

CANADA / JUDGMENT

R. v. Bornais

2023 BCSC 1945

COURT

Supreme Court of British Columbia

DECIDED

6 November 2023

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2023 BCSC 1945 R. v. Bornais

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Bornais,

2023 BCSC 1945

Date: 20231106

Docket: 112236-2

Registry: Kamloops

Rex

v.

Christina Leigh Bornais

Before: The Honourable Mr. Justice B. Smith

Oral Reasons for Sentence

Counsel for the Crown:

L.M. Winters

Counsel for the Accused:

J. Killoran

Place and Date of Hearing:

Kamloops, B.C.

September 28, 2023

Place and Date of Judgment:

Kamloops, B.C.

November 6, 2023

I. INTRODUCTION

- [1] In the almost six (6) years between June 2013 and March 2019, Christina Leigh Bornais stole at least \$144,000.00 from the Dr. Maureen Murray Dental Clinic in Kamloops, where she was employed as a dental receptionist. During the same time period, Ms. Bornais also defrauded nine (9) insurance companies; and wrongfully altered a variety of business records, including accounting records and patient treatment records. Ms. Bornais did so to facilitate her crimes and avoid their detection. The full extent of the losses suffered by Ms. Bornais' victims is not known, and likely never will be.
- [2] On September 28, 2023, Ms. Bornais pleaded guilty to four criminal offences, described on Indictment 112236-2 as follows:

Count 1

Christina Leigh BORNAIS, from the 11th day of June, 2013 to the 4th day of March, 2019, inclusive, at or near Kamloops, in the Province of British Columbia, did with intent to defraud Dr. Maureen Murray, alter, destroy or make false entry in paper, writing, document, accounting, billing or business record, contrary to Section 397(1)(a) of the Criminal Code.

Count 2

Christina Leigh BORNAIS, from the 11th day of June, 2013 to the 4th day of March, 2019, inclusive, at or near Kamloops, in the Province of British Columbia, committed theft of money, the property of Dr. Maureen Murray, contrary to Section 334 of the Criminal Code.

[]

Count 16

Christina Leigh BORNAIS, from the 11th day of June, 2013 to the 4th day of March, 2019, inclusive, at or near Kamloops, in the Province of British Columbia, did by deceit, falsehood or other fraudulent means, defraud Manulife Financial aka the Manufacturers Life Insurance Company of money, contrary to Section 380(1) of the Criminal Code.

[]

Count 19

Christina Leigh BORNAIS, from the 11th day of June, 2013 to the 4th day of March, 2019, inclusive, at or near Kamloops, in the Province of British Columbia, did with intent to defraud Pacific Blue Cross (PBC) aka PBC Health Benefits Society, alter, destroy, or make false entry in a paper, writing, document, accounting, billing or business record, contrary to Section 397(1)(a) of the Criminal Code.

[3] Ms. Bornais is before the Court today for sentencing. These are my reasons for sentence.

II. CIRCUMSTANCES OF THE OFFENCES

[4] Crown and defence provided the following Agreed Statement of Facts, which is an exhibit on sentencing:

AGREED STATEMENT OF FACTS: SENTENCING**OF CHRISTINA BORNAIS**

1. All events took place in Kamloops, British Columbia, unless otherwise stated.
2. In 2011, Christina Bornais was hired by Dr. Maureen Murray as a dental receptionist for the Dr. Maureen Murray Dental Clinic. As part of her role, Ms. Bornais was responsible for billing and maintaining practice accounting records. This included receiving and processing patient and insurance payments.
3. Ms. Bornais worked in that position until her employment was terminated on March 4th, 2019. During that period, the dental practice also employed two associates, Dr. Naido and Dr. Patch.
4. Dr. Maureen Murray became aware of possible fraudulent accounting activities in February 2019 after she had requested the services of Deborah Scott, an accounting consultant, in April 2018. Ms. Scott is a Practice Management Consultant with Dentegra Management Services.
5. In the course of her work, Deborah Scott discovered multiple instances of fraudulent billing and financial mishandling of accounts by Ms. Bornais. Ms. Scott's attempts to work with Ms. Bornais to clean up accounts and address discrepancies were unsuccessful as Ms. Bornais withheld information, misrepresented facts and was generally non-responsive to Ms. Scott's queries.
6. Deborah Scott informed Dr. Murray of her findings in February 2019. On March 4, 2019, Dr. Murray and her husband, Trevor Dempster, spoke to Christina Bornais about a particular fraudulent billing claim and other account receivable issues. Ms. Bornais was unable to provide an explanation and her employment was terminated immediately.
7. Dr. Murray then requested that Deborah Scott to conduct a thorough audit of the clinic's records. Dr. Murray also contacted RCMP on March 27, 2019.

