

PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Fairrae*, 2021 NSPC 12

Date: 20210302

Docket: 8424862; 8416452; 8401866

Registry: Kentville

Between:

Her Majesty the Queen

v.

Tyler Fairrae

SENTENCING DECISION

Judge:	The Honourable Judge Ronda van der Hoek
Heard:	January 29 and March 2, 2021, in Kentville, Nova Scotia
Decision	March 2, 2021
Counsel:	Robert Morrison, for the Crown Alexander MacKillop, for the Defendant

By the Court:

[1] Mr. Fairrae assumed the identity of one K. Corbeil after mining that man's social media accounts to obtain personal information and photographs. Using the nom de guerre, Mr. Fairrae met and befriended three women on social media platforms, and over a short period of time established a level of trust.

[2] Mr. Fairrae then told a tale of being stranded at the Newfoundland and Labrador airport, or some variation thereof, without access to his bank accounts. He asked the women to help him out of this untenable position by cashing a pay cheque or cheques and depositing the money into a specific bank account. One woman later said she thought she was simply "helping a new friend".

[3] Images of cheques were sent to the women and, as one does these days, they deposited the instrument virtually into their personal bank accounts. The money was in turn forwarded to the cited bank account number and in the days that followed, the women were contacted by their respective banks and told the cheques had been returned due to insufficient funds.

[4] The offences were reported to police who obtained Production Orders that confirmed Mr. Tyler Fairrae was the sole holder of the bank account into which the monies had been deposited and, as a result, was the sole beneficiary of the fraud.

[5] The particular facts of the three offences:

1. Between May 6 and 15, 2019, Ms. Alissa Colborne cashed ten cheques totalling \$6,857.00, deposited \$5,008.00 to Mr. Fairrae's account, after accepting his offer to keep the remainder of the money. She suffered a personal loss of \$5,008.00.
2. On July 2, 2019, Ms. Sasha Peverill expressed reluctance to cash a cheque and Mr. Fairrae told her it had already been sent to her and he would call the police. She was scared, cashed his \$1,000.00 cheque, and transferred the money as directed. She has suffered a personal loss of \$1,000.00.
3. Finally, on July 20, 2019, Ms. Brianna Barrett cashed an \$800.00 cheque and deposited \$772.00, agreeing to keep the remainder. Her first attempt to deposit a cheque did not "go through" and Mr. Fairrae sent her another that did clear, resulting in a personal loss to Ms. Barrett of \$772.00.

[6] Mr. Fairrae, who was on probation at the time, was located and arrested by police in November 2019. He accepts the facts outlined above and has pled guilty to two counts of fraud under \$5,000.00 contrary to sections 380(1)(b) of the *Criminal Code of Canada*. The third charge laid as a fraud over \$5,000.00 s. 380(1)(a) was amended to under \$5,000.00 at the time of plea and proceeded summarily with defence consent.

Position of the Parties:

[7] The Crown is seeking a denunciatory and deterrent focused eight-month period of incarceration followed by 18 months' reporting probation with rehabilitative and deterrent focused conditions that include: taking an assessment for personal issues and drug counselling, a prohibition from using social media, a prohibition from accessing the internet except for employment searches and to obtain government services, and not having contact or communication with the four victims or attending their residences or places of employment. Rather than add to the Probation Order and risk a breach of condition due to unstable employment, the Crown seeks "stand alone" restitution orders to compensate the victims- \$1,000.00, \$872.00, \$6,600.00.

[8] Defence is seeking a less restrictive sanction for this young man – a twelve-month conditional sentence order (CSO). He argues Mr. Fairrae now has the support of his girlfriend and her mother (his surety) who will assist and support his compliance with the proposed conditions. He acknowledged a CSO is essentially jail served in the community, that it comes with risks, and must be followed, and reminds the Court it is a sufficiently punitive sentence that meets the purposes and principles of sentencing. There is no contest that a period of probation should follow the CSO.

[9] Defence counsel acknowledges the offences resulted in serious financial impact for the victims, but reminds the Court that the overall amount of the fraud is under \$10,000.00, noting offenders who have engaged in frauds involving significantly higher amounts have received a CSO based on a consideration of their personal circumstances. To that end, I will consider Mr. Fairrae's circumstances as set out in the presentence report (PSR).

