SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Colpitts*, 2018 NSSC 180

Date: 20180725
Docket: Halifax, Nova Scotia, CRH No. 346068
Registry: Halifax

Between:

Her Majesty the Queen

v.

Robert Blois Colpitts and Daniel Frederick Potter

SENTENCING DECISION

Judge:	The Honourable Justice Kevin Coady
Heard:	May 22, 2018 in Halifax, Nova Scotia
Final Written Submissions:	May 18, 2018
Counsel:	Mark Covan, James Martin and Scott Millar, for the Crown Brian H. Greenspan and Jane O'Neill, Q.C. for Daniel Potter Jane Lenehan, for R. Blois Colpitts

By the Court:

[1] On December 6, 1999, Knowledge House Incorporated ("KHI") began trading on the Toronto Stock Exchange ("TSX"). Dan Potter, KHI's CEO, and Blois Colpitts, its Lead Director and legal counsel, were confident that the company's collaborative, problem-based learning programs would revolutionize the K-12 and post-secondary education system. So confident were they in the inevitability of KHI's success that they decided to artificially maintain the share price until the company could secure the capital it needed to get its software into schools across the country and beyond. The ends, they believed, would surely justify the means. The students would be equipped to succeed in the "knowledge economy", and the shareholders – including Mr. Potter and Mr. Colpitts – would get rich in the process. Unfortunately for the defendants, the financing never materialized and, after propping up the share price for 18 months, they could only watch as the house of cards they had built collapsed in August 2001, the stock plummeting from $5.10 a share to 33 cents. KHI closed its doors a few weeks later.

[2] On March 9, 2018, after the longest criminal trial in Nova Scotia history, Dan Potter and Blois Colpitts were convicted of the first two counts of the indictment before the Court, being:

- Count 1: conspiracy to, by fraudulent means and with intent to defraud, affect the public market price of shares, contrary to s. 465(1)(c) of the *Criminal Code of Canada*; and

- Count 2: that by fraudulent means and with intent to defraud, did affect the public market price of shares, contrary to s. 380(2) of the *Criminal Code of Canada*.

At the time of the offences, each count carried a maximum sentence of ten years. There were no mandatory minimum sentences.

[3] The Crown says the applicable range of sentence on each count is seven to nine years, and that the sentences should be served consecutively. Factoring in totality, the Crown recommends a sentence of federal incarceration in the range of 10 to 12 years for each offender. It is also seeking restitution orders totalling

$13,046,163.18, and DNA orders under s. 487.051 of the *Criminal Code*. Finally, the Crown asks that the victim fine surcharge apply on each of the convictions.

[4] Dan Potter and Blois Colpitts describe the Crown's proposed sentence as "draconian", "cruel", and "unwarranted both in law and in fact". They say the sentencing range for large-scale frauds in Nova Scotia is three to six years. Mr. Potter submits that a fit sentence for him, in the circumstances of this case, is three years' imprisonment on each count, to be served concurrently. For his part, Blois Colpitts submits that he should be sentenced to 1.5 to 2.5 years on each count, to be served concurrently. If the Court imposes a sentence of less than two years, Mr. Colpitts requests that it be served in the community, as a conditional sentence. Both defendants say that a restitution order is not available on the facts of the case, and that a DNA order is unwarranted.

Circumstances of the offences

[5] The complexity of this case is reflected in the length of the trial and the conviction decision: 2018 NSSC 40. While a short factual summary cannot possibly do justice to the sophistication of the fraud, a brief recitation of the facts will provide context for those who have no need to review the reasons for judgment.

[6] In the trial decision, I found that the defendants, along with 11 other individuals, developed and implemented a multi-faceted plan to manipulate the KHI share price on the TSX. The defendants artificially maintained the share price to attract new investment, to protect their own investment, to maintain access to credit sources, and, having financed their fraud through borrowing, to avoid margin calls on their accounts.

[7] The key participants in the conspiracy and fraud were Dan Potter, the CEO; Blois Colpitts, the lawyer; and Bruce Clarke, the broker. Each of them was critical to the market manipulation scheme. Mr. Potter was the silver-tongued mastermind, the architect of the conspiracy, who exerted his influence to manipulate and control other shareholders. He dictated who could sell shares, when they could sell, and how much they could sell. Mr. Colpitts was the enforcer, using his position as counsel to threaten legal action against anyone who might derail the conspirators' efforts, as well as preparing legal documents and providing legal advice in support of the conspiracy. At other times, he negotiated investment deals and prepared legal documentation knowing that the market price for KHI was being manipulated. Mr. Clarke was the engineer, moving the levers

as directed by the defendants to manage the trading in all of the conspirators' margin accounts. When Dan Potter wanted to reward certain shareholders for their loyalty, Mr. Clarke ensured that those individuals received liquidity.

[8] In December 1999, Dan Potter began a campaign to increase demand for KHI shares on the market. He asked KHI directors and other insiders to help facilitate buy-side activity in the stock to "get the stock to progress to the next level". He noted that this increased activity would likely bring the price up, so it was a good time to encourage friends and family to invest. Mr. Potter's goal was to see 10,000 KHI shares trading on the TSX every day by the end of January 2000. When he learned that a shareholder wanted to sell 200,000 shares, he immediately reached out to Dr. Bernard Schelew, the founder of KHI, to keep that person from putting sell-side pressure on the stock. When 50,000 of those shares did eventually come to market, the conspirators ensured that buyers were prearranged. By the end of January, the share price had risen from $4.15 to over $7. If that had been the end of Mr. Potter's efforts, we would not be here today.

[9] In March 2000, however, Dan Potter transferred $100,000 into the margin account of 2317540 Nova Scotia Limited (the "540 account"), Bruce Clarke's corporate account. Co-conspirator Calvin Wadden then transferred 220,000 shares of KHI into the account. These two transactions increased the 540 account's equity from $13,139 to more than $1.6 million, giving it $850,000 in loan-value-based buying power. Bruce Clarke immediately began using the account to buy KHI shares. Using the 540 account to trade allowed the defendants to sidestep disclosure obligations and create the misleading appearance of active retail trading in the stock.

[10] Just as the 540 account began trading, the "tech bubble" burst, causing interest in technology stocks to plummet and financing to dry up. The defendants had two options: allow the bear market to determine KHI's fate, or intervene to maintain the share price until market conditions improved or the company could secure new investment. Unprepared to watch their dreams for KHI go down the drain, the defendants decided to artificially maintain the price while trying to attract new investment.

[11] Over the course of the next 18 months, the defendants and their co-conspirators employed a variety of manipulative techniques to maintain the share price, including:

- They used their margin accounts to dominate the buy side of the market, creating a misleading impression of liquidity. The 540 account alone spent $4,336,816 buying KHI shares on the TSX. When it would run out of buying power, other conspirator accounts were used. Bruce Clarke also used client accounts to make unauthorized trades in KHI stock. Between March 2000 and August 2001, accounts connected to the conspiracy spent more than $11 million buying KHI shares.

- They suppressed sales by implementing a managed selling agreement, threatening legal action, placing contractual hold periods on the sale of certain shares, offering incentives not to sell, parking stock in nominee accounts, and keeping share certificates from their rightful owners.

- They frequently high-closed the stock. High closing refers to the practice of entering one or a series of orders, typically late in the trading day, for the purpose of raising the closing trade price from what it would otherwise be if left to the ordinary forces of supply and demand. High closing the stock served several functions. The published closing price is used to set a stock's value for margin account purposes; the higher the price, the more money that can be borrowed against the stock. High closing can also be used to give the stock a misleading appearance of strength. The conspirators regularly high-closed the stock while negotiating large investments to deceive prospective investors and ensure that the transactions would close.

- They failed to disclose material information concerning their "market support" activities and KHI's financial situation.

[12] The defendants were remarkably successful at controlling the market until the summer of 2001 when three important things happened. First, in July, National Bank Financial Limited cut the loan value on the conspirators' margin accounts. The move triggered margin calls for some investors, requiring the infusion of cash or the liquidation of KHI shares to bring the accounts back on side. Second, on August 16, Dan Potter's former company, Information Technology Institute ("ITI") announced that it had gone into receivership. This caused ITI's share price to plummet, generating margin calls for ITI shareholders. Some of those shareholders also held shares in KHI. Making things worse, on August 17, KHI announced that it had entered an agreement with IBK Capital Corp of Toronto to raise up to $5 million by way of private placement. The news was not favourably received, and shareholders began aggressively selling their shares. On August 16,

the stock closed at $5.10. By August 31, the price had dropped to 33 cents per share. The stock never recovered, and KHI ceased operations on September 13.

Circumstances of the offenders

[13] Dan Potter is a 66-year-old first-time offender. He has spent his entire life in Nova Scotia. He obtained his Bachelor of Arts degree from Acadia University, before attending Dalhousie University to obtain his LL.B.

[14] Mr. Potter practiced law with Burchell Jost MacAdam & Hayman from 1976 to 1980, before moving to the Atlantic Trust Company of Canada as Vice-President, Planning and Development. He remained in that role for three years, then became the President and CEO of Novatron Information Corporation in 1983.

[15] From 1991 until 1998, Mr. Potter was the CEO of ITI. In that role, he transformed a single location training institute into the largest single source of information technology graduates in Canada.

[16] After ITI was sold to Torstar in 1998, Mr. Potter became the President and CEO of KHI. Throughout his time at KHI and after its collapse, Mr. Potter was an active member of the Halifax business community. He was the First Chair of the Board of Directors of Nova Scotia Business Inc.; a member of the Learning Advisory Committee of CANARIE, Inc.; a Director of the Information Technology Association of Canada; and the Founding Director of the Software Industry Association of Nova Scotia.

[17] Mr. Potter has been married to Fiona Imrie for 36 years. They have five children together, who were between eight and 17 years old at the time of KHI's collapse. Their children are now adults, ranging in age from 25 to 34 years old. Mr. Potter is also a grandfather to two young grandchildren.

[18] In addition to mentoring his own children, Mr. Potter has been a mentor to other children in the community. From 2004 to 2009, Mr. Potter and Ms. Imrie acted as Homestay parents to over 15 international students who had travelled to Halifax to learn English.

[19] Blois Colpitts is 55 years old. He was born in Moncton, New Brunswick. He obtained his law degree from the University of New Brunswick in 1986 and was admitted to the Nova Scotia bar in 1987.

[20] Mr. Colpitts has practiced law in Nova Scotia since 1987, when he joined Stewart MacKeen & Covert (later Stewart McKelvey Stirling Scales). Mr. Colpitts left Stewart McKelvey in 2003 and opened his own law firm in 2004. He has spent his entire working life in Nova Scotia practicing corporate commercial and securities law.

[21] Mr. Colpitts has twin boys who were three years old at the time of KHI's collapse. They are now adults attending university. Mr. Colpitts is the primary caregiver for his 82-year-old mother.

[22] Mr. Colpitts has contributed to the Halifax community by serving on volunteer boards and committees at various institutions including a local university and the Nova Scotia Barristers Society.

[23] Mr. Colpitts took KHI public on the Montreal Stock Exchange as its lawyer in 1987 and joined the Board of Directors at the request of Dr. Bernard Schelew. He became KHI's Lead Director in or around 2000.

Principles of sentencing

[24] The fundamental purpose of sentencing is to ensure respect for the law and the maintenance of a just, peaceful, and safe society. Sentencing is not an exercise of vengeance; it is an exercise of retribution. Lamer C.J.C. distinguished the two concepts in *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, 1996 CarswellBC 1000. Writing for a unanimous court, he held at para. 80:

> Vengeance, as I understand it, represents an uncalibrated act of harm upon another, frequently motivated by emotion and anger, as a reprisal for harm inflicted upon oneself by that person. Retribution in a criminal context, by contrast, represents an objective, reasoned and measured determination of an appropriate punishment which properly reflects the moral culpability of the offender, having regard to the intentional risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offender's conduct. Furthermore, unlike vengeance, retribution incorporates a principle of restraint; retribution requires the imposition of a just and appropriate punishment, and nothing more.

[25] The purpose, objectives, and principles of sentencing are outlined in sections 718 to 718.3 of the *Criminal Code*. Section 718 sets out 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;
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> (c) to separate offenders from society, where necessary;
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> (d) to assist in rehabilitating offenders;
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> (e) to provide reparations for harm done to victims or to the community; and
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> (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

[26] Section 718.1 directs a sentencing court to ensure that the sentence is "proportionate to the gravity of the offence and the degree of responsibility of the offender." The Supreme Court of Canada has described proportionality as the "fundamental principle" of sentencing, which "could aptly be described as a principle of fundamental justice under s. 7 of the *Charter*": *R. v. Ipeelee*, 2012 SCC 13, [2012] S.C.J. No. 13, at para. 36.

