SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Kennedy*, 2021 NSSC 322

Date: 20211124
Docket: *Halifax*, No. 498999
Registry: Halifax

Between:

Her Majesty the Queen

v.

Diane Christine Kennedy

Restriction on Publication: 486.31(1) cc – Identity of a Witness

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SENTENCING DECISION

Judge:	The Honourable Justice Joshua Arnold
Heard:	October 8, 2021, in Halifax, Nova Scotia
Final Written Submissions:	October 5, 2021
Counsel:	Zachary Firlotte and Christine Driscoll, for the Provincial Crown Scott Brownell, for Diane Kennedy

Order restricting publication

486.31 (1) In any proceedings against an accused, the judge or justice may, on application of the prosecutor in respect of a witness, or on application of a

witness, make an order directing that any information that could identify the witness not be disclosed in the course of the proceedings if the judge or justice is of the opinion that the order is in the interest of the proper administration of justice.

Overview

[1] Diane Kennedy was convicted after trial of fraud in the amount of $29,063.16, and unlawful use of a debit card.

[2] She has a lengthy criminal record for similar crimes. Ms. Kennedy has had a very difficult life and is now the main caregiver for her adult son, who has many challenges. She has done almost nothing to rehabilitate herself and is habitually dishonest.

[3] The Crown recommends a sentence of three to five years in prison, while defence is requesting a two-year custodial sentence followed by a period of probation.

Facts

[4] The circumstances of these crimes are detailed in the trial decision (*R. v. Kennedy*, 2021 NSSC 211). Essentially, while the complainant, B.P., was on an alcoholic binge, Ms. Kennedy improperly obtained the PIN for his debit card, then took the debit card from him in a taxi without his permission while he was intoxicated, and used the card and PIN without B.P.'s permission, to fraudulently take money out of his bank accounts, make purchases, and obtain cash advances. Ms. Kennedy drained B.P.'s bank accounts as quickly as she was able, until the card was disabled. The total amount taken from B.P. by Ms. Kennedy was $29,063.16. B.P. was mostly reimbursed by the bank. The bank has not been reimbursed.

[5] According to the pre-sentence report, Ms. Kennedy is 58 years old. She self-reports that she started living on the street when she was 10 years old and supported herself through the sex trade for most of her life. Ms. Kennedy has little education, having left school in Grade 6. She has no history of sustained employment outside of the sex trade.

[6] Ms. Kennedy has 10 siblings but has no contact with or support from her family. She has a 38-year-old son, Percy, who has significant challenges including autism, paranoid schizophrenia, and psychosis. Ms. Kennedy says that her son is entirely reliant on her. According to the pre-sentence report:

> Ms. Kennedy reported her now adult son Percey has been diagnosed with Autism (aggressive), Paranoid Schizophrenia and Psychosis. Percey is 100% reliant on Ms. Kennedy for survival. Same stated "he functions mentally as a three-year-old,

> needs meds every two hours and I am the one who gives all his medications. I worry what will happen to my son. He tells me he will kill himself if he doesn't see mom. They will put Percy in the forensic ward if I go to jail."
>
> [As appears in original]

[7] In relation to Percy's challenges, a friend of Ms. Kennedy's, Brian Gerrie Ferguson, says:

> I met Diane on the street. She called me up and we became friends. That was 2016. I started going over to Diane's apartment to watch Percy when she did errands, when she was living on Charleston street. Diane had a Respite Care program that pays for me to watch Percy. I watch Percy on average two to three times a week. This varies, as sometimes it is more, sometimes it is less, depending on his needs. Percy can do laundry and go to the bathroom by himself, but he can become easily agitated. When Diane is not there, [he] gets agitated, he can enter extreme paranoia, when what he says does not make sense. He is unable to shop and cook for himself. He is deeply delusional. He is 39 years old. He often thinks he is a different person. Extremely paranoid. Gets very agitated and angry and throws things. Unable to stay at home without his mother. He throws things around and throws things on the floor. He forgets to bathe, sometimes forgets to clothe himself. Difficult for him to be in public because he wanders off and he gets lost following things in his own mind. Often the police pick him up and drive him back home. He's on anti-psychotic medication. Just since March that I spent this much time with him. Percy could not live alone, he would have to be put in institutional care without a care taker. Diane feeds him and cleans up the apartment. Mostly he just smokes and plays video games.
>
> [As appears in original]

