

# Sentencing for Fraud Over \$5,000 Offences

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## I. Sentencing for fraud over \$5,000 offences

This paper focuses on the offence of fraud and the sentences imposed for fraud over \$5,000.<sup>1</sup> Anyone who defrauds the public or another person of property, money, valuable security or a service by deceit, falsehood or other fraudulent means is guilty of fraud pursuant to section 380 of the *Criminal Code*. Fraud in excess of \$5,000 is an indictable offence punishable by a maximum sentence of 10 years. If the amount of the fraud is \$5,000 or less, and the Crown proceeds summarily, the maximum sentence is six months.

The first portion of the paper will deal with the general principles of sentencing relevant to fraud cases. The second part of the paper will provide a summary of some sentencing decisions in the provinces and territories. The sentences in the provinces and territories were imposed after the conditional sentencing provisions of the *Criminal Code* came into force on September 3, 1996. Some cases referred to in the sentencing principles section of the memorandum, however, may have been decided prior to that date.

## II. Sentencing factors

### 1. General deterrence and denunciation

The two sentencing principles given the most consideration in sentencing for fraud are general deterrence and denunciation. General deterrence is particularly emphasized in sentencing for large-scale frauds.<sup>2</sup> Emphasis on general deterrence is required to discourage people who would be tempted to defraud others because the offence can be easy to commit and quite profitable. Similarly, general deterrence is also strongly emphasized in cases where the fraud (large-scale or not) involves a breach of trust.<sup>3</sup>

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<sup>1</sup> The author would like to acknowledge the valuable contribution of Teresa Donnelly, counsel for the Attorney General of Ontario, and her colleague, David Littlefield, for providing substantial suggestions and revisions to this paper.

<sup>2</sup> See *R. v. Bertram*, [1990] O.J. No. 2013 at 3 (C.A.) online: QL (OJ); *R. v. Wismayer* (1997), 115 C.C.C. (3d) 118 (Ont. C.A.) at 38; *R. v. Dobis* (2002), 163 C.C.C. (3d) 259 (Ont. C.A.) at para. 42; *R. v. Bogart* (2002), 61 O.R. (3d) 75 (Ont. C.A.) at paras. 33-36.

<sup>3</sup> See *R. v. Howe*, [2002] A.J. No. 1443 at para. 3 (C.A.) online: QL (AJ), *R. v. Dobis* (2002), 163 C.C.C. (3d) 259 (C.A.) at 272, *R. v. Bogart*, [2002] O.J. No. 3039 at para. 29 (C.A.) online: QL (OJ) and *R. v. Pierce*, [1997] O.J. No. 715 at 11 (C.A.) online: QL (OJ).

The reason for the focus on general deterrence was stated by Locke J. in *Pierce*:

This country ... abounds with fraudsmen who would regard a low or a non-custodial sentence in these circumstances as an irresistible temptation to take the risk of spending a few short months in jail ... in return for attempting the crime of fraud or theft where the prize exceeds \$150,000 ... Great care must be taken in the matter of sentence for a criminal offence such as fraud at this level of seriousness, to avoid the prospect that by over-emphasizing the principle of rehabilitation, the crime, to many, would be worth the risk of being caught.<sup>4</sup>

Denunciation is also a key sentencing principle in fraud cases and sentences should reflect society's condemnation of the offender's unlawful conduct.<sup>5</sup>

## 2. Aggravating factors

Some of the most common aggravating factors considered in fraud sentencing cases include:

1. A high degree of planning and deliberation<sup>6</sup>, a lengthy time over which the fraud took place<sup>7</sup>, and a substantial number of transactions required to commit the fraud<sup>8</sup>;
2. Greed<sup>9</sup>;
3. Personal profit<sup>10</sup>;
4. The size of the fraud<sup>11</sup>;
5. The nature of the victim (e.g. elderly individual,<sup>12</sup> institution,<sup>13</sup> public agency,<sup>14</sup> and the number of victims<sup>15</sup>;

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<sup>4</sup> *Pierce*, supra at 5.

<sup>5</sup> *Howe*, supra 2 at para. 3 and *Dobis*, supra at 272.

<sup>6</sup> *Howe*, supra.

<sup>7</sup> See *R. v. Fehr*, [2001] S.J. No. 147 (C.A.) online: QL (SJ).

<sup>8</sup> See *R. v. Bjellebo*, [2000] O.J. No. 478 (Sup. Ct.) aff'd [2003] O.J. No. 3946 (C.A.) online: QL (OJ).

<sup>9</sup> *R. v. Wisniewski* (2002), 166 Man. R. (2d) 73 (C.A.) at para. 24.

<sup>10</sup> See *R. v. Damji*, 2002 Carswell Ontario 4436 (Ont. Ct. Just.) online: eCarswell

<http://www.ecarswell.com> and *Bogart*, supra.

<sup>11</sup> See *R. v. Kuriya* (2002), 252 N.B.R. (2d) 247 (N.B.Q.B.), *R. v. Evans*, [2003] N.B.J. No. 47 (Q.B.) online: QL (NBJ), *Damji*, supra 1 and *R. v. Bjellebo*, [2003] O.J. No. 3946 (C.A.) online: QL (OJ).

<sup>12</sup> *Evans*, supra, 12 and *R. v. Adler*, [1999] N.B.J. No. 100 (C.A.) online: QL (NBJ).

<sup>13</sup> See *R. v. Bradbury* (2002), 218 Nfld & P.E.I.R. 33 (S.C. [T.D.]).

<sup>14</sup> *R. v. Desormeau*, [2001] N.J. No. 341 (S.C. [T.D.]) online: QL (NJ).

<sup>15</sup> *R. v. Wheeler*, [2001] N.J. No. 240 (S.C. [T.D.]) online: QL (NJ) and *Damji*, supra note 11.