[27] Statutory aggravating and mitigating factors are contained in s. 718.2, under the heading "Other Sentencing Principles". In *R. v. Arcand*, 2010 ABCA 363, [2010] A.J. No. 1383, at para. 63, the Alberta Court of Appeal described the relationship between the fundamental proportionality principle and these secondary sentencing principles:

> Interpreting the secondary principles as complementary to, and consistent with, the proportionality principle gives weight and meaning to the secondary principles while maintaining, as Parliament clearly intended, the integrity and primacy of the proportionality principle. **Thus, sentencing judges are not free to pick and choose one principle out of s. 718.2 to the exclusion of the others, much less ignore the proportionality principle.** The object of the sentencing exercise is to draw on all sentencing principles in determining a just and appropriate sentence which reflects the gravity of the offence and the degree of moral blameworthiness of the offender.
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> [*Emphasis added*]

Sentencing for fraud

[28] The sentencing regime for those convicted of fraud changed after the commission of these offences. In 2004, the fraud provisions of the *Criminal Code* were amended to increase the maximum punishment from 10 to 14 years, and, in 2011, amended again to provide for a minimum punishment in particular circumstances. Those changes do not apply to the defendants.

[29] As the Supreme Court has made clear, sentencing is a highly individualized and fact-specific exercise. The facts of each case will guide how the sentencing principles are applied, and no one principle is to be considered to the exclusion of others. Courts have affirmed, however, that in large-scale, pre-meditated fraud cases, denunciation and general deterrence are the most important sentencing principles. In *R. v. Bogart*, 2002 CarswellOnt 2537, [2002] O.J. 3039 (Ont. C.A.), leave to appeal refused [2002] S.C.C.A. No. 398, for example, the Ontario Court of Appeal observed at para. 30:

> This court has affirmed that in cases of large-scale fraud committed by a person in a position of trust, the most important sentencing principle is general deterrence. Mitigating factors and even rehabilitation become secondary. In *R. v. Bertram and Wood* (1990), 40 O.A.C. 317, this court observed that most major frauds are committed - as this one was - by well-educated persons of previous good character. Thus the court held at p. 319,
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> > The sentences in such cases are not really concerned with rehabilitation. Instead, they are concerned with general deterrence and with warning such persons that substantial penitentiary sentences will follow this type of crime, to say nothing of the serious disgrace to them and everyone connected with them and their probable financial ruin.

[30] Similarly, in *R. v. Drabinsky*, 2011 ONCA 582, [2011] O.J. No. 4022, leave to appeal denied [2011] S.C.C.A. No. 491, the Ontario Court of Appeal emphasized that "denunciation and general deterrence must dominate sentencing for large scale commercial frauds" and that these principles "most often find expression in the length of the jail term imposed": para. 160.

Cases

[31] The parity principle outlined in s. 718.2(b) of the *Code* requires courts to take into account the fact that similar sentences should be imposed on similar offenders for similar offences committed in similar circumstances. The Supreme Court of Canada has recognized, however, that, "[o]wing to the very nature of an individualized sentencing process, sentences imposed for offences of the same type will not always be identical. The principle of parity does not preclude disparity *where warranted by the circumstances*, because of the principle of proportionality": *R. v. L.M.*, [2008] 2 S.C.R. 163, [2008] S.C.J. No. 31, at para. 36.

[32] The Crown and the defendants have, between them, provided the Court with dozens of fraud cases. I will review the authorities they relied on most heavily. I

am mindful that cases involving offences that occurred after the maximum fraud sentence increased from 10 to 14 years must be treated with caution.

The Crown's cases

[33] The Crown submits that the authorities draw a "clear and sharp distinction" between complicated frauds involving lawyers, and those involving non-lawyers. It suggests that the range of sentence for lawyers who commit large-scale, complex frauds in excess of $1 million is seven to nine years, while the range for non-lawyers is three to six years. Both Dan Potter and Blois Colpitts are legally trained, but Mr. Potter did not practise law at the time of the offences. The Crown says that while Mr. Potter did not hold out his legal education to entice investors, his involvement in the offences easily eclipses that of Mr. Colpitts. For this reason, the Crown submits, his culpability is equivalent to that of Mr. Colpitts and the higher range of sentence should be applied to both defendants.

[34] In *R. v. Davis*, 2014 ABCA 115, [2014] A.J. No. 314, the Alberta Court of Appeal quashed an 18-month sentence against a lawyer who defrauded and stole almost $3 million from multiple victims over a nine-month period. She stole property worth $330,000 from an estate while acting as its executor, fraudulently discharged three mortgages valued at almost $1.5 million, and fraudulently obtained three additional mortgages valued at over $1 million. The Court noted that her conduct was "persistent, prolonged, and deliberate and formed part of a sophisticated scheme involving forging signatures and uttering forged documents to transfer property, fraudulently obtaining mortgages on those properties, and fraudulently discharging existing mortgages": para. 3.

[35] In imposing a sentence of four years, the Alberta Court of Appeal divided the Crown's fraud cases into three categories: non-lawyer trust thefts, lawyer trust thefts, and frauds exceeding $1 million. For those cases involving dishonest lawyers, the Court stated at para. 33:

> The amounts involved ranged from $700,000 to over $2,000,000 and the sentences from 12 months to 9 years. Theft of amounts in the middle six figures typically resulted in prison terms of three to three and a half or four years. **Frauds involving over a million dollars ranged from seven years in *Cowan* to eight in *Liknaitzky*.**
>
> [*Emphasis added*]

[36] For frauds exceeding $1 million, with no lawyer or breach of trust, the Court of Appeal observed that the cases "suggest ranges between three and six years": para. 34. The Court concluded by emphasizing the highly reprehensible nature of frauds committed by lawyers:

> 36 We cannot overemphasize the harm occasioned by lawyer fraud. To be admitted to the practice of law, a lawyer must swear to uphold the law and in all things to conduct him or herself truly and with integrity. The respect that society holds for the profession is in our hands. Society's respect for the rule of law is directly dependent on it being honoured by the courts. Using the law to defraud beneficiaries, financial institutions and the Land Titles Office undermines the very foundation on which this profession is built. The public entrusts money to lawyers, who are fiduciaries and must conduct themselves in the utmost good faith.
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> 37 In this case, the respondent's position as a member of the Law Society allowed her to perpetuate this fraud. The damage to victims, beneficiaries, financial institutions, her former spouse, and to the reputation of the legal profession cannot be understated. Her conduct is highly blameworthy.

[37] In *R. v. Samji*, 2016 BCPC 301, [2016] B.C.J. No. 2109, aff'd on other grounds: 2017 BCCA 415, Rashida Samji was a notary who ran a Ponzi scheme, falsely representing to investors that the Mark Anthony Group Inc. was expanding its wine business into South America and South Africa. The defendant prepared false documentation to lure investors to enter into "a secure investment opportunity" through a trust fund operated and managed by her notary practice. Investors lost just under $10.5 million. Following proceedings before the British Columbia Securities Commission, the Commission imposed a $10,811,799 disgorgement order along with an administrative monetary penalty of $33 million. The Court described the fraud in the following terms:

> 42 The scheme was elaborate, deliberate, and premeditated. Professional and complex documentation was prepared by Samji to promote the scheme. I do not find that she became engaged in the promotion of the scheme as a result of an exercise of poor judgment. She knew exactly what she was doing and pursued the scheme with eyes wide open.
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> 43 It was aggravating that she used her position as a notary to lure the victims who unwittingly believed that their investment funds would be safe in her non-existent notary trust account. The use of her notary status sets her moral culpability at the high end of the scale. She was the principal who perpetrated the fraud.

[38] The Court recognized the many mitigating circumstances – the defendant's poor health, the significant penalties before the Securities Commission, and the fact that she did not proceed to trial. Nevertheless, the Court imposed a total sentence of six years' incarceration.

[39] For cases of fraud committed by non-lawyers, the Crown describes *R. v. Cameron*, 2017 ABQB 554, [2017] A.J. No. 331, as a "close analogue" to the case at bar. The Crown asserts, however, that the *Cameron* case lacks the magnitude, complexity, and the degree of planning involved in the KHI fraud, as well as the potential impact on the public markets. Over the course of five years, James Cameron ran a scheme selling shares of his private company, Venture Trading Inc. ("VTI"). VTI presented itself as a new venture start-up initiative, or seed capital company. Mr. Cameron made false statements about VTI's investments and profitability to entice investment, and diverted investor funds for his personal use. He used the money on vehicles, residential mortgages, credit card bills, and a cruise to the Bahamas, among other things. The defendant's scheme virtually guaranteed that VTI could never be profitable from 2002 to 2005, after which time the company collapsed. Investors were defrauded of over $8 million, and Mr. Cameron was convicted of fraud over $5,000 and income tax evasion.

[40] According to the Crown, *Cameron* shares many of the fraudulent techniques seen in the KHI fraud: the defendant kept secret the true financial position of VTI; he continually required new investment to fund his operation because VTI was not profitable; when investors wanted out of VTI, he always resisted, delayed, and most often ensured it never happened; and finally, he relied on money from new investors to repay early investors – a type of Ponzi scheme.

[41] In imposing sentence, the Court considered Mr. Cameron's poor health (he was a cancer survivor) and advanced age (66 at time of sentencing). Nevertheless, the Court imposed a total sentence of 11 years – 10 years for the fraud conviction and one year consecutive for the tax evasion offences. It also ordered restitution in the amount of $1,831,700, and a fine under the *Income Tax Act* in the sum of $550,892.45.

[42] The Crown also relies on *Drabinsky*, one of the leading authorities for fraud sentencings. The defendants, Garth Drabinsky and Myron Gottlieb, were found guilty after trial and each sentenced on two counts of fraud. Mr. Drabinsky and Mr. Gottlieb established Cineplex in the 1980s. They left that company in 1989, after acquiring its live entertainment division, and started a live entertainment

company called MyGar. On May 20, 1993, the company, renamed Livent, went public on the Toronto Stock Exchange. The defendants were major shareholders in Livent and together they controlled its operations and management decisions. Livent produced numerous successful musicals, plays, and concerts in Toronto, New York, and Chicago, often in historic theatres that the company renovated, owned, and managed. The company made significant cultural and economic contributions to these cities, and others.

[43] Running a successful live entertainment company was expensive, and Livent needed regular substantial infusions of capital to fund its ambitious projects. Between 1993 and 1998, the company raised over $500 million through share offerings, special warrants, notes, bond issues, debentures, and bank loans.

[44] On April 13, 1998, Mr. Drabinsky announced a change in management of Livent that would allow him to focus exclusively on the artistic and creative work of the company. A group of investors that included Michael Ovitz, a well-known Hollywood figure, was putting over $30 million into the company. The day-to-day accounting would be done by the Ovitz group's management team. The announcement was met with excitement and optimism. It was anticipated that adding the investors' management experience to the creative talent at Livent would ensure the company's continued upward trajectory.

[45] The Ovitz deal closed in June 1998, and the investors installed their management team. Unbeknownst to them, however, the Livent financial statements were fraudulent and did not accurately reflect the financial state of the company. It did not take long for the Ovitz group's accountants to start asking questions. Several Livent employees who had helped create the fraudulent statements went to the new management team and exposed the fraud, hoping to protect themselves. New management locked the defendants out of Livent, retained litigation counsel, and contacted securities regulators. Five months after the Ovitz deal closed, the TSX suspended trading of Livent shares and the company declared bankruptcy in the United States and Canada. A year after that, the shares were de-listed from the TSX.

[46] The fraud charges against the defendants encompassed two distinct frauds: one in the course of taking the company public (the "MyGar fraud"), and a second relating to the accounting practices of the public company (the "Livent fraud").

[47] The MyGar fraud had its roots in a "kickback scheme" devised by the defendants to enable them to take more money out of MyGar than the company's

lending agreement with the bank would allow. They were assisted by two individuals whose companies did extensive construction-related work for MyGar. It was agreed that the defendants, or entities controlled by them, would bill the construction companies for fictional services and support those billings with fraudulent invoices. The companies would pay the defendants the value of the false invoices, and then add those amounts to the invoices they submitted to MyGar for actual construction work done on MyGar's properties. Accordingly, the monies advanced from MyGar to the defendants were hidden under fraudulent invoices for services never rendered by them, as well as fraudulent invoices that inflated the amount claimed by the companies for construction work done for MyGar. Between 1990 and 1993, the defendants used the kickback scheme to take more than $8 million out of the company.

[48] The payments to the defendants should have been recorded in MyGar's financial statements as advances from the company to its shareholders. Instead, the defendants instructed the company's accountants to disguise the payments as either fixed assets or preproduction costs. Before MyGar went public as Livent in the spring of 1993, George Eckstein, the company's Vice-President of Finance and Administration, recommended to the defendants that MyGar should take a $4 to $6 million write-down of its assets so that their inflated value – caused by the treatment of the fraudulent payments – would be removed from the company's financial picture before it went public. Mr. Eckstein testified, and the trial judge accepted, that Mr. Drabinsky and Mr. Gottlieb emphatically rejected his proposal, saying that a write-down would "look terrible" and would interfere with the ability to market the IPO. Consequently, the MyGar financial statements used for the IPO showed assets of $90 million, an overstatement of about $6 million. The trial judge found that the misrepresentations were material to investors' assessments of the merits of the IPO and that the economic interests of those who ultimately invested in the IPO were prejudiced by the misrepresentations.

[49] The Livent fraud related to the accounting practices employed at the public company between 1993 and 1998. The trial judge found a consistent pattern of artificially reducing expenses in Livent's financial statements so that the company's reported net income would meet budget projections. The trial judge concluded that the purpose of the fraud was to make it appear to potential investors and lenders that Livent was meeting its financial obligations, thereby making it easier to bring in new investment.