Mr. Fairrae's Personal Circumstances:

[10] Mr. Fairrae is 26 years old, unmarried and without dependents. His education is described somewhat amorphously as grade 10-13, yet he reports

needing three credits to obtain a diploma. He has worked in various unskilled labour positions mostly of short duration and some appear to be summer jobs.

[11] Mr. Fairrae is remorseful for his actions and accepts responsibility, noting he has suffered from mental health issues since he was a teenager and a drug addiction for at least as long; both are said to be contributing factors in the commission of the offences. Mr. Fairrae reports an addiction to alcohol, cocaine, and prescription medications. The latter were prescribed following a serious car accident that left him with ongoing back pain. Mr. Fairrae is no longer medicated and is maintaining sobriety with support from his girlfriend and her mother with whom he resides.

[12] Mr. Fairrae served a recent period of incarceration and says following release he obtained a prescription for the anti-abuse medication, Suboxone, to support his sobriety when back in the community. It had the desired effect, and he ceased the prescription a few months later.

[13] Mr. Fairrae is currently employed by a numbered company and because of a stated fear of losing the job, did not provide the name of his employer. He did, however, submit to the Court a December 2020 “pay stub” purportedly issued for one day’s work as proof of the employment. I use the word purportedly quite

deliberately since the purpose for payment on the slip indicates “bill” with no indication of employee deductions such as EI and CPP.

[14] Mr. Fairrae explained that issues involving his personal bank account, as well as starting the job on the last day of the pay cycle and not yet being on the payroll, resulted in the very low amount of the cheque – \$91.00 and the means of payment. As a result, and not surprisingly given the offences before the Court, I am somewhat suspicious as to Mr. Fairrae’s employment submission. His past record also supports the concern. I will outline the record and the concern, after considering his allocution.

Section 726 Criminal Code: Allocution:

[15] Mr. Fairrae says he has anxiety, is worried about surviving in jail and not getting hurt. He says this is the best year he has had because of the people in his life. He just needs one chance to pay these people back. While he has money saved for the purpose, he has been paying back others pursuant to probation conditions. He says he is making his probation appointments and Probation Services has been helpful to him. He says he has struggled since getting out of jail, is tired, and now has a job and a girlfriend who supports him. Right now, he is doing really, well, but is disgusted with himself and does not know how he can do these things.

[16] It must be an ongoing road to self discovery because these things have been going on for some time. Mr. Fairrae has related record.

The Record Placed before the Court:

[17] On February 14, 2018 I sentenced Mr. Fairrae to a 15 month CSO for the following offences: obstruct justice: October 2016; threat: January to May 2017; threat: January to May 2017; theft/ forgery involving a credit card: February 2017; fraud: February 2017; fraud: April to May 2017; breach of undertaking: May to June 2017; and breach an undertaking: June to September 2017.

[18] I accepted the joint recommendation and recall the Crown submission at the time: but for Mr. Fairrae's recent enrollment in school, he would have recommended a custodial sentence. The Crown was skeptical that Mr. Fairrae could comply with the conditions and unfortunately that proved to be the case. There were three breaches: one where the Court took no action, another resulting in him serving some days in custody, and finally a collapse of the Order that saw Mr. Fairrae serve the significant remainder of the Order in custody.

[19] In October 2019 I sentenced Mr. Fairrae to 180 days' incarceration for the following offences: fraud: August 2018; breach of probation: September 2018;

fraud: January- February 2019; threat: February 2019; threat and breach of undertaking: August 2019; and perjury: August 19, 2019.

[20] The August 2018 fraud involved a friend and facts eerily similar to those before the Court today. The February 2019 threat involved that same woman and arose when she tried to get her money back. The February 2019 fraud involved a woman Mr. Fairrae met on Tinder and to whom he provided a false name. She was threatened and deposited 14 cheques suffering a \$2,700.00 personal loss. The August 2019 perjury charge arose when Mr. Fairrae testified at a bail hearing and told the presiding judge, he was employed full time at a named company. Police checks determined he was not employed with the stated company in any capacity. How can this not impact my careful consideration of Mr. Fairrae's submission that he is currently employed, and the meager proof proffered as support.