6. A breach of trust<sup>16</sup>; and
7. A criminal record for similar offences<sup>17</sup>.

### 3. Mitigating factors

Some of the most common mitigating factors in fraud sentencing cases are:

1. Voluntary restitution or attempts at restitution<sup>18</sup>;
2. Personal consequences (lost job, family or marriage problems)<sup>19</sup>; and
3. No prior record/good character.<sup>20</sup>

Good character counts less in fraud cases because it is precisely this characteristic that often enables the offender to commit the offence. In *R. v. Foran* the Court of Appeal for Ontario noted that:

In his reasons for judgment in imposing sentence the learned trial Judge seems to have placed undue emphasis upon the position of the accused in the community and seems to have relied on that as a mitigating circumstance. Any mitigation from that source would seem to us to be more than offset by the fact that the very nature of this type of crime requires that it be committed by persons who have an established place in the community and are allegedly honourable gentlemen. This was a fraud and one who did not have the respondent's position could not have succeeded in committing it as he did.<sup>21</sup>

In addition, courts have noted that good character, which is a common characteristic of most of the offenders who commit major frauds, is of little mitigating value because of the need to emphasize general deterrence.<sup>22</sup>

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<sup>16</sup> See *Evans, supra*, *Adler, supra*; *Criminal Code*, R.S.C. 1985, c. C-46, s.718.2(a)(iii).

<sup>17</sup> *R. v. Harding*, [2002] B.C.J. No. 2502 (C.A.) online: QL (BCJ).

<sup>18</sup> See *R. v. Inglis*, [2002] B.C.J. No. 1551 (Prov. Ct.) online: QL (BCJ) and *Bogart, supra*.

<sup>19</sup> Loewen, *supra*.

<sup>20</sup> *Bogart, supra*.

<sup>21</sup> *R. v. Foran*, [1970] 1 C.C.C. 336 (Ont. C.A.) at 337

<sup>22</sup> *R. v. Bertram and Wood* (1990), 40 O.A.C. 317 at 319; *R. v. Bogart* (2002), 61 O.R. (3d) 75 (Ont.C.A.)

#### 4. Custodial and conditional sentence considerations

There was a presumption in favour of custodial sentences for large-scale fraud or frauds involving a breach of trust before the Supreme Court of Canada's decision in *R. v. Proulx*<sup>23</sup>. Although conditional sentences were available before *Proulx*, many courts were of the view that a conditional sentence was more lenient than a custodial one and could not adequately address the need for general deterrence and denunciation. As a result, some courts continued to prefer the imposition of custodial sentences.

The Supreme Court of Canada made it clear in *Proulx* that conditional sentences are punitive sanctions that can achieve the objectives of deterrence and denunciation.<sup>24</sup> *Proulx* also indicated that there are no offences presumptively excluded from the conditional sentencing regime. As Lamer C.J. wrote,

In my view, while the gravity of such offences is clearly relevant to determining whether a conditional sentence is appropriate in the circumstances, it would be both unwise and unnecessary to establish judicially created presumptions that conditional sentences are inappropriate for specific offences.<sup>25</sup>

*Proulx* provided some further guidance on when a custodial sentences may be found preferable:

Where punitive objectives such as denunciation and deterrence are particularly pressing, such as in cases in which there are aggravating circumstances, incarceration will general be the preferable sanction.<sup>26</sup>

The application of this principle has led to some consistency in the use of custodial sentences for certain types of fraud. Where large-scale frauds are concerned, most courts have held that the quantum of the fraud alone may mean that the need for general deterrence is so “particularly pressing” that incarceration is required.<sup>27</sup> However, the

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<sup>23</sup> *R. v. Proulx*, [2000] 1 S.C.R. 61.

<sup>24</sup> *Ibid.* at para. 22.

<sup>25</sup> *Ibid.* at para. 81.

<sup>26</sup> *Ibid.* at para. 114.

<sup>27</sup> *Bogart, supra*, at para. 34.; *R. v. Evans*, [2003] N.B.J No. 47 (Q.B.), 2003 NBQB 54; *R. v. Williams*, [2003] O.J. NO. 2202 (C.A.), app. for leave refused [2003] S.C.C.A. 450; *R. v. Kuriya* (2002), 252 N.B.R. (2d) 247 (Q.B.), 2002 NBQB 306, aff'd 2003 NBQA 63; *R. v. Black*, [2003] N.S.J. No. 168

Saskatchewan Court of Appeal has taken the position that a conditional sentence should be available no matter the size of the fraud.<sup>28</sup>

Courts have continued to prefer custodial sentences where an offender has shown a lack of remorse<sup>29</sup> or a refusal to accept responsibility.<sup>30</sup> In these situations, it is thought that a conditional sentence would not adequately promote a sense of responsibility in the offender who might not respect the conditions imposed by the court.

The Manitoba Court of Appeal in *R. v. Matchett* rejected the position that a conditional sentence should not have been imposed because there was a breach of trust.<sup>31</sup> However, even after *Proulx*, there are still courts that show a preference for a custodial sentence for breaches of trust. In *R. v. Inglis* it was held that

the law has made it clear that unless there are exceptional and unusual circumstances, people who find themselves before the court on offences that involve a breach of trust should expect that a period of incarceration is the likely consequence.<sup>32</sup>

A preference for custodial sentences may also be found in cases dealing with frauds affecting public funds. In *Howe*, a tax fraud case, for example, the Alberta Court of Appeal held that:

In order to express society's abhorrence for those who would abuse this system, and to send a strong and clear message to others who might contemplate doing the same thing, only in the rarest of circumstances would less than a penitentiary sentence be appropriate.<sup>33</sup>

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<sup>28</sup> *R. v. Moulton* (2001), 160 C.C.C. (3d) 407 (C.A.).

<sup>29</sup> *R. v. Mastromonaco*, [2002] O.J. No. 4612 at para. 28 (Sup. Ct.) online: QL (OJ).

<sup>30</sup> See *Bradbury*, *supra* note 14 at paras. 28–30 and *Desormeau*, *supra* note 15 at para. 20.

