

CANADA / JUDGMENT

R. v. Bob

2006 BCSC 972

COURT

Supreme Court of British Columbia

DECIDED

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2006BCSC0972

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Bob,

2006 BCSC 972

Date: 20060623

Docket: 23205

Registry: Vancouver

Regina

Against

Elain T. Bob

Before: The Honourable Mr. Justice Cohen

Reasons for Judgment

Counsel for Crown

J.R. Bird

Counsel for the defendant

S.J. Rauch

Date and Place of Trial/Hearing:

January 9 - 12; 16 - 20; 24, 26-27;

February 6 - 10;

April 4 - 7; 10;

May 8-9; 15, 2006

Vancouver, B.C.

A. The Charge

- [1] The accused, Elain T. Bob, stands charged that between October 17, 1997, and May 5, 1998, she defrauded the Carpentry Workers' Benefit Plan of B.C. (the "Benefit Plan") of monies of a value in excess of \$5,000, contrary to s. 380(1)(a) of the Criminal Code, R.S.C. 1985, c. C-46. She also stands charged that she did commit theft of monies, the property of the Benefit Plan, of a value in excess of \$5,000, contrary to s. 334(a) of the Criminal Code.

B. The Benefit Plan

- [2] The Benefit Plan is a trust fund administered through its office situate at #300-2806 Kingsway Street, in the city of Vancouver. The Carpentry Workers' Pension Plan (the "Pension Plan") is also a trust fund, but it is a separate legal entity from the Benefit Plan. It is administered from the same office as the Benefit Plan.
- [3] A Board of Trustees manages the Benefit Plan and Pension Plan (collectively, the "Plans"). At the material times, the Trustees employed Mr. Wayne Stone ("Stone") as the administrator and Mr. Wayne Owen ("Owen") as assistant administrator of the Plans. There were six clerical employees in the office working under their supervision, including the accused, a longstanding employee, whose main duty at the material times was responsibility for balancing the cash and making deposits of the cash and cheques to the Benefit Plan bank account.
- [4] The Plans were audited annually by the accounting firm of T.L. Dhanji & Co. Inc. Mr. Ian Bartholomew ("Bartholomew"), a member of the firm, was in charge of the audits.

C. Background

- [5] At the material times, members made monthly contributions to the Benefit Plan for their benefits coverage. The majority of the contributions came from employers who paid, on behalf of their employees who were members, a set amount per hour worked in the previous month by that member. The employers' contributions were paid monthly and credited to the respective member on behalf of whom they made the payment. These contributions for each member were recorded as "credit hours" for the respective member. The credit hours were recorded in an "hour bank" that was maintained for each member. Full Benefit Plan coverage per month cost 100 hours from the hour bank.

- [6] Contributions were also made by self-employed members, unemployed members and members who did not have sufficient hours in their hour bank to provide for Benefit Plan coverage. Each month a "Billing for Shortage of Hours" notice ("Notice") was generated for each member who did not have sufficient hours (100) in his or her hour bank to provide for Benefit Plan coverage for the next month. The member had to personally pay for the shortfall noted on the Notice. These were referred to as "self-payments".
- [7] A member could make a self-payment by mailing in his or her payment along with their Notice. These payments were most often made by cheque and when received by the Plans' office would mainly be directed to the accused.
- [8] Members could also make a self-payment in person by attending at the office. The member made the payment indicated on the Notice to the receptionist either by cash or cheque. If the member attended without the mailed Notice then the receptionist filled in a Notice by hand which showed the amount paid and the mode of payment. The payment was immediately entered into the computer and credited to the member's account. In most instances a sequentially numbered computer generated receipt was printed out on a two part continuous form. The original was given to the member and the duplicate copy was retained in the office.
- [9] There were also Pension Plan self-payments. In the event that a member came to the office with his or her "Optional Self-Payment Form" ("Form") to make a payment, a hand written pre-numbered receipt from a receipt book was given to the member.
- [10] The physical set up in the office was that at the front counter there was a cash drawer with a tray where the cash, cheques, Notices and Forms were placed. The proceeds and documents for the Plans were co-mingled in the cash drawer along with an amount that served as a cash float. No formal record was kept of the cash float and it is unclear what the exact amount of the cash float was at the material times, although the evidence indicates that it was in the range of \$100 - \$400.
- [11] The cash drawer was not locked. Everyone who worked in the office had access to the cash drawer. Apparently, many of the people who worked in the office used the cash drawer as a sort of bank. In addition to drawing out funds to pay certain office or travel expenses, employees, as well as Stone and Owen, would take out cash for personal use and replace it with a personal cheque or IOU. No record was kept of who removed cash, how much was removed, or whether that person ever replaced the cash removed with a cheque or IOU or if or when amounts removed were repaid.
- [12] At the end of each day, and sometimes during the day if there was a large amount of proceeds in the cash drawer, the contents of the cash drawer, including Notices and Forms, were removed and placed inside a cash box which was kept underneath the cash drawer. This cash box was not locked. As with the cash drawer, everyone who worked in the office had access to the cash box during the day. Each evening the cash box was taken to a different location in the office for overnight storage. The overnight storage location was not locked

and everyone who worked in the office had access to the cash box in this location.