8. Over the course of months, Ms. Scott reconstructed Ms. Bornais's bookkeeping activities and determined that she had been diverting funds into a personal account at TD Canada Trust ending in #5344. That account matched the direct deposit employee account on record for Ms. Bornais at the dental clinic.
9. RCMP obtained a production order on April 20, 2020 for the account in question and were provided with a full report by TD Canada Trust. Further production orders were also issued on March 17, 2022 and June 20, 2022. The results of Ms. Scott's review and the material provided to RCMP establish that Ms. Bornais committed theft from Dr. Murray and defrauded her along with nine insurance companies in the following ways:
 - a. Fraudulently billing insurance companies;
 - b. Depositing insurance company payments into her own personal bank account at TD Bank rather than CIBC bank where the clinic accounts were held; and
 - c. Falsifying bookkeeping records in order to both facilitate the fraudulent conduct and to conceal her actions from detection.
10. The exact monetary extent of the fraud is not possible to ascertain with certainty; the steps that Ms. Bornais took to obscure her activities in the clinic account system made it impossible to completely reconstruct exactly how many transactions were legitimately sourced and how many were generated fraudulently in order to divert funds to Ms. Bornais and/or to cover her tracks.
11. Cancelled cheques deposited into two bank accounts associated with Ms. Bornais that have been provided upon request by insurance companies totalled \$125,362.25
12. In addition, RCMP were able to locate additional stolen cheques within the two associated accounts as a result of the production orders, in total, RCMP located a further \$19,523.71 within the two associated accounts,
13. The cheques that could be accounted for amount to \$144,885.96. However, Ms. Scott and Dr. Murray estimate that much more loss has occurred, with Ms. Scott estimating that over \$200,000 may have been unlawfully generated and/or diverted to Ms. Bornais. Total recovery of all cheques issued by the nine insurance companies impacted by Ms. Bornais' conduct was not possible due to the companies initiating a fee requirement for each cheque requested.

Summary of Findings:

14. A summary of the findings by Ms. Scott and the RCMP investigation is outlined below;

Diverting cheques from insurance companies to a personal bank account:

- a. Ms. Bornais took incoming insurance cheques addressed to Dr. Murray, Dr. Patch and Dr. Naido and deposited them into her personal account at TD Canada Trust. For example, copies of one hundred and fifty cancelled cheques in the amount of \$101,105.41 were recovered from nine insurance companies for dates between April 19, 2012 and March 4, 2019.
- b. Ms. Bornais fraudulently used Dr. Murray's and Dr. Naido's rubber signature stamp to endorse some of the cheques in order to deposit them to her personal account. She deposited other cheques without endorsements.
- c. ATM footage was obtained showing Ms. Bornais depositing cheques that correlate to cheques in her account from insurance companies that were the result of insurance claims from the dental clinic. Three such examples were provided for the dates of December 18, 2018, January 30, 2019 and February 11, 2019.
- d. As a result of a production order issued on March 17, 2022, RCMP obtained further records relating to Ms. Bornais's TD bank account with which she was associated. A further 84 fraudulent cheques were located, as confirmed by Dr. Murray,
- e. A final production order was issued on June 20th, 2022 for records associated to other TD bank accounts to which Ms. Bornais was linked. As a result of that production order, seven more fraudulent cheques were located in one of the bank accounts for the total amount of \$5203.23.

Fraudulent billing:

- f. Ms. Bornais fraudulently billed insurance companies in order to obtain funds for client services that the dental clinic had not provided. In doing so, she used patient insurance information and doctor's provider identification numbers.
- g. Ms. Bornais also engaged in fraudulent accounting by overcharging patients, accepting overpayments from insurance companies for services and neglecting to refund or credit patients when required to do so. In cases of dual insurance coverage, Ms. Bornais fraudulently collected more than 100% from insurance companies, neglecting to refund overpayments but rather applying payments to various outstanding treatments and accounts.
- h. Deborah Scott was able to trace specific fraudulent activity described above in the amount of \$141,604.87.

Concealing her actions through falsifying business records, including accounting records and patient treatment records:

- i. Ms. Bornais concealed her actions through a variety of alterations and falsifications of bookkeeping records. In doing so, she also made it impossible to accurately reconstruct the records to determine with accuracy the total financial loss to Dr. Murray, the insurance companies and the patients that she defrauded. Examples of some of these methods are provided below:
 - a) Ms. Bornais falsified financial reports by deleting treatments that had been completed, or misusing adjustment codes in order to give the appearance that the accounts were in good order. Adjustment codes that she misused included Fee Write Off (FWO), Family and Friends Discount (DISC) and Warranty (WAR).
 - b) Ms. Bornais intentionally misfiled insurance remittances rendering them difficult to locate, and deleted records from electronic storage so that they could not be located. For example, an entire day of entries for April 4, 2018 was deleted. By reconstructing transactions by other means, it was discovered that Ms. Bornais had deleted treatments by Dr. Murray in the amount of \$13,525.60 and by Dr. Patch in the amount of \$8,789.65 for April 4, 2018.
 - c) Ms. Bornais took payments received and deposited them into her own account but misrepresented the patient accounts that they were associated with as being overdue. When Deborah Scott attempted to balance the books in 2018 prior to uncovering Ms. Bornais' actions, Ms. Bornais led Deborah Scott to believe that the fees in question were too old to collect, resulting in them being written off as bad debts. For example, between July 1, 2018 and March 4, 2019, Ms. Bornais wrote off bad debts in the amount of \$36,396.08 to cover cheques she had taken. By comparison, write-offs for bad debts in previous years ranged from \$600 to \$3,500.
 - d) Other methods included applying payments to the wrong accounts or deleting services rendered in order to balance an account. Additionally, in creating false billing to collect insurance payments, Ms. Bornais was able to use those funds to cover cheques owed to Dr. Murray that she deposited into her own bank account.