[8] Ms. Kennedy has diabetes and Multiple Sclerosis but has no identifiable substance abuse issues. Her criminal record is significant. As noted in the Crown's brief:

> [6] Ms. Kennedy has been convicted 72 times between November 13, 1986 and March 15, 2016. Most recently, she was sentenced to a Conditional Sentence Order for a duration of two years less a day for violations of sections 380(1)(b) and 342(1)(c) of the *Criminal Code*.
>
> [7] The most relevant convictions for the purposes of these proceedings are:
>
> - 47 prior convictions for fraud contrary to section 380 of the *Criminal Code* or its predecessor sections; and
> - 5 prior convictions for theft, forgery, possession, or use of a credit card contrary to section 342 of the *Criminal Code*;
>
> [8] Notably, Ms. Kennedy has received the following custodial sentences:

- June 29, 2011: twelve months continuous custody at a provincial facility followed by two years probation for violations of section 380 of the *Criminal Code*;
- February 7, 2006: two years continuous custody at a federal facility for violations of sections 380 and 342 of the *Criminal Code*; and
- April 19, 1999: two years continuous custody at a federal facility for violations of section 380 of the *Criminal Code*.

> [9] Since November 1986, Ms. Kennedy has received other custodial sentences for fraud-related offences. The above-noted sentences are only the most recent. The record of incarceration for fraud-related offences is highly relevant for sentencing purposes. The sentences handed down clearly have not deterred her from this behaviour.

[9] At the conclusion of counsel's oral arguments I gave them an opportunity to make further submissions in relation to the sad life principle and the impact of pre-trial release conditions.

[10] Following oral argument the Crown forwarded information detailing an attempt by Ms. Kennedy to have her sentencing adjourned (originally scheduled for September 10, 2021) for dishonest reasons. She fabricated a scheme involving care for Percy that supposedly involved her sister only being available to help with his care at a later date. The police became involved, the dishonesty was exposed, her trial counsel was forced to withdraw, and she is now represented by new counsel. While not an aggravating factor, her continued dishonesty is noteworthy.

Principles of Sentencing

[11] Sections 718, 718.1 and 718.2 of the *Criminal Code of Canada* set out the principles and purposes of sentencing. They state, in part:

> **718** The fundamental purpose of sentencing is to protect society and 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 and the harm done to victims or to the community that is caused by 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 or to the community.

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

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 gender identity or expression, or on any other similar factor,
>
> …
>
> **(iii)** evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,
>
> **(iii.1)** evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation,
>
> …
>
> 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 and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

[12] Section 380(1) of the *Criminal Code* sets out the offence of fraud. Section 380.1 sets out factors considered aggravating in fraud cases and states:

> **380.1 (1)** Without limiting the generality of section 718.2, where a court imposes a sentence for an offence referred to in section 380, 382, 382.1 or 400, it shall consider the following as aggravating circumstances:
>
> > **(a)** the magnitude, complexity, duration or degree of planning of the fraud committed was significant;
> >
> > **(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;
> >
> > **(c.1)** the offence had a significant impact on the victims given their personal circumstances including their age, health and financial situation;
> >
> > **(d)** in committing the offence, the offender took advantage of the high regard in which the offender was held in the community;
> >
> > **(e)** the offender did not comply with a licensing requirement, or professional standard, that is normally applicable to the activity or conduct that forms the subject-matter of the offence; and
> >
> > **(f)** the offender concealed or destroyed records related to the fraud or to the disbursement of the proceeds of the fraud.
>
> [Emphasis added]

[13] The Crown says that s. 380.1(1)(c.1) is particularly relevant.

Bottom-line position of the Parties

Crown

[14] The Crown says that the aggravating factors include Ms. Kennedy's criminal record for related offences and her attempt to spend or withdraw as much of B.P.'s money as she could before the debit card was deactivated. The Crown's recommendation on sentence is noted in their brief:

> [39] Based on all the above, the Crown recommends the following sentence:
>
> - Three to five years imprisonment, position to be finalized upon receipt and review of the Presentence Report; and
> - An order that Ms. Kennedy not communicate, directly or indirectly, with B.P.