<sup>31</sup> *R. v. Matchett*, [1997] N.B.J. No. 176 (C.A.) online: QL (NBJ) at para. 5

<sup>32</sup> *Inglis*, *supra*, at para. 5

<sup>33</sup> *Howe*, *supra* at para. 3.

### III. Sentencing cases by province and territory<sup>34</sup>

Where possible, the most lenient custodial and conditional sentences and the most severe custodial sentences found for fraud over \$5,000<sup>35</sup> are described below for each province and territory.

#### 1. Alberta

*R. v. Altenhofen*, [2003] A.J. No. 797, 2003 ABQB 485

#### **2 years – multiple frauds totalling \$250,000 + possession of \$400,000 stolen property**

The offender was found guilty of 13 counts of fraud, theft, and possession of stolen property that were committed in the operation of his business. Two companies that were defrauded lost approximately \$250,000. The possession of stolen property offence involved heavy equipment worth more than \$400,000.

The offender was 49 years old, married, an experienced businessman, and had a minor, stale record. He admitted the possession of stolen property, but continued to deny responsibility for the fraud by claiming that he had acted naively. The court rejected this characterization and found that the offender was a bright person who knew exactly what he was doing.

After a careful review of recent authorities<sup>36</sup>, the court concluded that the need for denunciation and general deterrence would not be met by a conditional sentence. The court indicated at paragraph 19 that:

In *R. v. Ambrose*, Mr. Justice Cote referring to *Proulx* believed that for offences of this type “to maintain respect for the law” actual incarceration is required when there is a high level of moral responsibility for the offences. Mr. Altenhofen has an extremely high level of moral culpability since there was some evidence of planning, the illegal behaviour

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<sup>34</sup> No reported fraud sentencing decisions were found for Nunavut.

<sup>35</sup> The cases deal only with convictions for fraud under section 380 of the *Criminal Code* and do not address cases of fraud under the *Income Tax Act* or *Excise Tax Act*.

<sup>36</sup> *R. v. King* (1998), 212 A.R. 44 (Alta. C.A.); *R. v. Souter* (1998), 228 A.R. 54 (Alta. C.A.); *R. v. Howe* (2002), 317 A.R. 225 (Alta. C.A.); *R. v. Stevenson* (2002), 299 A.R. 159 (Alta. C.A.); and *R. v. Ambrose* (2000), 271 A.R. 164 (Alta. C.A.)

continued over a long period of time, it involved numerous pieces of property, and there were complicated frauds perpetrated that required forethought and planning.

The court imposed a sentence of 2 years imprisonment. No restitution order was made because the court could not determine the damages suffered by the victim.

*R. v. Chow*, [2001] A.J. No. 998 (C.A.), 2001 ABCA 202

**1 year in addition to 5 months conditional - \$177,000 fraud – substantial planning**

The offender pled guilty to a \$177,000 fraud that involved substantial planning and the use of forged documents. The Court of Appeal held that the trial judge had failed to give adequate weight to the need for denunciation. In addition, the conditional sentence imposed was not proportional to the high degree of responsibility of the offender who had committed the offence with substantial premeditation. Taking into consideration the five or six months served conditionally prior to the appeal, a majority of the Court of Appeal sentenced the accused to 1 year imprisonment.

*R. v. Grundy*, [2001] A.J. No. 1670 (Alta. C.A.), 2002 ABCA 4

**2 years conditional – CA said should have been prison - \$217,000 fraud**

The offender, a broker, conducted unauthorized discretionary trading that resulted in shortfalls. Over about a 1 year period he misappropriated cash and securities to cover the losses. He also forged client signatures and letters of instruction to perpetrate the fraud and generated forged computer printouts to conceal his misappropriations. His brokerage suffered a total loss of about \$217,000.

The first-time offender was 37. He had a grade 12 education, but had taken night courses to qualify as a registered representative in the securities industry. The trial judge found that at the time of the offences he was under considerable financial strain and marital strife. He was separated by the time of sentencing and providing child support for his two children. After he was dismissed by the brokerage, he found employment as a senior sales director with another company.

The trial judge agreed that general deterrence and denunciation were the paramount principles of sentencing. The court held that these principles were satisfied by a conditional sentence of 2 years less a day which required the offender to observe a curfew from 8 p.m. to 7 a.m., take counselling, and perform 240 hours of community service in addition to making restitution of \$218,000.

The Court of Appeal held that the trial judge had under-emphasized the gravity of the offence and the offender's moral blameworthiness. The Court also noted that the sentence failed to meet the requirement for general deterrence because it lacked any deterrent or punitive qualities. The Court indicated that it would have imposed a significant period of incarceration, but imposed a conditional sentence of 2 years less a day in view of the sentence already served. The Court also imposed a term of 24 hours a day house arrest except for medical emergencies, treatment or to perform the community service.

*R. v. Watkinson* (2001), 153 C.C.C. (3d) 561 (Alta. C.A.), 2001 ABCA 83

**18 months conditional - pathological gambler - \$117,000 fraud**

The offender used her position with an insurance company to receive secret commissions of about \$16,000 and defraud the company of \$117,000 over a period of seven months. The offender pled guilty to fraud and receiving secret commissions. The first-time offender was 36 years old, had a drinking problem and was a pathological gambler. No restitution had been made. The trial judge felt bound by the decision in *R. v. Holmes* (1999), 237 A.R. 145 (Alta. C.A.) where the Court of Appeal overturned a conditional sentence in favour of a custodial sentence of the same duration. *Holmes* involved a theft of over \$100,000 by an employee who was in a position of trust and who was also a pathological gambler. The Court of Appeal in *Holmes* had held that general deterrence and denunciation were paramount and imprisonment should be imposed absent exceptional circumstances. The *Holmes* court held that the offender's pathological circumstance did not amount to exceptional circumstances. Following *Holmes*, the trial court held that the offender's alcohol and gambling problems were not exceptional circumstances that would justify a sentence without imprisonment. As a result, the trial

judge held that in view of the importance of the insurance industry to the health of community, the sophistication of the fraud, the attempts to conceal it, and the breach of trust that a sentence of 18 months imprisonment for the fraud with 12 months concurrent for receiving secret commissions was appropriate.

