

PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. MacDonnell*, 2021 NSPC 57

Date: 20210806

Docket: 8266188-8266201

Registry: Halifax

Between:

Her Majesty the Queen

v.

Ralston MacDonnell
MacDonnell Security Risk Management Limited
MacDonnell Group of Canada Limited
3182552 Nova Scotia Limited

Judge:	The Honourable Judge Paul Scovil, JPC
Heard:	January 18, 19, 21, 22, 26, 27, 28, 2021; February 2, 3, 4, 5, 9, 10, 2021; March 12, 2021 in Halifax, Nova Scotia
Sentencing Decision:	August 6, 2021
Charge:	380(1)(a) of the Criminal Code of Canada x 7 327(1)(c) of the Excise Tax Act x 4
Counsel:	Scott Millar, Counsel for Her Majesty the Queen Brian Casey, Q.C., Counsel for the Accused

By the Court:

[1] The following is the sentencing of Ralston MacDonnell and his group of companies. The full decision convicting the accused can be found at *R. v. MacDonnell*, 2021 NSPC 22.

[2] Ralston MacDonnell was the principal operator of the accused companies during the period covered by the informations in this matter. During the course of this period Mr. MacDonnell fraudulently dealt with the Canada Revenue Agency by hiding bank accounts, writing cheques that had no funds to back them, as well as other activities while stripping funds from his companies to pay for his personal lifestyle expenses.

[3] As a result of his activities, he was charged and convicted of seven counts under s. 380(1)(a) of fraud under the **Criminal Code of Canada** and four counts under the **Excise Tax Act**.

[4] These charges involve both fraud and non-payment of amounts relating to both Payroll Source Deductions and HST.

[5] By agreement of both crown and defence counts nine, ten and eleven, under s. 327(1)(c) against the defendant, Ralston MacDonnell, are stayed as they are encompassed by count eight. This applies only to MacDonnell and not to MSRM, MGOC, and 3182562 Nova Scotia Limited.

Crown's Position on Sentencing

[6] The crown argues that the charges before the court are complex, large-scale fraud and tax evasion on the public purse. In his submissions, the Crown stressed denunciation and general deterrence.

[7] The crown reviewed the following cases.

R. v. Dawson and Ross, 2021 NSCA 29

R. v. Colpitts, 2018 NSSC, 180

R. v. Drabinsky, 2011 ONCA 582

Knox Contracting v. Canada, [1990] 2 S.C.R.J. No. 74

R. v. Bath, 2012 BCSC 645

R. v. Hofbauer, 2004 BCPC 604

R v. Coffin, 2006, QCCA 471

R. v. Cromwell, 2015 NSPC 99

R. v. Wilm, 2017 ONCJ 97

R. v. Lacasse, 2015 SCC 64

R. v. Elmadani, 2015 NSPC 65

R. v. Bogard, 2002 CanLII 41073 (ON CA)

R. v. Witen, 2012 ONSC 4151

R. v. Pavao, 2018 ONSC 4889

R. v. Canlas, 2020 ONSC 5879

R. v. Friesen, 2020 SCC 9

R. v. Dieckmann, 2014 ONSC 717

R. v. Proulx, 2000 SCC 5

R. v. Dyck, 2012 MBCA 33

R. v. Scholz, 2021 ONCA 506

[8] Stressing the principles of sentencing found in s. 718 of the **Criminal Code**, the crown agreed that an aggravating factor of these offences is the magnitude, complexity, duration, and degree of planning exhibited by the actions of the accused.

[9] In relation to the possibility of a Conditional Sentence Order, the crown argues that while it may be available, it would not be a fit and proper sentence in these circumstances. The range of sentence for what the crown terms a major fraud was

shown by cases submitted to be a range of between two and five years custody. The crown submitted that there were no mitigating factors which might bring the sentence to under two years to attract a Conditional Sentence.

[10] The crown puts forward that Mr. MacDonnell should receive a four-year prison term for fraud relating to Payroll Source Deductions. A further four years concurrent for the fraud relating to HST given totality factors. In relation to the charge under s. 327(1)(a) regarding HST evasion, the mandatory fine applicable is between 100 percent of the amounts evaded to 200 percent. The crown seeks the minimum fine of \$301,511.25, which is 100 percent HST amounts evaded.

[11] In relation to the corporate accused the minimal fines under the act is sought together with a minimal fine for the fraud charges of \$100 given the totality principle for MSRM the crown seeks a fine of \$185,584.33 under the **Excise Tax Act**, s. 327(1)(c) and a \$100 fine for each fraud charge. One relates to fraud for HST and one for Payroll Source Deduction. For MGOC the fine under s. 327(1)(c) of the **Excise Tax Act**; again, the crown seeks the minimum of \$63,859.24 and a \$100 fine under the two fraud charges. Finally, for 3182552 Nova Scotia Limited the minimum fine is \$52,067.18. Under the single fraud count again, the crown seeks a nominal fine of \$100.