Defence

[15] Counsel for Ms. Kennedy says that a two-year period of custody is appropriate, as noted in their brief:

> [45] The Defence is suggesting a 2-year period of custody. This is proportional with the sentencing case law for comparable offences. This sentence would also accomplish denunciation and deterrence.
>
> [46] Ms. Kennedy's traumatic childhood should serve as a mitigating factor with respect to her sentence. Also, her lengthy period on strict release conditions without any further issues should be treated as a mitigating factor.

Sentencing Considerations

Deterrence

[16] Ms. Kennedy has more than 70 prior convictions for fraud or related offences. She has received non-custodial sentences, including suspended sentences with probation on many occasions, but has not been deterred from continuing her criminal activity. In February 2006 she received a 30-month federal sentence for fraud related offences. She received a two-year less a day conditional sentence on March 15, 2016, for more offences of dishonesty. The instant offences were committed in October 2018. Clearly, the CSO likewise had no deterrent effect. There is no punishment that has a deterrent effect on Ms. Kennedy's propensity to commit crimes of dishonesty.

Collateral Consequences

[17] Counsel for Ms. Kennedy urges the court to consider the repercussions to Ms. Kennedy's son if she were incarcerated, that is, her inability to care for him, and to Ms. Kennedy herself, who will worry about his care in her absence. The Defence says this is a collateral consequence that should mitigate her sentence. However, Ms. Kennedy has numerous convictions for fraud stretching back over decades. She is fully aware of the harm caused by taking someone else's money. She is fully aware of the criminal consequences. She was fully aware that what she was doing was illegal. She tried to obtain as much financial gain as she could with B.P.'s debit card as quickly as she could. She knew of the potential consequences for committing these crimes. Many parents who commit crimes have to be separated from their children if a custodial sentence is required. The collateral consequence in this case, if this truly is a collateral consequence, is not mitigating.

Sad Life Principle

[18] The sad life principle was not specifically raised by either party. However, considering the arguments raised by Ms. Kennedy, I invited additional submissions on this issue. Ms. Kennedy left home at age ten, has lived on the streets since then, has a very limited education, has been a sex-worker for much of her life, and looks after her challenged adult son. The sad life principle was succinctly described by Hoskins J. in *R. v. Gloade*, 2019 NSPC 55:

> [79] The sad life principle must be considered in this case, as there is an evidentiary basis for its consideration when one considers the personal circumstances of Ms. Gloade, as discussed in all the reports prepared for this sentencing hearing, including the Pre-Sentence Report, the Gladue Report and the sentencing proposal report arising from the Sentencing Circle.
>
> [80] Let me be clear, the sad life principle involves much more than an evidentiary basis for a sad life. It also requires an offender to demonstrate a genuine interest in rehabilitation, such as Ms. Gloade has done in this case by successfully engaging in counselling and/or treatment, and by becoming gainfully employed in a position where her employer fully supports her rehabilitation efforts.
>
> [81] The so-called sad life principle is premised on the principle of restraint and is often considered in cases where the offender has demonstrated a genuine interest in rehabilitation. These cases often involve offenders who are victims of sexual and /or physical abuse, or have experienced a horrific upbringing.
>
> [82] Often the challenge for the sentencing judge is to consider all of the offender's personal antecedents and put the present offences into that context in crafting a sentence which underscores the principle of restraint.
>
> [83] This approach usually underscores a reluctance to re-incarcerate the offender or to impose a lengthy period of incarceration where one would have otherwise been imposed. In these situations, the objective is to fashion a sentence that will promote self-rehabilitation and thus protect the public in the long-term. [Emphasis added]

[19] Ms. Kennedy's counsel says:

> 4. The sad-life principle was also discussed in the Supreme Court decision *R v Simmonds*, 2021 NSSC 54, a case the court is certainly familiar with. In this decision, the sad life principle, as stated in *R v Gloade*, was confirmed. Again, what is required under this principle of sentencing is a "sad-life" and a demonstrated genuine interest in rehabilitation.