- [13] The person in the office who could shed some bright light on exactly what happened to the proceeds and documents when they were removed from the cash box to balance is mainly the accused, but she did not testify.
- [14] Generally, the evidence discloses that in the morning the accused (or another employee) would take the cash box from its overnight storage location and bring it to the accused's work station. The accused would then empty the contents of the cash box and separate out the payments for the Plans by comparing the cash and cheques with the information contained on the Notices and Forms. She would then restore the cash float and deliver the Pension Plan proceeds and Forms to Ms. Gail Nichol, the employee responsible for handling the Pension Plan payments. The accused would then do her balance of the cash and prepare the cash and cheques for deposit to the Benefit Plan bank account on that day, or at a later time.
- [15] The only witness for the accused was Mr. Daniel Barbour ("Barbour"), a chartered accountant. He interviewed the accused after the allegations in questions came to light. Through Barbour, the defence raised hypothetical scenarios that could legitimately explain the accused's standard work practices otherwise than as fraud or theft. While what the accused told Barbour is not admissible as proof of its truth, it is admissible to explain how he arrived at his conclusions. It is a question of how much weight the Court should place on his conclusions. I will address later why I believe that no weight should be attached to his conclusions.
- [16] For the purposes of background and narrative only, I will recount generally Barbour's evidence in relation to the accused's work practices. According to him the accused prepared an adding machine tape totalling the Notices and then bundled the Notices with the tape. She also did a tape totalling the cheques and cash. She would then compare the tapes to see if they came to the same total. Once she made the comparison to determine if the cash balanced she would place the cash and cheques into an envelope(s) and throw away the tape of the cheques and cash. If she was not immediately depositing the cash and cheques she used the cabinet beside her work station to store the envelopes. Everyone in the office had access to the cabinet, and it appears that it was well known in the office that daily deposits were not made and that pending deposit the accused kept the cash and cheques for deposit in envelopes in the cabinet. Apparently, the tape that was bundled with the Notices was kept and stored for several months before destruction.
- [17] Deposits were not usually made daily. Sometimes they were not made for many days. When deposits were made the accused would take the cash and cheques that she had kept in envelopes and make an adding machine tape of the total cheques and cash and attach the tape to the deposit slips. The bundle of cash, cheques and deposit slips with the attached tape was then given to Owen who took the package to the Benefit Plan bank for deposit.

D. The Investigation of the Accused

- [18] In October or November 1997, on a day when the accused was away from the office, Stone discovered in the cabinet adjacent to the accused's work station an envelope containing eighteen \$100 bills. He testified that he considered that suspicious (notwithstanding the fact that the accused frequently kept envelopes of proceeds stored in her cabinet for days). In any event, he kept the \$1,800 in his drawer for several days during which time the accused made no mention to him of missing the proceeds. After several days he told the accused that he had discovered the proceeds. Apparently there was no further discussion between them about the \$1,800. However, his discovery of the \$1,800, and the fact that the accused did not mention that these funds were missing, is what triggered the investigation by the Benefit Plan which ultimately led to the accused being charged with fraud and theft.

