal provided clear instructions on how to apply the totality principle in sentencing multiple offences. At paras. 23 and 24, the Court held:

> [23] In sentencing multiple offences, this Court has, almost without exception, endorsed an approach to the totality principle consistent with the methodology set out in C.A.M., *supra*. (see for example *R. v. G.O.H*. (1996), 148 N.S.R. (2d) 341 (C.A.); *R. v. Dujmovic*, [1990] N.S.J. No. 144 (Q.L.) (C.A.); *R. v. Arc Amusements Ltd*. (1989), 93 N.S.R. (2d) 86 (S.C.A.D.) and *R. v. Best*, 2006 NSCA 116 (CanLII) but contrast *R. v. Hatch* (1979), 31 N.S.R. (2d) 110 (C.A.)). The judge is to fix a fit sentence for each offence and determine which should be consecutive and which, if any, concurrent. The judge then takes a final look at the aggregate sentence. Only if concluding that the total exceeds what would be a just and appropriate sentence is the overall sentence reduced. (See for example, *R. v. G.O.H., supra* at para. 4 and *R. v. Best, supra*, at paras. 37 and 38)
>
> [24] This Court has addressed and rejected any approach that would suggest that, when sentenced for a collection of offences, the aggregate sentence may not exceed the "normal level" for the most serious of the offences (see *R. v. Markie*, 2009 NSCA 119 (CanLII) at paras. 18 to 22, per Hamilton, J.A.).

[52] More recently, in *R. v. Skinner*, 2016 NSCA 54, Saunders J. A. reaffirmed the application of the sequential steps described in *Adams* when sentencing for multiple offences. At para. 41, he wrote:

> Neither would I interfere with the judge's application of the sequential steps described by this Court in *Adams*. There, this Court directed that when sentencing for multiple offences, sentencing judges should proceed in the following order:
>
> - Fix a sentence for each offence;
> - Determine which should be consecutive and which, if any, concurrent;
> - Take a final look at the aggregate sentence; and
> - Only if the total exceeds what would be a just and appropriate sentence is the overall sentence reduced

[53] In *R. v. Hatch*, [1979] N.S.J. No. 520 (C.A.), the appellant appealed his sentence for multiple counts of uttering forged documents, fraud, theft and false pretences. Some sentences were consecutive, others were concurrent. Writing for the Court, MacKeigan, C.J.N.S., stated:

> 6 We have frequently noted that the *Code* seems to require consecutive sentences unless there is a reasonably close nexus between the offences in time and place as part of one continuing criminal operation or transaction*: R. v. Osachie* (1973), 6 N.S.R.(2d) 524. This does not mean, however, that we should slavishly impose consecutive sentences merely because offences are, for example, committed on different days. It seems to me that we must use common sense in determining what is a "reasonably close" nexus, and not fear to impose concurrent sentences if the offences have been committed as part of a continuing criminal operation in a relatively short period of time. Thus, I would not have thought it wrong in the present case to have imposed more concurrent sentences.

> 7 The choice of consecutive versus concurrent sentences does not matter very much in practice so long as the total sentence is appropriate. Use of the consecutive technique, when in doubt as to the closeness of the nexus, ensures in many cases that the total sentence is more likely to be fit than if concurrent sentences alone are used. Conversely, unthinking use of concurrent sentences may obscure the cumulative seriousness of multiple offences.

[54] In *Adams*, Bateman J.A. observed, at para. 58, that in giving effect to that principle, the court in *Hatch* has stated that "the law respecting concurrency and consecutively need not be slavishly applied."

[55] Similarly, in *Skinner*, Saunders J.A. commented "this Court has always cautioned against a slavish, mathematical and formulaic approach to sentencing for multiple offences."

[56] In this case, Mr. Surette committed multiple frauds involving numerous victims over an extended period of time. The following chart sets out the number of offences he committed including the identity of the victims, the amount of the frauds, and the dates of the offences and their respective duration.

Offence	Victim	Amount	Date of Offence	Duration
Fraud **over**	Peter Brown	$8,070.00	Feb 1 – Oct 31, 2016	9 months
Fraud **over**	Wayde Schwartz	$12,624.00	May 1 – Aug 17, 2016	3.5 months
Fraud **over**	Jay Frizzel	$8,974.75	June 18 – Sept 20, 2016	3 months
Fraud under	Jude Johnson	$2,500.00	Dec 1, 2015 – Sept 7, 2016	9 months
Fraud under	Jennifer Hughes	$600.00	May 4, 2016 – July 26, 2016	3 months
Fraud under	Ashley Petrie	$3,200.00	March 31 – August 2016	3.5 months
Fraud under	Michelle Brake	$4,200.00	May 21 – August 9, 2016	2.5 months

Fraud under	Ryan Witt	$1,200.00	May 31 – August 9, 2016	2 months
Fraud under	Robert Gillis	$2,793.85	June 4 - July 13, 2016	1 month
Fraud under	Phillip Barnes	$3,577.00	June 6 – July 28, 2016	2 months
Fraud under	Paul Tingley	$3,905.15	June 18 – July 25, 2016	1 month
Fraud under	Monica Bassett	$2,000.00	June 25 – July 25, 2018	1 month
Fraud under	Grace Gallow	$2,590.00	July 17 – August 2, 2016	2 weeks
Fraud under	Allen Phillips	$1,502.00	Feb 22 – Sept 25, 2018	7 months
Recognizance			Feb 22 – Sept 25, 2018	
Recognizance			April 8 -April 20, 2018	

[57] I must fix a sentence for each offence and then determine which should be consecutive and which should be concurrent. Considerations that are relevant in determining whether one sentence should be concurrent or consecutive to another include:

- The time frame within which the offences occurred;
- The similarity of the offences;
- Whether a new intent or impulse initiated each of the offences; and
- Whether the total sentence is fit and proper under the circumstances. *R. v. Hatch* (1979), 31 N.S.R. (2d)110 (CA).

[58] As clearly pointed out in *Adams*, the last step before the trial judge determines the just and appropriate sanction for multiple offences is that the judge should then take a last or final look at the total sentence, to ensure it is not unduly long or harsh.

[59] In taking that last or final look, the judge should consider what they have previously determined in the earlier analysis as the fit sentence for the most serious of the offences. In doing so, the judge may conclude that the total sentence for the most serious of the offences is broadly commensurate with the overall gravity of the offences and the offender's moral culpability. Then, if some adjustment is necessary, the judge may adjust the length of the consecutive sentences. Section 718.2(c) of the *Criminal Code* stipulates, "(c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh."

[60] Finally, once the Court has concluded what the global sentence will be, then the Court should deduct any pre-sentence custody credits from that total to reach the actual sentencing decision.

The Parity Principle

[61] The parity principle, as expressed in s. 718.2 (b) of the *Criminal Code*, requires the court to take into consideration the principle that:

> A sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances

[62] The principle of parity is qualified by the recognition that sentencing is an individualized process. Although it is always desirable to minimize disparity among the sentence of similar offences and similar offenders, there will

undoubtedly be exceptional cases in which the disparity between sentences is justified. However, the justification is limited to a fit sentence which is within the acceptable range of sentence imposed for similar offences.

[63] The relationship between the principles of proportionality and parity was discussed by the Supreme Court of Canada in *R. v. Lacasse*, [2015] S.C. J. No. 64, at paras. 53-54:

> 53 This inquiry must be focused on the fundamental principle of proportionality stated in s. 718.1 of the *Criminal Code*, which provides that a sentence must be "proportionate to the gravity of the offence and the degree of responsibility of the offender". A sentence will therefore be demonstrably unfit if it constitutes an unreasonable departure from this principle. Proportionality is determined both on an individual basis, that is, in relation to the accused him or herself and to the offence committed by the accused, and by comparison with sentences imposed for similar offences committed in similar circumstances. Individualization and parity of sentences must be reconciled for a sentence to be proportionate: s. 718.2(a) and (b) of the *Criminal Code*.
>
> 54 The determination of whether a sentence is fit also requires that the sentencing objectives set out in s. 718 of the *Criminal Code* and the other sentencing principles set out in s. 718.2 be taken into account. Once again, however, it is up to the trial judge to properly weigh these various principles and objectives, whose relative importance will necessarily vary with the nature of the crime and the circumstances in which it was committed. The principle of parity of sentences, on which the Court of Appeal relied, is secondary to the fundamental principle of proportionality. This Court explained this as follows in M. (C.A.):
>
> > It has been repeatedly stressed that there is no such thing as a uniform sentence for a particular crime... . Sentencing is an inherently individualized process, and the search for a single appropriate sentence for a similar offender and a similar crime will frequently be a fruitless exercise of academic abstraction. [para. 92]

[64] As emphasized by the majority judgement in *Lacasse*, proportionality is the cardinal principle that must guide courts in considering the appropriateness of a sentence imposed on an offender. The more serious the offence and its consequences, or the greater the offender's degree of responsibility, the heavier the sentence will be. In other words, the severity of the sentence depends not only on the seriousness of the crime's consequences, but also on the moral blameworthiness of the offender. Determining a proportionate sentence is a delicate task. Sentences that are too lenient, or sentences that are too harsh, can undermine public confidence in the administration of justice.

[65] The majority in *Lacasse* also stressed that although sentencing ranges are used mainly to ensure the parity, they reflect all of the principles and objectives of sentencing. Sentencing ranges are nothing more than summaries of the minimum and maximum sentences-imposed in the past, which serve in any given case as guides for the application of all the relevant principles and objectives. However, they should not be considered "averages", let alone straightjackets. Instead, they should be seen as historical portraits for the use of sentencing judges who must still exercise their discretion in each case.