Impact on Dr. Murray:

- 15. The financial impact on Dr. Murray has been significant. In addition to loss suffered as a result of Ms. Bornais' theft of cheques intended for the dental clinic, Dr. Murray has additional burdens to address:
 - a. Costly and time consuming auditing required to reconstruct and correct, to the extent possible, the dental clinic's records for the entire period that Ms. Bornais was employed there. Inaccurate patient records mean that individuals do not have documentation that reflects the treatments that they've received or require.
 - b. In order to maintain her professional licence, Dr. Murray has had to take additional steps required by her professional governing body, the BC College of Oral Health Professionals.

- c. In order to minimize the impact on patients, Dr. Murray is absorbing the cost of fraudulent billing to patients either directly or through their insurance provider; due to the way that coverage is provided to patients, treatments that were falsely claimed or inaccurately claimed may prevent patients from making claims for future treatments that they need. Dr. Murray is providing these treatments out of pocket in order to mitigate loss for her patients.
- d. Efforts to obtain copies of cancelled cheques has been costly and only partially effective. Older cheques are often not available and some insurance companies are now charging Dr. Murray for every cheque that is being requested.

III. CIRCUMSTANCES OF THE OFFENDER

- [5] Ms. Bornais is 48 years old. She was born in Maple Ridge, British Columbia. Her family moved around a lot when she was growing up. She had one sibling, a sister, who is now deceased. She completed high school, then moved to Alberta. She is in a long-term marriage, and she and her spouse have three adult children.
- [6] Ms. Bornais' education consists of a high school diploma and a business administration certificate from a college that is now part of Thompson Rivers University.
- [7] As of September 28, 2023, the date on which Ms. Bornais pleaded guilty to the above four charges, she was employed by a local construction company, which was not then aware of the charges against her. Ms. Bornais does general office work at the construction company, including estimating and planning. I was not told whether her job involves handling money. She is paid \$26 per hour, and works forty (40) hours per week.
- [8] I understand from defence counsel's submissions that Ms. Bornais has a history of misusing alcohol, including at work, and although her consumption is now reduced, she is unable to fully abstain. I was not provided with any medical or other evidence in that regard.
- [9] I understand further from defence counsel's submissions that Ms. Bornais suffers from depression, for which she is currently on prescription medication. I was not provided with any medical or other evidence in that regard.

IV. POSITION OF THE PARTIES

Crown

- [10] Crown counsel submits Ms. Bornais should be sentenced to twenty (20) months imprisonment, followed by two (2) years of probation, with an order for restitution of \$144,885.96 payable to Dr. Murray.
- [11] Crown counsel referred me to the following cases:
 - R. v. Dunkers, 2018 BCCA 363 [Dunkers];
 - R. v. Penttila, 2020 BCCA 63 [Penttila];

- R. v. Mangat, 2021 BCCA 450 [Mangat]; and
- R. v. Merkel, 2021 BCCA 445 [Merkel].

- [12] Dunkers involved an offender who was sentenced to five years' imprisonment and ordered to pay approximately \$200,000 in restitution following her conviction for fraud over \$5,000. She defrauded a non-profit organization, where she was employed as a bookkeeper, over a two-year period, by issuing cheques to herself. As a result of her offence, the organization had to cease operations. The sentence was upheld on appeal.
- [13] Penttila involved an offender who was sentenced to two years' imprisonment and ordered to pay the full amount of fraud in restitution. The offender, an office manager in a company that provided construction materials, was a trusted, long-term employee who defrauded her employer of approximately \$363,000 over the course of over six years by altering cheques to pay herself. Despite the Court of Appeal finding errors in principle in the sentencing judge's reasons, the sentence was not materially affected and was upheld on appeal.
- [14] Mangat involved an offender who was sentenced to three years' imprisonment and ordered to pay \$500,000 in restitution following his conviction of fraud over \$5,000. The offender devised a "sophisticated" investment scheme and had a childhood friend and his wife invest \$500,000. The sentence was upheld on appeal but the restitution order was varied, reducing the amount to \$250,000.
- [15] Merkel involved an offender who was sentenced to a conditional sentence order ("CSO") of two years less one day. The offender was also ordered to pay \$109,000 in restitution, in addition to \$400 to each of the former company employees affected by the fraud. The offender was a bookkeeper and defrauded her employer, a sawmill on Vancouver Island, of approximately \$109,000, through a series of fraudulent payroll transactions. The offender had a related criminal record involving repeated acts of dishonesty, including stealing from three prior employers while in a position of trust. The sentence was varied on appeal, with the Court of Appeal varying the sentence by setting aside the CSO and substituting it for a two year custodial sentence.
- [16] Merkel can be distinguished from the other cases provided by Crown counsel, in that the offender had committed multiple acts of theft and deception involving a number of different employers.