E. The Law

- [19] The Criminal Code, s. 380(1) provides that every one who, by deceit, falsehood or other fraudulent means defrauds the public or any person, whether ascertained or not, of any property, money or valuable security or any service, is guilty of an indictable offence.
- [20] A falsehood is a deliberate lie: see e.g. The Shorter Oxford English Dictionary, 3rd ed., s.v. "falsehood". Deceit is inducing a person to believe something is true, when the deceiver knows that it is false: *Re London and Globe Finance Corp. Ltd.*, [1903] 1 Ch. 728 at 732. "Other fraudulent means" is conduct apart from deceit or falsehood that an average, reasonable person would characterize as dishonest: *R. v. Théroux*, [1993] 2 S.C.R. 5 at 16-17, 100 D.L.R. (4th) 624, 79 C.C.C. (3d) 449, 19 C.R. (4th) 194 and *R. v. Zlatic*, [1993] 2 S.C.R. 29 at 44-46, 100 D.L.R. (4th) 642, 79 C.C.C. (3d) 466, 19 C.R. (4th) 230. The conduct may be composed of acts, omissions, or both.
- [21] In addition to the burden on the Crown to prove whether the accused used deceit, falsehood or other fraudulent means (to defraud the Benefit Plan of monies), the Crown must prove that the deceit, falsehood or other fraudulent means that the accused used did defraud the Benefit Plan. In this regard, "defraud" means to deprive someone dishonestly of something. The word "deprivation" means to place the economic interests of another person at risk. The victim does not actually have to lose money, so long as there was an actual risk of prejudice to his or her economic interests: *R. v. Olan*, [1978] 2 S.C.R. 1175 at 1182, 86 D.L.R. (3d) 212, 41 C.C.C. (2d) 145 and *R. v. Campbell and Kotler*, [1986] 2 S.C.R. 376 at 385, 32 D.L.R. (4th) 363, 29 C.C.C. (3d) 97.
- [22] Finally, the Crown must prove that the accused intended to defraud the Benefit Plan. The Crown must prove first that the accused intentionally carried out the acts or business transactions alleged, with knowledge (or recklessness or wilful blindness) of the facts and circumstances that make this conduct dishonest in the eyes of reasonable persons; second, that the accused intentionally carried out the acts or business transactions alleged, knowing (or being reckless or wilfully blind) that they would create prejudice or a risk of prejudice to

the economic interests of one or more persons, whether or not the Benefit Plan is among them: *Théroutx*, supra, at p. 18-26.

- [23] Provided that the accused acted intentionally knowing the facts, circumstances, and consequences mentioned above, the Crown will have proven an intent to defraud even if the accused personally believed that her conduct was not dishonest or did not know that reasonable people would see her conduct as dishonest: *Théroutx*, supra, at p. 18-19; *Zlatic*, supra, at p. 49.
- [24] Regarding the theft charge, the Crown must prove that the accused took the cash. The Crown must also prove that the cash was owned by the Benefit Plan when the accused took it. In addition, the Crown must prove that the accused took the cash fraudulently and without colour of right. The Court must be satisfied the accused knew she was doing something wrong when she took the cash, knowing that she did not have a legal right to take it and that she intended to deprive the Benefit Plan of the cash when she took it.

F. The Crown's Case

(1) Schemes Alleged Employed by the Accused

- [25] The Crown contends that the accused employed three schemes to defraud the Benefit Plan: Benefit Plan transactions, the Pension Plan, and the Purdy's Chocolate group purchase.
- [26] In relation to the Benefit Plan transactions, the Crown submits that the accused did not deposit all of the cash received by the Benefit Plan: the members' accounts were credited in the Benefit Plan computer so they would not be aware of any problem with the receipt of their cash payments by the Benefit Plan. The deposit slips made out by the accused did not include all of the cash receipts, but the bank would not notice a problem because the bank in fact received the amounts set out on the deposit slips.
- [27] The Crown asserts that the missing cash was not noticed by the Benefit Plan because the accused was the one responsible for balancing the cash received from the members with the amounts of cash in the cash box and she never reported any shortages.
- [28] In relation to the Pension Plan, the Crown says that while the Pension Plan always received the correct amount of proceeds from the accused for deposit into the Pension Plan bank account, the proceeds were not always in the same form as paid by the members.
- [29] The Crown submits that the accused would often take cash payments made to the Pension Plan and substitute a Benefit Plan cheque in its place by double endorsing the Benefit Plan cheque over to the Pension Plan. The Crown says that the Pension Plan would balance because it received the correct amount of proceeds, but the Benefit Plan would be short this same amount which would not be noticed by anyone but the accused.

- [30] The Crown contends that double endorsing Benefit Plan cheques over to the Pension Plan resulted in more cash in the control of the accused. The Crown says that there was no legitimate reason for the accused to substitute Benefit Plan cheques for Pension Plan cash and that through this scheme she took \$2,836 in cash.
- [31] In the fall of 1997 the employees in the office made a group purchase of Purdy's Chocolates. The accused organized the purchase and took the orders and payments from the individuals involved. She used the Benefit Plan bank account to pay Purdy's for the order and then collected the payments from the individuals to deposit into the Benefit Plan bank account.
- [32] The Crown submits that the accused deposited the correct amount into the Benefit Plan bank account, but that it did not include all of the cash she had collected from the purchasers. The amount deposited by the accused for the Purdy's Chocolate order included \$134 of cheques paid by members to the Benefit Plan. The Crown alleges that the accused kept cash in this same amount. The Crown asserts that there was no legitimate reason for the accused to substitute cheques made payable to the Benefit Plan from members for cash that she received from the purchasers of the chocolates.