[20] In support of this position, the defence provided a letter of support from Linda Grandy, Court Corrections Support Worker at Stepping Stone, who states:

> I am writing a letter of support for Diane Kennedy. I have known Diane for over 20 years while in my position at Stepping Stone Association as a Court/Corrections Support Worker.
>
> Over the years Diane has accessed services at our Drop-in Center for one-on-one client support. Approximately six years ago when our office was on Maitland Street we had received funding for our Transition Support Program where we offered personal and professional development sessions to help program users work towards their goals. At that time Diane did attend some programs and I do know she successfully completed Mental Health First Aid and WHMIS. I believe there may be several more programs that she completed at that time. My position as Court/Corrections Support Worker kept me out of the office and in the community most of the time so I am not sure what other programs she did attend. We have moved twice since then and all the staff who were doing programs at that time no longer work with us. We do have files, but our last move was to a much smaller space and those files are stored.
>
> Diane had to stop coming to programs because she is the sole caregiver for her son Percy who has schizophrenia and [has] been getting worse over the years and Diane is unable to leave him alone. Diane has done everything in her power to make sure her son was able to be with her and live at home.
>
> Diane has been looking for suitable housing for her and her son for sometime. She has been accepted into Metro Regional Housing which is an opportunity that takes years sometimes to get into.
>
> In closing, I have supported Diane over the years in the courts and do understand her past. I have also seen her do well on her release conditions and Conditional Sentence Orders. If Diane is given a chance to serve her sentence in the community Stepping Stone would be happy to support her in anyway that we can.
>
> [Emphasis added; As appears in original]

[21] There is no evidence that Ms. Kennedy has done anything to rehabilitate herself since taking programming six years ago.

[22] The sad life principle as historically applied, works to restrain the sentence if the offender has demonstrated a genuine interest in rehabilitation. There has been no such indication from Ms. Kennedy. Nonetheless, her troubling background and significant life challenges cry out for some restraint in imposing sentence.

Pre-trial release conditions

[23] In *R. v. Downes* (2006), 208 O.A.C. 324, Rosenberg J.A., for the Ontario Court of Appeal, explained the need to take pre-trial custody into account when determining the appropriate sentence for an offender (some citations omitted):

> [23] It is now well established that an offender should be given credit for pre-sentence custody. The rationale for doing so comes from the provisions of the *Criminal Code*, R.S.C. 1985, c. C-46 and judicial recognition of the conditions under which pre-sentence custody is served. Section 719(3) of the *Criminal Code* expressly provides that the sentencing court may take pre- trial custody into account. As Arbour J. said in *R. v. Wust*, 2000 SCC 18 (CanLII), [2000] 1 S.C.R. 455, [2000] S.C.J. No. 19, 143 C.C.C. (3d) 129, at para. 41, "while pre-trial detention is not intended as punishment when it is imposed, it is, in effect, deemed part of the punishment following the offender's conviction, by the operation of s. 719(3)".
>
> [24] While appellate courts do not lay down any fixed formula, it is generally agreed that a sentencing court should give more than 1:1 credit for pre-sentence custody in recognition of the circumstances that attend pre-sentence custody in most cases…As Laskin J.A. explained in *R. v. Rezaie* (1996), 1996 CanLII 1241 (ON CA), 31 O.R. (3d) 713, [1996] O.J. No. 4468, 112 C.C.C. (3d) 97 (C.A.), at p. 721 O.R., p. 104 C.C.C., in many respects pre-trial custody is even more onerous than post- sentencing custody:
>
> > First, other than for a sentence of life imprisonment, legislative provisions for parole eligibility and statutory release do not take into account time spent in custody before trial (or before sentencing). Second, local detention centres ordinarily do not provide educational, retraining or rehabilitation programs to an accused in custody waiting trial.
>
> [25] Thus, as a rule, trial courts will give 2:1 credit for pre-sentence custody and occasionally enhanced credit where the circumstances under which the offender has spent his time in jail have been particularly onerous. And in some cases, trial courts will give less than 2:1 credit because of the circumstances of the custody or the reasons for the detention…
>
> [26] These rationales do not readily apply to time spent on bail, even under stringent conditions such as house arrest, for three reasons. First, there is no statutory provision that directly addresses the issue. Section 719(2) of the *Criminal Code* provides that, "Any time during which a *convicted person* is unlawfully at large or *is lawfully at large on interim release* granted pursuant to any provision of this Act does not count as part of any term of imprisonment imposed on the person" [emphasis by Rosenburg J.A.]. However, there is no suggestion that this provision limits the right of a sentencing court to take into account, as a mitigating factor, time spent on pre-sentence bail…
>
> [27] Second, even the most stringent bail conditions, including house arrest, tend to allow the offender the opportunity to work, attend school, attend medical