[66] The Supreme Court recognized, at para. 58, that:

> 58 There will always be situations that call for a sentence outside a particular range: although ensuring parity in sentencing is in itself a desirable objective, the fact that each crime is committed in unique circumstances by an offender with a unique profile cannot be disregarded. The determination of a just and appropriate sentence is a highly individualized exercise that goes beyond a purely mathematical calculation. It involves a variety of factors that are difficult to define with precision. This is why it may happen that a sentence that, on its face, falls outside a particular range, and that may never have been imposed in the past for a similar crime, is not demonstrably unfit. Once again, everything depends on the gravity of the offence, the offender's degree of responsibility and the specific circumstances of each case. LeBel J. commented as follows on this subject:
>
> > A judge can order a sentence outside that range as long as it is in accordance with the principles and objectives of sentencing. Thus, a sentence falling outside the regular range of appropriate sentences is not necessarily unfit. Regard must be had to all the circumstances of the offence and the offender, and to the needs of the community in which the offence occurred.
> >
> > (Nasogaluak, at para. 44)

[67] In this case, all of the charges for which Mr. Surette pleaded guilty are indictable offences. The maximum punishment for fraud in circumstances where the value of the fraud (the subject-matter of the offence) exceeds five thousand dollars is 14 years imprisonment, and where the value of the fraud is under five thousand dollars, the maximum punishment is two years imprisonment.

[68] As previously emphasized, the gravity of an offence lies in the nature and comparative seriousness of the offence in the circumstances of its commission, and in the harm caused.

[69] In Nova Scotia, as in other jurisdictions, the range of sentences imposed for the offence of fraud varies considerably. The range of sentence for this offence is very broad, it extends from the suspension of the passing of sentence to periods of incarceration. Each case appears to turn very much on its own unique set of circumstances. Thus, it is often a difficult challenge to apply the principle that a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.

[70] As observed by Beveridge J.A. in *R. v. Upton*, [2008] N.S.J. No. 527 (S.C.), at para. 61:

> 61 No two cases will be identical. Many times the facts which would be more aggravating in one, but the circumstances of the offender militate toward a more lenient sentence. There are any number of permutations of these two key driving factors. A judge must nevertheless consider these in arriving at an appropriate sentence. Furthermore arriving at an appropriate sentence is not a science. There is no predetermined table that spits out the end result. The difficult task of courts is always to be guided by the fundamental principle of sentencing and to craft a sentence that best meets these principles.

[71] The following cases, albeit a small sample, illustrate the broad range of sentences in Nova Scotia for the offence of fraud:

- *R. v. Decoff*, [2000] N.S.J. No. 224 (NSSC), a manger of a small business had taken approximately $44,000 from deposits that were prepared but not taken to the bank over an eight month period. In

imposing an 18-month conditional sentence, the judge took into account Ms. Decoff's personal circumstances of having a disabled spouse and the responsibility to care for a ten-month old baby.

- *R. v. Pottie*, [2003] N.S.J. No. 543 (SC), the secretary/bookkeeper pleaded guilty to fraud and forgery which resulted in a $46,000 loss. He was in poor health and was the primary daytime caregiver for his five-year old grandson. He was sentenced to a 18 month conditional sentence order;

- *R. v. Naugle*, 2011 N.S.J. No. 68. The secretary/bookkeeper pled guilty to fraud and forgery which resulted in a loss of over $136,000 over a three-year period. The court imposed a custodial sentence of eight months followed by 12 months probation., coupled with restitution in the amount of $145,000.

- *R. v. Lee*, 2011 NSPC 81, an assistant manager of a spa stole over $66,000 from her employer over a one-year period. She was found guilty after trial. She was sentenced to 10 months incarceration followed by a one- year period of probation, coupled with restitution order for the amount.

- *R. v. Ford*, 2012 NSSC 340, the offender pled guilty to three charges, including fraud-over. The agreed quantum of funds involved was $322,634, which was diverted from a Health Canada program which covered non-insured pharmacy and other medical expenses for First Nations and Inuit beneficiaries. The fraud was perpetrated by virtue of the offender's role as an approved pharmacist with the Health Canada Program. A global sentence of 12 months incarceration was imposed, followed by a period of probation for 12 months. In addition, a restitution order was imposed in the amount of $322,634.

- *R. v. Hurlbert,* 2012 NSSC 291, a member of the Nova Scotia Legislature submitted 4 fraudulent invoices for repayment in the amount of $25,000 over a two-year period. He pleaded guilty, resigned, accepted full responsibility, and made full restitution. The court imposed a conditional sentence order of 12 months followed by probation for 12 months.

- *R. v. Wilson*, 2012 NSPC 40, a member of the Nova Scotia Legislature committed fraud in the amount of approximately $61,000. He pleaded guilty. He was a first offender, with a gambling addiction. He received

a custodial sentence of nine-months, followed by 18 months probation, coupled with restitution.

- *R. v. Zinc*, 2013 NSSC 338, a member of the of the Nova Scotia Legislature submitted fraudulent expense claims in the amount of $84,000. He had a limited and dated criminal record. He pled guilty and expressed remorse. He received a conditional sentence order of 18 months, followed by probation coupled with restitution.

- *R. v. Elmadani,* 2015 NSPC 65 the offender was a recruiter who claimed commissions on non-existent placements. The offender had a record for fraud and had recently completed a previous sentence. The total fraud was in the amount of $22,700.00. The offender received a custodial sentence of 12 months.

- *R. v. Shepard*, 2015 NSPC 23, the offender perpetrated fraud-over against several friends and a forgery against a real estate agent. She possessed a criminal record for fraud. She was not in a position of trust in the legal sense as contemplated by s. 718.2 (a)(iii) of the *Criminal Code*. The Court endorsed a joint recommendation of two years less a day, coupled with a restitution order totaling $50,000.

- *R. v. Thompson*, (2016), Dartmouth, NSPC (unreported), the offender was sentenced to a ten month custodial sentence, followed by probation coupled with a restitution order. The offender made 155 fraudulent returns to the company for which he worked, totaling $66,000.79. Prior to police involvement, the offender had voluntarily entered into a civil agreement to repay those funds not covered by the insurance policy. He pled guilty at the earliest opportunity. An order pursuant to s. 380.2 of the *Code* was also imposed.

- *R. v. Cain*, 2016 NSPC 54, the offender received a custodial sentence of 3 months for unlawful use of a credit card and fraud under. The offender was the care worker for the elderly victim. The total loss was $3,617.

- *R. v. Delgado*, 2017 NSPC 74, the offender pled guilty to fraud-over, expressed sincere remorse, was a first offender, and suffered from a serious gambling addiction. She was employed as a Accounts Clerk where she stole approximately $80,000. She received a conditional sentence of 24 months less one day, followed by a 36 month period of probation, coupled with an order to make full restitution.

- *R. v. Cassie & Hackett*, (2018), Dartmouth, NSPC (unreported), the offenders were the building managers of apartment buildings. Each offender pled guilty to four counts of fraud-under and one count of failing to account for monies. The offenders fraudulently received a total of $11,055.95 from various tenants. Ms. Cassie had an extremely limited criminal record with two prior convictions for theft. Mr. Hackett, however, had a significant and related record. Both offenders were sentenced to incarceration for a period of six-months.

- *R. v. Johnson*, 2018 NSSC 338, the offender, over a three-year period, stole over $100,000 from her employer by way of seventy-six fraudulent cheques. She was pressured by an abusive intimate partner to submit false medical-expense-reimbursement claims to her employer's health plan. The offender was a member of a first nation; an agency of that first nation was the victim. She had a limited and dated criminal record. She pleaded guilty and was remorseful. She received a conditional-sentence order of 18 months, followed by probation with restitution.

- *R. v. Colpitts and Potter*, 2018 NSSC 180. The offenders together with unindicted co-conspirators, developed and implanted a

sophisticated market manipulation scheme to artificially maintain the price of Knowledge House Incorporated shares to counteract the impact of the dot-com crash, attract new investment, maintain access to credit sources, and protect their personal net worth. The Court observed that the applicable sentencing range in Nova Scotia for large-scale, complex frauds is three to six years' imprisonment. There were numerous aggravating factors in the case. The most significant mitigating factor for both offenders was delay. Mr. Potter was sentenced to five years imprisonment on each count, to be served concurrently. Mr. Colpitts was sentenced to concurrent sentences of four and a half years on each count.

- *R. v. Blumental*, 2019 NSSC 34, the offender committed fraud with respect to a single used car. He had 25 previous convictions, 12 of which were for theft or property related offences. He received a 2-year term of imprisonment and an order under s. 380.2 of the *Criminal Code* was imposed. Both restitution and a fine in lieu of forfeiture were also imposed.

- *R. v. Beverley and David Barker*, 2019 NSPC 24, the offenders pleaded guilty to fraud-over. Both were first offenders and were

considered unlikely to re-offend. For about nine months the offenders pressured Mrs. Barker's elderly mother, who was suffering from dementia and dysphasia, to sign financial documents. David Barker's criminal actions resulted in a loss of $36,000, and Beverly Barker's actions resulted in a loss of $15,519.55. They both received a suspended sentence with probation for 36 months. They were also required to make restitution.

- *R. v. Clark*, (2019), Dartmouth, NSPC, (unreported) decision of this Court, where a joint recommendation of two years imprisonment, followed by 36 months probation was imposed on a 37 year old first offender for having committed twelve fraud-under offences over an extended period of time, and one offence of failing to comply with a recognizance. She pled guilty, and accepted full responsibility for her actions. She committed the offences to support her drug addiction. The sad life principle was considered and applied. In addition, an order for restitution in the amount of $ 10, 786.32 was granted, to compensate 12 victims.

[72] In *R. v. Savard* (1996), 109 C.C.C. (3d) 47, at p. 474, the Quebec Court of Appeal set out a useful framework respecting sentencing in a fraud case:

> The factors which permit one to measure the liability of an accused on sentencing, in matters of fraud, were well set out in the decision of our Court in *R. v. Lévesque* (1993), 59 Q.A.C. 307 (Que. C.A.). These factors can be summarized as follows: (1) the nature and extent of the loss, (2) the degree of premeditation found, notably, in the planning and application of a system of fraud, (3) the accused's actions after the commission of the offence, (4) the accused'[s] previous convictions, (5) the personal benefits generated by the commission of the offences, (6) the authority and trust existing in the relationship between the accused and the victim, as well as (7) the motivation underlying the commission of the offences…. Where these factors point to fraudulent wrongdoing with no indication of mitigating circumstances, the courts give preference to incarceration as the preferred means of protecting society and of general deterrence, and expressly reject consideration of rehabilitation.