(2) Expert Evidence

- [33] The Crown's case for the amounts alleged to have been taken by the accused in the three schemes employed by her to defraud the Benefit Plan is based primarily on the evidence of the Crown expert, Mr. Brian W. Elliott ("Elliott"). Elliott, a chartered accountant, was in fact not retained by the Crown or the Benefit Plan but rather by the lawyers for the Benefit Plan. He was retained in May 1998, after the accused had already been terminated by the Benefit Plan, to review a large volume of documentary material at the Benefit Plan office to determine if any funds were missing; to pay particular attention to the work done by the accused; and, to restrict his review of the documents to the self-payment cash receipt transactions, unless he determined that other matters also needed to be reviewed.
- [34] Elliott was qualified to testify as an expert in forensic accounting and the analysis of financial data and business records, including financial statements, bank records, accounting records and general business documents for the purpose of reconstructing financial transactions within a business.
- [35] In his report dated April 12, 1999, Elliott explained that he traced and compared the self-payment cheques deposited to the Benefit Plan bank account for the period of November 1, 1997, to May 5, 1998, to the self-payment non-cash transactions in the members' accounts in the Benefit Plan computer system. He determined that the total value of the self-payment cash transactions was \$34,362.07, which is the amount that, according to his review, should have been deposited to the Benefit Plan bank account. However, he concluded that the total cash deposited during the period under review was \$16,610.53, and that after he made certain adjustments the shortfall was \$17,899.60.

- [36] In addition, for the period of January 1, 1997, to May 5, 1998, Elliott traced and compared all self-payment cheques to the Pension Plan bank account to the Pension Plan members' accounts in the Plans' computer system. He concluded that the substituting of cheques payable to the Benefit Plan for cash payments made to the Pension Plan resulted in a loss to the Benefit Plan of \$3,771.20 (for the period November 1, 1997, to May 5, 1998, the loss to the Benefit Plan due to the substituting of cheques payable to the Benefit Plan for cash payments to the Pension Plan was \$2,836).
- [37] Finally, Elliott explained that while \$281.29 in cash was paid to the accused by the purchasers of the Purdy's Chocolates, the deposit to the Benefit Plan bank account for the group purchase included only \$59.85 in cash. Employees' personal cheques payable to the Benefit Plan, plus two member cheques payable to the Benefit Plan totalling \$134, were substituted for the balance of the cash. According to Elliott this means that the Benefit Plan lost \$134.
- [38] As a result of his review, Elliott concluded that for the period of October 17, 1997, to May 5, 1998, there was at least \$20,869.60 in cash missing from the Benefit Plan and that there was no logical explanation that he could provide as to why the Benefit Plan was missing this amount, other than that the accused was responsible for the shortage.
- [39] Elliott also noted that he did a review of cancelled cheques for the months of November 1997 to February 1998, and found that the accused did not cash her pay cheques promptly. This indicated to him that she was able to pay her expenses without needing to promptly cash her pay cheques.
- [40] As well, a review of the accused's annual vacation pattern indicated to Elliott that the accused did not consistently take her full annual vacation allotment. Based on his experience, it is common for employees who are involved in fraudulent activities at the workplace not to take their full annual vacation allotment to avoid the possibility of others in the workplace discovering their fraudulent activities.

(3) Submission on the Facts

- [41] The Crown's position is that although any one of the following facts on its own would not prove the guilt of the accused, when considered in their totality they prove the guilt of the accused beyond a reasonable doubt:
- a) the accused kept paper records, none of which were found after she was terminated, particularly records to show how she balanced the cash;
 - b) the accused was the only person who oversaw the cash in the Benefit Plan, and cash went missing in the Benefit Plan by double endorsing Benefit Plan cheques to the Pension Plan and by depositing members' cheques into the Benefit Plan bank account for the Purdy's Chocolate order;

- c) the accused carried over two months of unused vacation allotment into the beginning of 1998 - fewer days away from the office meant less opportunity for someone else to see what the accused was doing;
- d) the accused generally stayed at her desk during breaks and lunch hour to reduce the opportunity for someone to see what she was doing;
- e) the accused did not cash her pay cheques on a regular basis, which is consistent with the accused not requiring her pay cheques to meet her living expenses;
- f) the accused was the only person in the office who reconciled the Benefit Plan and that is where the cash went missing;
- g) the cash would not have gone missing before the accused balanced the cash because if it did the cash would not have balanced, and the accused never reported any cash missing;
- h) the cash would not have gone missing after the accused balanced the cash because she prepared the bank deposit forms and the bank received the total set out on the forms in every case during the material times;
- i) the accused did not say anything to Stone about his discovery of \$1,800 in her cabinet;
- j) during the time that Stone and Owen conducted their clandestine surveillance of the cash receipts (discussed below), cash consistently went missing; and,
- k) the accused's failure to make daily deposits assisted in creating an opportunity for cash could be embezzled.

G. Decision

[42] In my opinion, the Crown has failed to prove beyond a reasonable doubt the elements of the charges against the accused for the reasons which follow.

