SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Ross and Dawson*, 2020 NSSC 70

Date: 20200225
Docket: CRH No. 476294
Registry: Halifax

Between:

Her Majesty the Queen

v.

Bry'n Ross and Harold Dawson

D E C I S I O N

Judge:	The Honourable Justice James L. Chipman
Heard:	February 25, 2020, in Halifax, Nova Scotia
Oral Decision:	February 25, 2020
Written Decision:	February 25, 2020
Counsel:	Mark R. Donohue and Constantin Draghici-Vasilescu, on behalf of the Federal Crown Peter W. Kidston, on behalf of Bry'n Ross David Bright, Q.C., on behalf of Harold Dawson

By the Court:

INTRODUCTION

[1] By decision dated September 16, 2019 – *R. v. Ross and Dawson*, 2019 NSSC 275 – I convicted Bry'n Ross and Harold Dawson of the charged offences. Both offenders were convicted of a s. 380(1) offence (fraud over $5,000.00) and Mr. Dawson of an offence under s. 121(1)(b) (conferring an advantage or benefit on a government employee).

[2] Pre-sentence Reports (PSRs) were ordered and the sentencing was scheduled for December 17, 2019. Mr. Dawson missed his initial meeting with Correctional Services which led to a delay in preparing his PSR. In the result the sentencing of Mr. Ross and Mr. Dawson was adjourned to today's date with both offenders accepting responsibility for the delay.

[3] In advance of passing sentence I have listened to today's oral submissions and the expressions of remorse conveyed on the record by Mr. Ross. In addition, I have read the written materials consisting of the PSRs, briefs, authorities, three character reference letters submitted by Mr. Ross and four such letters with respect to Mr. Dawson. I should also be clear that I have disregarded the pleas for leniency contained in certain of the letters.

BACKGROUND

[4] In my decision after the trial I provided this overview at paras. 1 and 2:

> [1] In late 2011, file reviews conducted by the procurement office at the Shearwater military base raised concerns about certain contracts awarded respecting the heating plant. Following an investigation known as Operation Aftermath, it emerged that two civilian employees, Wayne Langille and the accused, Bry'n Ross, directed contracts to four companies connected to the co-accused, Harold Dawson. In 2016, the three men were charged with fraud, along with Kimberley Dawson. Mr. Langille pleaded guilty to a s. 121(1)(c) count in relation to this matter in Provincial Court. The charge against Ms. Dawson was eventually dropped.
>
> [2] During the six week trial, 37 witnesses were called and 47 exhibits were introduced. The exhibits were predominantly electronic, given the vast array of contracts and accompanying documents referable to the matters in issue.

[5] The Crown asserted that Mr. Ross and Mr. Dawson defrauded the federal government of approximately two million dollars during the charged period; i.e.,

April 1, 2008 – May 9, 2012. In my decision I did not find a precise amount outstanding. What I did say on this topic is found in these paras. (378 – 383):

> [378] The Crown has demonstrated on the evidence beyond a reasonable doubt that there was an actual loss of well in excess of $5,000.00 on account of the manipulated procurement process. Given that the proper bidding arrangement was not followed it is a fair observation that the best or fair price was never realized. For the vast majority of the contracts, true competitor companies were not afforded an opportunity to bid.
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> [379] Mr. Dawson admitted that he signed, or had Ms. Robar Harrisson sign, his wife's name on Colonial documents provided to DND. Similarly, Kelly Moore's signature was forged by Mr. Dawson and Ms. Robar Harrisson. These forgeries were dishonest and part of the ruse to pretend the company was distinct.
>
> [380] As for the alleged mark-ups, Mr. Dawson says that of the well over 600 contracts in evidence, the Crown had but a few examples of significant price mark-ups. Mr. Dawson stresses the fact that he was not confined to a specific mark-up percentage and that within the free market it was open for him to charge whatever he could get. Mr. Dawson points out that the Crown's expert, Ms. Shea, confirmed that if one of his companies ever made an incorrect charge, DND was always reimbursed.
>
> [381] While Mr. Dawson went to great lengths to emphasize his right to charge what he wanted in a free market, this evidence ignores the fact that he did this in an artificial market. The market was artificial because of his manipulation which excluded true competitors. This resulted in a true monetary loss to the government. In the result, when Mr. Dawson acknowledged charging up to 15 times what he paid (wholesale) for a part, this amounts to more than an extremely high profit. It represents a stark example of the deprivation to the government. When the contracts are scrutinized along with the quotes (and the prices the Dawson Companies received the parts for), it is easy to conclude the loss was far greater than $5,000.00.
>
> [382] Much evidence was led by the Crown in an attempt to demonstrate that the heating plant bought more parts from the Dawson Companies than reasonably may have been required. While I find it difficult to accept much of this evidence beyond a reasonable doubt, I do find it is made out in relation to the soot blower lances. Mr. Dawson notes that when he worked at Shearwater in the 1990s, they routinely blew soot. He notes that the soot blowers were ordered by Wayne Langille during March madness and that he simply complied with the request. In fact there were 11 of these devices purchased throughout the four year period. They were bought at times that do not fall within the "March madness" time period. Mr. Dawson said that he simply complied with Mr. Langille's requests but it defies logic as to why Mr. Dawson would have complied with the requests (which I do not believe were made) when he ought to have known (given his ongoing familiarity with the plant) that the plant had not blown soot in many