[21] The offences currently before the Court occurred a few months prior to the October 2019 sentencing hearing and he was charged in November 2019. As a result, it is necessary to flesh out the offences for which he was sentenced that occurred after those before the Court today. They include perjury, threat, and a breach of undertaking in August 2019.

[22] While I chose to break down in some detail the two sentencing dates where I imposed a CSO and a period of incarceration, I also note that Mr. Fairrae has a total of 23 prior convictions involving offences since 2011 including when he was a youth. That gap between the youth court record and the adult record was less than three years and is retained pursuant to section 119 of the *Youth Criminal Justice Act*.

[23] The facts, personal circumstances, allocution, and the record are all considered in determining a fit and proper sentence in the context of the statutory direction on sentencing. It is useful to set out those principles.

The Principles of Sentencing:

[24] Sections 718 to 718.2 enumerate the applicable principles which include imposing a sentence that serves to protect the public and contribute to respect for the law and the maintenance of a safe society.

[25] Section 718 directs the Court to impose a just sanction that has, as its goal, one or more of the following: denunciation; general and specific deterrence; separation from society where necessary; rehabilitation of the offender; promotion of responsibility in offenders; and acknowledgment of the harm done to victims and to the community.

[26] Section 718.1 requires application of the proportionality principle, noting it is a fundamental principle of sentencing that a sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[27] Section 718.2 requires a court to consider any aggravating and mitigating factors relating to the offence and to the offender, apply the principles of parity and proportionality, and directs that an offender not be deprived of liberty if less restrictive sanctions may be appropriate in the circumstances. As a result, the Court is to consider all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community.

Principles applicable to fraud offences:

[28] Sentencing fraud offences also comes with its own special considerations set out at section 380.1. This section requires the Court to address specific aggravating circumstances, and states as follows:

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;

...

Applying the Principles of Sentencing:

[29] Addressing each principle of sentencing in turn, I will start by saying that specific deterrence and denunciation are required for fraud offences and for this offender. Mr. Fairrae's history of committing frauds involving unwitting victims must end. The offences are fairly serious in that the entire reason for befriending the women appears to be for the purpose of committing the offences. None were met in person and the relationships were of short duration before he committed the offences. Establishing relationships through the internet has become common these days, and while older people might not trust it, younger people rely on it. In this case they did so to their financial detriment.

[30] It is fair to say there was no intention to actually meet these people in person and they were never meant to know Mr. Fairrae's identity. Of course, the situation also naturally led police to the innocent Mr. Corbeil who had to explain that he was

not involved in the crimes; one can imagine the distress such a call from police caused that man.

Mr. Fairrae's degree of responsibility and the gravity of the offences:

Mr. Fairrae's degree of responsibility is demonstrated in the case of Ms. Peverill who thought better of cashing the cheque and was in turn threatened with a call to police. It is despicable that Mr. Fairrae would employ this tool to compel compliance. It is also worth pointing out, although it plays no part in my decision, that some might consider offences such as these akin to a hate crime as they explicitly targeted an identifiable group – women on a dating application. While I will not go that far, it is certainly no accident that all the women were lured in by a photograph and biography of a man purpose-chosen by Mr. Fairrae.

[31] Finally, that the first cheque given Ms. Barrett was not accepted by the bank and he sent another, demonstrates that the transaction was not a momentary lapse of judgment, but a purposive design that he propelled to completion.

[32] I conclude that there was a fair bit of planning involved in laying the foundation for this ruse. It involved finding the alternate identity, establishing three different email accounts, and investing the time to establish a relationship sufficient to gain the trust of each woman.

[33] Today the Court was provided Victim Impact Statements that essentially mirrored the comments made when Ms. Barrett and Ms. Colborne were interviewed by the PSR writer. The report says Ms. Barrett had to pay the bank back by cashing an RRSP meant to fund the purchase of a house. As well, there were the resulting tax consequences for which she seeks reimbursement. The other women reported taking on extra employment and borrowing money for food and rent. These are real people who suffered real consequences resulting from the “favour” they did for Mr. Fairrae.

[34] As a result, while each offence on its own might represent a somewhat low-level fraud, it cannot be ignored that they occurred in quick succession over a short period of time. I find his level of responsibility relatively high and the offences relatively grave. These were not cheques expected to cash that he could not fund. He knew from the outset that the cheques would be returned NSF, and as such demonstrates the deliberate nature of the act conducted in another man’s name.