After serving about 2 ½ months in custody, the offender was released on bail. The Court of Appeal held that *Proulx* had made it clear that a conditional sentence might meet the sentencing objectives of denunciation and general deterrence. As the trial court did not have the benefit of *Proulx*, the Court of Appeal was satisfied that in the circumstances of the case that the need for denunciation and deterrence could be met by an 18 month conditional sentence, less credit for time served pending the appeal.

*R. v. Kerntopf*, [1999] A.J. No. 189 (C.A.), 1999 ABCA 63

**5 years – sophisticated fraud to falsely obtain \$836,000 in tax credits**

The offender was found guilty by a jury of defrauding the government through a sophisticated scheme which used forged documents to obtain tax credits in the amount of approximately \$836,000. The trial judge imposed a sentence of 5 years imprisonment plus a compensation order in the amount of the fraud. The Court of Appeal held that a review of the authorities suggested a sentence of 3 to 7 years. Although the Court indicated the sentence may have been at the high end, it was not unfit.

**2. British Columbia**

*R. v. Wilder*, [2004] B.C.J. No. 1030, 2004 BCSC 644

**9 years – sophisticated \$36 million tax fraud**

The offender was found guilty of 7 counts of defrauding the government of \$36,000,000 and 1 count of possession of property obtained by crime. The offender was originally charged along with Lawrence and two others, but his charges were severed before the joint trial. Mr. Wilder was initially acquitted, but the Court of Appeal ordered a new trial at which he was convicted. Before Wilder's re-trial, Lawrence and the others were convicted. A summary of the court's decision in *R. v. Lawrence*, [1996] B.C.J. No. 3027 (C.A.), in which two offenders were sentenced to 7 years and the third to 6 years, may be found later in this paper.

The offender was the president of a company that raised money from investors through the use of the Scientific Research Tax Credit (SRTC) program for three different research projects. The Crown proved that the statements certifying various aspects of the research that were supposed to have been completed were fraudulent. In one case the research expenditures were inflated, in the second case no expenditures had been incurred, and there was no research project in the third case. The trial court observed that in *Lawrence* the Court of Appeal had already noted that the fraudulent scheme was elaborate, involved numerous third parties, the use of inflated and bogus invoices, bogus promissory notes, and numerous false representations. The trial court observed that Wilder also plagiarized others work and created false documents in this case.

The court found that Wilder was the kingpin in the commission of the offences, motivated solely by greed, had no remorse, and had failed to accept responsibility for his conduct.

The offender was 57 years old at the time of the sentencing. The offender took the position that his sentence should reflect the fact that he had already served time for what he claimed was essentially the same offence in Manitoba. The offender, who was representing himself, suggested that he had suffered greatly due to the incompetence of Revenue Canada and had lost many business opportunities. The offender suggested that he should receive a discharge or conditional sentence.

The Crown argued that Wilder should receive a greater sentence than *Lawrence* in light of the fact that Wilder was the leader in the offence and was convicted of being involved in one additional scheme. The court examined the facts relating to the offender's conviction in Manitoba which are set out in *R. v. Wilder*, [1994] M.J. No. 455. The court found that in the Manitoba case Wilder had also used an SRTC scheme, but the alleged research product was completely different than the ones in B.C. and commenced after the B.C. schemes. The court noted that Wilder had been convicted of attempting to defraud

the government of \$7,000,000 in the Manitoba case and was sentenced on September 2, 1994 to 3 years imprisonment.

The trial judge decided that a total sentence of 9 years imprisonment was appropriate in view of the sentences imposed on Wilder's accomplices and the need for deterrence. In addition, the court noted that the offender had been careful to divest himself of identifiable assets. The offender's home in Canada was in his mother-in-law's name and his home in the U.S. was formerly in his wife's name but was now in the name of another. The court decided that a restitution order of \$5,000,000 was appropriate.

*R. v. Inglis*, [2002] B.C.J. No. 1551 (Prov. Ct.), 2002 BCPC 242

**18 months conditional + \$73,000 restitution – bank teller defrauded her employer**

The offender, a senior bank teller, pled guilty to defrauding her employer of approximately \$78,000 over a period of 1½ years. The first-time offender was 47, a mother of 3, voluntarily paid back \$5,000, showed genuine remorse and had the support of her family and friends. She was sentenced to an 18 month conditional sentence and restitution of \$73,000.

*R. v. Anderson-Davis*, [2000] B.C.J. No. 88 (S.C.), 2000 BCSC 42

**18 months conditional - \$136,000 welfare fraud**

The first time 53 year old offender pled guilty to 2 counts of welfare fraud totalling \$136,000. The offences took place over two separate four-year periods. The judge held that the offender had tried to live beyond his means and now accepted that he could no longer do this. The judge noted that there was no need for rehabilitation or individual deterrence and the offender had agreed to make restitution by selling his home. The court imposed a conditional sentence of 18 months.

*R. v. Lawrence*, [1996] B.C.J. No. 3027 (C.A.)

**7 years – sophisticated \$17½ million tax fraud**

In the companion case to *Wilder*, three offenders were found guilty by a jury of defrauding the government of approximately \$17 ½ million. The fraud rose out of two

phoney scientific research projects and was financed by the sale of tax credits under the short lived Scientific Research Tax Credit (SRTC) plan. The fraud was elaborate and involved the creation of a research infrastructure, attraction of investment money from thirty parties, creation of escrow accounts, and the use of inflated and bogus invoices, promissory notes and false statements to secure release of the funds held in escrow.

The investors received certificates that research was in fact being done. Mr. Lawrence was a lawyer who issued phoney letters of comfort to the investors knowing the certificates were false. All offenders had exemplary, unblemished backgrounds. The trial judge held that the need for denunciation and general deterrence required substantial sentences. Mr. Lawrence and one other offender were sentenced to 7 years imprisonment and ordered to pay \$1 million restitution. The other offender was sentenced to 6 years and also ordered to pay \$1 million restitution. The Court of Appeal upheld the sentence noting at paragraph 22 that:

The fraud saw profits of 17 million dollars. It consisted of an elaborate plan which was put into effect over many months. It involved many players, an elaborate paper trail, and significant cunning and deceit.