Defence Position on Sentencing

[12] Mr. MacDonnell's sentencing position regarding **Excise Tax Act** violation is similar to that put forward by the crown. For Mr. MacDonnell personally the minimum fine of \$301,511.25 is sought. With regard to the corporate defendants, the same minimum fine suggested by the crown is suggested, save, and except, rather than \$100 nominal fines where proposed a \$1 fine is sought.

[13] A significant different penalty is envisioned by the defence regarding the charges of fraud under s. 380(1)(a). Mr. MacDonnell seeks a 12-month jail term that would be served on a Conditional Sentence Order.

[14] The defence relies on the following cases:

Canada v. Lalande, 2016 ONCA 923

R. v. Bath & Khangura, 2012 BCSC 645

R. v. Breakell, 2009 ABCA 350, [2009] G.S.T.C. 157 (Alta.C.A.)

R. v. Brown, 2003 BCPC 537

R. v. Dawson, 2021 NSCA 29

R. v. Dwyer, 2001 CarswellOnt 3815 (Ont.C.A.)

R. v. Dyck, 2018 MBCA 33

R. v. Goett, 2012 ABCA 215 (Alta.C.A.)

R. v. Grimberg, [2002] O.J. No. 526 (C.A.)

R. v. Hofbauer 2004 BCPC 604

R. v. Klundert, 2011 ONCA 646 (Ont.C.A.)

R. v. MacIver, 2000 MBCA 82 (Man.C.A.)

R. v. Mahmood, 2016 ONCA 75, [2016] G.S.T.C. 103 (Ont. C.A.)

R. v. Pollio 2007 BCPC 51

R. v. Port Chevrolet, 2010 BCCA 47

R. v. Poulin, 2019 SCC 47

R. v. Proulx, 2000 SCC 5

R. v. Sharma, 2019 ONCA 274

R. v. Wilm, (2016), 2017 ONCJ 97 (Ont.C.J.)

[15] Mr. MacDonnell argues that in relation to the fraud charges, sentencing ranges include periods of custody that are under two years. It would therefore be appropriate to give a sentence of under two years; in this case one year, to be served in the community. While a conditional sentence may not be available if the offence was committed today, in 2009, a Conditional Sentence Order was in fact an available sentence.

Circumstances of the accused

[16] A pre-sentence report (PSR) was completed for Mr. MacDonnell. The report overall is very positive.

[17] According to the PSR, Mr. MacDonnell grew up in poverty in Cape Breton. He did not know who his father was, and his mother was an alcoholic. Mr. MacDonnell provided care for his 12 brothers and sisters.

[18] At 18, Mr. MacDonnell attended St. Mary's University and acquired an engineering degree. He began his career at Vaughn Engineering in Halifax and went on to buy the company. At the date of sentencing, Mr. MacDonnell is deeply in debt and his company has shrunk from a high of 100 employees in the early 2000's to no employees currently.

[19] He is married with two grown children, and he and his wife are moving in with one of his offspring.

[20] Mr. MacDonnell has a remarkable history of volunteering in the community. He was a Governor for the Art Gallery of Nova Scotia College of Art and Design, President of the Association of Professional Engineers of Nova Scotia, and board member of Engineers Canada. He was involved with the Chisholm Foundation for Children and the Technical University of Nova Scotia. In 2002 he was awarded the Queen Elizabeth Golden Jubilee Medal for his community involvement.

[21] It would not be surprising to learn many of the community entities Mr. MacDonnell was involved with received at least some sums of contributions from the government. Yet it was the government whom he cheated.

[22] At the end of the day, the accused is a first-time offender with an exceptionally positive PSR.

[23] The courts are governed today both by Statutory Codification of sentencing principles as well as precedents set by other courts.

[24] Section 718 of the **Criminal Code** sets out the fundamental purposes of sentence as follows:

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.

Section 718 goes on to say:

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

Further:

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 intimate partner or a member of the victim or the offender's family,

(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,

(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,

(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, or

(vi) evidence that the offence was committed while the offender was subject to a conditional sentence order made under section 742.1 or released on parole, statutory

release or unescorted temporary absence under the Corrections and Conditional Release Act.

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.