[50] After reviewing the relevant authorities, the trial judge held that the appropriate sentencing range for large-scale, pre-meditated fraud is approximately five to eight years. In sentencing Mr. Drabinsky and Mr. Gottlieb to seven years and six years' incarceration, respectively, she took into account mitigating factors including Mr. Drabinsky's physical limitations from childhood polio and that Mr. Gottlieb had lost everything and been unable to work for ten years.

[51] The Court of Appeal held that "the trial judge was correct in determining that crimes like those committed by the appellants must normally attract significant penitentiary terms well beyond the two-year limit applicable to conditional sentences": para. 164. It found that she was also correct in treating the fraud as a "large-scale" commercial fraud, notwithstanding the lack of evidence quantifying the economic loss caused by the fraud. The sentence appeal was allowed, however, on the basis that the trial judge erred in attributing the losses that resulted from the company's bankruptcy to the fraud. The Court of Appeal reduced the defendants' sentences to five and four years' imprisonment, respectively.

[52] The Crown also relies on *R. v. Fast*, 2015 SKCA 56, [2015] S.J. No. 274. Ronald Fast ran a Ponzi scheme that ultimately resulted in a $16.7 million fraud on nearly 250 primarily elderly people in his community. His daughter, whom he involved in the scheme, was also charged and convicted. The defendant appealed his sentence of seven years, arguing that his ill health rendered it an unfit sentence. The trial judge acknowledged the defendant's health issues at para. 22 of his decision[1]:

> Mr. Fast is 71 years of age. He has significant physical and mental health problems. On the psychiatric front, he is depressed and is a suicide risk. While he has expressed ideas about hurting individuals whom he believes are responsible for Marathon's bankruptcy and his own downfall, he is not assessed as a serious risk for violence toward others. The Crown made much of his threatening comments, but based on the information now before the court, I do not accept that Mr. Fast is presently a serious danger to these individuals. Regarding his physical ailments, Mr. Fast is morbidly obese, has heart troubles and diabetes. One need only observe him, his breathing and limited mobility, to accept defence counsel's point that Mr. Fast is in precarious health. This is a mitigating factor to be weighed when considering available dispositions, but given that there are custodial facilities which include accredited hospitals, it is not a determinative factor.

[1] 2014 SKQB 161, [2014] S.J. No. 299.

By the date of the appeal hearing, the defendant's condition had deteriorated still: he had lost mobility, experienced fainting spells, and had lost control over his bladder and bowel function. His seven-year prison sentence was upheld.

[53] Finally, the Crown relies on *R. v. Burden*, an unreported decision of Judge Claudine MacDonald of the Nova Scotia Provincial Court in Kentville (February 9, 2016). In that case, the defendant pleaded guilty to three charges of fraud over $5,000. Through his company, Advance Commission Company of Canada ("ACC"), Gregory Burden purchased real estate commissions from agents prior to the closing dates of the real estate transactions. He would then obtain an account receivable for the full commission, which he would collect on the closing date. In May 2007, the defendant obtained a credit facility with the Royal Bank. Under the terms of the agreement, he could borrow up to 75% of ACC's account receivables to a maximum of $100,000 per agent, and $250,000 per brokerage. The agreement required the defendant to submit monthly borrowing limit certificates and annual audited financial statements.

[54] Between May 2007 and April 2012, Mr. Burden submitted 53 fraudulent monthly borrowing limit certificates and five fraudulent year-end statements. Based on these fraudulent financials, the Bank increased the credit it offered to the defendant. By the time the fraud was discovered, the Bank had loaned the Mr. Burden more than $8.5 million.

[55] Over the years, about 36 independent investors -- several of them personal friends of the defendant -- bought shares in the company. One couple, relying on the false financial statements, invested and lost $306,900. Two other couples lost $76,000 and $27,000, respectively.

[56] The Crown recommended a custodial sentence in the range of three to five years. It also sought stand-alone restitution orders and a fine in lieu of forfeiture. The defendant argued that a conditional sentence order followed by lengthy probation was appropriate. He was confident that he could repay the individual investors and suggested that the restitution orders be included as conditions of the probation order.

[57] In reviewing the principles of sentencing, Judge MacDonald acknowledged that deterrence and denunciation are the dominant considerations in large-scale fraud cases. In her view, a sentence of less than two years "would not come close" to serving either of those objectives in a case of fraud spanning six years and involving $10 million. Judge MacDonald noted that the defendant used his

business acumen to carry out a sophisticated fraud against the Bank, his friends, and other investors. On more than 50 separate occasions, he knowingly provided false information to the Bank. He also provided his friends with these false financial statements to induce them to invest.

[58] Judge MacDonald accepted that Mr. Burden's motive for the fraud was not pure greed. He was attempting to operate a legitimate business and the fraudulent funds were primarily used to keep that business going. She went on to add, however, that the defendant would clearly benefit financially if the business succeeded. Mitigating factors included the defendant's age (66 years old), his lack of a criminal record, his decision to plead guilty, his positive pre-sentence report, his desire to make restitution to individual investors, and his expression of remorse for his actions. Describing the Crown's recommendation as "very reasonable", the Court sentenced the defendant to four years. The Court also ordered Mr. Burden to pay $3 million in restitution to Royal Bank, as well as $409,900 to the three couples who had made investment decisions based on the forged financial reports.

[59] According to the Crown, the crimes of Mr. Potter and Mr. Colpitts are more complex and more serious than those committed in any of the cases it provided to the Court. The Crown emphasizes that unlike the defendants in the other cases, Mr. Potter and Mr. Colpitts are not being sentenced for fraud *simpliciter* under s. 380(1). Instead, they are being sentenced for conspiracy and for the offence of affecting the public market price of KHI shares with an intent to defraud, contrary to s. 380(2). The Crown submits that the additional element required for a conviction under s. 380(2) significantly enhances the defendants' moral blameworthiness and justifies the Crown's recommended sentence of seven to nine years' imprisonment on each count.

[60] The Crown also takes the position that the sentences on each count must be served consecutively. It says the crime of conspiracy to manipulate the KHI share price is a separate and distinct offence from the crime of manipulating the KHI share price with intent to defraud. The essence of the conspiracy is an agreement to commit an unlawful act – here, the manipulation of the KHI share price. The essence of the second count, on the other hand, is the intent to defraud by means of stock manipulation. The Crown submits that within this count are numerous individual frauds on persons known and unknown to the defendants, financial institutions, and the public at large. The Crown distinguishes this situation from a "crime spree" or a "single criminal adventure". Instead, the frauds are separate and distinct transactions committed over a lengthy period of time using multiple

fraudulent means. Each of these frauds, the Crown says, are separate and distinct from the conspiracy offence and are themselves deserving of a significant sentence of imprisonment.

[61] In support of its position, the Crown cites *R. v. Bailey*, 2014 ABPC 223, [2014] A.J. No. 1116. In that case, the defendant (a lawyer), along with other defendants, operated an investment scheme in which people, individually or through corporations, invested tens of millions of dollars in a company known as HMS Financial Inc. Investors were promised high rates of return and that their investments were secured by bonds held by Mr. Bailey worth between $30 and $40 million. In fact, the bonds were worthless. Mr. Bailey was charged with four counts: conspiracy to commit fraud, fraud, conspiracy to transfer proceeds of crime, and proceeds of crime. The Court held that, before considering totality, it would have sentenced Mr. Bailey to four consecutive sentences. After considering totality, the Court imposed concurrent sentences of eight years for conspiracy to commit fraud and fraud over $5,000, and concurrent sentences of one year for conspiracy to commit money laundering and money laundering. The Crown says that although the Court in *Bailey* did not discuss the matter in any detail, it clearly determined that the conspiracy and the predicate fraud offences were separate and distinct.

[62] According to the Crown, the defendants committed two separate and distinct offences and they should receive consecutive sentences of seven to nine years' imprisonment on each count. This would result in a total sentence of 14-18 years, which is clearly outside the range of appropriate sentences. Adjusting for totality, the Crown submits that a sentence in the range of 10-12 years' imprisonment is fit and appropriate. The Crown says that although this sentence is higher than the nine-year total sentence in *Bailey*, that case fell well short of the magnitude, complexity, duration, and the degree of planning evidence in the KHI fraud. Furthermore, the Crown notes that its recommended sentence is consistent with the sentence imposed in *Cameron*.

Defence cases

[63] Dan Potter and Blois Colpitts say the cases the Crown relies on to support its recommended sentence of 10 to 12 years are all distinguishable, and that "the Crown has minimized – to the point of ignoring – the one directly on-point case that has already established what would be considered a fit sentence for this exact crime: the sentence received by co-conspirator Bruce Clarke." Mr. Potter and Mr.

Colpitts each submit that it can be reasonably argued that Mr. Clarke's participation in the offences was "more egregious" than their own.

[64] According to the defendants, the Crown's submissions are "so out of line with what could reasonably be deemed to be a proportionate sentence in this case that they ought to be ignored entirely." They emphasize that the Crown's recommended total sentence is more severe than the punishment imposed for what has been described as possibly the worst offence committed by the worst offender in the context of large-scale commercial fraud. In *R. v. Bjellebo*, 2000 CarswellOnt 403, [2000] O.J. No. 478, aff'd [2003] O.J. No. 3946, two defendants were each found guilty after trial of two counts of fraud and two counts of uttering forged documents in connection with a massive income tax fraud. The sentencing judge described it as a "substantial fraud of massive proportion and international in scope" involving the establishment of 79 fraudulent tax-sheltered limited partnerships: para. 18. Investors had been promised security, an interest in a luxury yacht or cruise ship, legitimate tax losses, eventual charter revenues, and high tax write-offs in exchange for their investments. In the end, they received none of these things. Instead, the defendants prepared fraudulent documents showing that the limited partnerships had incurred millions of dollars of losses for the construction and purchase of boats. Those fictitious losses were then claimed on over 2,600 income tax returns filed by the 613 Canadian taxpayers who had invested.

[65] The sentencing judge estimated the total fraud on the investors to be $22 million in actual cash, representing monies extracted from them in the belief that they were investing in a legitimate tax-sheltered enterprise. One of the defendants was, at one point, collecting $500,000 per month from investors by way of interest payments. The investors, relying on the false information provided by the defendants, claimed losses of $118 million from Revenue Canada. The sentencing judge estimated that if the fraud had not been discovered, Revenue Canada would have lost $60 million. The fictitious invoices, loan account statements, letters of credit, and performance bonds totaled almost $600 million.

[66] Mr. Bellfield was deemed the leading player in the scheme, with little prospect of rehabilitation. It was very well documented that the bulk of the monies went to him and were used for his own purposes. No mitigating factors were identified, and the Court held that, "[g]iven the magnitude of the offence, the calculated manner in which it was carried out, its duration, the breaches of trust and the lack of mitigating or ameliorating factors, this may well in the context of a

fraud, constitute a situation of the worst offence by the worst offender": para. 48. The Court sentenced him to ten years' imprisonment on the first count of fraud (then the maximum sentence), a fine of $1 million dollars on the second count of fraud (or two years' imprisonment in the case of default on the fine) and four years on each of the forgery counts, to be served concurrently with each other and with count one. In upholding the sentence, the Court of Appeal held that although the sentence was at the high end, it was within the acceptable range for a highly sophisticated and massive fraud involving $118 million against the public purse and $22 million against more than 600 individuals.

[67] As for other cases outside Nova Scotia, both defendants rely on *R. v. Kazman*, 2018 ONSC 2332, [2018] O.J. No. 2143, where the Court accepted that the appropriate range of sentence for pre-meditated, large-scale, multi-million dollar fraud is three to five years' imprisonment. The *Kazman* case involved multiple defendants, five counts of fraud over $5,000, two related counts of money laundering, and a criminal organization offence. Of relevance to this case are the fraud counts against two of the defendants – Marshall Kazman and Gad Levy.

[68] The defendants were involved in a sophisticated scheme to defraud Industry Canada, which administered the Small Business Financing Program, and five major banks. The charges arose out of numerous small business loans that the defendants had obtained from the banks over a period of approximately 30 months. The defendants defaulted on all of these loans (except one) within 12-18 months. They paid the loan proceeds out to themselves for fraudulently documented construction work. The scheme to obtain the loans was elaborate, involving fake companies, fraudulent lease agreements, fraudulent term deposit statements, and fraudulent invoices. The trial judge found that each company had been created solely for the purpose of fraudulently obtaining the loans so that the money advanced on each loan could be diverted to the defendants for their personal gain. The loans were guaranteed by Industry Canada, which paid the banks 85% of the value of the loan in the event of default. As a result of the fraud, Industry Canada paid out approximately $4.8 million.

[69] The Court accepted that this was a "pre-meditated, sophisticated 'large-scale', multi-million dollar complex fraud" which "involved a high level of planning and orchestration, skill, deception and covert behaviour that took place over a lengthy period of time", with multiple victims, including major banks and Canadian taxpayers: para. 393. The Court stated that the appropriate range of

sentence was three to five years' imprisonment, "even though the defendants were not in a typical position of trust with the financial institutions": para. 395.

[70] The Court in *Kazman* acknowledged that the situation was more serious than in *Drabinsky* because, unlike in *Drabinsky*, the defendants were motivated by pure greed: para. 402.