### **3. Manitoba**

*R. v. Kennedy*, [2000] M.J. No. 369 (C.A.), 2000 MBCA 44

#### **1 year – \$234,000 fraud on banks and government agency**

The offender pled guilty to defrauding four victims of \$234,600 by obtaining loans from them by the use of deceitful statements. Three of the victims were chartered banks and the fourth was a government loan agency. The offender's home had been mortgaged to secure a \$110,000 of the loans. The home had sufficient value for this amount to be recovered. The offender had made little other restitution. The offender was a mother of four children and in her early thirties. The offender had a record for similar offences and was on probation at the time of the offence. The trial judge imposed a sentence of 2 years less a day imprisonment plus probation and restitution. The Court of Appeal noted that the offender had not been in a position of trust and that the victims might have detected the fraud with a little diligence on their part. The Court of Appeal noted that

following *Proulx* a conditional sentence may have been appropriate but for the offender's previous record. The Court of Appeal reduced the sentence to 1 year imprisonment and probation with restitution largely on the basis that a first sentence of imprisonment should not be overly long.

*R. v. Beyer*, [1997] M.J. No. 368 (C.A.)

**9 years – multiple frauds – lengthy record for similar offences**

The offender was convicted of three counts of fraud and then pled guilty to another five counts of fraud on a separate indictment. He was sentenced at trial to 9 years imprisonment on the first indictment and 4½ years consecutive on the other indictment. In spite of the offender's long record for similar offences, and the fact the offences were committed while on parole for previous offences, the Court of Appeal found the overall sentence of 13½ years "wholly disproportionate to the gravity of the offences and the circumstances of this offender". As a result, the Court of Appeal reduced the overall sentence to 9 years imprisonment.

*R. v. Terhoch*, [1997] M.J. No. 177 (Prov. Ct.)

**10 months conditional – defrauded employer of \$18,000 over 2½ years**

The offender pled guilty to one count of fraud on his employer of approximately \$18,000. The fraud was committed over a two and a half year period and involved over 100 transactions. The offender was given a 10 month conditional sentence and two years probation.

*R. v. Laursen*, [1996] M.J. No. 440 (C.A.)

**1 year – defrauded employer of \$27,400 over 20 months**

The offender was convicted of defrauding his employer of approximately \$27,400 over a period of 20 months. On appeal, the sentence was increased from two years probation and a restitution order to 1 year imprisonment, 2 years probation and a restitution order. The Court of Appeal found no special circumstances permitting a more lenient sentence.

#### **4. New Brunswick**

*R. v. Evans*, [2003] N.B.J No. 47 (Q.B.), 2003 NBQB 54

##### **10 months + 2 months pre-trial - defrauded elderly man suffering from dementia**

The offender was found guilty after a jury trial of one count of fraud over a 14-month period. The victim was an elderly man suffering from dementia. The offender was the victim's caregiver and had an earlier conviction for theft. While the court concluded that the offender would not present a danger to the community, it held that the need for general deterrence and denunciation was so pressing that incarceration was necessary. Giving two months credit for time served, the offender was sentenced to 10 months imprisonment.

*R. v. Kuriya* (2002), 252 N.B.R. (2d) 247 (Q.B.), 2002 NBQB 306; aff'd 2003 NBCA 63

##### **2 years – defrauded government agency of \$840,000 – elaborate + lengthy scheme**

The offender was convicted of defrauding a government agency of \$840,699 through an elaborate scheme that continued over a protracted period of time and involved the use of false documents. The trial judge held that even following *Proulx* a conditional sentence was not appropriate for the first offender who had a good background in view of the planning, deviousness, and substantial money involved. The trial court held that denunciation and general deterrence required a sentence of 2 years imprisonment and restitution. The Court of Appeal dismissed the sentence appeal. The Court held at paragraph 22 that denunciation and general deterrence required incarceration to maintain respect for the law in view of the planning, deviousness and amount of money involved in the commission of the offence.

*R. v. Matchett*, [1997] N.B.J. No. 176 (C.A.)

##### **8 months conditional - defrauded employer of \$26,800**

The offender pled guilty to defrauding her employer of \$26,800 and was sentenced to an 8 month conditional sentence with two years probation. On appeal, the Attorney General argued that a conditional sentence was inappropriate where the offence involved a breach of trust. The Court of Appeal rejected the position that a conditional sentence should not have been imposed because there was a breach of trust and upheld the sentence.

## 5. Newfoundland

*R. v. Desormeau*, [2001] N.J. No. 341 (S.C.–T.D.)

### **8 months – captain in armed forces defrauded employer of \$70,000**

The first time offender, a captain in the armed forces, pled guilty to defrauding the government of about \$70,000. The offender had directed other soldiers to submit travel claims with the amounts blank. The offender then falsely completed the documents. Some monies were given by the offender to the soldiers. The offender was middle-aged and had retired after 20 years in the armed forces. The court rejected a conditional sentence in view of the fact that the offence involved a breach of trust, public monies, the involvement of other persons, the substantial amounts involved, and the offender's failure to accept responsibility for his actions. The court imposed a sentence of 8 months imprisonment and restitution.

*R. v. Wheeler*, [2001] N.J. No. 240 (S.C.–T.D.)

### **4½ years – defrauded hundreds of people of \$3 million through phoney investments**

The first-time offender pled guilty to defrauding hundreds of people of approximately \$3 million. The offender had run a phoney investment scheme promising fabulous rates of return. The offender confessed to the crime. The offender was middle-aged and had three children. The offender had operated a gas station his whole life. The offender had lost his gas station and been petitioned into bankruptcy. The court had earlier decided not to order restitution for several reasons including the fact the amounts could not be clearly determined for all of the victims.<sup>37</sup> The court decided that general deterrence required a sentence of 4½ years imprisonment. The court indicated that it was imposing an additional 6 months because a restitution order was not feasible.