Defence

- [17] Defence counsel submits Ms. Bornais should be sentenced to two (2) years imprisonment, served in the community by way of a CSO, followed by three years of probation, with an order for restitution of \$144,885.96, payable to Dr. Murray.
- [18] Defence counsel referred me to the following cases:
- R. v. McLean, 2016 BCSC 2191 [McLean];

- R. v. Nelsen, 2015 BCSC 444 [Nelsen];
- R. v. Thomas, BCPC Kamloops Registry File No. 110717-1, June 9, 2023, (unreported) [Thomas]; and
- R. v. Proulx, 2000 SCC 5 (CanLII) [Proulx].

[19] CSOs were imposed in McLean, Nelsen, and Thomas.

[20] McLean involved an offender who had a gambling addiction and committed a multi-transaction \$225,000 fraud against her employer over a six-year period. Unlike here, there was a pre-sentence report; expert reports from a psychiatrist and a psychologist, detailing the offender's various mental health problems; as well as in-court testimony from the offender and various persons who provided character reference evidence.

[21] Nelsen involved an offender who had a criminal record of fraud offences who defrauded a business customer of \$900, which he had repaid by the time of his sentencing. The offender had a prior criminal record and received a one-year CSO.

[22] Thomas involved an opportunistic unsophisticated fraud of less than two (2) years duration.

[23] Proulx involved the proper interpretation and application of the conditional sentencing regime.

V. DISCUSSION

Aggravating Circumstances

[24] Section 380.1 of the Criminal Code, R.S.C. 1985, c. C-46 [Code] is a statutory codification of aggravating circumstances in respect of various enumerated offences.

[25] On Count 16, Ms. Bornais pleaded guilty to one of the offences enumerated in s. 380.1 of the Code. With regards to Count 16, I must therefore consider the aggravating circumstances identified in s. 380.1 of the Code.

[26] Concerning the other counts, the fact that they are not offences enumerated in s. 380.1 of the Code does not preclude me from considering any of the aggravating circumstances set out in s. 380.1, because those aggravating circumstances exist at common law irrespective of s. 380.1: Dunkers, at para. 57.

Magnitude, Complexity, Duration and Degree of Planning

[27] The full magnitude of the financial and other losses suffered by Ms. Bornais' victims has not been determined, and likely never will be. The theft which has been quantified totals \$144,885.96. This was a large theft.

[28] Ms. Bornais' scheme was complex in nature, because it involved:

- multiple victims;

- multiple transactions, involving 241 cheques;
- fraudulently billing;
- depositing cheques in multiple personal bank accounts;
- altering records;
- falsifying records;
- mis-filing records;
- mis-using private patient information; and
- attempting to obscure and avoid detection.

[29] Ms. Bornais' scheme played out over a period of almost six years.

[30] I find Ms. Bornais' scheme involved premeditation and planning, because of its complexity, which was perpetuated over time.

[31] I note that, specifically concerning Count 16, details of the magnitude, complexity, duration and degree of planning of the fraud against Manulife Financial is not identified in the Agreed Statement of Facts.

The Offences Involved a Number of Victims

[32] As noted, there are multiple victims of Ms. Bornais' crimes, both individuals and corporations. The individual victims are Dr. Murray and a number of her patients. The corporate victims are nine (9) insurance companies, including Manulife Financial.

Abuse of Position of Trust

[33] Ms. Bornais abused her position of trust as an employee of Dr. Murray's dental clinic. She betrayed the trust associated with her position as a dental receptionist, with access to business records, including accounting records and patient treatment records, to facilitate her crimes and avoid their detection.

Effect on Victims

Dr. Murray

[34] Ms. Bornais' offences resulted in a significant financial loss to Dr. Murray. The loss is not limited to the dollar value of the theft. Dr. Murray has also incurred costly and time-consuming auditing of her practice to reconstruct and attempt to correct the records of the dental clinic for the entire period of Ms. Bornais' employment. The financial burden on Dr. Murray associated with the loss continues, as she is still absorbing the cost to patients of Ms. Bornais' fraudulent billing.

[35] Additionally, in order for Dr. Murray to maintain her professional license, she has had to adopt additional measures in her practice, as required by the B.C. College of Oral Health Professionals.

[36] I understand from Crown Counsel that Dr. Murray declined to provide a formal Victim Impact Statement.

Dr. Murray's patients

[37] Ms. Bornais' offences affected Dr. Murray's patients, whom Ms. Bornais used as unwitting pawns in her scheme. Ms. Bornais' actions may prevent the affected patients from claiming for necessary dental treatments in future.

Insurance Companies

[38] Ms. Bornais' offences resulted in unquantified loss to nine (9) insurance companies, including Manulife Financial.

Mitigating Circumstances

Guilty plea

[39] Ms. Bornais' guilty plea is a mitigating factor. Crown counsel described Ms. Bornais' guilty pleas as "very significant" because the case involved voluminous disclosure, multiple witnesses, including bankers and forensic accountants, and a one-week trial.

No prior record

[40] Ms. Bornais' absence of a prior criminal record is a mitigating factor. It indicates she has apparently led an otherwise pro-social life, as well as acceptance of responsibility for her actions.