[73] While there appears to be a wide range of dispositions for these types of offences, the aggravating circumstances surrounding the present offences necessitate a strong emphasis on the principles of denunciation and deterrence. Sections 718(a) and (b) of the *Criminal Code* identify denunciation and deterrence as appropriate objectives of sentencing. Where the primary objective of sentencing is denunciation, the sentence must publicly condemn the offender's conduct.

[74] Where, as here, the primary purpose of sentencing is to deter and denounce this type of behaviour, the Court must ensure its sentences are perceived by the public as strong condemnations of this type of behaviour.

[75] Again, I have considered and applied the parity principle in s. 718.2(b) of the *Criminal Code*. In doing that, I am aware of what the Supreme Court of Canada stated in *M. (C.A.)*, where Lamer C.J., at para. 92, wrote:

> [92] It has been repeatedly stressed that there is no such thing as a uniform sentence for a particular crime ... Sentencing is an inherently individualized process, and the search for a single appropriate sentence for a similar offender and a similar crime will frequently be a fruitless exercise of academic abstraction. As well, sentences for a particular offence should be expected to vary to some degree across various communities and regions in this country, as the just and appropriate mix of accepted sentencing goals will depend on the needs and current conditions of and in the particular community where the crime occurred.

[76] Similarly, in *R. v. Muller*, [1993] B.C.J. No. 223, (B.C.C.A.), at paras. 32 - 33, McEachern, C.J., expressed the view:

> . . . that it is often unproductive to approach the sentencing process either at trial or in this court as if absolute priorities can be given to various sentencing principles, such as deterrence, in any particular case.
>
> Also, it is unlikely that individually just results can be achieved by the application of formulae in which degree of importance are attached to specific sentencing factors. Sentencing is an art, not a science. It must take into account highly variable human behaviour and likely responses to penal sanctions. In some cases deterrence may be more important than rehabilitation; in others, the opposite will be true. Sentencing, in my view, should not be approached as a contest between those two important principles, for the raw material of sentencing is past and future human behaviour, which is never completely predictable.

[77] Even after a review of the cases, in an effort to find similar cases with similar offenders charged with similar offences, Mr. Surette's case is clearly distinguishable.

[78] While the paramount sentencing objectives in the present case are denunciation and deterrence, I must not lose sight of the prospect of rehabilitation.

The Just and Appropriate Sentence

[79] Mr. Surette's moral culpability here is significant. In other words, given the nature, extent, and number of victims that have suffered real emotional and financial hardship, the moral culpability of Mr. Surette is very high. As a mature businessman, there is simply no explanation for his crimes apart from the obvious motive to make easy money. The duration of the criminal activity, including Mr. Surette's incessant need to fraudulently obtain as much money as he could from each victim; the number of vulnerable victims he exploited, the amount of the frauds; the fact that he was serving a conditional sentence order for related crimes and was subject to a recognizance not to be employed in any capacity where he was required to handle financial transactions, all contribute to the high level of moral blameworthiness.

[80] Let me be clear, what is an extremely aggravating feature of this case is the relentlessness of the pursuit of monies from vulnerable victims, which is a reoccurring theme that underlies most of the offences. As the facts and the victim impact statements indicate, Mr. Surette orchestrated the fabrications and lies that facilitated his perpetration of the frauds. He simply preyed on vulnerable, trusting individuals, who, in some cases, repeatedly gave him the monies that he said he needed because they trusted him and believed that he was taking care of their

needs. Most, if not all, of the victims are of modest financial means, and the impact of Mr. Surette's fraudulent behaviour will presumably adversely affect them for a long time, as revealed by the victim impact statements.

[81] There is absolutely no question that Mr. Surette knew what he was doing as he repeatedly perpetrated the same fraudulent scheme on the victims, which included falsely reassuring them, raising their expectations that he would take care of them, and in some cases, he even asked for more money to complete the transactions while knowing that he never had any intention of honouring those transactions. Moreover, he did so over a prolonged period of time without any care or consideration of the victims' financial circumstances. He simply did not care. He was driven by greed to make more money for himself.

[82] While Mr. Surette was not in a position of trust or authority, he certainly repeatedly exploited the victim's vulnerability, as revealed in the victim impact statements.

[83] I should also note that another extremely aggravating feature of this case is that Mr. Surette chose to continue his fraudulent behaviour while he was serving a sentence of imprisonment in the community under a conditional sentence order for

related offences, and subject to a recognizance which prohibited him from being employed in any capacity where he was required to handle financial transactions.

[84] As emphasized earlier, the number of aggravating factors surrounding the circumstances of the offences, and the offender, Mr. Surette, necessitates an emphasis on denunciation and deterrence, both specific and general.

[85] In *Gray*, [1995] O.J. No. 92, at para. 32, the Ontario Court of Appeal made the following observation which is apposite:

> [32]... 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.

[86] Mr. Surette should have been deterred from committing the current offences. Given his previous related convictions, and that he was serving a conditional sentence order for related offences as well as being on a recognizance to prevent him from engaging in fraudulent behaviour. For some reason, he was not deterred despite the real risk of going to jail.

[87] What is troubling is that there are no exceptional or extreme personal circumstances that mitigate Mr. Surette's criminal conduct. Indeed, in this case the aggravating factors overwhelm the mitigating factors and therefore a significant

sentence of imprisonment is clearly necessary. In this case, denunciation and deterrence –both specific and general must be emphasized.

[88] The purpose of emphasizing deterrence in this case is two-fold: to specifically deter Mr. Surette from committing further frauds, and to assuage like minded people from engaging in fraud which is often easy to commit and highly profitable. Without sufficient punishment, the temptation of taking the risk of a lesser punishment in exchange for a large sum of money would make it worthwhile. Moreover, denunciation should adequately reflect the public's condemnation of this offence and Mr. Surette's criminal conduct.

Aggravating and Mitigating factors Surrounding the Circumstances of the Offences and the Offender

[89] Section 718.2(a) of the *Criminal Code* requires the Court to consider the aggravating and mitigating factors surrounding the circumstances of the offences and the offender.

[90] Accordingly, there are several aggravating factors in this case, such as:

- The nature, extent and number of frauds Mr. Surette committed over an extended period of time to numerous vulnerable victims. The

impact on the victims is revealed in several victim impact statements filed with the Court;

- Mr. Surette made a conscious and deliberate decision to repeatedly engage in these offences, which imports a degree of sophistication, premeditation, planning, malice aforethought, and deception;

- The duration of the dishonesty and deception was continuous over an extended period of time which involved repeatedly lying and deceiving vulnerable victims;

- Mr. Surette's sole motivation was greed. The fraudulent acts were an easy way for him to make money;

- As described in the Victim Impact Statements, the victims were both financially and emotionally impacted by Mr. Surette's incessant deception;

- The frauds only stopped due to police intervention - it was not voluntarily;

- Mr. Surette committed fraud while serving a sentence of imprisonment in the community under a conditional sentence order for related fraud and theft offences;

- Mr. Surette committed fraud while on release in the community on a recognizance, not to be employed in any capacity where he was required to handle financial transactions. He breached his recognizance on two separate occasions while committing fraud; and

- Mr. Surette has previous related convictions for fraud, theft, and for breaching his recognizance.

[91] There are also several mitigating factors surrounding the offences and Mr. Surette, which include the following:

- He has pleaded guilty to the offences, which prevented the expenditure of considerable court cost, and the necessity of witnesses testifying;

- He has accepted responsibility for the offences, and has expressed remorse; and

- He has a relatively positive pre-sentence report.

Restitution

[92] As Laskin, C.J.C. observed in *The Queen v. Zelensky*, [1978] 2 S.C.R. 940, there have been previous restitution or compensation orders in one form or another ever since the enactment of the *Criminal Code* in 1892.

[93] In delivering the judgment of the New Brunswick Court of Appeal, in *R. v. Moulton*, [2018] N.B.J. No. 79, Chief Justice Richard observed, at para. 31, that:

> [31] [s]ince 2015, there has been a clear legislative message requiring courts to consider restitution orders during sentencing process. That year, Parliament adopted the Victims Bill of Rights Act, S.C. 2015, c. 13, which added a number of provisions to the *Criminal Code*. Among these is s. 737.1, which: (1) requires a sentencing judge to "consider making a restitution order" in addition to any other measure imposed on the offender; (2) obliges the judge to make enquiries to determine if steps have been taken to provide victims with an opportunity to seek restitution; and (3) requires the judge to give reasons if restitution is sought but not ordered. The 2015 amendments also added s. 739.1, which states that an "offender's financial means or ability to pay does not prevent the court from making an order" of restitution, and s. 739.2, which provides that, in making a restitution order, "the court shall require the offender to pay the full amount specified in the order by the day specified in the order, unless the court is of the opinion that the amount should be paid in instalments, in which case the court shall set out a periodic payment scheme in the order."