*R. v. Quinlan* (1999), 133 C.C.C. (3d) 501 (Nfld. C.A.)

### **6 months conditional - \$12,000 theft + frauds to support cocaine addiction**

The offender pled guilty to one count of theft and two counts of fraud in relation to two different employers. The theft and frauds involved a total of \$12,000. The offences had been committed to support the offender's cocaine addiction. The offender had sought

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<sup>37</sup> *R. v. Wheeler*, [2001] N.J. No. 241 (S.C.–T.D.)

treatment for his addiction and had been since hired into a family business. The offender had been previously convicted of theft, but no details beyond this were provided to the trial court. The offender, who was 29 and married with a child, testified that he could make \$500 a month restitution. The Crown and defence made a joint submission for a 6 month conditional sentence. The trial judge held that he was not satisfied that restitution could be made and imposed a sentence of 6 months imprisonment with restitution. The offender was released on bail pending appeal and made restitution payments weekly as required by the bail order. The Court of Appeal found that the trial judge erred because restitution was possible. The Court varied the sentence to be a 6 month conditional sentence, 3 years probation, and full restitution.

*R. v. Oliver*, [1997] N.J. No. 248 (S.C.–C.A.)

**7 month conditional – clerk defrauded her bank employer of \$27,614**

The offender, a clerk, pled guilty to defrauding her employer of \$27,614.23. The offence took place over almost a 2 year period. One employee was laid off a result of the offence and another had her hours of work reduced. The trial judge mentioned that a jail term was appropriate, but imposed a suspended sentence and 3 years probation with a restitution order. By the time of the appeal, the offender had not made any restitution. The conditional sentence legislation had come into effect since the trial. The Court of Appeal held that a custodial sentence was required and imposed a 7 month conditional sentence.

**6. Nova Scotia**

*R. v. Black*, [2003] N.S.J. No. 168 (S.C.)

**2 years - \$1 million fraud on bank and a provincial agency**

The offender was convicted of defrauding a bank and a provincial agency of \$1 million by diverting money to companies that had not been designated to receive the funds. There was no evidence the offender had personally used the money. The first-time offender was 61 years old and from a good background. The court held that in view of the amount of money involved that a conditional sentence would not meet the needs for general deterrence and denunciation. The offender was sentenced to 2 years imprisonment.

*R. v. Rizzetto* (2002), 210 N.S.R. (2d) 67 (C.A.), 2002 NSCA 142

**2 years less day conditional – \$137,000 fraud on social services over 20 years**

The offender was convicted by a jury of defrauding the government of approximately \$137,000 over nearly a 20 year period. The offender received social services benefits improperly by failing to declare her assets and income that she earned. The offender was sentenced to 2 years less a day conditional imprisonment, two years probation and restitution of about \$71,000. The sentence was upheld on appeal.

*R. v. Macdonald*, [2001] N.S.J. No. 51 (C.A.), 2001 NSCA 26

**Probation + restitution – defrauded employer of \$32,000 through phoney overtime**

The offenders were paid for overtime they had not worked over a period of three years. One received about \$32,000 and the other about \$19,000. They gave half the money to the paymaster. Both pled guilty to fraud. The Crown agreed to a joint submission of probation with a restitution order for half of the amount defrauded. The rationale half was that the victim was content with this arrangement because the paymaster was also to be charged. The trial judge imposed a suspended sentence and two years probation with full restitution. The Court of Appeal varied the sentence to impose restitution for only half the amount defrauded as counsel had originally suggested.

**7. Northwest Territories**

*R. v. Cleary*, [2002] N.W.T.J. No. 44 (S.C.)

**2 years conditional – stole \$20,000 + defrauded \$55,000 from employer**

Ms. Cleary, who was the manager of a local housing office, was found guilty after a trial of stealing approximately \$20,000 and defrauding her employer over a six year period of another \$55,000 through the use of phoney bills and other schemes. She made voluntary restitution of \$220 in relation to the theft and \$1,720 in relation to the fraud.

Ms. Cleary was a first-time offender, 41, and had four children. The court noted that a good background is not usually a mitigating factor in fraud because the good background is often what allows a person to commit the offence. The court also noted that the breach of trust was an aggravating circumstance. While the court accepted that denunciation and general deterrence were the paramount factors in sentence, it felt these were met by a conditional sentence of 2 years less a day and a restitution order for \$53,000.

*R. v. Mulligan*, [2002] N.W.T.J. No. 45 (S.C.)

**1 year – mature person with related record - \$9,500 fraud**

The offender pled guilty part way through his trial of defrauding a person of \$9,500. The court noted that it could not give as much weight to the guilty plea as usual because it occurred after the offender had been caught in some blatant lies during cross-examination. The offender was 50 years old, had a spouse and young child. The offender was well liked as indicated by letters of support. The offender had a 10 year old record for fraud and theft for which he had been sentenced to 9 months. He was also convicted for obtaining merchandise by false pretences and breach of an undertaking. The court indicated that the offender was not a danger to the community. The court held that the need for denunciation and general deterrence required actual imprisonment in this case because the offender was a mature person with a record for similar offences. The court sentenced the offender to 1 year imprisonment, 18 months probation and restitution.

*R. v. Bedard*, [2000] N.W.T.J. No. 90 (S.C.)

**15 months conditional – defrauded employer of \$36,000**

Mr. Bedard was a municipal planning engineer for the government. He pled guilty to defrauding his employer by approving \$21,000 worth of invoices from a friend's company by certifying the work had been done when he knew it had not. The offender received the use of a printer at his home for 18 months from his friend. He later turned the printer over to the government. He also pled guilty to fraud over for having approved another invoice from his friend's company by certifying that \$20,000 worth of work had been done when it had not. Mr. Bedard then invoiced the friend's company for \$15,000 for work that he had not done in relation to this invoice.