Proactive counselling

[41] I accept as mitigating that Ms. Bornais voluntarily sought out and received some counselling for insight into her offending, because it evidences proactive behaviour consistent with rehabilitation.

Remorse

[42] I accept as mitigating that Ms. Bornais is now genuinely remorseful, because she has on various occasions over time since her apprehension expressed remorse to various people, including in her apology letter to Dr. Murray, her apology letter to the Court, and her tearful statement to the Court during the sentencing hearing.

Other factors

Motivation for offending

[43] Defence counsel submitted Ms. Bornais committed the offences because of her alcoholism, and her son's legal troubles.

Ms. Bornais' alleged alcoholism

[44] As the court noted in Penttila in the context of an offender with a gambling addiction, at paras. 68-70:

[68] The attachment of a medical label to an identified cluster of behaviours for diagnostic and treatment purposes does not, however, mean that the diagnosis will always be mitigating. But it is important for sentencing judges to consider whether an offender has a medically recognized disorder and, if so, whether that disorder caused or contributed to the commission of an offence. In cases of this kind, sentencing judges should, as one aspect of the analysis, consider the evidence addressing the nature and magnitude of the disorder and determine the overall role it played in the commission of the offence: *R. v. Badhesa*, 2019 BCCA 70 at paras. 40, 42-44.

[69] A medically recognized disorder, shown to have caused or contributed to the commission of the offence, may be regarded as a mitigating factor warranting a reduction in sentence on the grounds that the offender's moral culpability is attenuated. In addition, general deterrence and denunciation, which ordinarily figure prominently in sentencing offenders for thefts and frauds involving a breach of trust, may be entitled to less weight where the offender's behaviour is attributable to an underlying pathology.

[70] Where the disorder is found to have contributed to the commission of the offence, the weight it should be given as a mitigating factor will necessarily be fact-driven and context-dependent. In cases like the one at bar, where the offending conduct occurs over a lengthy period and involves the repeated unlawful taking of funds, sentencing judges must be particularly attentive to whether the evidence justifies a conclusion that a gambling disorder impaired the offender's decision-making processes. A sentencing judge's decision about the weight to be given to a behavioural disorder shown to have played a contributing role in the commission of an offence will, of course, attract a deferential standard of review.

[45] The comments of the Court in Penttila were made in the context of an offender with a gambling addiction, involved in a large-scale fraud committed on multiple occasions over a period of years.

[46] Gambling Disorder and Alcohol Use Disorder both appear in the most current edition of the Diagnostic and Statistical Manual of Mental Disorders, DSM-5. I consider the comments of the Court in Penttila to have equal application in this case, in the context of Ms. Bornais' alleged alcoholism.

[47] There is no medical or other evidence before the Court concerning Ms. Bornais' alleged alcoholism, or whether it caused or contributed to her offending.

- [48] The letter from counsellor Gregory Pearce states that "the purpose of our sessions was to determine what was the driver to make her move in this direction". Mr. Pearce's letter makes no mention of Ms. Bornais having any issue with alcohol misuse, or that it was a "driver to make her move in this direction".
- [49] Ms. Bornais' apology letter to Dr. Murray makes no mention of Ms. Bornais having any issue with alcohol.
- [50] Ms. Bornais' letter to the court states that: "I started drinking heavily to try [try] to erase the thoughts of it from my mind when I could". While I take from this that Ms. Bornais started "drinking heavily" to numb the reality of the situation she found herself in because of her offending, I do not conclude that it caused or contributed to her offending.
- [51] The three support letters, from Ms. Bornais' parents, from her son, and from her daughter-in-law, make no mention of Ms. Bornais having any issue with alcohol.
- [52] I decline to find Ms. Bornais' alleged alcoholism to be a mitigating factor in the determination of the appropriate sentence.

Ms. Bornais' son's legal troubles

- [53] There is some evidence before the court that Ms. Bornais' son's legal troubles caused or contributed to her offending.
- [54] The letter from counsellor Gregory Pearce states that: "During our conversations it became apparent that the impetus for this situation related to a personal situation with her son. She, like many, thought she was able to do this one-time thing and repay the funds, but it quickly got out of hand".
- [55] Ms. Bornais' apology letter to Dr. Murray states in part that:
- It started off when one of my kids was [charged] with crimes we knew he did not commit and I did not know what to do. Foolishly I chose to steal from you. As time went on it snowballed and I could not pay it back and I just tried to make it better, but was actually making it worse.

- [56] Ms. Bornais' letter to the court states in part that:

This started when my oldest son was charged with several crimes relating to his ex-girlfriend, which we knew he was innocent of. I had to come up with \$10,000 for his [lawyer's] fees, and I was at a loss of what to do. What began there continued along as I could never figure out how to make it right and it continued to snowball until it was so completely out of control.

- [57] The three support letters, from Ms. Bornais' parents, from her son, and from her daughter-in-law, make no mention of Ms. Bornais' son's legal troubles.
- [58] I decline to find Ms. Bornais' son's legal troubles to be a mitigating factor in the determination of the appropriate sentence.

Should there be a CSO?