> years. I would add that there was no credible evidence demonstrating the soot blowing lances -- allegedly received by the Dawson Companies from a company when it ceased business in 2006 -- were ever delivered to 12 Wing Shearwater.
>
> [383] Ms. Shea's evidence confirms that Mr. Dawson took approximately $1 million out of his companies over the course of the four years. In and of itself there would be nothing wrong with this; however, given the totality of my findings, I am of the view that much of this is attributable to Mr. Dawson's fraud and the benefit he gave to Mr. Langille. I have discussed the former at length. As for the latter, below I have assessed the evidence regarding the second count.

BACKGROUND GLEANED FROM THE PSRS

Mr. Ross

[6] Mr. Ross is 65 years old. His parents are living and Mr. Ross has a close relationship with them. Mr. Ross has been married for 30 years and is father to two adult children. The Ross family is close. Friends describe Mr. Ross as a caring person. Those interviewed by the probation officer are of the view that the crime in question is completely out of character for Mr. Ross.

[7] Mr. Ross is a high school graduate and attended University of King's College. After 30 years with Department of National Defence (DND) he is now retired. His financial situation is stable. Mr. Ross does not have a criminal record. Mr. Ross' PSR concludes as follows:

> ... Mr. Ross has taken responsibility for his actions and appeared sincere about his comments. Mr. Ross plays a significant part in his community, and the information gathered from his collateral state the same.
>
> Mr. Ross has concerns if he is to serve a custodial sentence at a Correction Facility this will cause on due [*sic*, undue] hardship toward his wife, as he takes care of his wife who has mobility issues.
>
> If the Court deems a community disposition to be a suitable part of sentencing options, he would appear to benefit from the condition to report to a probation officer as directed and to complete community service work.

Mr. Dawson

[8] Mr. Dawson is 60 years old. Married for 30 years, he is the father of two adult children. He describes his marriage as generally positive and supportive.

[9] A high school graduate, Mr. Dawson received a diploma from University College of Cape Breton and has a certificate in power engineering, second class. Mr. Dawson currently commutes to a job in Terrance Bay, Ontario. He and his wife are "stretched" financially.

[10] Mr. Dawson is generally in good health although he suffers from high blood pressure and has back problems. His mental health is fine.

[11] Mr. Dawson does not have a criminal record and according to his canvassed friends, the subject convictions are considered out of character. Mr. Dawson's PSR concludes, as follows:

> The subject presented himself to the Dartmouth Community Corrections Office for the purpose of this Pre-sentence Report interview. The subject was polite, pleasant, cooperative and answered all questions asked of him throughout the interview. When asked about the offences before the Court the subject advised that he was surprised and upset and that the whole process has been shocking to him and his family. Unsure of what the future impact will be, he noted he is focusing on work and providing for his family.
>
> Before the Court is Harold Joseph Dawson, a first-time offender facing sentencing before the Supreme Court of Nova Scotia. The subject appears to have been leading a primarily pro-social lifestyle and having the support of family and friends. The subject has left running his own businesses and now works for another company. The subject does not appear to have any presenting issues at this time which may contribute to further offending. Should any counselling or supervision be required by the Court, it can be provided by Correctional Services.