[94] In *R. v. Kelly*, 2018 NSCA 24, Beveridge J.A., extensively reviewed the relevant factors to guide trial judges in exercising their discretion to grant stand-alone restitution orders. In doing so, he comprehensively reviewed the purposes of imposing a stand-alone restitution order, and identified certain objectives that

relate to the proper exercise of judicial discretion for the purposes of s. 725(1). He wrote:

> 29 As traced by Chief Justice Laskin in *R. v. Zelensky*, *supra*, the discretion to order compensation as part of the sentencing process has been in the *Criminal Code* since its inception. A stand-alone restitution order fulfills a number of purposes. It serves as a vehicle, in appropriate circumstances, to acknowledge the loss caused by the commission of the offence. The order survives bankruptcy so that the offender, as much as the law can do, will not be able to personally benefit from the commission of the offence. People who may be tempted to commit an offence will know, crime does not pay. The victim will be saved the additional expense of being forced to pursue a remedy in the civil courts for the loss they suffered.
>
> 30 Labrosse J.A., for the Court in *R. v. Devgan* (1999), 121 O.A.C. 265 consolidated the relevant factors that should guide a court's discretion in relation to a restitution order:
>
> > [26] In Zelensky, Laskin C.J. identified certain objectives and factors that relate to the application of s. 725(1). These considerations have been expanded upon in subsequent cases. Below, I have consolidated these objectives and factors, all of which are relevant to the issue of what constitutes a proper exercise of discretion for the purpose of s. 725(1).
> >
> > 1.An order for compensation should be made with restraint and caution.
> >
> > 2.The concept of compensation is essential to the sentencing process:
> >
> > > (i)it emphasizes the sanction imposed upon the offender;
> > >
> > > (ii)it makes the accused responsible for making restitution to the victim;
> > >
> > > (iii)it prevents the accused from profiting from crime; and
> > >
> > > (iv)it provides a convenient, rapid and inexpensive means of recovery for the victim.
> >
> > 3.A sentencing judge should consider:

> (i)the purpose of the aggrieved person in invoking s. 725(1);
>
> (ii)whether civil proceedings have been initiated and are being pursued; and
>
> (iii)the means of the offender.
>
> 4. A compensation order should not be used as a substitute for civil proceedings. Parliament did not intend that compensation orders would displace the civil remedies necessary to ensure full compensation to victims.
>
> 5. A compensation order is not the appropriate mechanism to unravel involved commercial transactions.
>
> 6. A compensation order should not be granted when it would require the criminal court to interpret written documents to determine the amount of money sought through the order. The loss should be capable of ready calculation.
>
> 7.A compensation order should not be granted if the effect of provincial legislation would have to be considered in order to determine what order should be made.
>
> 8.Any serious contest on legal or factual issues should signal a denial of recourse to an order.
>
> 9.Double recovery can be prevented by the jurisdiction of the civil courts to require proper accounting of all sums recovered.
>
> 10.A compensation order may be appropriate where a related civil judgment has been rendered unenforceable as a result of bankruptcy.

[95] Justice Beveridge further noted that Labrosse J.A. observed that the considerations he identified were not exhaustive, nor were any one of them determinative. Much would depend on the circumstances of each case:

> [27] It is in light of these considerations that an exercise of discretion under s. 725(1) must be assessed. None of these considerations by themselves are determinative of whether a compensation order should be granted. The weight to be given to individual considerations will depend on the circumstances of each

case. Nor is the preceding list intended to be exhaustive. Indeed, other relevant considerations may arise in future cases.

[96] Justice Beveridge, at para. 35, observed that:

> 35 It is well accepted that if an offender has no present or realistic foreseeable ability to pay a stand-alone restitution order, making such an order may interfere with the offender's rehabilitation, justifying its refusal or reduction from the full amount of the loss (*R. v. Siemens* (1999), 138 Man.R. (2d) 90 (C.A.); *R. v. Spellacy* (1995), 131 Nfld. & P.E.I.R. 127 (Nfld. C.A.); *R. v. Ali* (1997), 98 B.C.A.C. 239; *R. v. Popert*, 2010 ONCA 89; *R. v. Fast-Carlson*, *supra*).

[97] Later, at paras 52 and 53, he wrote:

> 52 The judge properly observed that a restitution order is not simply an ancillary order, but forms part of the sentence and must be included when considering the totality of the sentence. However, with respect to the role that ability to pay plays, she asserted that it was not determinative and paramount consideration should be given to the victims of fraudulent transactions. She said this:
>
> > [28] The ability of the accused to pay, and even the future ability to pay is not the determinative factor in whether restitution is ordered by the court, and paramount consideration should be given to the victims of fraudulent transactions, see *R. v. Fitzgibbon*,[1990] 1 S.C.R. 1005, also *R. v. Yates* (2002), 169 C.C.C. (3d) 506 (B.C.C.A.). Section 739.1 of the *Code* also states that "the offender's financial means of ability to pay does not prevent the court from making an order under section 738 or 739".
>
> 53 There are certainly some circumstances where patent inability to pay may not deflect a restitution order. Cases where monies property have been obtained by an offender in breach of trust stand out (see: *R. v. Fitzgibbon*, [1990] 1 S.C.R. 1005; *R. v. Scherer* (1984), 5 O.A.C. 297 (leave to appeal to S.C.C. refused, [1984] S.C.C.A. No. 29), both where lawyers committed egregious breaches of trust). As well as where monies have been taken and cannot be accounted for.
>
> 54 The decision of the British Columbia Court of Appeal in Yates, cited by the trial judge above, was not a breach of trust case. The offender committed welfare fraud. The trial judge imposed a restitution order on an offender who had

substantial equity in her home. The Court of Appeal upheld the order on the basis of deference.

55 Other than referring to the general concept of Ms. Kelly's doubtful ability to pay as a factor, the trial judge made no further comment on it. She dismissed it as unimportant, because of the paramount consideration for the victim of the fraudulent transactions. With respect, the failure to appropriately consider the offender's patent inability to pay such a restitution order reflects legal error.

56 I have already referred to the well-established relationship between losses in circumstances of breach of trust (para53 above). Bennett J.A. in *R. v. Nanos*, *supra* canvassed the relevant caselaw and summarized it as follows:

> [17] The case law is uniform on the consideration of restitution orders when the offences involve **a breach of trust or other theft-related cases when the stolen money is unaccounted for or not accounted for adequately. In such a case, the fact that an offender has little or even no ability to pay the restitution order will be given little weight, as one of the principles behind the legislation is that an accused should be deprived of "the fruits of his crime".** The Law Reform Commission of Canada Working Paper 5, Restitution and Compensation (Ottawa: Information Canada, 1974), cited with approval in Zelensky at 952-953; Castro at para. 34; see also *R. v. Fitzgibbon*, [1990] 1 S.C.R. 1005 at 1014; Yates.
>
> [Emphasis added]

57 This approach was echoed in *R. v. Johnson*, 2010 ABCA 392. The offender breached his trust as an assistant pastor and investment broker to defraud 50 individuals of over $2M. At the time of sentence, approximately $1.7M was unaccounted for. No financial information was submitted. The trial judge imposed a restitution order. On appeal, the Court commented on the applicable principles:

> [29] More important, an offender's means have limited import in cases of fraud: *R. v. Cadieux* 2004 ABCA 98, 346 A.R. 56 at para. 9. **Depriving an offender of the fruits of his or her crime continues to be one of the overarching goals of a restitution order. Thus, ability to pay must take into consideration what disclosure an offender has made - or not made - concerning disposition of the proceeds of the crime. Further, where, as here, the case also involves a breach of trust, the paramount**

> **consideration must be the victims' claims**: Castro, *supra*, at para. 28; and *R. v. Fitzgibbon* [1990] 1 S.C.R. 1005 at 1014-1015. In fact, where a breach of trust is involved, a restitution order may be made even where there does not appear to be any likelihood of repayment:*R. v. Yates* 2002 BCCA 583, 169 C.C.C. (3d) 506 at para. 17; and *R. v. Scherer* (1984) 16 C.C.C. (3d) 30 (Ont. C.A.) at 38, leave den. [2004] 2 S.C.R. x, [1984] S.C.C.A. No. 29. This is as it should be. **Economic predators should not be permitted to walk away in the future from any obligations to their victims, especially where the proceeds of the fraud remain unaccounted for in whole or in part. Otherwise, crime would pay**.
>
> [Emphasis added]

[98] In this case, Mr. Surette did not commit a breach of trust. As Beveridge J.A. observed in *Kelly*, at para. 60, - "every fraudulent transaction involves a victim placing trust in the offender; that does not make their relationship one of trust in the sense of a recognized aggravating factor in sentence such as solicitor-client, principle-agent, doctor- patient or other similar relationships." While Mr. Surette was not in a position of trust, the monies that he defrauded from the victims is unaccounted for, or not accounted for adequately. In essence, Mr. Surette spent the money on himself; he squandered it. The fact that Mr. Surette spent the monies he obtained from the frauds he committed against the victims, and has little or no ability to pay the restitution order, should be given little weight. One of the principles behind the legislation is that an accused should not benefit from the fruits of their crime. Depriving an offender of the fruits of his or her crime is one of the overarching goals of a restitution order. Thus, the ability to pay must take

into consideration what disclosure an offender has made – or not made - concerning the disposition of the proceeds of crime. As stated earlier, economic predators should not be permitted to walk away in the future from any obligations to their victims, especially where the proceeds of the fraud remain fully or partially unaccounted for. Otherwise, crime would pay.

[99] In this case, the Crown submits that the restitution sought is somewhat unusual because some of the victims had money refunded to them by Mr. Sapp, the owner of the Used Car Factory 21. Mr. Sapp apparently, however, lacked the funds to reimburse everyone, so he offered restitution in the form of credit or alternative vehicles. Therefore, the Crown is only seeking restitution for amounts which were actually paid out (as opposed to reimbursed with trade credit) by Mr. Sapp.

[100] Mr. Atherton, on behalf of Mr. Surette, does not dispute the total amount of the restitution orders being requested by the Crown. Rather, the Defence's position is that Mr. Surette has no financial ability to pay the restitutions orders and contends that there is no realistic possibility that he will be able to do so in the future.

[101] In *R. v. Castro*, 2010 ONCA 718, the Ontario Court of Appeal held:

> While consideration of the offender's ability to pay and the impact of a restitution order on an offender's rehabilitation are factors to be considered, the weight to be given to those factors will vary depending on the nature of the offence and the circumstances of the offender. When the offence involves a breach of trust, a primary consideration is the effect on the victim; rehabilitation of the accused is a secondary consideration. Where the circumstances of the offence are particularly egregious, a restitution order may be made even where there does not appear to be any likelihood of repayment. Where money was taken, consideration of the ability to pay includes the ability to make payment from the money taken. **The court is not obliged to accept an offender's bald assertion that he or she has no ability to make restitution because the money is gone when no evidence is proffered in support of that assertion.** (emphasis added).