[59] There are four criteria the Court must consider before deciding to impose a CSO: Proulx, para. 46.

Criteria #1: offence not punishable by a minimum term of imprisonment

[60] The offender must be convicted of an offence not punishable by a minimum term of imprisonment. None of the offences Ms. Bornais has pleaded guilty to involve a minimum term of imprisonment.

Criteria #2: less than two years imprisonment

[61] The Court must impose a sentence of less than two years imprisonment. I am satisfied a sentence of probation would not be appropriate. I am satisfied that a sentence of imprisonment for two years or more, while not outside the range, would not be the appropriate sentence in the circumstances of this case. In reaching this conclusion I have considered the fact that Crown counsel is seeking a sentence of less than two (2) years imprisonment.

Criteria #3: safety of the community would not be endangered

[62] The Court must be satisfied that the safety of the community would not be endangered by the offender serving the sentence in the community: Proulx, at para 46. The phrase "safety of the community" refers to the threat posed by the specific offender: Proulx, at para. 68. To assess the danger to the community posed by the offender while serving their sentence in the community the Court must take account of two factors: (1) the risk of the offender re-offending; and (2) the gravity of the damage that could ensue in the event of re-offence: Proulx, at para. 69. Two factors which may be relevant in assessing an offender's risk of re-offence are: (1) an offender's post-offence conduct; and (2) the danger to the affected part of the community: Proulx, at para. 70.

[63] The phrase "would not endanger the safety of the community" should be broadly construed, and includes the risk of economic harm: Proulx, at para. 76.

Factor #1: the risk of Ms. Bornais re-offending

[64] I find there is some risk of Ms. Bornais re-offending.

[65] In reaching this conclusion, I have considered the aggravating, mitigating and other factors discussed above; as well as the letter from counsellor Gregory Pearce, the letters from Ms. Bornais' parents, her son, and her daughter-in-law; Ms. Bornais' apology letter to Dr. Murray, her letter to the Court and her statement to the Court.

[66] I also considered Ms. Bornais' post-offence conduct, in respect of which I find two things noteworthy. First, the Agreed Statement of Facts indicates Ms. Bornais "withheld information, misrepresented facts and was generally non-responsive to the queries of Ms. Scott", the accounting consultant hired by Dr. Murray. I find Ms. Bornais' reason for doing so was to avoid detection. Second, as of September 28, 2023, the date on which Ms. Bornais pleaded guilty, her current employer did not know about the charges against her. I find her current employer did not know because Ms. Bornais did not tell them. I find Ms. Bornais did not tell them because she feared they either would not have hired her, or would have terminated her employment if they had already hired her. I find both of the foregoing examples of a willingness by Ms. Bornais to engage in ongoing post-offence deception. In regards to Ms. Bornais' behaviour with Ms. Scott, I find it was ongoing active deception, to avoid detection. In regards to Ms. Bornais' failure to inform her current employer, I find it was ongoing deception by omission, to avoid the consequences of her behaviour. In both instances, Ms. Bornais' ongoing deception affected her employers. This is significant, because it is Ms. Bornais' employers, whether current or future, who are the affected part of the community most at risk of harm if she were to re-offend.

Factor #2: gravity of the potential damage if Ms. Bornais re-offends

- [67] I find the gravity of the potential damage if Ms. Bornais were to re-offend to be significant, especially if Ms. Bornais is in a position which involves having authority over the real property, money or valuable security of others.
- [68] As above, this is significant, because it is Ms. Bornais' employers, whether current or future, who are the affected part of the community most likely to suffer the potential damage if she were to re-offend.

Conclusion: safety of the community would not be endangered

- [69] Notwithstanding the foregoing, I conclude the safety of the community would not be endangered by Ms. Bornais serving her sentence in the community, because the risk of her re-offending, and the gravity of the potential damage if she were to re-offend, could be sufficiently mitigated by the imposition of a lengthy prohibition order in connection with her having authority over the real property, money or valuable security of others, as provided for in s. 380.2(1) of the Code.

Criteria #4: A CSO must be consistent with the fundamental purpose and principles of sentencing

- [70] A CSO must be consistent with the fundamental purpose and principles of sentencing set out in ss. 718 to 718.2 of the Code.

Fundamental purpose of sentencing

- [71] The fundamental purpose of sentencing is set out in s. 718 of the Code, which provides as follows:

Purpose

718 The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

Objectives of sentencing

Denunciation and Deterrence

- [72] Sections 718(a) and 718(b) of the Code codify the sentencing objectives of denunciation and deterrence.
- [73] The principles of denunciation and deterrence are paramount in fraud and dishonesty related offences: *R. v. Kodimiyala*, 2020 BCCA 275, at para. 42.
- [74] The Court in *Proulx* further emphasized that denunciation and deterrence are particularly pressing where there are aggravating circumstances and that incarceration will generally be the preferable sanction: *Proulx*, at para. 114.
- [75] CSOs with sufficiently punitive conditions can provide significant denunciation and deterrence, particularly if the duration of the CSO is of longer than a non-CSO term of imprisonment would have been, and the public is made aware of the conditions: *Proulx* at paras. 102 and 107. Concerning punitive conditions, house arrest, in which the offender is confined to their home unless otherwise permitted, should be the norm, not the exception: *Proulx*, at para. 103. The stigma of serving a CSO with house arrest should not be underestimated: *Proulx*, at para. 105.
- [76] Here Ms. Bornais could be subject to a CSO for two years less a day, which is longer than the twenty (20) months imprisonment suggested by Crown counsel. The public could be made aware of the CSO conditions by the publication of these reasons for sentence on the Supreme Court of British Columbia website. The CSO conditions could include house arrest, subject to exceptions.