RELEVANT *CRIMINAL CODE* PROVISIONS

[12] I accept Mr. Dawson's argument that because the Indictment charge period (April 1, 2008 – May 9, 2012) straddles the period before and after the November 1, 2011 amendments to the *Criminal Code*, that the offenders must be subject to the lesser punishment (see *Canada (Attorney General) v. Lalond*, 2016 ONCA 923 at para. 15). Accordingly, the sections applicable to the offenders are those in existence before the 2011 amendments, which read:

> Fraud
>
> 380 (1) Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, defrauds the public or any person, whether ascertained or not, of any property, money or valuable security or any service,

(a) is guilty of an indictable offence and liable to a term of imprisonment not exceeding fourteen years, where the subject-matter of the offence is a testamentary instrument or the value of the subject-matter of the offence exceeds five thousand dollars; or

(b) is guilty

(i) of an indictable offence and is liable to imprisonment for a term not exceeding two years, or

(ii) of an offence punishable on summary conviction,

where the value of the subject-matter of the offence does not exceed five thousand dollars.

Sentencing — aggravating circumstances

380.1 (1) Without limiting the generality of section 718.2, where a court imposes a sentence for an offence referred to in sections 380, 382, 382.1 and 400, it shall consider the following as aggravating circumstances:

(a) the value of the fraud committed exceeded one million dollars;

(b) the offence adversely affected, or had the potential to adversely affect, the stability of the Canadian economy or financial system or any financial market in Canada or investor confidence in such a financial market;

(c) the offence involved a large number of victims; and

(d) in committing the offence, the offender took advantage of the high regard in which the offender was held in the community.

Non-mitigating factors

(2) The court shall not consider as mitigating circumstances the offender's employment, employment skills or status or reputation in the community if those circumstances were relevant to, contributed to, or were used in the commission of the offence.

PURPOSE AND PRINCIPLES OF SENTENCING

Purpose

718 The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

(a) to denounce unlawful conduct;

(b) to deter the offender and other persons from committing offences;

(c) to separate offenders from society, where necessary;

(d) to assist in rehabilitating offenders;

(e) to provide reparations for harm done to victims or to the community; and

(f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

Fundamental principle

718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

Other sentencing principles

718.2 A court that imposes a sentence shall also take into consideration the following principles:

(a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,

(i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor,

(ii) evidence that the offender, in committing the offence, abused the offender's spouse or common-law partner,

(ii.1) evidence that the offender, in committing the offence, abused a person under the age of eighteen years,

(iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,

(iv) evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization, or

(v) evidence that the offence was a terrorism offence

shall be deemed to be aggravating circumstances;

(b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

(c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;

(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and

(e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

[13] Having referenced the relevant *Criminal Code* sections, I am also mindful of the Crown's submissions that some conditions that are considered to be aggravating on sentence arise by operation of the common law and through legal precedent. In this regard, I refer to Justice Malloy's helpful analysis in *R. v. Pavao*, 2018 ONSC 4889, at paras. 28 – 43.

[14] It is common ground that at the time of the offences a conditional sentence was available for each offence, pursuant to s. 742.1 which provides:

> Imposing of conditional sentence
>
> 742.1 If a person is convicted of an offence, other than a serious personal injury offence as defined in section 752, a terrorism offence or a criminal organization offence prosecuted by way of indictment for which the maximum term of imprisonment is ten years or more or an offence punishable by a minimum term of imprisonment, and the court imposes a sentence of imprisonment of less than two years and is satisfied that the service of the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2, the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the offender's compliance with the conditions imposed under section 742.3.

Aggravating Circumstances

Mr. Ross

[15] Mr. Ross was a DND purchasing officer and therefore in a position of trust. During this offence Mr. Ross abused the trust of his employer on a regular basis for just over four years. Mr. Ross' actions worked against the Treasury Board rules designed to promote fair competition amongst Canadian businesses.

Mr. Dawson

[16] Mr. Dawson's companies benefitted from the transactions. I found that well in excess of $5,000.00 of the approximately $1 million he drew from his companies was attributable to Mr. Dawson's fraud and the benefit he gave to Mr. Langille.

Mitigating Circumstances

Mr. Ross

[17] Mr. Ross has been on bail for eight years without incident. He does not have a criminal record. He has accepted responsibility for his actions and shown remorse. Mr. Ross has a positive PSR confirming that he is pro-social and has the support of family and friends. Mr. Ross was not shown to have benefitted from the profit from the fraud.