[71] Mr. Kazman, a lawyer, was convicted of all five counts of fraud. The sentencing judge characterized Mr. Kazman as playing a "key role" in the criminal organization, using his legal experience to incorporate the fraudulent companies and prepare the fraudulent leases: para. 478. She found that there was a "significant risk" that he would reoffend: para. 485. Aggravating factors included Mr. Kazman's previous disbarment for his involvement in fraudulent real estate transactions, and his convictions for money laundering and for committing offences for the benefit of a criminal organization. Mitigating factors included that neither defendant had a criminal record and that there was some delay in bringing the matter to trial. The Court sentenced Mr. Kazman to five years on each fraud count, to be served concurrently.

[72] Mr. Levy was also convicted on all counts. In sentencing him to six years, the Court found that he was equally morally responsible for the fraud, but that his sentence must be more severe because he received the most money from the scheme, and he continued the fraud on his own after the breakdown of his relationship with Mr. Kazman: para. 479.

[73] The defendants also rely on *R. v. Clarke*, 2004 CarswellOnt 3366, [2004] O.J. No. 3438 (Ont. C.A.). In that case, the Ontario Court of Appeal overturned a conditional sentence of two years less a day where the defendant committed a $20 million fraud. Dane Clarke, a bank employee, surreptitiously obtained passwords to accounts used by front-line employees, and used those accounts to redeem money from 33 separate mutual funds. The amount of the redemptions was approximately $20 million, and the defendant attempted to transfer those funds into his own investment accounts. The fraud was discovered by chance the next day and no funds were lost.

[74] In allowing the Crown's sentence appeal, the Court described the offence as a "huge fraud that could have resulted in almost unprecedented losses to the bank" and one that "involved planning on the defendant's part both in its execution and for dispersal of the stolen funds": para. 16. According to the Court, it was the "very type of offence for which general deterrence had to be the paramount

consideration, even for a first time offender of otherwise good character": para. 16. Accepting that the range of sentence should be three to five years, the Court held that a sentence near the bottom of the range would have been justified in the circumstances. In particular, the Court noted that the offence was committed over a very short period of time, it was not particularly sophisticated, and that although Mr. Clarke was in a position of trust, he was at the low end of the bank's hierarchy and had not been entrusted with the particular information that allowed him to commit the offence.

[75] In *R. v. Coffin*, 2006 QCCA 471, [2006] Q.J. No. 3136, Paul Coffin was convicted of 15 counts of fraud arising out of the sponsorship scandal. In total, the defendant defrauded the Government of Canada of approximately $1.5 million over a period of five years. He submitted 373 fraudulent invoices in order to misappropriate public funds for his own use. He was 62 years old at the time of sentencing and had no prior criminal record. In overturning the defendant's conditional sentence, the Court of Appeal noted:

> 60 In the present case, the prosecution is correct in its contention that the various Canadian appellate courts have generally imposed imprisonment in cases of large-scale premeditated fraud that took place over relatively long periods of time.
>
> 61 In these cases, the courts recognized that a custodial sentence was necessary to achieve the objectives of denunciation and deterrence, even where the offender (1) had no record, (2) enjoyed a good reputation in his or her milieu, (3) had, on some occasions, partially repaid the victims, (4) expressed remorse, (5) was not likely to re-offend.
>
> [*Emphasis in original*]

[76] After considering all of the aggravating and mitigating circumstances, and in particular the reimbursement by the defendant of $1 million, the Court sentenced him to 18 months' imprisonment.

[77] Mr. Potter and Mr. Colpitts submit that there have also been numerous sentencing cases for large-scale frauds in Nova Scotia and that those cases establish a sentencing range of approximately three to six years' imprisonment. In *R. v. Black*, 2003 NSSC 99, [2003] N.S.J. No. 168, Frederick Black was convicted of three counts of fraud. His company obtained a $1 million loan from a German company on the basis that the funds would be used to meet obligations associated with a project involving both companies. The defendant then misrepresented to ABN Bank and ACOA that the funds were an injection of equity into his company.

That misrepresentation induced the financial institutions to advance funds to the defendant that would otherwise not have been made available to him.

[78] The evidence showed that Mr. Black diverted approximately $684,000 of the $1 million he received from the German company to other companies he controlled or operated. There was no evidence as to what those companies did with the funds and it was not demonstrated that the defendant personally benefitted from the fraud. The evidence did establish, however, that Mr. Black provided inaccurate financial information to at least three parties. Each party relied on that information to its detriment, and each incurred a loss of at least $1 million. The Court accepted that it was a large-scale fraud and that general deterrence was therefore a paramount sentencing principle. Mitigating factors included Mr. Black's positive presentence report, his lack of a criminal record, and the absence of personal benefit from the fraud. The large amount of money involved in the fraud was an aggravating factor. The Court sentenced the defendant to two years' imprisonment on each count of fraud, to be served concurrently.

[79] In *R. v. Wilson*, 2008 NSPC 68, [2008] N.S.J. No. 646, John Wilson pleaded guilty to a single count of fraud that encompassed numerous transactions over a one-month period. Mr. Wilson ran a car dealership. During the period in question, he fabricated purchase orders for 68 vehicles and submitted them to the Bank of Nova Scotia for inventory financing, which resulted in the Bank advancing him approximately $1.8 million. The defendant's guilty plea, his expressions of genuine remorse, his complete cooperation with the police investigation, his previous good character, indications that he was suffering from stress and depression, and the short duration of the fraud were all mitigating factors. The Court acknowledged that there was no evidence the defendant used the money for anything other than the business. He was not leading a lavish lifestyle. The Court noted, however, at para. 9:

> [T]he distinction between Mr. Wilson and his company is to some extent an artificial one. He was inextricably tied up with his business, he had a direct beneficial interest in the company, he presumably went into business to make a success of it, to secure his and his family's long term financial well being. In December and January of '01 he saw that the business was in trouble and to keep it going presumably hoping things would turn around he embarked on a serious of fraudulent transactions by which he deceived the Bank of Nova Scotia of giving the business 1.8 million dollars. Certainly it is possible that he did not want to see his employees laid off and he felt a sense of responsibility to them. Many people have said this and I don't disbelieve it. However, despite this these actions cannot be seen as simply selfless acts. In doing this one asks what sacrifice he was

> making? He and others, of course, were directly benefiting from the fraud and I have little doubt that the preservation of his business, personal pride and long term financial success were all motivating factors. …

[80] Aggravating factors included the amount of the fraud and the number of fraudulent documents submitted, which the Court described as a concerted pattern of fraudulent behaviour. The defendant was sentenced to 26 months' imprisonment.

[81] In *R. v. Sponagle*, 2017 NSPC 23, [2017] N.S.J. No. 157, the defendant pleaded guilty to a single count of fraud. Quintin Sponagle had incorporated a company in Panama with an office in Windsor, Nova Scotia. He solicited investments from 201 individuals, many of whom were Nova Scotia residents. They invested $4.3 million, with approximately $4.2 million of those investments being diverted to the corporation's bank account in Curacao. The defendant periodically sent newsletters and updates, portraying to investors how their investments were safe, were yielding positive gains, and were being traded in successful and profitable ways.

[82] The corporation's bank account was eventually frozen and a joint RCMP and Nova Scotia Securities Commission investigation was commenced. It was discovered that Mr. Sponagle had used $1.1 million of the money for his own purposes, including the purchase of automobiles, recreational vehicles and property, international travel, cash withdrawals, personal expenses, and charitable donations. It was agreed that this amount did not represent the total loss left outstanding to the victims. Aggravating factors included the large-scale nature of the fraud; its calculation, deliberation, and sophistication; the number of victims; the breach of trust; and the defendant's greed. Judge Derrick (as she then was) noted that there was no evidence that Mr. Sponagle "embarked upon his criminal scheme in the desperate throes of an addiction or because a legitimate venture had failed and he was trying to redeem a foundering cause": para. 11. Instead, she found that he betrayed his investors primarily to enable him to live "the good life". Mitigating factors included the defendant's guilty plea, his acceptance of responsibility, and his lack of a criminal record. Judge Derrick accepted that, taking the aggravating and mitigating factors into account, the appropriate range of sentence for a fraud of the nature perpetrated by the defendant was three to six years in prison: para. 21. The Court held that the joint recommendation of three years and four months was a fit sentence.

[83] In addition to adopting Mr. Potter's arguments, Mr. Colpitts makes several of his own. He submits that lawyers who engaged in "clearly more morally blameworthy conduct" than his own have received lower sentences than the 10-12 years sought by the Crown. Along with the *Kazman* decision, he relies on *R. v. Wirick*, 2009 BCSC 1714, [2009] B.C.J. No. 2479. In that case, Martin Wirick, a former real estate lawyer, pleaded guilty to two counts of fraud in excess of $5,000 and two counts of forgery in connection with 107 fraudulent real estate transactions. The fraudulent transactions all involved the same client – a real estate developer – and fell into three categories. In the first category, the defendant acted for the developer (or his nominee) and a financial institution in registering what was supposed to be a new first mortgage on property owned by the developer (or his nominee). Notwithstanding his instructions from the financial institution, the defendant would not pay off one or more existing mortgages upon receiving the new mortgage proceeds. In the second category of transaction, the defendant handled the sale of property owned by the developer or his nominee and, notwithstanding his undertaking to the lawyer for the purchaser, he would not pay off existing mortgages when receiving the sale proceeds. In the final category of transaction, the defendant would file forged releases at the Land Title Office in response to demands for proof that mortgages had been discharged.

[84] Following each refinancing, sale, or filing of a forged release, the developer would continue to make payments on the mortgages that were supposed to have been discharged so that the holders of the mortgages would remain in the dark. The money that was supposed to be used for clearing existing mortgages from title was instead fraudulently transferred by the defendant to one of the developer's companies or otherwise to the developer's benefit. When the defendant was put under pressure to provide evidence of discharges of mortgages he had previously undertaken to clear, he would either use funds from a subsequent and unrelated sale or refinancing to pay off those previous mortgages, or file a forged release. The amount of money scammed was in excess of $40 million, which was approximately the amount paid out by the Law Society of British Columbia in compensation to the victims of the offences. Mr. Wirick was sentenced to seven years in prison.

[85] Mr. Colpitts also provided several decisions that he says refute the Crown's claim that lawyers who commit fraud invariably receive much lengthier prison sentences than non-lawyers. In *R. v. Shandro*, (1985) 42 Alta. L.R. (2d) 331, [1985] A.J. No. 578 (Alta. C.A.), for example, the Alberta Court of Appeal commented:

> 14 In *R. v. Ryan*, [1976] 6 W.W.R. 668 at 670, McDermid J.A. said in a case involving defalcation of some $7,000 by a lawyer:
>
> > A great deal of confidence has been reposed in the legal profession by the public and by the legislature; they are entrusted which large sums of money and with large matters where integrity is most necessary. It is imperative that the reputation of the profession be maintained and, **although I do not think a longer prison sentence is called for than in other similar cases of the misappropriation of trust funds**, it must be made clear that a lawyer receives no more favourable treatment than the general public.
>
> 15 **While a lawyer should receive no greater and no less penalty than would be imposed on any other person similarly situated**, in my opinion breach of trust by a highly educated person taking advantage of his position and his education must always receive a severe penalty. Those who possess the greatest gifts and on whom society has bestowed its greatest rewards commit a far greater act of betrayal by such acts as these than do fellow citizens who are less well endowed.
>
> [*Emphasis added*]

[86] He also cites *R. v. Rosenfeld*, 2009 ONCA 307, [2009] O.J. No. 1478, a case involving a lawyer who was convicted of two counts of laundering the proceeds of crime and one count of attempting to possess money obtained by crime. At trial, the Crown sought a sentence of five to seven years. The defendant was sentenced to three years in prison. He appealed the convictions while the Crown appealed the sentence. On appeal, the Crown acknowledged that the trial judge's sentence was not inconsistent with sentences imposed on lawyers for similar offences. It argued, however, that the relatively few sentences imposed on lawyers who were involved in sophisticated, large-scale money laundering operations were far too low to adequately reflect the seriousness of the offence and to adequately express society's denunciation of the conduct of lawyers whose actions aided and abetted organized crime. The Ontario Court of Appeal accepted that the defendant's sentence was too low, but cautioned against generalizations in sentencing:

> 34 **There is a danger in generalizing when describing the imposition of an appropriate sentence.** Canadian sentencing philosophy has avoided the concept of tariff sentencing for certain kinds of offences and favoured an approach that recognizes the uniqueness of each sentencing problem. Sentencing judges in Canada must tailor the sentence to the specifics of the offence and the specifics of the offender: see *Criminal Code*, s. 718.1.
>
> 35 Consequently, I do not adopt Crown counsel's sweeping condemnation of sentences imposed on lawyers for this kind of offence. I do, however, accept the

> submission that in the specific circumstances of this case, a significantly longer jail term was required to adequately reflect the seriousness of the offence and the appellant's level of culpability. Three years is demonstrably unfit.
>
> [*Emphasis added*]

[87] In increasing the defendant's sentence to five years, the Court described his status as a lawyer as a "significant aggravating factor", but did not appear to prioritize it above other aggravating factors, including the defendant's belief that he was laundering the proceeds of a Colombian cartel's international cocaine trade, the size and sophistication of his operation, and the facts that that he was motivated by pure greed and was clearly an experienced money launderer.