H. Reasons

- (1) There was no independent forensic accounting investigation leading up to the charges being laid against the accused to determine if cash was missing from the Benefit Plan and, if so, who was responsible for the loss?
- [43] Elliott and Barbour were on common ground that the internal control systems in the office were as much as non-existent. Elliott said that calling them "weak" was being "generous". Barbour said that the practice in the office was exactly the opposite of what should be permitted in a proper internal control system for the handling of cash receipts. Everyone in the office had access to the cash before it was deposited, and there was no audit trail overseeing the use of the cash drawer as a bank by those in the office.

- [44] The Crown's position is that despite the absence of internal controls in the Benefit Plan office Elliott was nevertheless able to establish that cash was missing and that the accused was the one responsible for the loss.
- [45] In my opinion, the circumstances in the office at the time Stone concluded that there was cash missing demanded an independent forensic accounting investigation to thoroughly analyze and review the practices and documents, and to collect and secure the integrity of evidence in order to reliably determine if cash was missing and, if so, who was responsible for the loss. However, I find that no such investigation was carried out. Rather, for all intents and purposes, the approach taken by the Benefit Plan from the time of Stone's discovery of the \$1,800 through to the engagement of Elliott by the Benefit Plan's lawyers was that cash was missing from the Benefit Plan and that the accused was the employee responsible for the loss.
- [46] Soon after discovering the \$1,800 in cash in the accused's cabinet, Stone spoke with Bartholomew and the lawyers for the Benefit Plan. With their advice and assistance Stone conducted a clandestine surveillance of the cash payments to the Benefit Plan. The surveillance got underway in mid-March 1998, some 3 ½ months after Stone had discovered the \$1,800.
- [47] Initially, Stone suspected everyone in the office, including Owen. However, without giving specifics, he said that in his discussions with Bartholomew he narrowed down the suspects to focus on the accused because that is where he believed the cash went missing. Once Owen was eliminated as a suspect he joined Stone in the clandestine surveillance.
- [48] Stone and Owen would attend at the office in the evening after office hours and in the morning before office hours. They kept a written record of their count of the cash receipts. Stone said that they discovered right away that there was cash missing and that there was a pattern of missing cash. They estimated the cash loss to the Benefit Plan at \$4,000 per month. He said that at no time during this period did the accused tell him that the Benefit Plan was missing cash.
- [49] In my opinion, the review undertaken by Stone and Owen cannot be characterized as an independent forensic accounting investigation for several reasons.
- [50] First, neither Stone nor Owen had any training as accountants, or in forensics. Elliott testified:

Q O.k. You're not sure. So, Mr. Elliott, when you began your work at the office, you went in and you had no confidence in the records that were presented to you, did you?

A No. When I went in, I didn't know what I was going to get. It was very shortly after the first day that I realized they had no one in there that knew anything about the financial matters, I found out very early in the game, like about the first half hour. The two Waynes were carpenters and they had no training or background in financial matters and that there was no accountant in the office. And - I thought, 'Oh, this should be interesting' and then I asked them 'well, what do you do in the accounting?' 'We contact Dhanji and Co. for any accounting.'

- [51] Secondly, notwithstanding the advice they received from Elliott on how to conduct the surveillance, they failed to follow his advice with the result that although he included their results as part of his analysis, he did not rely on their findings.
- [52] Elliott testified that Stone and Owen were to prepare a detailed count of the cash at the end of the day and recount it in the morning to make sure that there was no change overnight. They were to follow this plan on a daily basis. He left it up to Bartholomew to prepare the forms to be used for the count.
- [53] Elliott said that Stone and Owen carried out the count, but not in the manner he had told them to do it. He wanted a count to the penny. It was a big disappointment to Elliott that they did not do their count religiously every night and every morning. The results were of some use to Elliott but he did not fully rely on them. He said that his analysis of the results of the counts Stone and Owen had done was consistent with what he had concluded.
- [54] Thirdly, it appears that virtually from the time that Stone discovered the \$1,800, the accused became the sole focus of the investigation. Without any experience in the investigation of financial fraud, and without an independent forensic accounting investigation, he eliminated everyone in the office as suspects, except the accused, and then recruited Owen to assist him to carry out a clandestine surveillance of the cash receipts.
- [55] Turning to Elliot's analysis, I accept his testimony that he conducted his analysis and review with an open mind. I do not suggest in any way that he was biased against the accused. However, in my opinion, his work was not independent in the sense of setting the focus of the investigation or defining its parameters. In fact, Elliott testified that he did not conduct an "investigation". Rather he was instructed to focus his analysis and review on the accused with a restricted set of parameters for his engagement: to restrict his review to the self-payment cash receipt transactions and to pay particular attention to the accused because she had been recently terminated from her position and was suspected of having stolen money from the Benefit Plan.
- [56] It is also noteworthy on the point of independence that Elliott's instructions came from the lawyers for the Benefit Plan who at the time were potentially defending the Benefit Plan from a wrongful dismissal suit by the accused. Elliott said that they probably mentioned this to him.
- [57] Nor did the police conduct an independent forensic accounting investigation.