Mr. Dawson

[18] With the exception of the last sentence, all of Mr. Ross' mitigating circumstances apply to Mr. Dawson.

POSITION OF THE PARTIES

Crown

[19] The Crown characterizes what occurred in this case as a "large scale and complex fraud". In their brief they put the "two million dollar fraud" in context:

> During the offence period Mr. Ross awarded over 640 contracts, valued at approximately two million dollars, to Dawson's businesses.

[20] The Crown goes on to note:

> The range of sentences for large-scale complex frauds was discussed by Coady, J. in *R. v. Colpitts*, 2018 NSSC 180, at para. 111:
>
> > [111] I agree with the defendants that for large-scale, complex frauds of the nature committed here, Nova Scotia case law supports a range of three to six years' imprisonment.
>
> While this case does not involve market manipulation such as occurred in *Colpitts*, or a fraud against large investors such as occurred in *R. v. Drabinsky*, 2011 ONCA 582, it nonetheless involves systematic efforts to perpetuate a lengthy and significant fraud. Although fraud involving contracts for heating plants parts may appear mundane in comparison to the financial transactions that occurred in *Drabinsky* and *Colpitts*, this does not make the crime insignificant.
>
> *Colpitts* involved a market fraud initiated by Mr. Potter and Mr. Colpitts over an 18 month period designed to prop up the share price of Knowledge House Inc. The extent of the total loss suffered by investors was not clearly established but the court found that it "was a large-scale, multi-million dollar fraud that resulted

> in significant economic harm to investors and financial institutions". Mr. Potter was sentenced to 5 years in prison on each count concurrent and Mr. Colpitts was sentenced to 4 years in prison on each count concurrent.

[21] With respect to the additional charge facing Mr. Dawson, the Crown acknowledges a paucity of caselaw, referencing only two reported decisions. The Crown concludes its written submission on the s. 121(1)(b) offence with this:

> In this matter, the offence under s. 121(1)(b) could be considered part of the continuing criminal adventure of the fraud, however there is one distinguishing feature. The payment of the benefit to a government employee, Mr. Langille, although likely integral to the contracts being requisitioned, specifically relates to government integrity as is outlined in *Hinchey*. It is a separate offence that should be dealt with by way of a consecutive sentence.

[22] At the end of the day the Crown recommends federal jail time for each offender; three years for Mr. Ross and three and one half to four years for Mr. Dawson. The Crown summarizes their position as follows:

> Generally, when co-accused are sentenced for their role in a matter the sentences should be similar if the responsibility of each person is similar. In this case, there are aggravating factors relating to each accused, some of which they jointly share and some that are unique to each person. For Mr. Ross the main aggravating factor is that he was an employee of the Government, which is a very clear breach of trust and an aggravating factor listed in s. 718.2 of the *Criminal Code*.
>
> Mr. Dawson was not in a breach of trust situation. The aggravating factors relevant to Mr. Dawson are that he is the party who benefited financially from these transactions. The Crown has not proven that Mr. Ross received valuable benefits from Mr. Dawson. The Crown has shown a close relationship between the parties and the provision of minimal benefits such as restaurant lunches and a ride from the airport. Mr. Dawson on the other hand enjoyed an almost complete monopoly of all business from the heating plant for over four years. His companies received approximately $2 million in contracts. He withdrew approximately one million dollars in cash from his businesses during this time.
>
> With respect to documents seized from Mr. Dawson's place of business or home, a small number of records showed that Mr. Dawson charged significant mark ups to the Government. Importantly, Mr. Dawson has also been convicted under s. 121(1)(b), of providing a benefit to an employee, Mr. Langille.
>
> As we consider parity, it is important to note that none of this could have happened without Mr. Ross. Mr. Ross could have prevented this long-standing fraud. Moreover, it was at a minimum Mr. Ross' job to prevent such a scheme from going forward. Mr. Ross engaged in fraudulent activity that perpetuated the scheme. As such, it is not easy to differentiate the two accused.

> While sentencing is not simply a mathematical calculation, the fact that Mr. Dawson committed the additional offence is a distinguishing factor that requires an additional sanction because of the nature of that offence, its affect specifically on this matter and, as stated above, its general affect on the integrity of the Government.