[88] Mr. Colpitts says the case law shows that a defendant's level of involvement in a fraudulent scheme is a more significant factor than whether or not that defendant is a lawyer. In *R. v. Lee* (May 30, 2007), Doc. 051216695Q4 (Alta. Q.B.) [unreported], the defendant had been a practicing lawyer who, together with several other individuals, engaged in a multi-million dollar mortgage fraud scheme. They obtained control of a number of residential lots and recruited straw buyers to act as nominal purchasers of the properties and apply for mortgages to fund the purchase of the properties and construct modular homes on them. The value of the properties was inflated, none of the straw buyers ever intended to take title to or reside on the properties, and the modular homes were either never purchased or not completed. The mortgage companies and insurers relied on a number of false documents, including agreements of purchase and sale, property reports, and applications. Heavy losses were sustained.

[89] The defendant lawyer was involved in 22 fraudulent transactions. In each case, he acted for the vendor and, in some transactions, for all parties to the conveyance (vendor, purchaser, and mortgagee). He failed to provide any notice or advice respecting the scheme to the lawyers for the straw buyers, mortgage lenders, or mortgage insurance corporations. The total value of the mortgages involved was $2,644,365.

[90] The defendant pleaded guilty at a very early stage. The Court sentenced him to 30 months' incarceration, recognizing that he would also be disbarred as a result of his actions. He had also been forced to declare bankruptcy. Notably, the benefit to the defendant was merely the legal fees involved in processing the transactions. The masterminds of the scheme received the bulk of the financial benefits from the fraud. Those two individuals were sentenced to four and six years respectively (*R. v. Chamczuk*, 2010 ABCA 380, [2010] A.J. No. 1407, and *R. v. Steinhubl*, 2013

ABCA 39, [2013] A.J. No. 56). In *Chamczuk*, the Alberta Court of Appeal remarked that the sentence in that case was not inconsistent with the sentence handed down in *Lee*:

> The trial judge sentenced the respondent to three years imprisonment on all counts, to be served concurrently: *R. v. Chamczuk*, 2010 ABQB 434. He concluded that the range of sentencing for this type of offence was in the 3 to 5 year range. He held that a four year sentence was appropriate, but deducted one year because of the guilty plea and the restitution order that he made. **This was not inconsistent with the 2 1/2 year sentence given to his lawyer, because the lawyer was involved in fewer transactions, was less involved in the scheme itself, derived no profit from the fraud beyond ordinary legal fees, and offered to plead guilty even before charges were laid.**
>
> [*Emphasis added*]

[91] The Court held that the trial judge should not have reduced the sentence and increased it to four years – 1.5 years longer than the sentence in *Lee*.

[92] In *R. v. Kilba*, 2012 ABPC 302, 2012 CarswellAlta 2060, a lawyer was sentenced to 30 months in prison for his role in a multi-million dollar mortgage fraud. Over a two-year period, Russell Kilba recruited four of his friends and acquaintances to act as straw buyers for properties and helped the main perpetrator obtain mortgages in their names. The pair paid the straw buyers between $3,000 and $5,000 per mortgage and also gave them money to cover the monthly mortgage payments. The lenders were given and relied upon false information in approving the mortgages and advancing the funds. They advanced a total of $4.2 million in mortgage funding. The total loss to the financial institutions was $1.47 million. While there were additional anticipated losses, they were not ascertainable at the time of sentencing.

[93] Mr. Kilba had no prior criminal record, entered an early guilty plea, and cooperated with police. Other mitigating factors included that he was "not the main player (although he was the main perpetrator's right-hand man for approximately two years)" and that he attempted to help make mortgage payments for his friends when he saw the financial problems his actions had caused them: para. 3. The aggravating factors included the total amount of the fraud ($4.2 million), the duration of the fraud, the number of properties involved, the premeditated nature of the defendant's acts, and the fact that the defendant took advantage of the high regard he was held in within the community. In sentencing the defendant to 30 months in prison, the Court wrote:

> 36 Considering all of the circumstances in this case, and in particular the aggravating and mitigating factors earlier mentioned, the appropriate sentence is 30 months incarceration and I sentence the accused accordingly. **In arriving at this length of sentence, I have noted that the decision of *R. v. Lee, supra*, involved a lawyer who facilitated a mortgage fraud similar to the one before the Court. In my view, the accused in the case before me is not any more morally blameworthy than a lawyer who facilitated the large mortgage fraud that Mr. Lee was a part of. I am mindful that Mr. Lee only received the legal fees for transactions he processed as opposed to sharing in the profit from the transactions themselves. Similarly, in the case before me, the accused was not the person who stood to benefit the most, that being Mr. El-Sayed. Nevertheless both Mr. Lee and the accused were pivotal with respect to facilitating the sophisticated mortgage fraud schemes and their moral blameworthiness was not insignificant.** I note too that in the decision of *R. v. Kahlon*, supra, the accused was sentenced to three years incarceration in a case involving a similar mortgage fraud scheme to that before the Court where a similar net loss of 1.2 million dollars took place. In that case Mr. Kahlon was also willing to testify at trial against his co-accused, Mr. Pervez and one Mr. Park.
>
> 37 In view of all of the foregoing, I sentence the accused to 30 months incarceration to be served concurrently on each of the charges before the Court.
>
> [*Emphasis added*]

[94] Lastly, in *R. v. Elander*, 2015 ABQB 299, [2015] A.J. No. 527, the defendant lawyer was convicted of 14 out of 22 counts of mortgage fraud. Roy Elander was convicted in a trial also involving his co-accused Allen MacMullin, the ringleader of the scheme, who was likewise convicted of numerous counts and sentenced to 10 years in prison.

[95] Mr. MacMullin used various techniques to obtain first mortgages from financial institutions that they would not have granted if they had known the true facts. One of his simplest ploys was to acquire property and resell it at marked up value to a straw buyer before the actual closing date. In exchange for a fee, the straw buyers would apply for high-ratio mortgage financing to 95% of the property's value, which was often overstated to begin with. The straw buyers were convinced by Mr. MacMullin that the deals were legitimate. In many of the fraudulent transactions, Mr. Elander acted as the lawyer for both the borrower and the financial institution. He also took active steps to hide the fraud, including creating numbered companies for Mr. MacMullin to help disguise his involvement, and creating a numbered company for one set of straw buyers and transferring their principal residence into that numbered company to make it appear that they did not own other property. In addition, Mr. Elander ignored specific instructions from

some lenders. The Court noted that these actions lent support to the Crown's submission that "not only was Mr. Elander an essential cog in the apparatus of these frauds, he was greasing the wheel": para. 13.

[96] In convicting Mr. Elander, the Court found that "he was instrumental in providing a cloak of legitimacy to the fraud" and that whenever the fraudsters were confronted about irregularities in various transactions, he helped Mr. MacMullin "re-center the deal with an aura of legitimacy": para. 23. In imposing sentence, the Court made it clear that the defendant was not being sentenced as the "ringleader" of the scheme:

> 24 Mr. MacMullin went through many lawyers. Some caught on quickly that something was amiss, and so then Mr. MacMullin moved on. Others, like Mr. Elander, participated through several deals. No other lawyer had Mr. Elander's staying power. While I accept the thesis that, even absent Mr. Elander, Mr. MacMullin would probably have been able to complete these transactions, Mr. Elander was an individual that Mr. MacMullin could manipulate and who would assist in these frauds. By no means is Mr. Elander being sentenced here as the ringleader, he is more like the third convicted in this fraud. Mr. Seremet, another co-conspirator, pled guilty even before the trial started. Mr. Elander was used by Mr. MacMullin, but he knew that these mortgage transactions were frauds, and on that basis he was convicted and now must be sentenced.

[97] Noting that the defendant suffered from failing kidneys and required dialysis three times a week, the Court described the Crown's recommended sentence of five years in prison as "compelling and highly persuasive, absent the issue of Mr. Elander's health": para. 54. Justice Germain acknowledged the Alberta Court of Appeal's decision in *Davis*, reproducing its comments on lawyer fraud, but stated that he must nevertheless "continue to recognize that the sentencing regime in Canada is an individualized one and recognizing the medical condition of Mr. Elander he will be more greatly affected by a lengthy prison term and less able to accommodate the risks that prison poses to all prisoners": para. 60. The Court added, however, that even serious health issues could not relieve it of the responsibility to sentence Mr. Elander in a way that reflected general deterrence and denunciation.

[98] To arrive at a fit sentence for the defendant, the Court used the sentences of the two co-accused and their respective roles in the fraud as a guide:

> 64 I am further mindful of the fact that both Joe Seremet and Mr. Elander were to a certain extent used by Mr. MacMullin. Each had their own different skills

> which they brought to the fraud. Mr. Seremet received a 39 month sentence which represented a reduction from a much higher proposed sentence because he pled guilty before the trial commenced. Factoring all of the principles set out in *Criminal Code*, s 718, and taking into account Mr. Elander's unique, but not extraordinary, health circumstances, I have come to the conclusion that his sentence should be slightly higher than that received by Mr. Seremet. A sentence of that type is consistent with the legal literature, consistent with common sense, and reflects a reasonable analysis of proportionality, but as well factors into account Mr. Elander's age and his serious health condition which, despite the best intentions of the present prison system, will be aggravated by the fact that initially his hospital time will be served in Saskatoon, removed from his spouse. …

[99] Mr. Elander was sentenced to 42 months in prison – significantly less than the ten-year sentence handed down to non-lawyer Mr. MacMullin, and only three months more than Mr. Seremet, another non-lawyer who pleaded guilty at an early stage.

[100] Mr. Colpitts' final submission is that penalties unique to lawyers and other professionals, such as disbarment, as well as loss of professional reputation, are relevant to the principles of general and specific deterrence and denunciation. He says these penalties can be factored into the analysis when determining the appropriate length of sentence.

[101] On the issue of consecutive versus concurrent sentences, Dan Potter and Blois Colpitts describe the Crown's position as a "novel application of sentencing principles" that "has no basis in law". They cite *R. v. Hatch*, 1979 CarswellNS 53, [1979] N.S.J. No. 520 (N.S. C.A.), where the Nova Scotia Court of Appeal commented:

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

[102] In *R. v. Battista*, 2011 ONSC 6394, 2011 CarswellOnt 11959, the Ontario Superior Court of Justice considered whether sentences for conspiracy to traffic and possess narcotics ought to be consecutive or concurrent to a sentence the defendant was already serving for conspiracy to launder money. Crown counsel argued that consecutive sentences were required because the conspiracy to launder money was different in nature and quality than the drug offences. Defence counsel argued that the factual underpinning of the conspiracy to launder proceeds of crime was virtually identical to that of the drug offences. He contended that the two sets of offences were inextricably intertwined and should attract concurrent sentences as a result. The Court agreed with the defence, stating:

> 31 In my view, Defence counsel is correct that the offence of conspiracy to launder money and the offences of conspiracy to traffic, trafficking and possession for the purpose of trafficking all arise out of the same set of circumstances. Much of the same evidence was elicited at both trials; the events occurred in the same time period, and the money that was laundered came from the very drug transactions that underpin Battista's convictions on this trial. As noted in *R. v. Dass*:
>
> > ... The general principle is that where there is a reasonably close nexus between the offences in time and place, and where they appear to be part of "one continuing crime operation", the sentences should be concurrent.24
>
> 32 In this case, there is a nexus in time, place and subject-matter. Therefore, it is more appropriate for the sentences to run concurrently.

[103] In *R. v. Wozny*, 2010 MBCA 115, 2010 CarswellMan 757, the Manitoba Court of Appeal conducted a comprehensive review of the principles that ought to guide the decision of whether to order concurrent versus consecutive sentences. It stated that the decision does not relate to the overall length of sentence, but instead pertains "to the nature and circumstances of the criminal activity under consideration and the connectedness of two or more offences to each other": para. 45. The Court further stated that "if the offences are sufficiently interrelated to form part of one single, continuous criminal transaction, a concurrent sentence is called for": para. 46.

[104] In *R. v. Leblanc*, 2011 NSSC 412, [2011] N.S.J. No. 600, the defendant was sentenced on counts of conspiracy to commit murder and attempted murder. Citing *Wozny*, the Court held that the sentences were to be consecutive to a sentence the defendant was already serving for a separate conviction of attempted

murder. However, it was held that sentences for the conspiracy and attempted murder charges before the Court were to be concurrent.

[105] The defendants submit that the present matter involves one continuing criminal transaction and that when Crown counsel attempts to distinguish the conspiracy and fraud offences, they make a distinction without a difference. Different methods were used to manipulate market share prices, but the intention of these methods was the same – to maintain a high share value. Similarly, they say, the formulation of the conspiracy in this case is inseparable from the execution of the conspiracy: the conspiracy was being formulated and advanced as the manipulation was happening, and the two are inextricably intertwined.