[102] I am mindful that it would be inappropriate and undesirable to make a restitution order in an amount that is unrealistic to think the offender could ever discharge. In this case, however, I am satisfied that there is a realistic expectation that Mr. Surette could pay the restitution in the future after he is released from prison and becomes gainfully employed. According to his pre-sentence report, it seems he has no difficulty in securing work. Indeed, he will have to re-establish employment once he has served his jail sentence. He is known to be a hard worker and I understand he has been employed through most of his adult life. He has many productive working years ahead of him. Based on the evidence, I am not satisfied that there is little prospect of Mr. Surette being able to pay back what he stole.

[103] Mr. Surette is only 53 years old and has employable skills. For example, he reported to the author of the pre-sentence report that his last period of employment was for a landscaping company for three months. He also expressed that he was

not stressed about his financial situation, as it was then, because he felt “o’kay about it”. Moreover, Mr. Surette reported that he is in good physical and mental health, and is not taking any prescription medications. There is insufficient evidence before the Court to suggest that Mr. Surette would not be able to work following the completion of his term of imprisonment. His pre-sentence report would suggest he has employable skills and a strong work ethic.

[104] Further, given Mr. Surette’s criminal history, the imposition of a restitution order may very well assist him in his rehabilitation. It would promote a sense of responsibility in him, and it is an acknowledgement of the harm done to the victims and the community.

[105] I should note that I am mindful that generally the shorter the sentence, the more likely it will be that a restitution order is more appropriate. However, in this case, the amount of the restitution is $38, 841. 50, which in my view is manageable given the term of imprisonment I intend to impose. I want to emphasize that I am also mindful that restitution orders are part of the punishment, so where punishment is exacted in the form of a restitution order, there is a corresponding reduction in other forms of punishment. In other words, in this case the restitution order must be considered as a factor in the totality of the punishment imposed.

[106] Additionally, it should also be noted that the ability of a restitution order to facilitate a means of recovery for vulnerable victims, as in this case, individuals of modest means, is one of the considerations in favour of making such an order.

[107] Thus, I will grant the stand-alone restitution orders, as set out in the following chart.

Victim	**Restitution Sought**
Peter Brown	$8,070.00
Stephanie Edwards	$4,252.65
Jennifer Hughes	$600.00
Jude Johnson	$2,500.00
Allen Phillips	$1,502.00
Joel Sapp	$6,500.00
Wayde Schwartz	$12,624.00
Robert Gillis	$2,792.85
Total	$38,841.50

The Just and Appropriate Disposition

[108] In the final analysis, considering all the relevant purposes and principles of sentencing, the aggravating and mitigating factors, and that the sentence must be proportionate to the gravity of Mr. Surette's crimes and his degree of responsibility for having committed them, I hereby impose as a just and appropriate sentence for Mr. Surette and for the offences a global sentence of 44 months.

[109] In determining which offences should be consecutive, and which, if any, should be concurrent, I considered that Mr. Surette perpetrated distinct and

separate offences against multiple victims over an extended period of time. This required him to form a singular and fresh intent to defraud each individual victim over different time periods. While there may be some overlap in the time frame of some of the frauds committed against different individuals, each fraudulent act possessed its own unique intent and method to deprive the victim of their monies, which was based on the unique vulnerability or circumstances surrounding the individual victim. In other words, there is not enough nexus between the offences and time and place for them to be characterized as one continuing operation or transaction in a relatively short period of time. Indeed, there were numerous transactions against multiple victims over an extended period of time.

[110] In taking a final look at the aggregate sentence of 44 months for having committed multiple frauds over an extended period of time against numerous victims, with numerous aggravating factors that far exceed the mitigating factors surrounding the offences and Mr. Surette's personal circumstances, I am satisfied that a global sentence of 44 months strikes a just proportion between the circumstances surrounding the offences and the offender, Mr. Surette. Put differently, the sentence of 44 months is proportionate to the gravity of the offences and the degree of responsibility of Mr. Surette having regard to all of the circumstances surrounding the offences and offender, including all of the

aggravating and mitigating factors described earlier in these reasons. Thus, in my view, the global sentence of 44 months is not unduly long or harsh.

[111] Therefore, I impose as a *global sentence* of 44 months imprisonment.

[112] The breakdown of the sentences imposed are as follows:

Offence	Victim	Date of Offence	Sentence	Credit
Fraud **over**	Peter Brown	Feb 1 – Oct 31, 2016	5 months	
Fraud **over**	Wayde Schwartz	May 1 – Aug 17, 2016	5 months consecutive	5 months
Fraud **over**	Jay Frizzel	June 18 – Sept 20, 2016	5 months consecutive	
Fraud under	Jude Johnson	Dec 1, 2015 – Sept 7, 2016	2 months consecutive	
Fraud under	Jennifer Hughes	May 4 – July 26, 2016	2 months consecutive	
Fraud under	Ashley Petrie	March 31 – August 9, 2016	2 months consecutive	
Fraud under	Michelle Brake	May 21 – August 9, 2016	2 months consecutive	
Fraud under	Ryan Witt	May 31 – August 9, 2016	2 months consecutive	
Fraud under	Robert Gillis	June 4 - July 13, 2016	2 months consecutive	
Fraud under	Phillip Barnes	June 6 – July 28, 2016	2 months consecutive	
Fraud under	Paul Tingley	June 18 – July 25, 2016	2 months consecutive	
Fraud under	Monica Bassett	June 25 – July 25, 2018	2 months consecutive	
Fraud under	Grace Gallow	July 17 – August 2, 2016	2 months consecutive	
Fraud under	Allen Phillips	Feb 22 – Sept 25, 2018	7 months consecutive	7 months
Recognizance		Feb 22 – Sept 25, 2018	1 month concurrent	
Recognizance		April 8 -April 20, 2018	2 months consecutive	2 months

[113] Lastly, having concluded that a just and appropriate sentence for these multiple offences is a term of imprisonment of 44 months, I will deduct any pre-sentence custody credits from the total to reach the actual sentence - the “go forward” sentence.

Section 719 of the *Criminal Code*: Credit for Pre-Sentence Custody

[114] The Crown and Defence both submit that Mr. Surette should receive enhanced credit pursuant to s. 719, but they disagree as to the exact amount of time that should be credited. It is indisputable, however, that Mr. Surette has been in custody from June 16, 2017 to June 20, 2017, in relation to the Information that alleges between February 1, 2016 and October 31, 2016, he committed 13 offences. On June 20, 2017, he was released on a recognizance which was revoked by consent on May 15, 2019, pursuant to s. 524(8). The Crown further submits that because Mr. Surette's recognizance was revoked pursuant to s. 524(8), he is not therefore entitled to enhanced credit by operation of s. 719 (3.1).

[115] It should be noted that the Defence thought that Mr. Surette was on remand for the period in question because he was consenting to remand while remanded on other charges, notwithstanding that he had his release which was not actually revoked until May 15, 2019.

[116] With respect to the issue of enhanced credit and its availability for certain offences, I am aware of the decision of the Nova Scotia Court of Appeal in *R. v. Hatt*, 2017 NSCA 36, which is similar in complexity for the credit calculation in the present case. In this case, like Mr. Hatt, Mr. Surette was not on remand in relation to the 2016 charges. He had his release on those charges which was not

revoked until May 15, 2019. Therefore, he is only entitled to enhanced credit for any time spent in custody as a result of those offences. I find this interpretation consistent with the wording of s. 719(3) of the *Criminal Code*, as *applied* in *Hatt*.

[117] In respect to the other charges; the two Informations that alleged offences in 2018, Mr. Surette has been consenting to his remand on those charges since November 8, 2018, according to the endorsements on two Informations.

[118] With respect to the application of s. 719(3.1), during Crown submissions the Court pointed out that this Court routinely and consistently, with the consent of both counsel, applies s.719 in circumstances where revocation under s. 524(8) has taken place. The reason for that, in part, emanates from the Supreme Court of Canada's decision in *R. v. Safarzadeh-Markali*, [2016]1 S.C.R. 180.

[119] The Court also raised with Counsel the fact that s. 719(3.1) was amended effective December 13, 2018 such that both exceptions were eliminated. The Crown, however, questions the validity of the new amendment, and thus, submits that the Court should apply the former s. 719(3.1) because the offences predate the effective date of the amendment.

[120] In my respectful view, the Crown's position is not supported in law. Clearly, s. 719(3.1) came into force on December 13, 2018. Section 719(3.1) states:

> (3.1) Exception – Despite subsection (3), if the circumstances justify it, the maximum is one and one-half days for each day spent in custody.

[121] I asked counsel to address whether the new amendment applies to this case, particularly whether s. 11(i) of the *Charter* is applicable. Section 11(i) of the *Charter* provides that any person charged with an offence has the right:

> if found guilty of the offence and if the punishment for the offences has been varied between the time of the commission and the time of sentencing, to the benefit of the lesser punishment.

[122] Thus, the issue arises of whether pre-sentence custody is "punishment" for the purposes of s. 11(i) of the *Charter*. *In R. v. S.(R.)*, 2015 ONCA 291, the Ontario Court of Appeal held that pre-sentence custody *is* punishment for the purposes of s. 11(i) of the *Charter*.

[123] In considering this issue, I endorse the observation of D.R. Mah J., *in R. v. Berg*, [2019] A.J. No. 957. In delivering the judgment of the Alberta Court of Queen's Bench, at para. 83 wrote:

> 83 Turning to the first argument, I note that s 719(3.1) was amended effective December 13, 2018 such that both exceptions were eliminated. I expect the Crown relied on the former s 719(3.1) because the offence date or the conviction date predated the effective date of the amendment. Nonetheless I am reluctant to apply the former s 719(3.1) because of constitutional concerns. The first exception in the subsection, which related to offenders who are denied bail primarily because of a prior conviction, was declared unconstitutionally overbroad by the Supreme Court of Canada in R v Safarzadeh-Markhali, 2016 SCC 14. Of course, the Crown relies on the second exception but that exception was also found constitutionally invalid by trial Courts in Ontario and Yukon and

> by Courts of Appeal in Ontario, BC and Manitoba, although there have been no such findings at the Queen's Bench or Court of Appeal level in Alberta: R v Dinardo, 2015 ONSC 1804; R v Meads, 2018 ONCA 146; R v Taylor, 2017 YKTC 3; R v Kovich, 2016 MBCA 19; R v Romanchych, 2018 BCCA 26.
>
> 84 One can surmise that concerns over the constitutionality of the second exception to subsection (3.1) led to its repeal by Parliament. The current section now simply reads "Despite subsection (3), if the circumstances justify it, the maximum is one and one-half days for each day spent in custody." I am not applying this now repealed exception, even if it might apply retrospectively, because of its constitutional dubiousness as found by other Courts.