Mr. Bedard was a first-time offender, 45 years old and the divorced father of three. He had obtained an engineering degree in 1979 and had worked since. After the offences were disclosed, he was suspended and then resigned. He had subsequently obtained another position as the Director of Public Work for a town near Ottawa. Three character witnesses spoke on his behalf and indicated that he was a good worker, and had

volunteered for community activities such as hockey and was a member of the Volunteer Fire Department. Notwithstanding the breach of trust, the court held that the principles of sentencing were satisfied by a 15 month conditional sentence concurrent on each count with 200 hours community service.

### **8. Ontario**

*R v. Bjellebo*, [2000] O.J. No. 478 (Gen. Div.); [2003] O.J. No. 3946 (C.A.), <http://www.canlii.org/on/cas/onca/2003/2003onca10627.html>; application for leave to appeal dismissed, [2003] S.C.C.A. No. 541

#### **10 years – defrauded government of \$118 million and investors of \$22 million**

Einar Bellfield set up a yacht chartering business called Overseas Credit and Guaranty Corporation (OCGC) in 1984 to sell units in limited partnerships to investors. He was later assisted in the operation of the company by Mr. Minchella. The incentive to investors was the promise of substantial early tax losses that would create a positive cash flow. The Crown proved that numerous misrepresentations constituted a fraud on the public who were at risk of losing tax revenues from the individual investors. The Crown further proved that the misrepresentations also constituted a fraud on the investors whose tax loss claims were ultimately disallowed by Revenue Canada. Investors claimed \$118 million in losses to Revenue Canada and paid \$22 million in interest payments to OCGC between 1984 and 1989. Finally, the Crown proved that the offenders uttered forged documents to further their misrepresentations to both the government and the investors.

Mr. Bellfield set up two companies offshore to assist with the fraud. Starlight Charters S.A. was supposed to be responsible for providing the charter services and supplies. Neptune Resources S.A. was supposed to be responsible for providing financing for building the yachts.

The Crown proved that Bellfield and Minchella created false Neptune Loan account statements, Starlight Invoices, performance bonds, letters of credit, management agreements, financial statements, and loss schedules, bank letters, false certificates and correspondence. The Crown also proved that the investors were told that: (1) the yachts existed when in fact they did not, (2) Bellfield did not own or control the offshore companies Starlight and Neptune when in fact he did, and (3) Neptune had millions of

dollars to pay the Starlight invoices and construction costs when Neptune did not have any real financing.

The first-time offenders were convicted of two counts of fraud and two counts of uttering forged documents after a nine-month jury trial. Bellfield, the mastermind behind the scheme, was sentenced by the trial judge to 10 years imprisonment and a fine of \$1,000,000. Minchella was sentenced to 7 years imprisonment. In dismissing the offenders' appeals as to sentence, the Court of Appeal held at paragraph 13 that:

While at the high end, the sentences imposed by the trial judge fell within the acceptable range. This was a highly sophisticated and massive fraud involving \$118,000,000 against the public purse and \$22,000,000 against more than 600 individuals. It was perpetrated over a lengthy period of time, and involved thousands of documents, off-shore companies and accounts.

*R. v. Williams*, [2003] O.J. NO. 2202 (C.A.), app. for leave refused [2003] S.C.C.A. 450

**90 days – defrauded employer by hiring girlfriend without authorization**

The offender was found guilty of defrauding his employer. The offender had no authorization to hire people, but purported to hire his girlfriend to provide recruitment services. The trial judge sentenced him to 90 days intermittent imprisonment and a \$20,000 fine. In dismissing his appeal, the Court of Appeal described the sentence as merciful in view of the fact that Williams was a senior manager in a position of trust.

*R. v. Bogart* (2002), 61 O.R. (3d) 75 (Ont. C.A.)

**18 months – doctor defrauded health insurance plan of \$1 million over 7 years**

The first-time offender, a doctor, pled guilty to defrauding the government's health insurance plan of nearly \$1 million over 7 years. The offender submitted nearly 20,000 fraudulent billings. On average the offender fraudulently billed the plan for about 200 services that he did not perform a month. The offender, who was 45 years old, had survived cancer at a young age and had a large group of devoted patients, many of whom

were HIV positive or had AIDS. The fraud supported a lavish lifestyle for the offender and his partner.

The trial judge felt that society would not benefit from the offender's incarceration and imposed a conditional sentence of 2 years less a day, 3 years probation, 100 hours community service, and restitution of \$790,000. By the time of the appeal, the offender had served over ½ of the conditional sentence, completed the community service and repaid over \$200,000.

The Court of Appeal held that the sentence imposed was unfit. The Court noted the offence was very serious because the government was victimized and the offender committed an egregious breach of trust in relation to the government and his patients. In addition, the amounts involved were substantial, the offence was committed over a lengthy period of time, numerous transactions were involved, and the offence was motivated, at least in part, by greed. The Court noted that general deterrence is the most important principle in major frauds. In addition, when general deterrence is particularly pressing, as it was in this case, incarceration is the preferable sanction. The Court noted that it had recently reviewed large-scale fraud sentences in *R. v. Dobis*<sup>38</sup> and concluded that the usual range of sentence in cases of major frauds was 3 to 5 years.

The Court noted that a conditional sentence to be effective must be punitive which usually required house arrest or a stringent curfew. The Court felt that because the offender operated his practice from his home the conditional sentence amounted to little more than probation. In addition, a conditional sentence in this case sent the wrong message about health care fraud. The Court concluded that a health care fraud of this magnitude should ordinarily attract a sentence of 4 years. In view of the mitigating factors, and the portions of the sentence already completed, the Court varied the sentence to 18 months in jail with other terms remaining the same.

### **9. Prince Edward Island**

*R. v. MacEachern*, [1999] P.E.I.J. No. 85 (C.A.),

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<sup>38</sup> *R. v. Dobis* (2002), 163 C.C.C. (3d) 259 (Ont. C.A.)