[106] Mr. Potter and Mr. Colpitts also point out that courts routinely impose concurrent sentences in large-scale commercial fraud cases, even where the defendant is convicted of multiple counts of fraud dealing with different time frames, different facts, and different methods of fraud. For example, in *Drabinsky*, concurrent sentences were imposed on each fraud conviction, despite the fact that each fraud was entirely distinct. One count related to the deliberate misrepresentation of the company's value upon issuance of its IPO in 1993, which misled investors. The second count related to the preparation of fraudulent financial documents, which were then relied on by new investors who were to assume business management of the company in 1998. After the deal closed, the deception was uncovered. The two frauds were distinct in time, distinct in method, and distinct in victims. Concurrent sentences were nevertheless imposed.

[107] The same occurred in *Kazman*, where the accused was convicted of five separate counts of fraud. While the methods used in each fraud were similar, they involved different fake companies, different falsified documents, and a fraud committed on a different bank. The Court nevertheless held that concurrent sentences were appropriate.

[108] Similarly, in *R. v. Adurogboye et al*., 2013 MBQB 260, 2013 CarswellMan 568, the defendant was described as "one of two kingpins leading a fraud ring" who, over the course of five years, engaged approximately 40 people to participate in various aspects of his frauds: para. 1. The sole victim was the Manitoba Public Insurance Corporation. He pleaded guilty to eight counts of fraud and one count of committing an indictable offence for the benefit of a criminal organization. The Court held that, "because of the singular nature of the scheme … concurrent

sentences for the fraud offences is a preferable approach to sentencing rather than consecutive sentences for each count": para. 33.

[109] According to the defendants, the essence of both offences was the same. The offences spanned the same period of time, and they were inextricably intertwined. As the conspiracy developed, so too did the fraud. The agreement to commit the fraud was neither temporally nor factually separate from the fraud itself and, as such, concurrent sentences are appropriate.

Analysis

[110] The Court's first task is to decide on the range of sentence for a fraud of the nature committed here. In recommending a range of seven to nine years for each offence, the Crown relies heavily on the *Cameron* and *Drabinsky* decisions. In my view, neither of these decisions supports the Crown's position. The offences in *Cameron* took place over a period of five years, during which Parliament increased the statutory maximum sentence to 14 years. It is clear from the decision that the sentencing judge increased the applicable sentencing range to accord with Parliament's change. As I stated earlier, these amendments to the statutory maximum sentence do not apply to the defendants. As for *Drabinsky*, that decision is, in my view, the closest analogue to this case. I am not satisfied that it supports the Crown's range, either. The Court of Appeal in *Drabinsky* held that the trial judge was correct in holding that large-scale commercial frauds normally attract significant penitentiary terms. But it stopped short of adopting her conclusion that the applicable range for these offences is five to eight years. Indeed, despite the many aggravating factors, the Court of Appeal reduced the defendants' sentences to five and four years' imprisonment, respectively.

[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 I am mindful that Dan Potter and Blois Colpitts were convicted of an offence under s. 380(2), not s. 380(1), the Crown has not persuaded me that this necessarily justifies a higher sentencing range. In sentencing for fraud, it is an aggravating factor if the offence adversely affected, or had the potential to adversely affect, the stability of the Canadian financial markets or investor confidence in those markets. In my view, where the Crown has proved the additional element required for a conviction under s. 380(2) – that the public market price of a stock has been affected by the fraudulent conduct – this

aggravating circumstance has been made out, and will support a sentence at the higher end of the existing sentencing range.

[112] I also reject the Crown's submission that there is necessarily a higher range for large-scale, complex frauds involving lawyers. The Crown based this assertion on *Davis*, where the Alberta Court of Appeal identified three categories of fraud cases relied on by the Crown: non-lawyer trust thefts, lawyer trust thefts, and frauds exceeding $1 million. The sentences imposed in two cases of lawyer fraud involving over a million dollars were seven and eight years. I agree with Mr. Colpitts that the Court was merely categorizing the cases provided by the Crown, not endorsing a separate sentencing range for lawyers involved in multimillion dollar fraud cases. Indeed, the Court in *Davis* sentenced a lawyer who defrauded and stole almost $3 million to only four years' imprisonment. While Mr. Colpitts' position as a lawyer is certainly an aggravating factor, I do not find that it automatically results in a higher sentencing range.

[113] The next step is to determine where the sentences for Mr. Potter and Mr. Colpitts should fall within the applicable range based on relevant aggravating and mitigating circumstances. I will begin with the aggravating factors that apply to both defendants.

Dan Potter's role in the offences

[114] At trial I found that Dan Potter, as President and CEO of KHI, was the primary figure in the conspiracy. He was the architect of the "recommended plan of joint action" and oversaw every aspect of its execution. His long-term involvement with public companies, combined with his legal education and his personal wealth, gave him the knowledge, experience, and financial means required to orchestrate and implement the conspiracy. Without Mr. Potter, there could be no conspiracy. Bruce Clarke and the other co-conspirators regularly reported to him and took his instructions. Nothing was done without his knowledge and approval, and he ensured that his fellow conspirators adhered to his code of conduct. Mr. Potter's central role in the conspiracy is an aggravating factor.

Blois Colpitts' role in the offences

[115] Blois Colpitts was Lead Director of the KHI Board, as well as Chair of the Audit Committee and legal counsel to the company. Although he was not the

mastermind behind these offences, Mr. Colpitts used his legal expertise and his reputation as the pre-eminent securities lawyer in Atlantic Canada to advance the conspirators' aims. He was in regular communication with Mr. Potter about all aspects of the conspiracy. When called upon, he provided necessary legal assistance. He drafted legal documents and negotiated investment deals knowing that the KHI share price was artificial. He threatened legal action to suppress potential sellers. So enmeshed was he in the conspiracy that, on one occasion when Bruce Clarke was looking for help to high close the stock, he e-mailed Mr. Colpitts. Although Mr. Colpitts' role in these offences was not as substantial as that of Mr. Potter, his use of his legal skills and reputation to assist the conspiracy is an aggravating factor that makes him as blameworthy as Mr. Potter for the offences.

[116] Moving on to statutory aggravating factors, the s. 718.2 factors applicable in this case are:

> (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,
>
> …
>
> (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;

[117] In addition to the s. 718.2 factors, courts sentencing for fraud are now mandated to consider the following as 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 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.
>
> (1.1) Without limiting the generality of section 718.2, when a court imposes a sentence for an offence referred to in section 382, 382.1 or 400, it shall also consider as an aggravating circumstance the fact that the value of the fraud committed exceeded one million dollars.
>
> (2) When a court imposes a sentence for an offence referred to in section 380, 382, 382.1 or 400, it 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.

[118] Although s. 380.1 was not in force at the time of the offences, it is a codification of appellate jurisprudence and, as such, can be applied to the defendants: *Drabinsky*, at para. 161.

Abuse of trust or authority

[119] Officers and Directors of a public company occupy a position of trust in relation to that company's shareholders and to the public: *R. v. Weinberg*, 2016 QCCS 3137, [2016] Q.J. No. 7703; *Drabinsky*; *R. v. McCarthy*, 2008 CarswellOnt 8014, [2008] O.J. No. 5365 (Ont. Sup. Ct. J.), *R. v. Spensieri*, 2007 ONCJ 425, [2007] O.J. No. 3617.

[120] Dan Potter was President and CEO of KHI. Blois Colpitts was Lead Director and Chair of the Audit Committee, as well as the company's legal counsel. Shareholders were entitled to expect that the defendants would act in the company's best interests and observe the applicable laws. But instead of reporting illegal activity in respect of KHI and its shares, they were the primary offenders. Members of the public, who relied on the defendants to ensure that KHI fulfilled its disclosure obligations, made investment decisions oblivious to KHI's serious

financial distress, and unaware of the insiders' funneling of cash and shares into a “market support” account.

The offence had a significant impact on the victims

[121] Notwithstanding the defendants' position that the Crown has not proven the amount of the losses suffered by the victims, or that the losses were entirely attributable to the fraud, the defendants concede that, given the findings in the trial decision, this statutory aggravating factor applies.

The magnitude, complexity, duration, and the degree of planning of the fraud

[122] Manipulating the price of a stock on the Toronto Stock Exchange is not an easy feat. It is therefore all the more remarkable that the defendants were able to sustain the fraud for 18 months. This undertaking required commitment, ingenuity, creativity, and legal and business expertise that most people simply do not have.

[123] The defendants and their co-conspirators executed a huge volume of transactions using many different accounts and manipulative techniques to create a false image of the value of KHI stock. They communicated constantly. In support, Bruce Clarke monitored stock positions and margin positions of the control group accounts, switching from one account to another as margin limits were reached. Whenever pressure mounted, Dan Potter put a call out to the team for assistance. As new threats emerged, they pivoted, adopting one scheme after another to keep the price up, entice new investors, and allow major shareholders to sell just enough shares to keep them from tanking the stock. In all of this, the defendants relentlessly pursued their goal of maintaining the price of KHI shares.

The offences adversely affected, or had the potential to adversely affect, Canadian capital markets and investor confidence

[124] As I indicated earlier, I find that this aggravating factor was made out by proof that the KHI share price was affected by the fraudulent conduct of the defendants. As the Ontario Court of Appeal noted in *Drabinsky*, "[w]hen prominent business leaders who are directors and officers of public companies engage in fraudulent activity, the public faith in, and the integrity of, the public marketplace no doubt suffers regardless of the actual financial loss suffered": para. 186. Similarly, in sentencing Bruce Clarke, Campbell J. said that "[e]ach time someone rigs the market a message is sent that things may not be as above board as they might seem": *R. v. Clarke*, 2016 NSSC 101, [2016] N.S.J. No. 135, at para. 71.

The offences involved a large number of victims

[125] The defendants acknowledge that there were victims in this case, but submit that the Crown has not proved the total number of victims or that anyone suffered quantifiable losses as a result of the fraud. I will return to the issue of whether the Crown has proved quantifiable losses later in this decision. I have no difficulty, however, concluding that the offences in this case involved a large number of victims.

[126] This Court reviewed the law of fraud extensively in the trial decision. To be a victim of fraud, one need not suffer actual economic loss. The element of deprivation required to prove fraud is satisfied on proof of detriment, prejudice, or risk of prejudice to the economic interests of the victim. The expert evidence at trial established that the conduct of the defendants began affecting the price of KHI shares from April 2000 until August 2001, when the share price collapsed. Every investor who held KHI shares during that period, regardless of when they purchased them, was defrauded as to the value of their shares. The fraudulent conduct of the defendants created the risk of economic prejudice to each of those shareholders. Every investment decision made to buy or sell KHI shares during that period was based on misleading information. I find that the Crown has proved this aggravating circumstance.

The defendants took advantage of the high regard in which they were held within the Halifax business and legal communities

[127] In *Drabinsky*, the Ontario Court of Appeal noted that "individuals who perpetrate frauds like these are usually seen in the community as solid, responsible and law-abiding citizens. … The offender's prior good character and standing in the community are to some extent the tools by which they commit and sustain frauds over lengthy time periods": para. 167. Both defendants in this case enjoyed strong reputations in Halifax's business and legal communities. Mr. Potter established his stake in KHI having just sold his interest in ITI, a well-known, post-secondary education firm, to Torstar in Toronto. He was seen as a leading entrepreneur in education and technology. Mr. Colpitts was, by his own admission, widely known as a leading business and securities lawyer in Atlantic Canada through his partnership with the prestigious law firm of Stewart McKelvey.

[128] Mr. Potter and Mr. Colpitts clearly recognized the value of prestige and image. They attracted a veritable "who's who" of Nova Scotia businessmen to KHI's Board of Directors, including David Fountain, Charles Keating, Derek Banks, and others. Both men were able to leverage their positions, reputations, and connections to recruit and defraud unsuspecting investors.

Both defendants knew that their conduct violated securities laws and regulations

[129] In the trial decision, I found that, contrary to what they claimed at trial, the defendants were fully aware of the dishonest nature of their conduct. After the KHI share price collapsed, Leon Trakman, a Knowledge House Limited Partnership unit holder, and his lawyer, wanted the name of a lawyer for KHI to discuss the financial losses Mr. Trakman incurred when the defendants failed to deliver his share certificate on time. In an e-mail, Dan Potter warned Blois Colpitts that they needed to be careful with Mr. Trakman and his lawyer because "they could go to the TSE or Securities Commission if we do not give them a lawyer to talk to!! Neither you or I need that!" The fact that the defendants knew they were violating securities laws is an aggravating factor.

The defendants recruited third parties into the fraud

[130] Maintaining the price of KHI shares required the combined and concerted effort of a large group of people. Recruitment efforts, like the various scheme and plans for furthering the fraud, were ongoing and continuous.

[131] The evidence at trial established that this fraud was part of the DNA of the company. Anyone who did not fall in line would be prevented from selling their shares, threatened with legal action, or simply subjected to the combine forces of Mr. Potter and Mr. Colpitts to bring home the point that compliance and participation in the fraud was in their best financial interest.

The value of the fraud exceeded $1 million

[132] The Crown concedes that it is impossible in a market manipulation case of this nature to state with precision the number of victims, the amount of money they lost, or the extent to which their financial interests were put at risk. That said, the Crown proposes a value for the fraud of $86,720,000. To arrive at this figure, Crown counsel started with $92 million, which was KHI's market capitalization as of May 16, 2001. They then subtracted $5,280,000, which was the company's

market capitalization at the end of August 2001, after the share price collapsed. This results in a difference of $86,720,000. While I am not prepared to attribute an exact dollar value to the fraud, I am satisfied that this was a large-scale, multi-million dollar fraud that resulted in significant economic harm to investors and financial institutions.