Separation

[77] Section 718(c) of the Code codifies the sentencing objective of separation of offenders from society, where necessary.

[78] The objective of separation is not applicable in determining the appropriateness of a CSO, because a prerequisite for a CSO is that the offender not pose a danger to the community: Proulx, at para. 108.

Restorative objectives

[79] Sections 718(d), 718(e) and 718(f) of the Code codifies the restorative sentencing objectives of rehabilitation, reparations and promotion of a sense of responsibility in the offender.

[80] A CSO is generally better suited to achieving these restorative objectives: Proulx, at para. 109. When they may realistically be achieved in the case of a particular offender, a CSO will likely be the appropriate sanction, subject to considerations of denunciation and deterrence: Proulx, at para. 109.

[81] CSO conditions with restorative objectives include: house arrest, mandatory treatment orders, restitution orders and community service orders.

[82] Here, such conditions together with a lengthy prohibition order under s. 380.2(1) of the Code could ensure the safety of the community, while being tailored to fit the particular circumstances of Ms. Bornais and her offences. I find Ms. Bornais would be capable of abiding by such conditions, and that they would be realistically enforceable.

Proportionality - the fundamental principle of sentencing

[83] Proportionality is a fundamental principle of sentencing, and requires that a sentence be proportional to the gravity of the offence and the degree of responsibility of the offender: Code, s. 718.1; Proulx, at para. 82. Proportionality requires an examination of the specific circumstances of both the offender and the offence so that the "punishment fits the crime": Proulx at para. 82.

Other sentencing principles

[84] Section 718.2(a) of the Code requires the court to consider other sentencing principles, including that a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, of which several aggravating circumstances already discussed above are relevant here:

(iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,

[]

(iii.2) evidence that the offence was committed against a person who, in the performance of their duties and functions, was providing health services, including personal care services,

[]

(vii) evidence that the commission of the offence had the effect of impeding another person from obtaining health services, including personal care services;

Parity

[85] Section 718.2(b) of the Code codifies the principle of parity in sentencing. In the case of CSOs, the criteria identified in s. 742.1 of the Code considerably narrow the range of cases in which a CSO may be imposed, and the potential for disparity between potential CSO candidates who receive one, and those who do not, is relatively small: Proulx, at para. 87.

[86] I am satisfied that a CSO here would not offend the principle of parity in sentencing.

Totality

[87] Section 718.2(c) of the Code codifies the principle of totality in connection with consecutive sentences.

[88] I have considered the provisions of s. 718.3(4)(b) of the Code, and am satisfied that the sentences for the offences here should be served concurrently, notwithstanding that to some extent they do not arise out of the same event or series of events.

Restraint

[89] Sections 718.2(d) and 718.2(e) of the Code together codify the principle of restraint in sentencing and, with s. 742.1 of the Code, which addresses CSOs, were specifically enacted to help reduce the rate of incarceration in Canada: Proulx, at para. 90. When the first three statutory criteria discussed above are satisfied, as I find they are here, the principle of restraint requires me to give serious consideration to the imposition of a CSO: Proulx, at para. 90.

Should there be a restitution order?

[90] Ms. Bornais has not made any restitution to the victims of her offending. The Agreed Statement of Facts indicates \$144,885.96 is the amount of the loss which can be accounted for. Crown and defence counsel each submit I should make a restitution order for \$144,885.96 in favour of Dr. Murray.

[91] Section 737 of the Code requires me to consider making a restitution order under either ss. 738 or 739 of the Code.

[92] Section 738 of the Code concerns restitution orders to victims of offences. Pursuant to s. 738(1)(a) of the Code the court can order restitution for loss of property where the amount is readily ascertainable.

- [93] A restitution order is part of the sentence, not simply a "add on" to the sentence, and must not render the global sentence demonstrably unfit: *R. v. Abdulahi-Sabet*, 2020 BCCA 213, at para. 12.
- [94] An offender's financial means or ability to pay does not prevent the court from making a restitution order: Code, s. 739.1.
- [95] While \$144,885.96 is a very significant amount, I find that there is a prospect Ms. Bornais will be able to make repayment, particularly if she is given a lengthy period of time to do so. She is middle-aged and possesses skills which have enabled her past employment and can enable her future employment. She has a family, including three adult children. While I have no information about whether Ms. Bornais' children could help her with repayment, they are supportive of her, from which I infer they will be generally willing to help her to the extent they can do so.
- [96] Even if I was satisfied there is no prospect Ms. Bornais will be able to make repayment, I note that while an offender's ability to pay is a relevant consideration in some circumstances, in cases involving theft or breach of trust offences, a restitution order may be appropriate even if there appears no likelihood of repayment, because the underlying rationale is that the offender should be deprived of the "fruits of their crime": *Dunkers*, at para. 25, citing *R. v. Dreger*, 2014 BCCA 54 at para. 59 and *R. v. Castro*, 2010 ONCA 718 at para. 28.
- [97] It has not been possible for Dr. Murray to fully quantify the "fruits" of Ms. Bornais' crime as some of her loss remains unaccounted for. The Agreed Statement of Facts indicates "over \$200,000 may have been unlawfully generated and/or diverted to Ms. Bornais".

