
CANADA / JUDGMENT

R. v. Merkel

2021 BCCA 445

COURT

British Columbia Court of Appeal

DECIDED

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2021 BCCA 445 R. v. Merkel

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Merkel,

2021 BCCA 445

Date: 20211129

Docket: CA47509

Between:

Regina

Appellant

And

Renee Patricia Merkel

Respondent

Corrected Judgment: The text of the judgment was corrected on the cover page on December 2, 2021.

Before:

The Honourable Mr. Justice Groberman

The Honourable Mr. Justice Fitch

The Honourable Mr. Justice Abrioux

On appeal from: An order of the Supreme Court of British Columbia, dated

April 29, 2021 (sentence) (R. v. Merkel, 2021 BCSC 839, Nanaimo Docket 86561-2).

Counsel for the Appellant:

M.B. Rankin

B.O. Webber

Counsel for the Respondent,

Renee Patricia Merkel:

T.C. Paisana

B. Zargarian

M. Iyengar

Counsel for the Respondent,

Director of Public Prosecution:

O.L. Bick

Place and Date of Hearing:

Vancouver, British Columbia

October 25, 2021

Place and Date of Judgment:

Vancouver, British Columbia

November 29, 2021

Written Reasons by:

The Honourable Mr. Justice Fitch

Concurred in by:

The Honourable Mr. Justice Groberman

The Honourable Mr. Justice Abrioux

Summary:

Crown appeal from a conditional sentence order (CSO) of two years less one day imposed on the respondent following her guilty plea to one count of fraud over \$5000. A bookkeeper, the respondent manipulated her employer's payroll system for about ten months to direct company funds totaling about \$109,000 into her own account. Her conduct inflicted substantial harm on the company. She had a substantial and related record. The Crown argues that the sentencing judge: (1) erred in principle by giving mitigating effect to the respondent's claim that her opioid

use and mental health contributed to her offending conduct; (2) erred in principle by concluding the CSO could be terminated if she failed to comply with the restitution order; (3) erred in principle by framing the main issue as the cost to the taxpayer of incarcerating Ms. Merkel; (4) erred by failing to give adequate effect to the principles of specific and general deterrence and denunciation when previous CSOs for similar crimes did not deter her; and (5) erred in law by imposing a CSO when it is precluded by s. 742.1(c) of the Criminal Code.

HELD: Appeal allowed. There was no evidence upon which the trial judge could reasonably conclude Ms. Merkel's opioid use contributed to her offending conduct. In any event, this was a disputed fact on sentencing and the judge erred in principle by treating it as a mitigating circumstance without finding a link between the respondent's mental health and her conduct. The trial judge also erred in principle by concluding that the CSO could be terminated if restitution was not paid, and by considering the cost of incarceration to the taxpayer. In any event, the sentence did not reflect the respondent's high moral culpability or meet the principles of denunciation and deterrence. It is demonstrably unfit. A two-year custodial sentence is the lowest sentence that could reasonably be imposed. It is neither necessary nor appropriate in this case to undertake an analysis of the constitutional validity of s. 742.1(c).

Reasons for Judgment of the Honourable Mr. Justice Fitch:

I. Introduction

- [1] This is a Crown appeal from a conditional sentence order ("CSO") of two years less one day imposed on the respondent, Renee Patricia Merkel, following her plea of guilty to one count of fraud over \$5,000, contrary to s. 380(1) of the Criminal Code, R.S.C. 1985, c. C-46 (the "Code"). The Crown asserts that the sentencing judge made a variety of errors in principle that had a material impact on the sentence. In the alternative, the Crown submits that the sentence is demonstrably unfit.
- [2] The Crown also argues that the sentencing judge erred by imposing a CSO when such a disposition was unavailable as a matter of law. On this issue, the Crown notes that the offence of "fraud over" is an indictable offence punishable by a maximum term of imprisonment of 14 years. Pursuant to s. 742.1(c) of the Code, a CSO cannot be imposed for an offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 14 years or life.
- [3] In *R. v. Sharma*, 2020 ONCA 478 (released on July 24, 2020) [Sharma] the Ontario Court of Appeal issued a declaration that ss. 742.1(c) and 742.1(e)(ii) of the Code unjustifiably infringe ss. 7 and 15 of the Charter and are, therefore, of no force and effect. Leave to appeal was granted in Sharma on January 14, 2021: [2021] S.C.C.A. No. 39346. The respondent's plea of guilty in the case at bar was entered on October 5, 2020. On November 27, 2020, the respondent served notice of her intention to challenge the validity of s. 742.1(c). Two weeks before the respondent's sentencing hearing, the decision in *R. v. Chen*, 2021 BCSC 697 [Chen] was released. In that case, Justice Schultes held that ss. 742.1(c) and 742.1(e)(ii) were

inconsistent with s. 7 of the Charter.