[133] Before moving on to mitigating factors, I will address the Crown's submission that the defendants were motivated by financial self-interest, and that this should be treated as an aggravating factor. I will also discuss the impact of the defendants' lack of remorse.

[134] The Crown concedes that KHI was a real company with real employees and a real business plan, but says that financial gain was "clearly the singular motive of this conspiracy's membership group". The defendants, on the other hand, say there was no express finding at trial that they acted out of financial self-interest. With respect, the conclusion that financial self-interest played a significant role in these offences is inescapable. The defendants directly benefitted from the fraud because of their financial, personal, and professional interest in KHI. The success of the company was their success. That said, KHI was not a scam company created for the purpose of committing the offences. The defendants were operating a legitimate business when they committed these offences. They were not driven by pure greed. In *Drabinsky*, the Court of Appeal accepted that the defendants had been running a legitimate enterprise, and distinguished this context from scams, which "will normally call for significantly longer sentences than frauds committed in the course of the operation of a legitimate business. Whether the absence of 'pure greed' is viewed as a mitigating factor or simply as the absence of an aggravating factor would seem to make little difference in the ultimate calculation": para. 173.

[135] The defendants did not set out to cheat KHI investors while lining their own pockets. There was no version of the defendants' plan where they got rich at the expense of innocent investors. It is obvious that Mr. Potter and Mr. Colpitts firmly believed that KHI would be a huge success, revolutionizing education in North America and beyond, and that investors, including themselves, would reap the rewards of their belief in the company's potential. Contrary to the Crown's submissions, this fact distinguishes this case from fraud cases like *Cameron*, *Fast*, and *Kazman*. As the Court noted in *Drabinsky*, it matters little whether the absence of pure greed in this case is treated as a mitigating factor or the absence of an aggravating factor.

[136] Mr. Potter and Mr. Colpitts have expressed no remorse for these offences. Despite the overwhelming evidence against them, they both maintain that they are innocent of any wrongdoing. In fact, they see themselves as victims in this affair: victims of Calvin Wadden and other greedy shareholders; victims of Bruce Clarke; victims of National Bank Financial; victims of a rogue Securities Commission investigator; victims of overzealous Crown counsel; and finally, victims of a biased trial judge. There were many victims here, but Dan Potter and Blois Colpitts are not among them. The defendants' lack of remorse is not an aggravating factor, but it disentitles them to leniency that might otherwise have been extended. As the Nova Scotia Court of Appeal noted in *R. v. Hawkins*, 2011 NSCA 7, [2011] N.S.J. No. 33, "remorse is a one-way street: the failure to express remorse is not an aggravating factor, but the expression of remorse (obviously, only if genuine) is a mitigating one": para. 34.

[137] I will now consider the mitigating factors that apply. There are several mitigating factors that apply to both defendants, and some that apply only to Mr. Colpitts.

Delay

[138] The market manipulation underlying these convictions occurred between January 2000 and August 2001. The collapse of KHI was a very public one, resulting in the public announcement of an RCMP investigation in February 2003. A direct indictment was preferred against the defendants in March 2011. Convictions were entered seven years later, on March 9, 2018.

[139] In this Court's first delay decision, [2015 NSSC 224], on the issue of pre-charge delay, I found that the KHI investigation suffered from several deficiencies and faltered on many fronts. The defendants were not responsible for the eight years that it took for the investigation to be completed. They had no control over the resources allocated to the investigation and had no means to make it proceed more expeditiously. Both defendants were forced to endure considerable uncertainty, public stigma, and prejudice while awaiting conclusion of the investigation. While I found that the delay did not amount to a constitutional violation, "[d]elay which causes prolonged uncertainty for an accused person but which falls short of constitutional limits can be taken into consideration in sentencing": *R. v. Clarke*, 2016 NSSC 101, at para. 76; *R. v. Bosley*, [1992] O.J. 2656 (Ont. C.A.), at para. 44.

[140] On the issue of post-charge delay, I found in the second delay decision [2018 NSSC 41] that the defendants were responsible for 23 months of delay from the preferring of the indictment to the start of trial. I further found that the defendants created significant delay during the trial by, among other things, seeking repeated adjournments, filing baseless motions, and refusing to agree on continuity. Mr. Colpitts' mismanagement of his defence was another contributor to the delay that plagued the trial. As I said in that decision, "[t]he defendants in this case were not the victims of delay. Indeed, they went to great efforts throughout the entirety of this prosecution to create it": para. 143.

[141] Although the defendants themselves were responsible for some of the delay, the fact remains that they have lived the last 15 years with the very real possibility of imprisonment looming over them. This is the most significant mitigating factor for both defendants.

Publicity and stigma

[142] The names of both defendants have appeared in the media in relation to the collapse of KHI and to the resulting legal proceedings. There has been limited coverage on the CBC website and in the Chronicle Herald. Coverage on the paid subscription business news website AllNovaScotia.com, has been much more extensive. It must be noted, however, that Mr. Potter generated some of his own attention by creating a website where he expressed his views on, among other things, National Bank Financial, Mr. Colpitts, and Stewart McKelvey.

Age

[143] In Clayton Ruby et al., *Sentencing*, 9th ed. (Toronto: LexisNexis Canada Inc., 2017), the authors note at page 293 that, "[t]he age of an offender, particularly past 60 years, is a serious factor to be considered in mitigation…" Dan Potter is 66 years old. Blois Colpitts is 55.

Lack of criminal record and prior good character

[144] This is Mr. Potter's first criminal offence. Although Mr. Colpitts is not a first time offender, his prior criminal record is unrelated and is of little significance to this matter.

[145] Both defendants provided the Court with numerous letters of reference attesting to their good character, their love for and commitment to their families,

their professional and charitable contributions, and the respect they have enjoyed in the community. It is obvious that, notwithstanding their criminal convictions, both men continue to retain the respect and support of their families and friends.

[146] Although these are both relevant mitigating factors, their mitigating effect is reduced in cases like this where the defendants' lack of a criminal record and prior good character aided them in committing the offences: *R. v. Chan*, 2012 ABPC 272, [2012] A.J. No. 1023, at paras. 42-43; *Drabinsky*, at para. 167; *Kazman*, at para. 410. In *Sentencing*, 9th ed., the authors note at page 1144 that, "[t]he high rate of 'white-collar' crimes committed by persons of prior excellent reputation tends to blunt the otherwise mitigating effect of good background, and many first time offenders have received high sentences for sophisticated frauds."

Additional mitigating factors applicable to Mr. Colpitts

[147] There are three additional mitigating factors that apply only to Mr. Colpitts. First, Mr. Colpitts faced proceedings before the Nova Scotia Securities Commission and the Nova Scotia Barristers Society. Before the Securities Commission, the allegation was that, in his role as Lead Director and Chair of the Audit Committee, Mr. Colpitts failed to "uncover conduct" by an insider group that was engaged in market transactions that were contrary to the public interest. He paid fines and costs totalling $50,000 and was prohibited from being an Officer or Director or a reporting issuer for a period of two years. Before the NSBS, the complaint concerned the failure to identify conflicts of interest in relation to his representation of KHI. He paid penalties and costs totally $12,000 and received a reprimand.

[148] Second, Mr. Colpitts will presumably be disbarred as a result of his convictions. The loss of his entitlement to practice law is a mitigating factor. That said, there is no reason to assume, with Mr. Colpitts' skills, experience, and connections within the local business community, that he will be unable to find meaningful and rewarding work upon release.

[149] Finally, Mr. Colpitts was the only member of the conspiracy who paid off his margin debt to National Bank Financial after the stock price collapsed. He also spent $148,000 paying off the claims of Leon Trakman and Thomas MacQuarrie against KHI, thereby ensuring that these two investors suffered no losses.

Conclusion on length of sentence

[150] Having considered the relevant sentencing principles, including the parity principle; the case law submitted by the parties; and the aggravating and mitigating circumstances, I find that a fit sentence for Dan Potter is five years on each count, and for Blois Colpitts, four and a half years on each count.

[151] In arriving at these sentences, I am mindful that co-accused Bruce Clarke was sentenced to three years on a joint recommendation. There are some very important reasons why Mr. Clarke was deserving of a lesser sentence than his co-conspirators. Most significantly, he pleaded guilty four weeks into trial. In addition, Mr. Clarke's life effectively imploded not long after the KHI share price collapsed. He was fired from National Bank Financial and lost his securities license. He was fined $150,000. At sentencing, Campbell J. described Mr. Clarke as having "lost everything he ever had", forced to live -- along with his wife -- on CPP, old age pension, and his income from seasonal work with a cruise line: para. 62. Justice Campbell noted that Mr. Clarke's wife suffered from serious illnesses and relied on her husband to provide everything from medical assistance to hospital visits and meal preparation. Together they provided care for Mr. Clarke's elderly parents. The life that Bruce Clarke has lived for the past 17 years bears little resemblance to that of Mr. Potter and Mr. Colpitts.

Conclusion on consecutive vs. concurrent sentences

[152] The sentences will be served concurrently. It is impossible to separate the conspiracy from the fraud in the circumstances of this case. They spanned the same period of time and were inextricably intertwined, both part of one continuing criminal operation. The agreement to commit the fraud was neither temporally nor factually separate from the fraud itself. Although the aim of the conspiracy remained consistent across the indictment period – that is, to maintain the KHI share price – the means used to pursue that objective were always evolving in response to new information and potential threats to the stock.

Restitution

[153] The Crown is seeking restitution orders in favour of the following individuals and financial institutions:

David Fountain	$2,995,000
Larry Elchuk	$153,470.25
Michael Chambers	$56,000
Pierre Bourgeois	$50,000
Michael MacIntyre	$16,494.89
Norma (Jackie) O'Flaherty	$3,790
Kathy Holman	$21,700
Gary Marsh	$6,650
Margaret Thomas	$150,000
George Unsworth	$110,000
Kiki Kachafanis	$40,000
Hugh Smith	$150,000
Thomas Hickey	$40,000
TD Financial Group	$695,000
BMO Nesbitt Burns	$2,558,552.93
National Bank Financial	$6,000,000

The total amount of the restitution orders sought is $13,046,163.18. According to the Crown, the precise amount of many of the victims' losses is readily quantifiable, there is no evidence that these victims have obtained recovery against the defendants by other means, and the defendants are wealthy men who are able to pay restitution. While the Crown says that it made inquiries to determine whether any of the victims wished to make formal requests for restitution, only two requests have been received: Margaret Thomas and Larry Elchuk made requests for restitution in the amounts of $153,000 and $153,470.25, respectively.

[154] Section 738(1) of the *Criminal Code* provides a sentencing judge with the discretion to make an order for restitution. It reads, in part:

> 738. (1) Where an offender is convicted or discharged under section 730 of an offence, the court imposing sentence on or discharging the offender may, on

> application of the Attorney General or on its own motion, in addition to any other measure imposed on the offender, order that the offender make restitution to another person as follows:
>
> > (a) in the case of damage to, or the loss or destruction of, the property of any person as a result of the commission of the offence or the arrest or attempted arrest of the offender, by paying to the person an amount not exceeding the replacement value of the property as of the date the order is imposed, less the value of any part of the property that is returned to that person as of the date it is returned, where the amount is readily ascertainable;

[155] In *R. v. Zelensky*, [1978] 2 S.C.R. 940, 1978 CarswellMan 51, at para. 14, Laskin C.J. adopted the following passage from a report of the Law Reform Commission of Canada to highlight the importance of restitution orders:

> Recognition of the victim's needs underlines at the same time the larger social interest inherent in the individual victim's loss. Thus, social values are reaffirmed through restitution to victim. Society gains from restitution in other ways as well. To the extent that restitution works toward self-correction, and prevents or at least discourages the offender's committal to a life of crime, the community enjoys a measure of protection, security and savings. Depriving offenders of the fruits of their crimes or ensuring that offenders assist in compensating victims for their losses should assist in discouraging criminal activity. Finally, to the extent that restitution encourages society to perceive crime in a more realistic way, as a form of social interaction, it should lead to more productive responses not only by Parliament, the courts, police and correctional officials but also by ordinary citizens and potential victims.

[156] In *R. v. Kelly*, 2018 NSCA 24, [2018] N.S.J. No. 85, Beveridge J.A., for the Nova Scotia Court of Appeal, recognized that restitution orders serve multiple purposes:

> 29 As traced by Chief Justice Laskin in *R. v. Zelensky*, *supra*, the discretion to order compensation as part of the sentencing process has been in the Criminal Code since its inception. A stand-alone restitution order fulfills a number of purposes. It serves as a vehicle, in appropriate circumstances, to acknowledge the loss caused by the commission of the offence. The order survives bankruptcy so that the offender, as much as the law can do, will not be able to personally benefit from the commission of the offence. People who may be tempted to commit an offence will know, crime does not pay. The victim will be saved the additional expense of being forced to pursue a remedy in the civil courts for the loss they suffered.