Mr. Ross

[23] Mr. Ross points to the favourable PSR and then states as follows in his brief:

> The offence for which Mr. Ross has been convicted is serious and quite often attracts a sentence of federal time. The case law, however, indicates that a court has discretion in crafting an appropriate sentence taking into consideration of the offence and the offender.
>
> In the vast majority of fraud cases the offenders have received a financial benefit for themselves. In Mr. Ross's case there was no substantial financial benefit. It is submitted that this is a factor that differentiates this case from most of the cases dealing with sentencing for fraud.

[24] Mr. Ross asserts that a conditional sentence is available and represents a just and fit sentence in these circumstances. At the close of his brief, Mr. Ross' position is set forth as follows:

> In determining that a conditional sentence was a fit and proper sentence in this case the Court took into account factors including the lack of personal gain, no prior criminal convictions, a lengthy period on bail without incident, the support of his family and friends, a positive Pre-sentence Report and that he was no threat to the community at large.
>
> These factors in *McCarthy,* are also present in the case of Mr. Ross. He did not benefit personally, has no prior convictions, has been on release for a lengthy period of time with no incidents, has the support of family and numerous friends and would be no threat to the community at large if serving his sentence in the community.
>
> It is submitted that the imposition of a conditional sentence of two years less a day, followed by a period of probation, and the inclusion of community service work as part of the conditions, is an appropriate and fit sentence in the circumstances of this case and the particular circumstances of Mr. Ross.

Mr. Dawson

[25] Mr. Dawson points to the trial decision and states:

> Accordingly, there is no finding (other than "well in excess of $5,000") of an amount of money paid as a result of manipulated procurement process. The loss here consisted of two factors: there were a small number of times (the soot

> blowing lances) which were unnecessarily supplied. The entire cost of those times is a loss to the Crown.
>
> The second loss was the loss of opportunity to obtain a more competitive price from another supplier for the other products supplied. There was no evidence that Dawson was paid for a part which was not delivered. Accepting your Lordship's finding that this was an artificial market, the evidence of significant price mark ups was limited to a few examples. Many of the goods supplied might well have been supplied at exactly the price if a competitive bidding process had been used.

[26] Mr. Dawson emphasizes the favourable PSR and adds that unlike his co-accused he was not a government employee and committed no breach of trust. He therefore submits that he should receive a lesser sentence than Mr. Ross.

[27] Mr. Dawson cites caselaw and suggests that range of sentence of between eight months and two years less a day for a first offence of fraud. As for some of the Crown's submission, Mr. Dawson responds with this:

> The Crown reasons that this case is comparable to *Drabinsky*, *Colpitts* and *Potter*. Drabinsky raised $500 million dollars in a public offering based on fraud. He received five years for his actions, which led hundreds or thousands of shareholders to lose money – a $500 million fraud. Colpitts and Potter were convicted of what our Court of Appeal agreed was a "a large-scale, multi-million dollar fraud that resulted in significant economic harm to investors and financial institutions". … More than 120 employees lost their job when KHI collapsed; large numbers of investors lost money. Potter received a five-year sentence and Colpitts received four and a half years. This case is not a $500 million dollar fraud or a multi-million dollar fraud affecting 120 employees and dozens or hundreds of investors. Neither of the three cases relied on by the Crown is comparable to what is before the Court. Here, the government is the single victim who paid inflated invoices, the amount is modest, and there was no position of trust. …
>
> The Crown in its submission could locate only two reported sentencing decisions under s. 121: a two-year conditional sentence for Mr. Pilarinos and a three-year sentence for Mr. Fontaine (who defrauded a first nation of more than $2 million dollars). The *Fontaine* decision mentions a conviction under s. 122 which resulted in a 12 month sentence. Counsel for Mr. Dawson has not found any additional sentencing authorities.
>
> Because it is Dawson's submission that the offence arose out [of] the same transactions, the sentences should be concurrent. Dawson proposes a one-year sentence for the offence under s. 121 (which counsel seeks to have served in the community). The amount involved here is less than in *Fontaine*, the government is less vulnerable financially than the first nation in that case, there is no position of trust in this case.