> appointments, conduct religious worship and address personal needs. The rehabilitative and treatment options that are often denied an accused in pre-trial custody are usually available, even to an accused on house arrest.
>
> [28] Third, unlike pre-trial custody, the impact of the bail conditions cannot be assumed. Trial judges do not need evidence or even submissions to understand the impact of ordinary pre- trial custody on an offender because they can take judicial notice that the ordinary consequences of pre-trial custody involve a severe loss of liberty. It is only in unusual circumstances, where the offender seeks enhanced credit, or the Crown seeks less than the usual 2:1 credit, that a trial judge will need to engage in a hearing to determine the effect of pre-trial custody.
>
> [29] On the other hand, some of the same considerations that justify credit for pre-sentence custody apply to an offender who has spent a long time under house arrest. Stringent bail conditions, especially house arrest, represent an infringement on liberty and are, to that extent, inconsistent with the fundamental principle of the presumption of innocence. House arrest is a form of punishment, albeit of a different character than actual incarceration. Pre-sentence house arrest varies little in character from the house arrest that is often imposed as a term of a conditional sentence under s. 742.1 of the *Criminal Code*. As Mr. Doucette points out, in *R. v. Proulx* 2000 SCC 5 (CanLII), [2000] 1 S.C.R. 61, [2000] S.C.J. No. 6, 140 C.C.C. (3d) 449, at para. 103, Lamer C.J.C. identified house arrest as a form of punishment in the conditional sentence context:
>
> > First, the conditions should have a punitive aspect. Indeed, the need for punitive conditions is the reason why a probationary sentence was rejected and a sentence of imprisonment of less than two years imposed. As stated above, conditions such as house arrest should be the norm, not the exception. This means that the offender should be confined to his or her home except when working, attending school, or fulfilling other conditions of his or her sentence, e.g. community service, meeting with the supervisor, or participating in treatment programs. Of course, there will need to be exceptions for medical emergencies, religious observance, and the like.
>
> Despite its punitive aspects, the offender receives no credit towards parole eligibility for time spent on pre-sentence house arrest.

[24] Counsel for Ms. Kennedy therefore says:

> The lengthy period of compliance with strict release conditions should serve as a mitigating factor when crafting a sentence but also should serve to show a step towards rehabilitation by Ms. Kennedy.

[25] In *R. v. Knockwood*, 2009 NSCA 98, Saunders J.A. explained the approach to assessing the credit for pre-trial release conditions to be applied by Nova Scotia courts:

> [34] Assuming that to be so, I would conclude that the *impact* of the particular conditions of release *upon the accused* must be demonstrated in each case. That is, there must be some information before the sentencing court which would describe the substantial hardship the accused *actually suffered* while on release because of the conditions of that release...
>
> [35] Here, the submissions made by both Crown and defence were brief. On this issue Mr. Knockwood's lawyer emphasized that the appellant had "already served 19 months on those house arrest type conditions .... He's only able to leave the house, essentially, for employment purposes."
>
> [36] In my view, this falls far short of identifying legitimate, substantial hardship. Aside from a recitation of the terms of Mr. Knockwood's pre-trial release, nothing further was put on the record. The sentencing judge was asked to infer from the conditions themselves, without more, that the appellant had suffered hardship, which then ought to be taken into account as a mitigating factor. In my opinion the mere reference to the terms of pre-trial release will not satisfy the onus to demonstrate actual hardship as a result of those pre-trial conditions. I see no error on the part of the sentencing judge.
>
> [Emphasis in original]

[26] Ms. Kennedy has not identified any substantial hardship arising from her time on release conditions. However, in this case the 35 months she spent on strict release conditions, without incident, will, in a limited way, go into the mix of crafting the appropriate sentence.