Aggravating and Mitigating Factors:

[35] Mr. Fairrae submits his guilty pleas and the victims not being required to attend court for trials, are mitigating factors. As a result, scarce court time was available to hear other matters. That is of course no small consideration as courts

work to avoid breaches of the s. 11(b) *Charter* right to a trial in a reasonable time. However, to his submission I must also add the resulting benefit to Mr. Fairrae – that he never had to face his victims in person.

[36] In support of a conditional sentence Mr. Fairrae argues he now benefits from the support of a new girlfriend and her mother, and while they all live together, the couple hope to save enough money to eventually move to a place of their own. Obviously, Mr. Fairrae benefits from stability in his life and it is possible this relationship will assist in turning things around for him. However, I would be remiss not to note that the PSR indicated he has been in several relationships of a few years' length while amassing his lengthy criminal record.

[37] Employment of a short duration is also arguably mitigating, although as previously mentioned the Court remains skeptical. While any employment and the resulting stability it can offer is mitigating in sentencing those who commit fraud, a lack of truthfulness on the topic in the bail hearing combined with the suspect "bill", renders the evidence before the Court somewhat diminished.

[38] It is perhaps mitigating that an addiction to drugs and alcohol, now reportedly well in hand, led Mr. Fairrae to commit the offences. I expect the jointly requested period of probation will offer ongoing support in that regard. I will also

say that the Court is impressed that Mr. Fairrae had the foresight to see his family doctor about medication upon release from custody to assist him to remain drug free.

[39] The aggravating factors include the impact the offences have had on the victims. In the case of one, she had recently suffered a tragic loss and was simply extending herself to meet new people when she fell prey to Mr. Fairrae's scheme. Another sought counselling and her hair fell out due to the financial stress caused by her loss. Another contemplated suicide. Not surprising one mentioned a resulting inability to trust people.

[40] The degree of planning involved to carry out the scheme is also aggravating as it speaks to a level of organization and the many opportunities to reconsider his actions. Creating false accounts, finding a false identity, and managing the relationships was an involved enterprise and speaks to a deliberation and disregard for the impact these offences have on others. They are quite simply selfish, and rendered more so, as the money was used to purchase drugs.

[41] The related and recent criminal record for similar offences, some employing the same scheme, is likewise aggravating as it strongly suggests a cost benefit analysis came down on the side of continuing to commit these offences. It also

suggests the ease with which Mr. Fairrae could prey on women using social media sites. I must also consider the overall pattern of offending and the elevation in seriousness. The first fraud of this nature was carried out on a friend, he progressed to strangers, and from there engaged in threatening behaviours directed at those strangers when they hesitated to cash the cheques.

[42] The victims have not been compensated for their losses and while Mr. Fairrae advised the Court he had \$1,500.00 in pocket at the hearing, that money was intended to reimburse his earlier victims, as it should be, given reimbursement is a condition of his current probationary period that expires quite soon.

[43] After considering and balancing the mitigating and the aggravating factors I am left concluding Mr. Fairrae perpetrated a purposeful, well-orchestrated fraud on numerous victims that required time and attention on his part and a demonstrated lack of concern for his victims. I accept that he used their money for drugs and alcohol and has not paid them back. He has a dubious source of income and is somewhat unlikely to compensate the victims in the future. The aggravating factors outweigh the mitigating. I am not convinced his current living situation and purported sobriety overwhelm the significant aggravating factors.

Sentences imposed for fraud and the principle of parity:

[44] Defence counsel asked the Court to consider the recent decision *R. v. Ross and Dawson*, 2020 NSSC 70, sentence under appeal, submitting it is a useful decision as the Court outlined sentences imposed for fraud and, at paragraph 32, confirmed a CSO can be imposed even for major frauds. In that case the two men defrauded the Government of Canada when one awarded two million dollars worth of contracts to the other; the scheme occurred outside the lawful tender process.

[45] Defence counsel acknowledges the difficulty in comparing cases, and a review of *Ross* disclosed Mr. Ross benefitted from several attributes Mr. Fairrae does not. For example, Mr. Ross was without a criminal record, his PSR was positive, he did not ascribe drug or alcohol issues as the reason for committing the offences.