[28] Ultimately, Mr. Dawson asks for a conditional sentence, as follows:

> However, unlike the cases relied on, Dawson was not in a position of trust. The government of Canada is not a vulnerable individual, whose ability to pay their ordinary expenses is threatened by the fraud. The fraud took place over a four-year period, however. The absence of the position of trust and the lack of a vulnerable victim place the case at the lower end of the range; the fact the fraud continued over a four-year period places it at the higher end of the range. On balance, it is submitted a sentence in the middle of the range – 18 months or so – is the appropriate sentence in this case.
>
> Both offences occur together, and accordingly the sentence should appropriately be concurrent.

***R. v. Potter; R. v. Colpitts*, 2020 NSCA 9**

[29] In the time since the Crown filed its brief, the Nova Scotia Court of Appeal released *R. v. Potter*; *R. v. Colpitts*. At paras. 818 – 949, the Court of Appeal reviewed the sentence appeals by the Crown noting at paras. 820 and 821:

> [820] There is no question the offences for which Mr. Potter and Mr. Colpitts were convicted are very serious offences. At the time the offences were committed, they carried a maximum sentence of ten years' imprisonment. (In 2004, the maximum penalty for a fraud conviction was increased to 14 years. In 2011, Parliament established a mandatory minimum sentence for frauds over one million dollars. These legislative amendments do not apply to these crimes committed in 2000 and 2001.)
>
> [821] The Crown has made a forceful case in support of its position. While we find some bases for disagreeing with the trial judge in relation to how he dealt with aspects of the issues before him, we are not persuaded we should intervene and increase the sentences he imposed. We grant leave to appeal sentences but dismiss the appeals.

[30] Having reviewed the decision in *Potter* it is apparent that the Court was focussed on the difference between sentencing ranges for s. 380(1) and s. 380(2) offences. At paras. 837 – 839 the Court of Appeal reviewed Justice Coady's reasons for sentence and their words have application here:

> [837] The trial judge understood denunciation and general deterrence are the most important sentencing objectives in cases of large-scale, premeditated fraud. He cited the emphasis by the Ontario Court of Appeal in *R. v. Drabinsky* [2011 ONCA 582] a case we will say more about later, that in large commercial frauds,

> the dominant principles of denunciation and deterrence "most often find expression in the length of the jail term imposed".
>
> [838] Specific deterrence was not an issue: the trial judge found there was "virtually no risk" either Mr. Potter or Mr. Colpitts would re-offend.
>
> [839] The trial judge recited the purpose and principles of sentencing laid out in ss. 718 to 718.2 of the *Criminal Code* and noted the fundamental principle of proportionality enshrined in s. 718.1, requiring sentences be "proportionate to the gravity of the offence and the degree of responsibility of the offender". He recognized "sentencing is a highly individualized and fact-specific exercise". Undoubtedly with Bruce Clarke's three-year sentence in mind, he observed the principle of parity—similar sentences for similar offenders who have committed similar offences in similar circumstances—may have less application where the circumstances warrant because of the principle of proportionality.

ANALYSIS AND DISPOSITION

[31] The Crown has characterized the overall scheme of the crimes in question as complex and points to their lengthy duration in advocating for federal jail time. The Crown says that "systematic efforts to perpetuate a lengthy and significant fraud" align it with *R. v. Potter*; *R. v. Colpitts*, *R. v. Drabinski* and other like cases.

[32] In one of the cases submitted by the Crown, *R. v. Surette*, 2019 NSPC 46, Judge Hoskins notes as follows at para. 71:

> 71 The following cases, albeit a small sample, illustrate the broad range of sentences in Nova Scotia for the offence of fraud:
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> • *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.
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> • *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;
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> • *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.

[33] Today in oral argument the Crown referenced the ninth case referred to by Judge Hoskins, *R. v. Elmadani*, citing paras. 106 – 119. This is a decision of Derrick, P.C.J., as she then was. Of the referenced paras., I note para. 112 where now Justice Derrick notes that breach of trust convictions have led to sentences of incarceration and conditional sentences in Nova Scotia:

> [112] In Nova Scotia, breach of trust fraud convictions have led to sentences of incarceration and conditional sentences. (see, for example, *R. v. Ferguson*, [1999] N.S.J. No. 481 (P.C.) -- conditional sentence; *R. v. Matheson*, [2001] N.S.J. No. 195 (S.C.) -- conditional sentence; *R. v. Decoff*, [2000] N.S.J. No. 224 (S.C.) -- conditional sentence; *R. v. Trask*, [2005] N.S.J. No. 561 (P.C.) -- conditional sentence of two years less a day, joint recommendation; *R. v. Pottie*, [2003] N.S.J. No. 543 (S.C.) -- conditional sentence; R. v. Hurlburt, [2012] N.S.J. No. 420 (S.C.) -- conditional sentence; *R. v. Flemming*, [2013] N.S.J. No. 633 (P.C.) -- 18 month conditional sentence, jointly recommended; *R. v. Hill*, [1997] N.S.J. No. 236 (C.A.) 12 months incarceration upheld on appeal; *R. v. Teresa Cox-Kubas*, unreported decision of MacDougall, P.C.J., November 22, 2005 -- 12 months incarceration); *R. v. Naugler* [2011] N.S.J. 519 (P.C.) -- 8 months incarceration; *R. v. Lee*, [2011] N.S.J. No. 611 (P.C.) -- 10 months incarceration; *R. v. Connell*, [2015] N.S.J. No. 7 (S.C.) -- 2 years, joint recommendation.

[34] At para. 115 Judge Derrick went on to note that Mr. Elmadani, "previously received the benefit of a conditional sentence in relation to a fraud he perpetrated against an employer". To my mind this fact alone significantly distinguishes the *Elmadani* case from what we have here with two first time offenders. I do not believe Mr. Ross and Mr. Dawson require the specific deterrence emphasized in the sentencing decision of Mr. Elmadani.

[35] Earlier in this decision I noted the *R. v. Pavao* decision of Justice Malloy. I note that she concluded her analysis of the aggravating factors in that case with this para.:

> [43] In this case, clearly the magnitude of the fraud, its complexity and duration are factors that would always have been considered to be aggravating, with or without the 2011 amendments. Likewise, a crime that has had a significant impact on victims, particularly where the victims are vulnerable, is considered an aggravating factor in all criminal offences, including financial offences such as fraud. In a financial offence, it is obvious that the financial circumstances of the victim would therefore be a factor. I would expect that a failure to comply with a licensing requirement or professional standard would typically attract a higher sentence. Likewise, efforts undertaken to conceal the fraud by destroying or hiding records would likely be seen as aggravating. However, in this particular case, I do not consider these latter two factors to play a significant role and have not put any weight on them.

[36] Although I agree with Justice Malloy's approach to have considered all of the relevant aggravating factors even without the specific statutory regime, I do not find many commonalities with what she cited as aggravating factors and what we have here. Indeed, I note that Mr. Pavao's crimes involved ten counts of fraud against named individuals and one count of defrauding the public. The total amount of the fraud involving the sale of shares in gold mining companies exceeded $1.1 million. For reasons that I will explain, I do not believe the subject fraud was anywhere approaching this magnitude.

[37] When I consider all of the authorities submitted by the Crown and Defence along with the Court of Appeal's recent decision in *R. v. Potter*; *R. v. Colpitts*, I cannot equate what happened here to the "large-scale fraudsters" cases. While it is true that Mr. Ross and Mr. Dawson committed the offences over a relatively lengthy period of time, I do not regard their scheme as being very complicated or sophisticated. Indeed, I venture to say that had the late 2011 file reviews been carried out earlier, and in the same fashion, I have no doubt that the crimes would have been detected much earlier.

[38] While in no way excusing the planned fraudulent behaviour of the offenders, I regard their activities as having far less impact than what occurred in several of the cases submitted by the Crown. By way of example, whereas the figures of $2 million and $1 million find their way into my trial decision and the briefs, it is important to put these numbers in context. As the Crown clarified in their sentencing brief, the totality of the value of the 640 contracts over the four year period was approximately $2 million. Of this amount, roughly half was extracted

by the Dawson companies. Further, this amount must again be considered in the four plus year context such that Mr. Dawson's companies received on average a total of less than $250,000.00 per annum and given the expert opinion evidence of Ms. Shea, this figure in no way equates with profit.

[39] In sentencing Mr. Ross and Mr. Dawson I am cognizant of the very important sentencing objectives of denunciation and general deterrence. In my view, specific deterrence is not an issue as there is essentially no chance of either Mr. Ross or Mr. Dawson re-offending. In coming to my decision I have borne in mind the current plight of both men. Mr. Ross is in his mid-sixties and helps with the care of his wife who has mobility issues. Mr. Dawson is sixty and has ongoing back pain. Owing to financial challenges Mr. Dawson has put off retirement. He presently commutes to his job in Ontario.