- [58] A year after Elliott was engaged, Detective Mark Mounce ("Mounce"), now a retired member of the Vancouver Police Department's Financial Crime Section, received a complaint of a theft of funds from the Benefit Plan. He was made aware of the surveillance of Stone and Owen and received a copy of Elliott's report. Mounce reviewed Elliott's report, spoke to Elliott, Stone and Owen and interviewed some of the Benefit Plan employees.
- [59] At the time of his investigation, Mounce was aware that the Benefit Plan accountants had concluded that \$172,000 had gone missing from the Benefit Plan. However, he gave this conclusion no weight because he felt that they had no data to support their conclusion. On the other hand he placed great weight on the conclusions reached in the Elliott report and although his objective was to determine if Elliott's conclusions were correct, he did not conduct an independent forensic accounting investigation.
- [60] Mounce conceded in cross-examination that his investigation into the matter was minor compared to the review done by Elliott, or the surveillance done by Stone and Owen. He said that it was more accurate to state that he concurred with the conclusions reached by others. He also conceded that the first interview he conducted was some 15 months after the accused had been terminated from her position with the Benefit Plan and that he did not feel it was necessary to examine the way that everyone at the Benefit Plan office had been eliminated as suspects.
- [61] Quite simply, Mounce relied almost exclusively on Elliott's conclusions to recommend that charges be laid against the accused.
- [62] Thus, I find that at no time before the Crown decided to lay the charges against the accused was an independent forensic accounting investigation made by the Benefit Plan or the Crown to determine if there was cash missing from the Benefit Plan and, if so, who was responsible for the loss. In the circumstances, I am not satisfied beyond a reasonable doubt that there was money missing from the Benefit Plan or that the accused was responsible for the loss.
- (2) Even if the Court accepts Elliott's analysis that there was cash missing from the Benefit Plan, the evidence does not support the conclusion he reached that the only logical explanation is that the accused is responsible for the loss.
- [63] Before turning to Elliott's conclusions, I will deal with Barbour's criticism of Elliott's conclusions. Generally, Barbour, who was qualified to testify as a forensic accountant, was critical of the sample time period chosen by Elliott. He would have chosen an earlier start date and continued his review for several months after the accused was terminated. He felt that the arrival of a new receptionist at about the time Elliott chose to start his sample period might have influenced the results and that not having continued his review for well after the accused's termination presupposed that the accused was the guilty party.

- [64] Barbour was also very critical of the time Elliott took to trace every cheque received during the sample period. He felt that it was a "complete waste of time". He felt that the only justification for such a process would be if there was suspicion of collusion between a Benefit Plan employee and a member whereby the employee was crediting a member's hour bank without actually receiving a payment. He said there was no such suspicion and it was not what the lawyers engaged Elliott to review.
- [65] Barbour said he would have reviewed the Notices and only some of the cheques. He would also have determined that a computer printout of the electronic records of the Plans was reliable, given that it was a one time report produced solely for Elliott's review.
- [66] In summary, if Barbour had determined that the internal control system was weak, which he did, and if he had concluded after conducting a "macro" analysis that there indeed was a problem, he would have reviewed the Notices to assist him in determining if all of the cash received by the Benefit Plan had in fact been deposited. He opined that without reviewing the Notices it was impossible to tell at which stage funds went missing, if in fact they did. He said that if a Notice and cash had been removed from the cash box prior to the accused doing her balance of the cash, he would not have been able to tell. He would only have been able to tell by comparing the Notices to the computer printout, provided it was correct. He also said that once the accused did her balance and threw away the tape of the cash and cheques there was no way of telling what amount of cash should have been in the envelope, other than looking at the batch of Notices. He said that the Notices, and the tapes which do not exist any longer, would have been his key source of investigation.
- [67] As for Elliott's point on vacation allotment, Barbour said that an allegation of fraud linked with not taking days off work is usually made in a case where a person is "stealing from Peter to pay Paul" and does not take time away from work to ensure that the fraud is concealed. However, where the allegation is that proceeds have been completely removed from the system it would not matter at all if the accused took her full vacation allotment because no-one would discover anything unusual.
- [68] Barbour also disagreed with Elliott's conclusion regarding the Purdy's Chocolate order. He said that when the Benefit Plan cheque was issued it would have been recorded in the general ledger. There would have been two entries: a credit to the bank for the cheque amount and a debit to some other general ledger account. When the deposit was made and entered into the general ledger account there would have been a debit to the bank and a credit to the same general ledger account. Barbour claimed that Elliott failed to review the general ledger and therefore it was unknown whether there exists an account receivable for the money owed by the employees that Elliott claimed paid cash to the accused.
- [69] Barbour and Elliott shared the same view that the double endorsing of the Benefit Plan cheques to the Pension Plan was inappropriate. He called it a "terrible internal control procedure". However, he did not agree with Elliott that it was possible to conclude that the practice could account for missing cash.