[157] In *R. v. Devgan*, (1999) 44 O.R. (3d) 161, [1999] O.J. No. 1825, (Ont. C.A.), at para. 26, LaBrosse J.A. consolidated the objectives and factors that courts should consider when deciding whether a restitution order is appropriate:

1. An order for compensation should be made with restraint and caution;

2. The concept of compensation is essential to the sentencing process:

(i) it emphasizes the sanction imposed upon the offender;

(ii) it makes the accused responsible for making restitution to the victim;

(iii) it prevents the accused from profiting from crime; and

(iv) it provides a convenient, rapid and inexpensive means of recovery for the victim;

3. A sentencing judge should consider;

(i) the purpose of the aggrieved person in invoking s. 725(1);

(ii) whether civil proceedings have been initiated and are being pursued; and

(iii) the means of the offender.

4. A compensation order should not be used as a substitute for civil proceedings. Parliament did not intend that compensation orders would displace the civil remedies necessary to ensure full compensation to victims.

5. A compensation order is not the appropriate mechanism to unravel involved commercial transactions;

6. A compensation order should not be granted when it would require the criminal court to interpret written documents to determine the amount of money sought through the order. The loss should be capable of ready calculation.

7. A compensation order should not be granted if the effect of provincial legislation would have to be considered in order to determine what order should be made;

8. Any serious contest on legal or factual issues should signal a denial of recourse to an order;

9. Double recovery can be prevented by the jurisdiction of the civil courts to require proper accounting of all sums recovered; and

> 10. A compensation order may be appropriate where a related civil judgment has been rendered unenforceable as a result of bankruptcy.

[158] The defendants say that restitution is not available in this case because the Crown has not met the statutory prerequisites in s. 738(1)(a), which require that: (1) the loss occurred "as a result of the commission of the offence", (2) that the amount lost be "readily ascertainable", and that (3) any amounts already paid be deducted. The defendants agree that the Crown has proved that specific investors invested a total sum of money in KHI and that the company was worthless after bankruptcy. They say, however, that the Crown has not proved that the bankruptcy was caused by the conspiracy and/or the fraud. Having taken the position at trial that the reasons for the company's demise were irrelevant to the charges, they say, the Crown cannot now attribute the investors' losses entirely to the defendants' actions.

[159] The defendants rely on *Drabinsky*, where the Court of Appeal held that the trial judge erred when she attributed the losses that resulted from the company's bankruptcy to the fraud, and sentenced the defendants on that basis. As explained earlier, the defendants in that case overstated the value of the company's assets by approximately $6 million, resulting in a fraud against investors in the IPO. After taking the company public, they used a variety of accounting techniques to fraudulently reduce expenses, thus increasing net income and causing the company to appear more favourable to potential investors and lenders. In sentencing the defendants, the trial judge stated:

> 24 The offence was fraud with respect to a high profile public corporation. The financial records of the corporation were systematically altered to mislead auditors, the Board of Directors, investors and the public. There was a direct link between the financial manipulations and the share value. While the exact dollar value of the fraud is not known, the investments made in the public company were over $500 million.

[160] The company went bankrupt five months after the fraud was discovered. In allowing the sentence appeal, the Court of Appeal held as follows:

> 182 We do agree with the appellants, however, that in the absence of evidence from the Crown, it was wrong to attribute the ultimate failure of Livent to the fraud. The causes of Livent's demise were admittedly numerous and complex. This matter was not explored in the course of the criminal trial and the state of the record does not permit allocation of responsibility for the bankruptcy to the fraud. The bankruptcy no doubt caused significant losses to creditors, employees and

> investors. Those losses cannot, in our view, be laid entirely at the feet of Drabinsky and Gottlieb.
>
> 183 The trial judge in the course of enumerating the various aggravating factors said, at para. 37:
>
> > When the company collapsed, people lost their jobs, creditors lost their money, and investors lost share value.
>
> 184 This passage could be read as a finding by the trial judge that the financial consequences of the bankruptcy were the product of the fraud. With respect to the trial judge, before she could make that finding she had to come to grips with the question of the extent to which the financial loss flowing from the bankruptcy could be attributed to the fraud. **The Crown cannot, on the one hand, refrain from joining issue on the actual loss attributable to the fraud and, on the other hand, ask the sentencing court to assume the worst for the purposes of sentencing.** The Crown is obligated to prove all aggravating factors on sentence beyond a reasonable doubt.
>
> 185 **On this record, while it can safely be said that the fraud was a factor in the bankruptcy, it cannot be said that the fraud caused the bankruptcy and the subsequent financial losses. Where the actual economic harm caused by a fraud is uncertain, the sentencing judge must give the benefit of that uncertainty to the accused. The trial judge should have approached this case as one in which the Crown had proved the ultimate inevitability of significant loss, but had not proved a fraud of a specific magnitude or that the insolvency was the product of the fraud.**
>
> [*Emphasis added*]

[161] During oral submissions, the Crown argued that *Drabinsky* is distinguishable because the losses in this case were caused by the collapse of the share price, not by the bankruptcy.

[162] At the end of the day, as far as restitution is concerned, it matters little whether this Court finds that the losses occurred when the share price collapsed, or later, at the time of the bankruptcy. I decline to order restitution in either case, for the following reasons.

[163] Section 738(1) permits a restitution order only where the amount of the loss is readily ascertainable. The formal request for restitution filed by Margaret Thomas illustrates the difficulty of quantifying individual losses in market manipulation cases. On August 4, 1999, Ms. Thomas purchased a Knowledge House Limited Partnership ("LP") unit for $150,000. The LP subscription agreement entitled investors to two key benefits. First, they were allocated a share of the LP's losses that they could claim on their income tax returns. Blois Colpitts

testified that an individual who purchased one LP unit would be allocated approximately $149,000 in losses that they could claim against their income. Second, when KHI elected to exercise the call option under the subscription agreement in December 2000, investors were entitled to receive common shares of KHI worth 120% of the original investment price. Having paid $150,000 for her LP unit, Ms. Thomas was therefore entitled to 28,125 KHI shares ($6.40 per share).

[164] Winding up the LP created the potential for almost 650,000 KHI shares to come to market at a time when the stock had very limited liquidity. To buy themselves more time, the defendants imposed a contractual six-month hold period on the shares. Under the terms of the hold period, the shares could be margined but not sold. When the share certificates were issued on December 28, 2000, those belonging to investors that the defendants could not prevent from selling were immediately sent to Stewart McKelvey to be held in trust until the hold period expired on June 27, 2001. When that day came, however, the defendants failed to deliver many of the share certificates to investors. Margaret Thomas never received her shares and she now asks this Court to award restitution in the amount of $153,000 – the $150,000 price paid for the LP unit, along with $3,000 in legal fees. This quantification of Ms. Thomas's loss (apparently proposed by the Crown) is misleading. Ms. Thomas presumably received one of the benefits she was entitled to as an LP investor – the allocation of losses. What she did not receive was 28,125 KHI shares, notionally worth $180,000 at the time they were issued. The actual value of the shares to Ms. Thomas depended on what she could sell them for on the market.

[165] The evidence at trial established that KHI stock had limited liquidity both at the time the share certificates were issued, and on June 27, 2001, when the hold period expired. It would have been difficult, if not impossible, for Ms. Thomas and the other LP investors to liquidate their shares in that environment. The defendants knew that the LP shares could not hit the market without tanking the stock. That is why they went to such great lengths to keep the certificates out of the shareholders' hands. This Court is not in a position to speculate on the number of shares Ms. Thomas or any other LP investor would have been able to sell, nor on the prices they would have obtained for those shares, if the defendants had not manipulated the market. Further muddying the waters, the price of $6.40 per share agreed to by the Toronto Stock Exchange for the LP private placement was intended to reflect the then current market price for the stock. As we now know, that market price was artificial. What would the market price have been in

December 2000, if not for the defendants' actions? How many shares would Ms. Thomas and the other LP investors have received in exchange for their units? How many shares would they have been able to liquidate? No one knows the answers to these questions.

[166] My concerns are not limited to the restitution claimed on behalf of LP unitholders. I am also not satisfied that the Crown has proved the precise amount of the losses suffered by the other individual investors or the financial institutions. The Crown's examination of most of the investor witnesses was brief. After asking how they learned of KHI, their reasons for investing, and how much they invested, Crown counsel asked each witness what happened to their investment. Most replied that they had "lost" their investments. The Crown concluded by asking each investor whether they would have invested had they known the share price was being manipulated. The defendants objected to this question, arguing that it was irrelevant and prejudicial. The Crown submitted – and this Court agreed – that the question was relevant to proving deprivation, an element of fraud. Unsurprisingly, almost all the investors were unequivocal in their response that they would not have invested. The defendants chose not to cross-examine the witnesses on their losses. The Crown now suggests that this failure to cross-examine disentitles the defendants from contesting the amount of the investors' losses at sentencing. I disagree. As the defendants and the Court understood it, the Crown intended to rely on the witnesses' evidence to prove only that investors had suffered losses – not to establish the precise amount of their losses for restitution (or other) purposes. This interpretation of the Crown's position is consistent with the following passage in its post-trial submissions:

> i. The losses and risk of loss
>
> 371. As noted above, the Crown does not need to prove a loss to prove these charges. However, many people lost money or had their money put at risk, and the ultimate impact upon the market is incalculable.
>
> 372. Due to the number of investors and institutions, the length of time involved, and the nature of the market, it is not possible to state with precision how much money the victims lost, or to what extent their financial interests were put at risk. That said, the evidence supports amounts well into the tens of millions of dollars.

[167] In any event, I find that there is insufficient evidence before the Court to calculate the actual loss to any particular investor. The Crown did not ask the witnesses whether they were able to deduct capital losses from their income taxes,

or obtained any other tax advantages, as a result of the collapse of KHI. Without this information, it is impossible to accurately quantify their losses.

[168] There are similar difficulties with the restitution requested on behalf of the financial institutions. Although the Crown proved that the financial institutions were unable to collect on a number of margin loans, it led no evidence on what, if anything, they recovered in civil proceedings. It did not ask about the profit the financial institutions made during the period set out in the indictment, including the interest and commissions each brokerage earned on the margin accounts involved in the fraudulent trading. Financial institutions do not lend money for free, and any revenue they obtained as a result of the fraudulent trading would need to be considered when calculating their actual losses. In addition, the Crown's request for restitution on behalf of National Bank Financial is further complicated by the settlement agreements it previously signed, releasing the defendants from any claims against them.

[169] I will address one additional reason for not ordering restitution. In *R. v. Siemens*, (1998) 138 Man.R. (2d) 90, [1999] M.J. No. 285 (Man. C.A.), the Manitoba Court of Appeal held that the fact that there are multiple participants in a crime "is a factor which militates against a restitution order enforceable against one accused, but not against the others": para. 10. In this case, Bruce Clarke, the third accused, pleaded guilty during the trial. Although the same requests for restitution were filed at his sentencing, no such orders were made. In addition, the Crown elected not to charge other key participants in the fraud, despite ample evidence of their involvement. The Crown explained that this decision was driven by practical considerations; prosecuting that many individuals would have complicated the proceeding exponentially. During closing arguments, Crown counsel commented:

> You know the – nobody realizes it today and will never realize it, but the biggest decision that was made about this case was how many accused would be charged. Ah, you know, [you] could have 13 accused. You could easily have six, easily. Very easily have six accused here.

[170] Rather than charging six individuals, or 13, the Crown elected to charge the three "lynchpins" to the operation: the CEO, the lawyer, and the broker. This was a valid exercise of the Crown's discretion. Having made that decision, however, the Crown cannot expect this Court to make restitution orders against Mr. Potter and Mr. Colpitts for all of the quantifiable losses the Crown attributes to the fraud. A restitution order is part of the punishment for an offence, and so must be

proportionate, having regard to the principles of sentencing. The defendants could not have manipulated the KHI share price without the help of their fellow conspirators and it would be inappropriate to order Mr. Potter and Mr. Colpitts to make full restitution for the actions of others, as well as their own. For all of these reasons, I decline to order restitution.

DNA order

[171] The Crown seeks a DNA order in this case. Section 487.051(3)(b) provides a sentencing judge with the discretionary power to order a defendant to provide a sample of their DNA. The section provides that the court, in deciding whether to make the order, "shall consider the person's criminal record, whether they were previously found not criminally responsible on account of mental disorder for a designated offence, the nature of the offence, the circumstances surrounding its commission and the impact such an order would have on the person's privacy and security of the person and shall give reasons for its decision."

[172] The Crown relies on *Cameron* to support its request for a DNA order. I find that *Cameron* is distinguishable. The circumstances in that case raised issues of specific deterrence, as it was believed that the defendant was still evading taxes and accessing funds that he obtained illegally to support a lavish lifestyle. The Court noted that individual deterrence remained a factor in sentencing Mr. Cameron: para. 73.

[173] In my view, there is virtually no risk that either Mr. Potter or Mr. Colpitts will reoffend. In the circumstances, a DNA order would represent an unwarranted intrusion into the defendants' privacy and security of the person.

Conclusion

[174] I sentence Mr. Potter to five years on each count, to run concurrent to each other. I sentence Mr. Colpitts to four and a half years on each count, to be served concurrently. For both defendants, I enter conditional stays on counts 3, 4, and 6 of the indictment. I decline to grant DNA orders. I impose the mandatory victim surcharge of $200 per indictment count which I direct should be fully paid by August 31, 2018.

Coady, J.