[40] Both offenders have asked for conditional sentences. The imposition of a conditional sentence has been recognized as a punitive measure. Over twenty years ago the Nova Scotia Court of Appeal in the case of *R. v. Wheatley*, [1997] NSJ 173 stated at para. 22:

> [22] A conditional sentence is punitive. It is a sentence of imprisonment to be served in the community for the full term with conditions as set by a sentencing judge which significantly restrict the liberty of the offender. In appropriate circumstances it is to be imposed as an alternative to the other sentencing procedures, but only if the court is satisfied that serving a sentence in the community will not endanger the safety of the community. With respect to those who may hold a contrary opinion, it should not be considered a "soft" penalty.

[41] In the seminal case on conditional sentences, *R. v. Proulx*, [2000] 1 SCR 61, Chief Justice Lamer stated at paragraph 100:

> [100] Thus, a conditional sentence can achieve both punitive and restorative objectives. To the extent that both punitive and restorative objectives can be achieved in a given case, a conditional sentence is likely a better sanction than incarceration. Where the need for punishment is particularly pressing, and there is little opportunity to achieve any restorative objectives, incarceration will likely be the more attractive sanction. However, even where restorative objectives cannot be readily satisfied, a conditional sentence will be preferable to incarceration in cases where a conditional sentence can achieve the objectives of denunciation and deterrence as effectively as incarceration. This follows from the principle of restraint in s. 718.2(d) and (e), which militates in favour of alternatives to incarceration where appropriate in the circumstances.

Further in the decision at para. 107, the Supreme Court of Canada noted:

> [107] Incarceration, which is ordinarily a harsher sanction, may provide more deterrence than a conditional sentence. Judges should be wary, however, of placing too much weight on deterrence when choosing between a conditional sentence and incarceration: see *Wismayer*, *supra*, at p. 36. The empirical evidence suggests that the deterrent effect of incarceration is uncertain. …

[42] In all of the circumstances I am of the view that conditional sentences are the proper sentences for Messrs. Ross and Dawson. I am of the overwhelming view that it would not be in the interests of justice to commit Messrs. Ross and Dawson to a prison environment. In this regard, I have considered their ages and circumstances along with authority from our Court of Appeal. With respect to the latter, I am especially mindful of Justice Farrar's comments in *R. v. Livingstone*; *R. v. Lungal*; *R. v. Terris*, 2020 NSCA 5 at paras. 57 and 58.

[43] Whereas on the first count Mr. Ross' (then) employment with DND means he was in a trust position as opposed to his co-offender, Mr. Dawson obviously gained financially in a way that Mr. Ross did not. To my mind these features tend to "even out" their respective crimes of fraud.

[44] Mr. Dawson was also convicted of the s. 121(1)(b) offence; however, I regard this crime as part of the continuing criminal fraud venture such that I am not prepared to entertain the Crown's argument that it should be dealt with by way of consecutive sentence.

[45] In the result I hereby impose a conditional sentence order of two years, less a day for both Mr. Ross and Mr. Dawson on the offence of fraud under s. 380(1) of the *Criminal Code*. Further, on the count under s. 121(1)(b) with respect to Mr. Dawson, I sentence the identical sentence, to be served concurrently.

[46] I am satisfied that Mr. Ross and Mr. Dawson serving their sentences in the community will not endanger its safety and is consistent with the fundamental purpose and principles of sentencing. Mr. Ross and Mr. Dawson shall serve their sentences in the community under the following conditions:

(a) keep the peace and be of good behaviour;

(b) appear before the Court when required to do so by the Court;

(c) report to a Supervisor at Halifax or Dartmouth Probation Services on or before February 28, 2020 and as directed;

(d) remain within Nova Scotia, except for Mr. Dawson who has the Court's written permission to travel to Ontario for work;

(e) notify the Court or the Supervisor in advance of any change of name or address, and promptly notify the Court or the Supervisor of any change of employment or occupation; and

(f) perform 120 hours of community service as directed by your Supervisor over a period not exceeding eighteen months.

Chipman, J.