[124] I also am satisfied that s. 11(i) of the *Charter* provides Mr. Surette the right to receive the benefit of the lesser punishment. Thus, I will give him pre-sentence credit for the period that his recognizance was revoked under s. 524(8) of the *Criminal Code* because, in my view, pre-sentence custody is punishment for the purposes of s. 11(i) of the *Charter: R. v. S (R.),* 2015 ONCA 291.

[125] Mr. Surette has been in custody on all three Informations since December 13, 2018, Consequently, he has been in custody for the equivalent of approximately 14 months, after providing him enhanced credit on all of the offences.

[126] In relation to the 13 count Information which alleges offences between February 1, 2016 and October 31, 2016, he is entitled to receive enhanced credit of 5 months, which includes the time from May 15, 2019 to August 12, 2019, and the period between June 16, 2017 to June 20, 2017. When you consider the five actual

days in custody, which is slightly over a quarter of a month of enhanced credit added to the enhanced credit of four and one half months (that is, 3 x 1.5 = 41/2) In fairness to Mr. Surette, and for ease of calculation for the sentence administer to keep this sentence in round numbers, it should be noted that all of my calculations of credit and enhance credit is based on a average of 30 days in a month.

[127] With respect to the two remaining Informations, Mr. Surette is entitled to receive enhanced credit of 9 months, which is the remaining period of time during that he consented to his remand.

[128] It should be stressed that Mr. Surette is being credited for a total of 14 months of enhanced credit, as apportioned on each *Information*, and applied in a manner to ensure that there is no inadvertent double-credit.

[129] Accordingly, Mr. Surette will receive an actual sentence of 30 months going forward in relation to the 13 count *Information*. He is in a time served situation with respect to the two remaining *Informations* as he is credited a total of nine months in respect to those three offences.

[130] The pre-sentence credit is shown above in the last column of the chart which sets out all of charges described in the three *Informations*.

Forfeiture of Proceeds of Crime: Fine in lieu of Forfeiture

[131] Separate from the sentencing hearing, the Crown sought an Order for a fine in lieu of forfeiture of proceeds of crime. I raised the issue of whether this Court had jurisdiction to impose a fine in lieu of forfeiture given the definition of "judge" in s. 462.3 (1) of the *Criminal Code*. The Crown directed my attention to the decision of *R. v. Rosenblum*, [1998] B.C.J. No. 2942, where the British Columbia Court of Appeal held that the Provincial Court has jurisdiction to impose a fine in lieu of forfeiture. In deciding this issue, Goldie J.A., in delivering the judgment for the Court wrote, at para. 31:

> 31 In my view, and with great respect to the trial judge's concern, the statute is clear: the trial judge, who may be a provincial court judge where the necessary election has been made and plea taken, is expressly directed in s-s. 462.37(1), if satisfied on a balance of probabilities that any property is proceeds of crime and that the enterprise crime offence was committed in relation to that property, to order the property be forfeited to Her Majesty. See: Wilson v. Canada (1993), 86 C.C.C. (3d) 464 (Ont.C.A.) at 470.

[132] Part XII.2 of the *Criminal Code* governs forfeiture of proceeds of crime. These provisions were enacted to ensure that crime does not pay. They reflect a Parliamentary intention to give teeth to the general sentencing provisions in Part XXIII. While the purpose of the sentencing regime is to punish an offender for committing a particular offence, the objective of forfeiture is to deprive offenders

of proceeds of crime and deter future crimes: *R. v. Angelis*, 2016 ONCA 675, at para. 32.

[133] Mr. Surette benefited from receiving $45,812.53 in "proceeds of crime" as defined in s. 462.3 of the *Criminal Code*. The monies fraudulently received from the victims, for vehicles that were never provided to them, are clearly benefits obtained through the commission of designated offence as defined in s. 462.3 of the *Criminal Code*.

[134] The evidence establishes, on a balance of probabilities, that the monies obtained by Mr. Surette's criminal acts are proceeds of crime obtained through the commission of designated offences. Accordingly, pursuant to section 462.37(1), the Court shall order that property be forfeited to Her Majesty.

[135] As Justice Watt observed in delivering the judgment for the Ontario Court of Appeal in *Angelis*, at para. 33:

> 33 Parliament also recognized that the forfeiture of proceeds of crime is not always practicable. Sometimes, proceeds can't be found. They may be outside Canada. Or in the hands of a third party. What was taken may have been substantially diminished in value, rendered worthless or commingled with other property that cannot be divided without difficulty: Lavigne, at para. 18. And so, Parliament enacted a provision, s. 462.37(3), to permit judges to impose a fine in lieu of forfeiture.

[136] Thus, when the monies cannot be subject to an order of forfeiture given the circumstances, including those outlined in s. 462. 37(3) of the *Criminal Code*, the Court may order a fine in lieu of forfeiture. Where the offender advised that he or she does not have the monies and, therefore, there are no proceeds to forfeit, a sentencing judge may impose the fine in lieu of forfeiture: *Angelis*, at paras. 33 - 36.

[137] In *Angelis*, Justice Watt, distilled a number of principles to guide the decision of whether to order the fine in lieu of forfeiture:

> (a)The principles of Part XXIII of the *Criminal Code* (sentencing) are applicable to only the extent that they are compatible with the specific provisions of Part XII.2 (proceeds of crime): para. 40;
>
> (b)The imposition of a fine in lieu of forfeiture is not punishment imposed upon an offender: para. 50;
>
> (c)The fine in lieu of forfeiture is not to be consolidated with sentencing on a totality approach: para. 51;
>
> (d)The sufficiency of the carceral component of a sentence to satisfy the applicable sentencing objectives and principles cannot justify refusal to order payment of a fine in lieu: para. 53;
>
> (e) Once the conditions for the imposition of a fine in lieu of forfeiture are met, a sentencing judge has limited discretion to refuse to make the order: para. 72;
>
> (f)The exercise of discretion to refuse to order a fine in lieu of forfeiture is necessarily limited by the objective of the provision, the nature of the order, and the circumstances in which the order is made: para. 73;

(g)The provisions of Part XXIII have no say in exercising the limited discretion to refuse to impose a fine in lieu of forfeiture: para. 56;

(h)The ability of a victim to pursue civil remedies does not militate in favour of refusing to impose a fine in lieu of forfeiture: para. 74;

(i)Ability to pay is not a factor to consider in deciding to impose a fine in lieu of forfeiture nor in determining the amount of the fine: para. 81; and

(j)Ability to pay is a factor to be considered in determining the time in which the fine is to be paid: para. 81.

[138] As Justice Chipman stated in *R. v. Blumenthal*, 2019 NSSC 35, at paras. 43-45;

43 Where a fine in lieu of forfeiture of proceeds of crime is ordered, any payments made pursuant to the fine should be credited to any restitution orders made by the sentencing judge: Angelis, para. 18. As such, the offender will not be required to pay twice (i.e. the restitution and the fine in lieu of forfeiture). In Angelis, the Ontario Court of Appeal allowed the Crown's appeal and imposed a fine in lieu of forfeiture in the amount of the losses suffered by the victims. This fine in lieu of forfeiture was imposed in addition to the restitution order.

44 In *R. v. Sponagle*, 2017 NSPC 23, Judge Derrick (as she then was) adopted the reasoning in Ontario decisions that the sentencing Court can make both a restitution and fine in lieu of forfeiture order. The Court can explicitly order that restitution take priority over the payment of the fine in lieu of forfeiture and that the fine in lieu be reduced by any amount paid pursuant to the restitution order: paras. 43 and 59. Further, the direction in s. 740 of the *Criminal Code* (to first consider restitution and then consider whether a fine is appropriate) does not apply to the fine in lieu of forfeiture: para. 46.

45 Ordering both restitution and the fine in lieu of forfeiture fulfills the Parliamentary intention of "giving teeth" to the sentencing provisions. Upon application by the Crown and fulfillment of the conditions precedent, Part XII.2 requires forfeiture be ordered and only provides limited discretion to not order a fine in lieu of forfeiture. When that fine in lieu of forfeiture accompanied by restitution and priority given to restitution, the victims of the offences will receive

> the "proceeds" upon payments being made by the offender. Restitution orders require the victims to proactively seek enforcement, either through entering the judgment in a civil court or seeking other remedy: *Criminal Code*, ss. 741, 741.2. As such, remedy on an unpaid restitution order relies upon the victims' knowledge and navigation of the legal system. In contrast, failure to pay a fine in lieu of forfeiture within the time period set out by the sentencing Court will result in consecutive default time; there is a tangible consequence for failing to make payments. As a result, there is a greater impetus on the offender to make payments, the benefit of which goes first to the victims through restitution.

[139] In this case, I am satisfied that the monies cannot be made subject to an order of forfeiture given the circumstances, including those outlined in section 462.37(3) of the *Criminal Code*. Accordingly, a fine in lieu of forfeiture is imposed because Mr. Surette advises, through counsel, that he does not have the monies to forfeit.

[140] I have also considered that, where a fine in lieu of forfeiture of proceeds of crime is ordered, any payments made pursuant to the fine should be credited to any restitution orders made by the sentencing judge: *Angelis*, at para. 18. As such, Mr. Surette will not be required to pay twice (i.e. the restitution and the fine in lieu of forfeiture). In *Angelis*, the Court of Appeal allowed the Crown's appeal and imposed a fine in lieu of forfeiture in the amount of the losses suffered by the victims. This fine in lieu of forfeiture was imposed in addition to the restitution order.