[46] The Crown in addressing the applicability of *Ross*, reminds the Court that the Government of Canada was the victim and he took the interesting step of pointing out the 2 million dollar fraud over five years represented government revenue of 0.00004% of \$1.3 trillion. On the other hand, Mr. Fairrae's victims suffered much more significant and immediate impacts – borrowing to afford food and rent; and an inability to afford a house purchase with resulting tax consequences. Not to be ignored, the real Mr. Corbeil had no idea his likeness and name were used to commit offences – he is also a victim of these crimes.

[47] The Crown says the related criminal record and the breaches of a past CSO that was terminated, suggest nothing has changed for Mr. Fairrae and the principles and purposes of sentencing do not support imposition of another.

[48] I have no difficulty accepting that there is a broad range of sentence for fraud and can do no better than reference the many cases Hoskins J. summarized in *R. v. Surette*, 2019 NSPC 46, 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:

- *R. v. Decoff*, [2000] N.S.J. No. 224 (NSSC), a manager 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 an 18 month conditional sentence order;
- *R. v. Naugle*, 2011 NSSC 30 (CanLII), 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 an 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. 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.

[49] A review of the cases discloses a few things. One, a CSO appears to be imposed in cases involving lack of record, dependents, poor health, little to no chance of reoffending, serious gambling addiction, pressure from an abusive partner, and paying back the victims. Two, factors that militate against a CSO include particularly repugnant facts – fraud involving a First Nation health program (*Ford*), record of similar offences, committing the offences against trusting friends, (*Shepherd*), a high number of transactions, and the vulnerabilities of the victims – elderly (*Cain*).

[50] Mr. Fairrae's circumstances do not appear to support a CSO based on the cases reviewed. That said, the Court must exercise restraint and incarcerate only where necessary. As such I will consider whether he meets the test for CSO.

Jail as a last resort:

There is no doubt a CSO is perhaps the least restrictive sanction Mr. Fairrae could expect in the circumstances, and he appears to be asking for another chance to prove that a CSO is fit and proper in light of his mitigating factors and the Covid-19 situation. He acknowledges jail in the community comes with risks, must be followed, and is ultimately punitive.

[51] He also acknowledges the impact on the victims is great but says it is under \$10,000.00, and some people who commit fraud involving higher amounts receive CSOs. He says it will aid his rehabilitation, noting jail is very stressful given his mental health conditions and the risk of contracting the virus. Before considering a CSO, I will consider the impact COVID-19 has had on sentencing offenders.

Covid-19 as a consideration on sentence:

By now a fairly, large body of case law has developed addressing the impact Covid-19 may have or should have in sentencing offenders. After reviewing several decisions, mainly from Ontario, I discern some guiding principles. Hardship that would be experienced serving a jail sentence has always been a proper consideration in crafting an appropriate sentence. (*R. v. Kandhai*, 2020 ONCS 1611, at para. 7) Hardship can include the risk to health arising from a global pandemic. There need not be evidence of any particular hardship in the case of Covid-19 and the new variants. While the end is in sight with vaccines on the way and being administered, a surge in those new variants remains a risk. That risk is heightened for those residing in congregate living. While they are expected to receive some priority in vaccine distribution, that has not yet occurred on a widespread basis in March 2021. The risk to those individuals should Covid-19 enter a jail is far reaching for those incarcerated as well as the staff who work there and the families they go home to.

[52] That said the Court must still balance “its fundamental role in the administration of justice and protection of the public” (*R. v. TK*, 2020 ONSC 1935 at para 74) Taking the pandemic into account may result in a shorter sentence “in the interest of personal and public safety” (*R. v. Suter*, 2018 SCC 34) as the Court is required to consider collateral consequences including “where the sentence would have a more significant impact on an offender”.

[53] Some courts have required an evidentiary basis supporting the impact Covid-19 may have on an individual, others do not and instead allow judicial notice to be taken of the heightened risk for people housed in jails. To that end, the Supreme Court of Canada in *R. v. Lacasse*, 2015 SCC 64, at para. 58 reminds courts to consider “the specific circumstances of each case”, that must surely include the reality of a pandemic.