**15 months conditional – Deputy Minister defrauded government of \$25,000**

The offender, a Deputy Minister of Agriculture, pled guilty to two counts of fraud and one count of breach of trust. The offences were committed over a 3½ year period from March of 1992 to September of 1995. The 65 year old offender had a record for a similar offence and had received a suspended sentence in 1989. The trial judge imposed a conditional sentence of 12 months, 18 months probation, and restitution of \$25,000. The Court of Appeal held that the trial judge had failed to give sufficient weight to the offender’s record. However, the only change the court made in the sentence was to raise the conditional sentence from 12 to 15 months.

**10. Québec**

*R. v. Lobel*, [2001] J.Q. no. 430 (C.Q.)

**9 months – lawyer defrauded elderly through telemarketing scheme**

The offender, a lawyer, pled guilty to six counts of defrauding the elderly through a telemarketing scheme over a one-year period. The offender was 36 years old and had both gambling and alcohol addictions. The offender was sentenced to 9 months imprisonment and two years probation.

*R. v. Meunier*, [2002] J.Q. no 6089 (C.Q.)

**Suspended sentence – defrauded teachers’ consortium of \$30,000**

The offender pled guilty to defrauding a teachers’ consortium of \$30,000. She was given a suspended sentence and 3 years probation.

*R. v. Cantin*, [2000] J.Q. no 3630 (C.Q.)

**5 years – lawyer defrauded congregations of \$100 million**

The offender, a lawyer, pled guilty to defrauding religious congregations and charities of over \$100,000,000. The offender benefited personally to the extent of \$5,000,000. The offender was sentenced to 5 years imprisonment and ordered to pay restitution of \$5,000,000.

**11. Saskatchewan**

*R. v. Moulton* (2001), 160 C.C.C. (3d) 407 (Sask. C.A.)

**12 months conditional – defrauded government + coop of \$270,000**

The offender pled guilty to defrauding the government and a beef producers' cooperative of about \$270,000. The offender, who had been in the cattle business for 20 years, sold his cattle in unauthorized transactions when market prices dropped dramatically. He then failed to report these sales to the cooperative. The first-time offender was 44, married, and had two adult children. The trial judge accepted that the offender was not motivated by greed, but was trying to save his herd. The offender made an unspecified amount of restitution to a large number of persons. The trial judge found there was no breach of trust and imposed a conditional sentence of 12 months. The Court of Appeal rejected the Crown's argument that there should be a presumption that a conditional sentence is not appropriate for fraud cases involving substantial amounts of money. The Court distinguished its earlier decisions in *Fehr* and *Dickhoff* on the basis there was no breach of trust in this case and dismissed the Crown's appeal.

*R. v. Fehr*, [2001] S.J. No. 147 (Sask. C.A.)

**11 months – defrauded small employer of \$220,000**

The offender pled guilty to defrauding his employer of approximately \$220,000 over a 10-year period. The offender, a bookkeeper, managed the company's books and financial affairs. The small company was seriously affected by the fraud. Victim impact statements indicated that the company's reputation was hurt, that the livelihood of 35-40 employees was jeopardized, and that it would take years for the company to recover.

The first-time offender was 56, married and had one daughter living with the family. When the fraud was discovered, the offender admitted to his employer that he was responsible and was dismissed. The offender demonstrated his remorse by making a public confession to the congregation of his church. In addition, the offender entered into an agreement with the employer in which he admitted the fraud and agreed to re-pay his retirement savings of \$80,000.

The trial judge imposed a conditional sentence of 2 years less a day with 200 hours community service. The Court of Appeal held that the conditional sentence was unfit as it

was not proportional to the gravity of the offence and failed to satisfy the need for denunciation and general deterrence. The Court indicated that 18 months imprisonment would have been fit, but sentenced the offender to 11 months imprisonment because some of the sentence had already been served.

*R. v. Dickhoff* (1998), 130 C.C.C. (3d) 494 (Sask. C.A.)

**2 years less a day – defrauded employer through multiple frauds**

The first-time offender, the president of a trust company, was found guilty of 11 counts of fraud against his employer. The offender misled the board of directors and made false notes on mortgage files to facilitate loans to himself or companies in which he had an interest. While the offender benefited little personally, he was motivated by greed and the offences were carefully planned and committed over a 4 year period.

The trial judge noted that the offender had shown no remorse, had been in a position of trust, and while he had not been solely responsible for the collapse of the company, his actions had precipitated its collapse. The trial judge held that the need for general deterrence required a substantial sentence and imposed 5 years imprisonment. The Court of Appeal found this sentence was outside the 1-4 year range of sentences for similar offences and over-emphasized general deterrence. The Court indicated that the need for denunciation in this case made a conditional sentence inappropriate and varied the sentence to 2 years less a day imprisonment.

*R. v. Horvath* (1997), 117 C.C.C. (3d) 110 (Sask. C.A.)

**Two years less a day conditional – defrauded employer of \$200,000 – gambling addict**

The first-time offender, a branch manager, defrauded her bank of almost \$200,000 and a trust company of \$35,000 to support her addiction to gambling on Video Lottery Terminals. The offender, who was 25 years old and had a 2 year old child, was remorseful and had sought treatment for her addiction. The trial judge imposed a conditional sentence of two years less a day and required the offender to participate in gambling addiction treatment. The Court of Appeal agreed that requiring treatment was a more effective preventative measure in the circumstances of the case than jail. The Court

further indicated that general deterrence had little role to play in a decision whether or not a pathological gambler should be imprisoned. In addition, this was not one of those exceptional cases where it was necessary for prison to protect society from the offender. The Court dismissed the sentence appeal.

## **12. Yukon**

*R. v. Zenovitch*, [2001] Y.J. No. 105 (S.C.)

### **20 months conditional – bookkeeper defrauded employer of \$37,000**

The offender, a bookkeeper, was found guilty of defrauding her employer who operated a small machine business, of \$37,000. The offender, who did not accept full responsibility for the offence, was 42, a single parent, and mother of an 11 year old boy who lived with her. The court accepted that a breach of trust was involved, but found that a 20 month conditional sentence followed by two years probation with an order of restitution was appropriate.