[141] The Crown seeks an order for a fine in lieu of forfeiture in the amount of $45,812.53, pursuant to s. 462.37(3) of the *Criminal Code*. The Crown further asks that this Order state that any restitution orders imposed shall take priority over payment of the fine in lieu of forfeiture ordered, and moreover, that the fine in lieu of forfeiture shall be reduced by any amount paid pursuant to the Restitution Order.

[142] Having considered all the evidence proffered in this hearing, including the contents of the pre-sentence report, and submissions of Counsel, I am satisfied that an order of forfeiture is not possible or practicable in this case.

[143] The objective of Part XII.2 would be frustrated if a fine in lieu of forfeiture was not ordered, and the circumstances do not justify exercising the limited discretion available to this Court to not order the fine.

[144] Accordingly, I hereby order a fine in lieu of forfeiture in the amount of $45,812.53, pursuant to s. 462.37(3) of the *Criminal Code,* which shall state that the restitution order shall take priority over payment of the fine in lieu of forfeiture ordered in this case, and that the fine in lieu of forfeiture shall be reduced by any amount paid pursuant to the restitution order.

[145] The Court has discretion for the amount of time to be given to Mr. Surette to pay the fine. Further, the Court has discretion to set the amount of default time to be served between twelve months and eighteen months of imprisonment, pursuant to s. 462.37(4)(a)(iii).

[146] In the result, I order that payment be made by Mr. Surette within ten years of today's date, as suggested by his counsel, Mr. Atherton.

[147] Further, in the unfortunate event that he defaults, he shall be subject to a period of 12 months in custody for being in default. However, as pointed out in *R. v. Lavigne,* [2016] 1 S.C.R. 392, at paras. 45 to 48, when the time allowed for payment of the fine instead of forfeiture has expired, the Court may not issue a warrant of committal unless it is satisfied that the offender has, without reasonable excuse, refused to pay the fine. Failure to pay because of poverty cannot be equated to refusal to pay.

Prohibition Order

[148] Lastly, pursuant to s. 380.2 of the *Criminal Code*, it is ordered that Mr. Surette not seek, obtain, or continue any employment, or become or be a volunteer in any capacity, that involves having authority over the real property, money or valuable security of another person for a period of 10 years from today’s date.

Appendix 1
Agreed Statement of Facts, Exhibit 1

Pursuant to section 655 of the *Criminal Code* of Canada, Michael David Surette (Mr. Surette) admits the following facts for the purpose of dispensing with the proof thereof at trial:

1. THAT at all material times Mr. Surette was employed by the Used Car Factory 21 in Dartmouth, Nova Scotia.

2. THAT while employed at the Used Car Factory 21 Mr. Surette collected monies from customers to whom he never ultimately provided vehicles.

3. THAT, specifically, Mr. Surette did deprive, by deceit, the following individuals of the enumerated sums by the methods listed:

a) Ms. Monica Bassett purchased a 2007 Toyota Yaris from Mr. Surette. On June 25, 2016 she sent Mr. Surette an email money transfer in the amount of $2,000.00 as a down payment on the vehicle. At the time, Mr. Surette advised Ms. Bassett that the vehicle would be ready no later than July 1, 2016 as it needed the air conditioner fixed. As time went on, whenever Ms. Bassett requested paperwork on the vehicle, Mr. Surette would tell her that something else was wrong with the car and push the delivery date back. Eventually, Ms. Bassett informed Mr. Surette that she wanted her deposit back and he agreed to return it by email money transfer within three days. That money was never sent to Ms. Bassett and after three days Mr. Surette advised a cheque was in the mail. On July 15, 2016 Ms. Bassett attended at the dealership and found it had closed down. Ms. Bassett never received a refund or the vehicle from Mr. Surette. Mr. Joel Sapp, the

owner of the Used Car Factory 21, later informed police that Ms. Bassett was one of three people who had been sold the same vehicle. Mr. Sapp ultimately wrote Ms. Bassett a cheque for $2000.00 to indemnify her for the loss.

b) Ms. Grace Gallow purchased a 2006 Chevrolet Aveo from Mr. Surette. On July 17, 2017 she sent Mr. Surette an email money transfer in the amount of $2000.00 as a down payment on the vehicle. At the time, Mr. Surette advised Ms. Gallow the vehicle would be ready July 25, 2016 as there were some aesthetic repairs required. Mr. Surette solicited three further payments, by way of email money transfer, from Ms. Gallow in the amounts of $250.00, $175.00, and $165.00, for a total of $2,590.00. The third payment was ostensibly for the purchase of a two-year warranty. Mr. Surrette provided Ms. Gallow with multiple excuses as to why the vehicle was not ready and then began avoiding her. Ms. Gallow never received a refund or the vehicle from Mr. Surette. Mr. Sapp later informed police that he has since given Ms. Gallow the vehicle to indemnify her for the loss.

c) Mr. Robert Gillis purchased a 2006 Ford Focus from Mr. Surette. On June 4, 2016 he sent Mr. Surette an email money transfer in the amount of $2,793.85 for the vehicle. At the time, Mr. Surette advised that Mr. Gillis could take possession of the vehicle, once a mechanical deficiency had been corrected, in a day or two. The vehicle was never ready, and Mr. Surette provided multiple excuses as to why Mr. Gillis could not take possession of the car. On July 6, 2016 Mr. Gillis demanded a refund. Mr. Gillis never received a refund or the vehicle from Mr. Surette. Mr. Joel Sapp, later informed police that the vehicle had in fact been sold to someone else, but he

did provide Mr. Gillis with an alternate vehicle to indemnify him for the loss. Mr. Surette did pay at least some portions of a rental car cost ($300.00) for Mr. Gillis for a couple of days.

d) Ms. Michelle Brake purchased a 2005 Toyota Matrix from Mr. Surette on May 21, 2016. Ms. Brake paid $4,200.00 in cash for the vehicle. Ms. Brake also made further monthly payments on the vehicle. At the time of the initial purchase, Mr. Surette advised that Ms. Brake could take possession of the vehicle, once some work on it was completed, in a week's time. The vehicle was never ready and on June 14, 2016 Ms. Brake demanded a refund, as she was paying interest on a loan for a car which she did not possess. After great effort and innumerable communications with Mr. Surette, by July 8, 2016 Ms. Brake had been able to get all but $250.53 refunded.

e) Mr. Paul Tingley purchased a 2005 Ford Focus from Mr. Surette. On June 19th, 2016 he paid Mr. Surette $500.00 in cash as down payment on the vehicle. Even though there was a credit-card terminal at the dealership, Mr. Surette insisted on payment by either email money transfer or cash. Mr. Paul Tingley was to take possession of the car once some mechanical work had been completed. The vehicle was never ready and on June 24th, 2016 Mr. Surette requested another payment of $1000.00 cash, which Mr. Paul Tingley made. On July 6th, 2016, Mr. Surette requested a third payment of $1905.15 cash, which Mr. Paul Tingley made. Finally, Mr. Surette requested a fourth payment of $500.00 on July 14th, 2016 for new tires and rims. With respect to the second, third and fourth payments, Mr. Surette met Mr. Paul Tingley at his bank to receive the cash. The vehicle was never

ready and Mr. Surette provided Mr. Paul Tingley with multiple excuses and explanations.

Mr. Paul Tingley resorted to significant lengths attempting to secure the vehicle. The following is an account of Mr. Paul Tingley's actions, taken from his statement:

> My girlfriend and I went to the original location [of the dealership] and it looked abandoned. There was no change of address notification on the door or windows, absolutely nothing. It took me a few days to find them. They were not where he [Mike Surette] said they were going. He told me directions that were at the other far end of Sackville Drive. He did not give a street address. Their new current address, however, was now on Kijiji for ads of cars they had for sale when they were at the Dartmouth address. He looked a bit shocked when I showed up at there. He hurried to meet me at the car door I was getting out of. He promised me the car would be ready Monday that time. I wanted my ownership papers, official receipt, and paperwork. He told me the computer was not set up at the new location yet. He said they are not even set up or finished unpacking yet. I asked him where the car was. He said, "MacPhee Ford."
>
> I started looking for the car. I went to The MacPhee Ford dealership twice. They were cooperative and professional. I spoke to a number of people there at the company's invitation to do so. They called several places and other lots in the area. No one had seen that car. Mike or the company have no account with them and no service history. The men

> and women who book appointments and work in the service bay said that car would have stood out like a sore thumb around there because it is so old, a wagon, and they are all car people who easily recognize and identify vehicles. They all checked computers and made calls. I thanked them for their help.
>
> I also went to the OK Tire locations. I found someone who knew of Mike. He had the 2008 purple Mazda 3 that he was driving at the Sackville Drive location. They never saw the beige 2005 Ford Focus wagon. All locations were contacted internally to see if any recent cars that met that description had been in or around any of their shops. I stood there while all calls were made. That car or any Focus wagons had not been "kick-in around there".
>
> This is where I had caught him in lies. He told me that it had been to these places different times, ordering parts, getting repaired, stuck waiting. At the end of it I asked him where the car was. He said he didn't know because he wasn't the one working on the car. All he would say is "he is working on the car" so where is the car? Who is "he"? *text in italics added.

Mr. Paul Tingley was living on a low income and the vehicle purchase was significant to him. The following is a further extract from his statement:

> At the time I was working part-time at the Bedford/Sackville Walmart located at 141 Damascus Rd. I had a start time of 5:00AM a lot of days, and sometimes closing shifts until 11:00PM. I also worked most weekends. There is no bus service at these times. A taxi one way is

> $32.00. I had a car when I started this job in March 2016 but it unexpectedly would not start one morning in May, after spending a lot of money on it, and having it repaired at a Ford Dealership. Rather than more money spent on repairs that were not lasting, it was decided I should get a vehicle I could just drive immediately. I was in an extreme financial bind, having not worked for a year before getting the minimum wage job at Walmart. With no options I had been diving into my credit line to get by. I would use my credit line to purchase another car, as with no full time job status I was told I would not be able to finance. Tired of looking at junk in people's backyards, and missing cars that had been sold before I could get to look at them, I thought going to a dealership would at least give me a vehicle that was inspected. It was also advertised as having a warranty.