- [4] On the sentencing hearing in this case, the Crown agreed the judge should follow Chen based on the principles of judicial comity set out in *Re Hansard Spruce Mills Ltd.* [1954] 4 D.L.R. 590, 1954 CanLII 253 (BCSC). The judge acceded to the Crown's position. Thus, the sentencing hearing proceeded on the basis that a CSO was an available disposition.
- [5] Against this background, the Crown seeks an order granting leave to appeal, allowing the appeal, and substituting for the CSO a custodial sentence of two years less one day. The Crown says this Court should consider the constitutionality of s. 742.1(c) even if it decides that the CSO imposed on the respondent is unfit. The Crown acknowledges, in this event, that the tangible and concrete dispute between the parties will have disappeared. It nevertheless submits that this Court should exercise its discretion to hear the constitutional question, arguing that the issue is evasive of review and that appellate court guidance is required.
- [6] For the reasons that follow, I would grant leave to appeal, allow the appeal and substitute for the CSO a custodial sentence of two years. I would not vary the length of the probation order, but I would modify some of the conditions that attach to it. I would not entertain the constitutional issue.

II. Background

a) Circumstances of the Offence

- [7] From 2010 until her termination in 2018, the respondent was employed as a bookkeeper at Errington Cedar Products Ltd., ("Errington") a family owned sawmill located on Vancouver Island which employed approximately 50 people. The respondent had access to the company's timekeeping and payroll systems and oversaw the payment of wages to employees. She was in a position of trust.
- [8] From April 2017 to July 2018, the respondent defrauded her employer through what the sentencing judge described as "a complicated scheme involving multiple transactions." In short, the respondent reactivated dormant payroll accounts in the names of employees who had been terminated or placed on unpaid leave. She changed the direct deposit banking account numbers for those employees to her own personal bank account number. She entered falsified time and payroll information, setting the payroll system to record that those absent employees (or ex-employees) had worked longer hours, resulting in greater payments owed to them by the company. She then directed these payments to her personal bank account. After directing funds to her own account, the respondent engaged in acts of concealment by changing the banking information back to the correct account numbers.

- [9] Thirty-eight fraudulent transactions were discovered resulting in \$70,340.48 of company funds being deposited into the respondent's personal bank account. The company lost an additional \$38,700 due to CPP, EI, WCB and DPSP overpayments based on the falsified reported employee payments. The financial harm inflicted on the company totalled \$109,040.48.
- [10] The company was not the only victim. The respondent's payroll manipulations resulted in increased reported income for ex-employees and employees on unpaid leave. This resulted in increased tax obligations for these individuals, as well as the loss of child and other tax credits. The extent of the harm inflicted by the respondents on her co-workers could not be determined.
- [11] The fraud came to light after an employee complained that a T4 tax form issued by the company showed earnings substantially in excess of wages actually paid. Soon after the fraud was uncovered, Errington declared bankruptcy. The Crown did not allege that the respondent's fraud caused the bankruptcy, but the sentencing judge found that "her embezzlement further inflicted financial harm on an already-struggling company."
- [12] When sentence was imposed, more than two years after the fraud was uncovered and between three and four years after the commission of the offence, the respondent had not paid restitution to the company, its trustee in bankruptcy, or any of the affected employees. She pledged to do so on the sentencing hearing.
- [13] The respondent's supervisor, a daughter of one of the owners of Errington, provided a victim impact statement at the sentencing hearing. She hired the respondent to help out in the office. The two became friends. She lost her father to cancer in 2017, and assumed full responsibility for the duties he previously discharged. She discovered that the respondent began committing the fraud about five or six weeks after her father died. As she put it, "the forest industry is a really hard industry to be in" and that while "\$100,000 might not seem like a lot of money to a company that's struggling, it was a lot of money." The respondent's offence has left her feeling "like I failed my team . . . I failed my dad and his partner" because "I wasn't paying attention."
- [14] Victim impact statements were also filed by ex-employees of Errington describing the tax implications they experienced as a consequence of the respondent's conduct and their uncertainty about whether they would receive refunds for taxes paid, but not owed.
- [15] As the sentencing judge recognized, the respondent's conduct engages a number of statutorily recognized aggravating circumstances under ss. 380.1(1) and 718.2(a) of the Code. They are set out below:

Sentencing -- aggravating circumstances

380.1 (1) Without limiting the generality of section 718.2, where a court imposes a sentence for an offence referred to in section 380, 382, 382.1 or 400, it shall consider the following as aggravating circumstances:

- (a) the magnitude, complexity, duration or degree of planning of the fraud committed was significant;

...