- [70] Barbour also performed his own analysis. Relying largely on the work that Elliott performed, Barbour concluded that the amount of cash missing in the Benefit Plan was \$19,999.70 (the small amount of difference between his amount and Elliott's amount being due to the slightly different time periods used by Barbour). However, Barbour adjusted this figure for what he called an over deposit in the amount of cheques accounted for by Elliott. His view is that the amount of cash indicated by Elliott did not go missing but rather was mostly converted into cheques by employees. In any event, Barbour concluded that the net amount of cash missing was \$4,877.04. Because he felt that this amount of missing cash was not material, and that if he had kept going with his analysis it might have even been reduced to zero, he said that his recommendation to his "pseudo-hypothetical client" would have been that there was no accounting evidence of any funds missing.
- [71] In cross-examination, Barbour said that the important conclusions he reached were that the internal controls were very bad and that there did not appear to be any cash missing. Barbour conceded that when he prepared his analysis he was not attempting to do an audit or a forensic accounting, rather he was trying to do a forensic analysis as to whether or not there was a reasonable expectation that cash was missing. He said that the absence of documents which showed the beginning balance for the day, the cash received plus the float and the IOUs, minus the deposit, was a huge hole in the internal control system.
- [72] Barbour took a broad stroke approach in making his analysis. He discovered a system that was in terrible shape and he was not sure whether at the end of the day, even if he was able to determine that cash was missing, he could determine who was responsible for the loss. While he agreed that the double endorsing of the Benefit Plan cheques was a bad practice from an accounting point of view, he said that there was no evidence that anyone was out of pocket as a result.
- [73] In my opinion, no weight should be attached to Barbour's criticisms of Elliott's analysis. Within the restrictions of his terms of reference, Elliott conducted a most thorough and detailed analysis of the information contained on the computer printout showing the cash and cheques received by the Benefit Plan for the period under review, whereas Barbour, in my view, conducted a broad superficial analysis in preparing his schedules.
- [74] I agree with the Crown that Barbour was not correct in assuming that Elliott had improperly included certain sums as self-payments in his analysis of the deposits and moreover, Elliott's analysis of the deposits, in my opinion, dispels any conclusion that the amount of cash which Elliott concluded was missing should be substantially reduced to account for so-called over deposits of personal cheques. The detailed analysis done by Elliott, whereby he traced all of the cheques deposited during the timeframe of his analysis, accounts for the personal cheques deposited.
- [75] I find that the analysis and review conducted by Elliott on whether cash was missing should be preferred over that done by Barbour. However, the Crown relies most heavily on the conclusion reached by Elliott that the accused is the only one in the office who would have

noticed the missing cash yet she did not report any shortages. In his opinion, there is no logical explanation as to why cash was missing other than that the accused was responsible for the shortages. From this the Crown argues that while everyone in the office had access to the cash, it was the accused alone who had to balance the cash, and she would have noticed that cash was missing.

[76] With respect, I disagree with the Crown's submission that the evidence proves beyond a reasonable doubt that the accused took cash from the Benefit Plan.

[77] I am mindful of the law set out in *R v. Todd*, 2005 BCSC 1707, that the defence cannot raise a reasonable doubt by mere speculation. Chamberlist J. said, as follows:

[22] A trier of fact is not entitled to speculate on "conjectural possibilities" not reasonably inferable from the evidence, and, more so, must not speculate on evidence not called. See *R. v. Noble*, [1997] 1 S.C.R. 874 (Q.L.); and *R. v. Wild*, [1971] S.C.R. 101 (Q.L.).

[23] In *Wild*, supra, Martland J., speaking for the majority, said this at p. 11 of the Quick Law citation:

. . . the learned trial judge, in considering the facts to which he referred failed to appreciate their proper effect, in law, in that he did not distinguish between a conjectural possibility, arising from those facts, and a rational conclusion arising from the whole of the evidence.

[24] In *Noble*, supra, the Supreme Court of Canada upheld the decision of the appellate court in concluding that where the accused calls no evidence, the Crown's case may stand uncontradicted. At para. 77, the court said:

. . . such a reference is permitted by a judge trying a case alone to indicate that he need not speculate about possible defences that might have been offered by the accused had he or she testified. As McEachern C.J.B.C. stated (at p. 171):

In other words, the court will not speculate that the accused may have some unstated defence, such as, in this case, that someone may have stolen his driver's licence.