Having borrowed money to purchase a vehicle, which he never obtained, Mr. Paul Tingley requested a transfer to a closer work location. He now walks the 30 minutes, each way, to work and takes an occasional bus. Mr. Paul Tingley never received a refund, of $3,905.15, or the vehicle, from Mr. Surette.

f) Ryan Witt purchased a Ford Focus Wagon from Mr. Surette. On May 31st, 2016 Mr. Witt paid Mr. Surette $550.00 as a down payment on the vehicle. He later paid another $650.00 towards the vehicle for a total of $1200.00. At the time, Mr. Surette advised the vehicle would be ready shortly but there were mechanical issues which needed to be addressed. After Mr. Surette provided repeated excuses of various mechanical faults in the vehicle which were delaying delivery, Mr. Witt demanded a refund. On July 4, 2016 Mr. Surette told Mr. Witt that a refund cheque was “in the

mail." On July 19, 2016 Mr. Witt discovered the dealership had closed down. Mr. Surette ultimately stopped responding to Mr. Witt and Mr. Witt never received a refund or the vehicle from Mr. Surette.

g) Philip Barnes purchased a 2007 Honda Fit from Mr. Surette in June of 2016. He made two payments, in cash, of $200.00 and $3,377.00. At the time, Mr. Surette advised the vehicle would be ready shortly but there were issues with the windshield which needed to be addressed. After repeated excuses for the delay in delivery of the vehicle, Mr. Barnes attended the dealership only to find it had closed down. Mr. Surette advised Mr. Barnes that it had moved, but then provided him with the wrong address. Mr. Barnes was able to determine the dealership's actual new location using the internet and eventually met with the owner, Mr. Joel Sapp. Mr. Sapp had no idea the Honda Fit in question had been sold and gave it to Mr. Barnes to indemnify him for the loss. Mr. Barnes' communications with Mr. Surette, by text message, are attached to these Admissions as Appendix 'A'.

h) Ashley Petrie purchased a 2007 Toyota Yaris from Mr. Surette. On March 31, 2016 Ms. Petrie, and her grandmother, paid $3,200.00 in cash to Mr. Surette. At the time, Mr. Surette advised the vehicle would be ready shortly but needed to be cleaned. After Mr. Surette provided repeated excuses for delaying delivery of the vehicle, Ms. Petrie's grandmother demanded the money be refunded. Mr. Surette told them he was mailing them a cheque, which never arrived. Ms. Petrie never received a refund or the vehicle from Mr. Surette. Mr. Sapp later informed police that he ultimately wrote Ms. Petrie a cheque for $3,200.00 to indemnify her for the loss.

i) Jennifer Hughes purchased a 2010 Dodge Caravan from Mr. Surette. On April 20, 2016 Ms. Hughes paid a deposit of $600.00 in cash to Mr. Surette for the vehicle. Mr. Surette provided repeated excuses for delaying delivery of the vehicle. Below is the text from the last emails between Ms. Hughes and Mr. Surette:

> From: jennhughes5.0@gmail.com
>
> Date: June 7, 2016 at 8:44:01 PM ADT
>
> To: mikeinnovascotia@gmail.com
>
> Subject: Re: Insurance
>
> Hello, I thought I'd give you a break from the calling lol...what's going on now? Am I close to getting the van yet? Will I have this week? Just getting anxious; it's been about 5 weeks. Can you send me a quick email please and let me know what's going on?
>
> Thanks
>
> Jenn
>
> - - - - - - - - - - -
>
> From: jennhughes5.0@gmail.com
>
> Date: July 28, 2016 at 7:48:20 PM ADT
>
> To: mikeinnovascotia@gmail.com
>
> Subject: Re: Insurance
>
> So I can't get you on your phone; that's fine. The rcmp and the BBB now have my complaints along with the others. I also have talked to legal council. What you did was so low. You have destroyed my faith. I really believed I was getting that van. I just want my kids 600.00 back. I saved up as much as I could to give you in hopes that I would have a safe and reliable vehicle for the kids and I. You should feel ashamed. I wonder what your kids would think of you? Just please give me my deposit back. I don't even care about the van. I have NOTHING to drive my kids around in anymore. If you are any kind of decent human being you would at least give me my money back ASAP. I don't know how people who do this shit can live with themselves. It's sickening. I will get my money back but you will be the one to just give it to me. You at least owe me that.
>
> Thank you
>
> Jennifer Hughes

Ms. Hughes never received a refund or the vehicle from Mr. Surette.

j) Between December of 2015 and May of 2016 Jude Johnson paid $2,500, in multiple installments, to Mr. Surette towards a 2014 Honda Civic. All but one payment was made by email money transfer. Mr. Surette provided repeated excuses for delaying delivery of the vehicle. Mr. Surette later attempted to secure a further $6,500 from Mr. Johnson's mother, ostensibly to buy the car out. Mr. Johnson never received a refund or the vehicle from Mr. Surette.

k) Stephanie Edwards and Jay Frizzell purchased a 2007 Toyota Yaris from Mr. Surette. They initially paid the total cost of the vehicle, in cash, between two payments on June 18, 2016 and June 20, 2016, for a total of $4,664.75. Over the subsequent months, delivery of the vehicle was repeatedly delayed and Mr. Surette solicited the following additional sums from the complainants to cover various, supposedly refundable, fees:

Early August 2016 – $360.00

August 22 - $550.00

August 23 - $950.00

August 24 - $1000.00

Approximately August 26 - $340.00 *(he asked for more than this, I told him we couldn't do the amount he asked for and he called his contact and got them down to this price)*

September 2 - $200 *(he asked for more than this, I told him we couldn't do the amount he asked for and he called his contact and got them down to this price)*

September 12 - $310.00

September 13 - $600.00

Note: The above parenthesis are taken from the statement of Ms. Edwards

The total sum taken from Ms. Edwards and Mr. Frizzell amounted to $8,974.75. Ms. Edwards and Mr. Frizzell never received a refund or the vehicle from Mr. Surette.

l) Mr. Wayde Schwartz purchased a 2010 Dodge Caravan from Mr. Surette. On May 1, 2016 Mr. Shwartz paid Mr. Surette $4,812.75, in cash, for the vehicle. Mr. Surette provided repeated excuses for delaying delivery of the vehicle. On August 1, 2016 Mr. Shwartz gave Mr. Surette a further $1000.00 for a 2013 Dodge Caravan. Mr. Surette then claimed there was a problem with this van as well, so on August 9, 2016 Mr. Shwartz paid an addition $1200.00 for a 2016 Dodge Caravan. Mr. Surette solicited the following additional sums from the complainant to cover various, supposedly refundable, fees over subsequent weeks:

$950.00 – taxes

$460.00 – taxes

$1,100.00 – fees

$400.00 – fees

$650.00 – fees

$480.00 – fees

$850.00 – taxes

$220.00 – plate fees

$500.00 – warranty

Mr. Schwartz paid a total of 12,624.00, in cash, for a vehicle. Mr. Surette made arrangements with Mr. Schwartz to refund the fees on August 26th at 1:00pm at an Access Nova Scotia center. Mr. Surette did not appear, and Access Nova Scotia employees advised Mr. Schwartz there was no van registered in his name. Mr. Schwartz never received a refund or the vehicle from Mr. Surette.

i) Peter Brown is 62 years old and on long-term disability. Around the time of these offences, Mr. Brown had declared bankruptcy and his vehicle at the time was in the process of being repossessed. He met with Mr. Surette in February of 2016. At the time, Mr. Surette advised that the dealership did not have any Honda Fits in stock, but that if Mr. Brown provided cash, Mr. Surette could purchase one at an upcoming auction next week. The price of the car was to be $2500.00.

By April of 2016, over the course of three payments, Mr. Surette had obtained $1900.00 from Mr. Brown, ostensibly to secure the vehicle at an auction. Eventually, Mr. Surette advised Mr. Brown that he had located a vehicle for him.

At one point, Mr. Surette drove Mr. Brown to a car lot near the Halifax International Airport to show Mr. Brown his vehicle. However, on arrival they were unable to get into the lot and Mr. Surette advised Mr. Brown that he had expected someone to be there to let them in.

Shortly after the trip to the Airport, Mr. Surette advised Mr. Brown that the vehicle was in Amherst. Mr. Brown took a bus to Amherst in order to see his vehicle. While onroute to Amherst, Mr. Brown called Mr. Surette and asked

him the name of the lot where the vehicle was stored. Mr. Surette then advised that the vehicle was onroute, at that very time, to Halifax. Mr. Brown returned, by bus, to Halifax.

Mr. Brown made several payments to Mr. Surette, who would pick Mr. Brown up at his home, or the nursing home where his mother was living, and drive Mr. Brown to the bank to take out more money for Mr. Surette. Mr. Surette visited Mr. Brown 8 – 10 times at his home and another 6-7 times at his mother's nursing home. Mr. Brown would pay Mr. Surette in cash taken from his bank account or his mother's bank account. Mr. Brown was never given a formal receipt but, on some occasions, Mr. Surette would hand write a receipt on a piece of paper. Ultimately, Mr. Surette provided a "customer disclosure" document to Mr. Brown for a Honda Fit with a VIN number of JHMGD38647S806319 cataloging payments of $8,070.00. This document is attached to these facts as Appendix 'B'.

All of the additional funds, beyond the cost of the car ($2,500.00) were to be refunded to Mr. Brown. Mr. Brown never received the vehicle or a refund for Mr. Surette.

6. The total monies defrauded amounted to $43,310.53. In some cases, as listed above, Mr. Sapp was later able to provide full or partial compensation by providing the vehicles themselves, comparable vehicles or, in one case, a cheque.

7. The actions detailed above constitute fraud within the ambit of s. 380 of the *Criminal Code*.

8. At the time of the above offences Mr. Surette was serving a Conditional Sentence Order, from March 10, 2016 through March 10, 2017 following convictions on a variety of fraud-related offences. A copy of that Conditional Sentence Order is attached as Appendix ‘C’.