[54] While I am prepared to take the pandemic into account in sentencing Mr. Fairrae, I find the sentence recommended by the Crown is well within the range and certainly appears to have considered the collateral consequence of the pandemic and the impact in jails. I note that there are no cases of Covid-19 in Nova Scotia prisons, and this province has done exceptionally well keeping the disease at bay. Given Mr. Fairrae’s record the Crown certainly could have sought a higher

sentence and I accept the eight-month recommendation represents less than the amount of time he could have expected in non-pandemic times.

Considering the availability of a CSO:

[55] Mr. Fairrae seeks a conditional sentence.

[56] Section 742.1 of the *Criminal Code* states:

742.1 If a person is convicted of an offence and the court imposes a sentence of imprisonment of less than two years, 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 conditions imposed under section 742.3, if

(a) the court 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;

(b) the offence is not an offence punishable by a minimum term of imprisonment;

...

[57] The Court accepts the defence submission that a CSO is, as the Court said in *R. v. Proulx*, 2000 SCC 5, “a punitive sanction capable of achieving the objectives of denunciation and deterrence.” In proper circumstances it can satisfy the primary factors of deterrence and denunciation. A CSO is available (1) where there is no statutory minimum term of imprisonment, (2) where a sentence of less than two years is appropriate in the circumstances, (3) where the Court is satisfied that such

a sentence would not endanger the community and (4) where the sentence would be consistent with the fundamental purpose and principles of sentencing that are contained in ss. 718-718.2 of the *Criminal Code*.

[58] While Mr. Fairrae meets the first two criteria, I am not satisfied that such a sentence is consistent with the fundamental purposes and principles of sentencing – deterrence and denunciation. Finally, I am also not satisfied that such a sentence would not endanger the community.

[59] A term of custody in an institution is necessary for this offender given the combination of factors previously discussed as well as the related record, breaches of previous court orders and inability to comply with a previous CSO, *inter alia*.

[60] His record suggests a serial fraudster whose actions are increasing in seriousness over time. When Mr. Fairrae has access to the internet the offences are easily committed, and he needs to be deterred from doing so – an objective best achieved in the institution. No matter his faith that his girlfriend and her mother will support his compliance with conditions not to use the internet, his history of failing to comply with court orders does not comfort the Court and I am not satisfied a CSO is appropriate in his current situation.

The proper length of sentence:

[61] Mr. Fairrae is being sentenced for three offences. In the past he has received 30-day sentences for each of two counts of fraud and a 15 month CSO on others, but these decisions were based on consolidation sentencing hearings involving a large number of offences over a number of dates.

[62] After careful consideration I accept the position of the Crown that Mr. Fairrae must be incarcerated. I accept that these are serious offences, he has preyed on women in the community for the sole purpose of defrauding them of their money. He is a danger to the community who has broken the trust of the victims and was predatory and cruel. For example, threatening Ms. Peverill with a call to police – the very fate that would shortly befall him. Now he invites the Court not to incarcerate him because he is not a danger to the public. I decline the invitation.

[63] I am skeptical that he is maintaining employment. The cheque stub placed before the Court for \$90.00 paid to him by a numbered company was provided along with an explanation that he cannot have his employer confirm his employment because he may lose his job. I am told today he is no longer employed in that job but has a new one. That may be true, but when one has a history of crimes of dishonesty one can surely not be surprised that his word is not good enough. Even accepting he is employed he will no doubt find similar work when he is released from custody.

[64] He appears to benefit from the support of his girlfriend and his surety, and I do hope for his sake, that support continues upon his release.

[65] I find the first in time fraud under \$5,000.00 warrants a 90-day period of incarceration, the next under \$5,000.00 warrants 60 days and the second warrants 70 days. The total sentence is 220 days incarceration. The sentences will all be served consecutive one to the other. Taking the required look back, I conclude that having regard to the factors that must be emphasized, the sentence is fit and proper, not excessively harsh, and as a result, there is no reason to reduce it.

[66] Upon release from custody Mr. Fairrae will serve a period of probation for eighteen months under the conditions recommended by the Crown. There will also be free standing restitution orders to the benefit of each of the three victims in the amount requested.

Judgment accordingly.

van der Hoek J.