[25] Our courts, in Nova Scotia as well as the rest of Canada, have consistently stressed the seriousness of fraudulent criminal activity. As was stated by Justice Derrick of our Court of Appeal in *R v Dawson*, [2021] NSJ No 123, 2021 NSCA 29 at para 74:

74 The emphasis in serious fraud sentencing on denunciation and deterrence is long-standing. Large scale, premeditated frauds involving a breach of trust are most often perpetrated by offenders who "are likely to be affected by a general deterrent effect" (*R. v. J.W.*, [1997] 33 O.R. (3d) 225 (ONCA), at para. 50; see also: *R. v. Gray*, 1995 CanLII 18 (ONCA), at para. 32 (Leave to appeal refused: [1995] S.C.C.A. No. 116). This Court in *Potter* endorsed the views of the sentencing judge in *Pavao*:

[23] The *Criminal Code* requires that the principles of denunciation, deterrence and rehabilitation be considered in sentencing. There is considerable legitimate debate as to whether significant sentences imposed on offenders truly have a deterrent effect, either for the individual offender or for others who might be tempted to commit similar crimes. **However, it is well recognized that if deterrence is relevant at all, it is particularly so for crimes of this nature, involving individuals who are intelligent and who deliberately set out to plan and execute sophisticated frauds. It is important that such individuals be aware that the significant risk of a long jail term outweighs any benefit or financial reward they may obtain from the fraud. This is relevant to the individual offender, and also to others in the community who are tempted towards such crimes.** (emphasis added) (*Potter*, at para. 918)

[26] In the very recent case of *R. v. Scholz*, Justice Nordheimer of the Ontario Court of Appeal was clear that in Ontario major frauds attract a sentence range of three to five years. The Justice went on to say at paragraphs 20 and 21:

20 In this case, of course, there were no specific individual victims of the respondent's offence. Rather, the victims were the taxpayers of Canada. The Government of Canada was deprived of tax revenue, which has the effect of increasing the tax burden on all other taxpayers in order to fund the work of the federal government. This very point was restated by this court in *Davatgar-Jafarpour*, at paras. 44-45. It was also made by the Quebec Court of Appeal in *R. c. Coffin*, 2006 QCCA 471, 210 C.C.C. (3d) 227, where the court rightly said, at para. 46: "Defrauding the government is equivalent to stealing from one's fellow citizens."

21 The need for a penitentiary term of imprisonment in major fraud cases has been reiterated in other decisions of this court, including *Bogart*, at para. 36; *R. v. Drabinsky*, 2011 ONCA 582, 107 O.R. (3d) 595, at para. 164, leave to appeal refused, [2011] S.C.C.A. No. 491; and *Davatgar-Jafarpour*, at para. 35.

[27] Scholz involved failure to remit G.S.T. as well as a single fraud charge related to a unique Registered Retirement Savings Plan that Scholz had created and marketed to 300 investors.

[28] Justice Nordheimer at paragraph 18 of his decision in *Scholz* stated that the Ontario Court of Appeal had a long-time established range of three to five years for major frauds.

[29] A review of the case law both in Nova Scotia and across the country makes it clear that for large scale frauds such as before this court the range of sentence is almost invariably a prison sentence of between two to five years.

[30] At issue in the matter before this court is whether a sentence under two years custody would be within the range and therefore open to a Conditional Sentence Order. If not would an appropriate period of a prison sentence be.

[31] Here the moral blameworthiness of the accused is high. Mr. MacDonnell's priority during the time in question was to maintain his personal lifestyle at the expense of his obligations to the Crown as well as his business. While he may have a positive PSR and no prior record there are no other mitigating factors which might bring the sentence here to under two years.

[32] Considering all of the above I find that the appropriate sentences regarding the fraud charges relating to the accused MacDonnell to be three years in custody on each to be served concurrently to each other. In relation to the charge under s. 327(1)(c) of the Excise Tax Act there will be a further concurrent period of custody of one year together with the mandatory fine of \$301,511.25.

[33] In relation to MacDonnell Security Risk Management Limited under s. 327(1)(a) of the Excise Tax Act there will be the imposition of the mandatory minimum fine of \$185,584.82. As to the two Criminal Code charges under s. 380(1)(a) a nominal monetary penalty of \$1.00 is imposed taking into account the totality principle.

[34] For MacDonnell Group of Canada Limited similar to MSRM the minimum fine under s. 327(1)(c) of the Excise Tax act of \$63,859.24 is imposed together with a nominal fine of \$1.00 for each additional charge.

[35] Finally, the charge against 318552NSL under s. 327(1)(a) will attract the mandatory minimum fine of \$52,067.18. The single fraud count under s. 380(1)(a) of the Criminal Code will have a nominal fine of \$1.00.

[36] Where applicable I waive any Victim Fine Surcharge.

Paul Scovil, JPC