Range of Sentence

[27] The range of sentence for fraud-related crimes involving a repeat offender is very broad. Counsel have provided me with a number of cases including:

Crown:	Defence:
• *R. v. Jubbal*, 2021 BCSC 851 • *R. v. Tremblay*, 2014 BCSC 901 • *R. v. Armstrong*, 2005 BCPC 690 • *R. v. Beyer*, 1997 CarswellMan 338 • *R. v. Hardiman*, 2014 ONSC 968 • *R. v. Rowe*, 2008 BCPC 392 • *R. v. Chudyk*, 2011 SKQB 134	• *R. v. Suter*, 2018 SCC 34 • *R. v. Elmadani*, 2015 NSPC 65 • *R. v. Tremblay*, 2014 BCSC 901 • *R. v. Barker*, 2019 NSPC 24 • *R. v. Sheppard*, 2015 NSPC 23 • *R. v. Blumenthal*, 2019 NSSC 35

[28] The range of sentence for similar crimes, as suggested by counsel, starts at suspended sentences, and proceeds through provincial custodial sentences,

conditional sentences, up to federal sentences ranging from two to eight years in custody.

Analysis

[29] Merely because B.P. was reimbursed does not make this a victimless crime, as stated in *R. v. Hardiman*:

> [37] It must be emphasized that the offences in relation to falsified or forged credits cards are not victimless crimes. It is true that the banks, which are large institutions, will reimburse customers for losses as a result of the actions of fraudsters like Mr. Hardiman. That, however, is not the point. As financial intermediaries, banks occupy a critical position in the economy. One does not need expert evidence to know that credit card fraud is insidious and harmful. It is tempting to think that the only people harmed are plutocrats who run the banks, but the truth is that we all pay when this crime is committed. Everyone in the economy has to use the financial system. The people who really pay are bus drivers, nurses, teachers, and factory workers. In other words, regular people who make their livings honestly are victimized through higher bank fees, insurance premiums, and taxes. Economic criminals, who are prepared to wreak havoc on the lives of individuals and on the general economy purely for the sake of their own greed, and have the skills to use their powers for good rather than ill, should not be treated gently.

[30] Ms. Kennedy has a serious and substantial criminal record for related crimes of dishonesty. She has received almost every possible type of criminal disposition, she lives in poverty and has had a very difficult life. She is the primary caregiver to her severely challenged adult son. Yet, many people convicted of criminal offences have families that rely on them financially or emotionally, and from which they will be separated, if incarcerated. Considering the ongoing and protracted nature of her criminal behaviour, in this case rehabilitation or reformation take a distant back seat to other sentencing principles. Because of Ms. Kennedy's criminal background, combined with the related nature of these offences, the primary guiding principles for sentencing her are general and specific deterrence and denunciation. That being said, restraint also has a role to play in determining the appropriate disposition for Ms. Kennedy.

[31] Both Crown and Defence agree that a period of federal incarceration is appropriate. In *R. v. Proulx*¸ 2000 SCC 5, Lamer C.J., for the unanimous court, discussed the problem of overincarceration in Canada, the need for restraint when considering incarceration, and the requirement for judges to consider less

restrictive sanctions, if appropriate. So while jail is a must in this case, restraint has to be kept in mind.

[32] In the case of Ms. Kennedy, a two-year custodial sentence followed by three years of probation with conditions properly satisfies all of the principles of sentencing. It addresses both general and specific deterrence and denunciation through the time in a federal penitentiary. It takes into account the need for restraint. It also allows for the possibility of reformation and rehabilitation, however remote, taking into account Ms. Kennedy's personal circumstances. At a minimum she usually seems to abide by probationary and release conditions.

Conclusion

[33] Ms. Kennedy will be sentenced to two years in prison for the fraud charge and two years' concurrent for the unlawful use of the debit card.

[34] She will also receive three years' probation. The terms of her probation will include:

- Report to a probation officer within three days of the expiration of this prison sentence and thereafter as directed by her probation officer;
- Have no direct or indirect contact with the complainant, B.P.;
- Make reasonable efforts to locate and maintain employment or an educational program as directed by your probation officer;
- Attend for mental health assessment and counseling as directed by your probation officer;
- Attend for assessment, counseling or program as directed by your probation officer.

Arnold, J.