[25] At para. 82 of *Noble*, Sopinka J. said:

. . . the evidence of the Crown stands alone. It must be evaluated on this basis. Contradictions that have not been offered cannot be supplied. No inference of guilt is drawn from the silence of the accused. Rather, the silence of the accused fails to provide any basis for concluding otherwise, once the uncontradicted evidence points to guilt beyond a reasonable doubt.

[78] However, in the instant case I find that the evidence in the Crown's case contradicts Elliott's conclusion that the accused was the only person in the Benefit Plan office who would have known that cash was missing.

[79] The evidence of Owen and Ms. Shelley Wade, who at the time was employed by the Benefit Plan to adjudicate the dental and optical claims, was that if someone had removed a Notice and the cash corresponding to the amount set out in the Notice that the accused would not have known. Most significantly, Elliott testified:

Q Mr. Elliott, if in the morning before Elain Bob arrived for work someone had removed from the cash drawer a billing for shortage of hour notice in the amount of \$167, and had removed from the cash drawer \$167 cash, put it in their pocket, when Elain Bob got to work that day she would never have known that that payment was made; would she have?

A If she's doing a rec, no, she wouldn't, but when the member would not have that credited to his account and then he'd squeal.

Q Ok, but let's say - let's say that he was credited to his account. Let's say that that computer posting reflected that \$167 was made on such and such a date -

A Right.

Q And then someone came in, took the billing for shortage of hour notice, took the cash, then Elain came, got the contents of the cash drawer, didn't see anything there, did a reconciliation, she would never have noticed that that money was missing; would she have?

A She would not - would not have noticed, but down the road there would have been some member - no she may -

Q The member was already credited on the computer. The entry -

A Correct, correct.

Q - was made into the computer?

A Correct.

Q The member would get their benefit?

A Correct.

Q The money went missing, the billing for shortage of hour notice went missing?

A Correct.

Q Elain Bob would never notice, correct?

A Correct.

[80] Elliott later testified that the fact that Notices and corresponding amounts of cash could have been taken without the accused knowing did not happen given the finding of Stone and Owen that cash was missing when they conducted their count. He said, "But we can see by the work they did that cash was disappearing but the [Notices] weren't disappearing."

- [81] In my opinion, Elliott's answer does not remove the doubt on this point created by his earlier testimony. He was not in a position to personally confirm that all of the Notices were accounted for. He did not trace all of the Notices. He traced only those where he thought that there was a discrepancy between the mode of payment noted on the computer printout and the actual mode of payment. On the other hand, unlike Elliott, the accused did not have the computer printout when she was balancing the cash. Her balance hinged entirely on the comparison of the cash in the cash box with the Notices in the cash box.
- [82] Moreover, Elliott's reliance on the count conducted by Stone and Owen to establish that no Notices were missing deserves little weight, in my view, given the serious flaw he identified in their count. He was more than just disappointed in the reliability of their count; he was "furious" that they had not followed his instructions.
- [83] Thus, in my opinion, even if I accept Elliott's conclusion that cash was missing from the Benefit Plan, the uncontradicted evidence that Notices and cash could have been taken without the accused's knowledge substantially undermines Elliott's firm and insistent conclusion that the accused took Benefit Plan cash.
- [84] Regarding the double endorsing of Benefit Plan cheques by the accused, I accept the Crown's position that the practice placed cash in the control of the accused. Like the double endorsing of cheques, the deposit of members' cheques to the Benefit Plan bank account for the Purdy's Chocolate order was also an improper accounting practice. However, I am not satisfied beyond a reasonable doubt on the totality of the evidence that the accused took cash related to these transactions. In my opinion, the evidence does not elevate the practices she engaged in above mere suspicion that the accused took the cash and obviously that is not good enough for me to ground a conviction upon.
- [85] Regarding the evidence of the accused's vacation pattern, or her failure to consistently cash her pay cheques, in my opinion, the Crown has not been able to show any dishonest conduct on the part of the accused arising from this evidence that would warrant criminalization.

I. Conclusion

- [86] I agree with the defence that the totality of the evidence does not establish that a prohibited act occurred, or that it occurred because of prohibited conduct. Potential circumstances for fraud were certainly present, but I am not satisfied beyond a reasonable doubt that those circumstances resulted in prohibited conduct by the accused.
- [87] In the result, I find that the Crown has failed to prove the elements of the charges against the accused and therefore the charges are dismissed.

"B.I. Cohen, J."

The Honourable Mr. Justice B.I. Cohen

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