V. CONCLUSION

- [98] On an assessment of all the evidence before me, I have determined that a CSO is not appropriate, because it would not adequately give effect to the sentencing objectives of denunciation and deterrence. Here, the considerations of denunciation and deterrence outweigh the restorative sentencing objectives. Ms. Bornais' moral culpability is high. While she is a first-time offender, Ms. Bornais engaged in a deliberate pattern of deception over a period of almost six (6) years, all while abusing her position of trust. Ms. Bornais caused substantial losses to her victims. She did so in a situation involving the provision of dental services, which I find are integral to an individual's general health, and within the description of health services as referred to in s. 718(2)(a)(iii2) of the Code, and her actions will likely have long-lasting and far-reaching impacts on Dr. Murray, Dr. Murray's patients and the insurance companies. Her actions, given their severity, must be strongly denounced. The sentence imposed on Ms. Bornais must serve to deter those who would betray the trust of their employers and steal from them.

[99] A restitution order for \$144,885.96 is appropriate, because it will hold Ms. Bornais accountable for the financial harm she has caused and, compared to a civil lawsuit, will provide Dr. Murray with a more convenient and less expensive means of attempting to recover her losses. If Dr. Murray does ultimately seek a judgment as provided for in s. 741(1) of the Code, legal mechanisms exist to prevent undue hardship to Ms. Bornais: Dunkers, at para. 28, citing Court Order Enforcement Act, R.S.B.C. 1996, c. 78, ss. 3(5), 4 and 5(2); Politeknik Metal San ve Tic A.S. v. AAE Holdings Ltd., 2015 BCCA 318 at para. 26. I am satisfied that a restitution order in combination with the other components of the sentences I am going to impose would not offend against the totality principle.

Imprisonment

[100] On Count 1, I sentence Ms. Bornais to imprisonment for six (6) months;

[101] On Count 2, I sentence Ms. Bornais to imprisonment for twenty (20) months, concurrent to the sentence on Count 1;

[102] On Count 16, I sentence Ms. Bornais to imprisonment for six (6) months, concurrent to the sentences on Counts 1 and 2;

[103] On Count 19, I sentence Ms. Bornais to imprisonment for six (6) months, concurrent to the sentences on Counts 1, 2 and 16.

Probation Order

[104] On Counts 1, 2, 16 and 19, pursuant to s. 731(1)(b) of the Code, I impose a probation order. Ms. Bornais will be on probation for a period of two (2) years when she is released from custody following the completion of her sentences of imprisonment, subject to the following conditions:

- a) keep the peace and be of good behaviour;
- b) appear before the court when required to do so by the court;
- c) notify the court or the probation officer in advance of any change of name or address, and promptly notify the court or the probation officer of any change of employment or occupation;
- d) You must have no contact or communication, directly or indirectly, with Dr. Maureen Murray;
- e) You must have no contact or communication, directly or indirectly, with Deborah Scott;
- f) You must not go to (or be within 100 metres of):

any place where Dr. Maureen Murray lives, works, attends school, worships, or happens to be. If you see them, you must leave their presence immediately without any words or gestures.

- g) You must not go to (or be within 100 metres of):

any place where Deborah Scott lives, works, attends school, worships, or happens to be. If you see them, you must leave their presence immediately without any words or gestures.

- h) You must attend, participate in and complete any intake, assessment, counselling, or education program as directed by your probation officer.

This may include but is not limited to counselling or programming for:

- alcohol or drug addiction;
- mental health.

Prohibition Order

[105] On Count 16, pursuant to s. 380.2(1) of the Code, I impose a prohibition order. Ms. Bornais is prohibited from seeking, obtaining or continuing any employment, or becoming a volunteer in any capacity, that involves having authority over the real property, money or valuable security of another person. The prohibition order will be in effect for ten (10) years from today.

Restitution Order

[106] On Count 2, pursuant to s. 738(1) of the Code, I impose a restitution order. Ms. Bornais will pay \$141,604.87 to Dr. Murray by December 31, 2030.

Victim Surcharge

[107] Pursuant to s. 737(1) of the Code, I am required to order that Ms. Bornais pay a victim surcharge, the amount of which is determined pursuant to s. 737(2) of the Code, unless the statutory exception in ss. 737(2.1) and 737(2.2) applies. Counsel made no submissions concerning the victim surcharge. I have reviewed the provisions of ss. 737(2.1) and 737(2.2) of the Code and am satisfied the statutory exception is not applicable. Accordingly, Ms. Bornais will pay a victim surcharge.

"B. Smith J."

SMITH J.

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