- (c) the offence involved a large number of victims;

(c.1) the offence had a significant impact on the victims given their personal circumstances including their age, health and financial situation;

...

- (f) the offender concealed or destroyed records related to the fraud or to the disbursement of the proceeds of the fraud.

Other sentencing principles

718.2 A court that imposes a sentence shall also take into consideration the following principles:

- (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,

...

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

b) Circumstances of the Offender

[16] The respondent was 43 years old at the time of sentencing. She reports having had a difficult upbringing. She has five children ranging in age from 16 to 26. Her youngest child has spina bifida. The respondent's sister serves as this child's guardian.

[17] The respondent reports being in abusive relationships in the past. In 2004, she married a supportive husband who is gainfully employed. The sentencing judge noted that the offence in issue occurred during a period of domestic stability. The respondent holds a certificate in business administration from what was then known as Malaspina College.

[18] The respondent has a related criminal record involving repeated acts of dishonesty, including stealing from employers while in a position of trust.

- [19] On May 25, 2004, the respondent pleaded guilty to 25 counts of failing to declare income while receiving employment insurance benefits, contrary to s. 135(1) (b.1) of the Employment Insurance Act, S.C. 1996, c. 23. She was fined and sentenced to a 6-month CSO.
- [20] On May 11, 2009, the respondent pleaded guilty to and was sentenced for two counts of theft over \$5,000 committed in 2006. On this occasion, the respondent defrauded two different companies she was employed by to provide bookkeeping services. The circumstances appear to be similar to the offence at bar. On multiple occasions, the respondent manipulated the payroll systems of both companies to deposit company funds into her personal account. In a Pre-Sentence Report prepared in 2009, the respondent expressed remorse and confusion as to why she would commit these offences. She attributed her behaviour to an ongoing struggle in making ends meet. The author of the report opined that the respondent's focus during the interview "seemed to be solely on the difficulties she is experiencing" and noted that she impressed as being bitter about being prosecuted for these offences. The respondent told the author of the report that she was in sound emotional and mental health. She denied having any substance abuse problems. The respondent was sentenced to an 18-month CSO, concurrent on both counts, to be followed by 12 months' probation. In addition, an order was made under s. 738(1) of the Code requiring her to make restitution to the victims in the total amount of \$108,240.24. The respondent has never made any payments on this restitution order.
- [21] On May 15, 2009, four days after being placed on this CSO, the respondent was pulled over during an impaired driving investigation. She was arrested. A search conducted incident to that arrest led to the discovery of cheque stubs and a blank cheque belonging to yet another company. Further investigation revealed that the respondent was defrauding this company that had also employed her as a bookkeeper. She stole \$10,050 on this occasion. Breach proceedings ensued. The CSO was terminated on June 30, 2009, and the respondent was committed to custody to serve the unexpired portion of the sentence.
- [22] On June 30, 2009, the respondent pleaded guilty to one count of possessing stolen property and one count of fraud over \$5,000, contrary to ss. 355 and 380(1)(a) of the Code. She was sentenced to nine months' incarceration, concurrent on each count, but consecutive to the unexpired portion of the sentence imposed on May 11, 2009. She was ordered to make restitution to the victim in the amount of \$10,050. On this occasion, the respondent did repay the amount wrongfully taken from her employer.
- [23] The sentencing judge in the case at bar had before him an updated Pre-Sentence Report, a court-ordered forensic report prepared by Dr. Dugbartey, a registered psychologist, and a further psychological report prepared by Dr. Monkhouse, also a registered psychologist, who was retained by the respondent to address her risk of re-offence and the clinical factors that contributed to her recidivism. Dr. Monkhouse had the benefit of both the Pre-Sentence Report and the report of Dr. Dugbartey when he prepared his report.

- [24] The author of the Pre-Sentence Report noted that the respondent believes OxyNEO, an opioid prescribed to her for pain management in 2016, changed her personality. The respondent reported a possible connection between the drug and how she was feeling around the time of the offence. The respondent advised that she has since weaned herself off OxyNEO. In September 2020--just before her guilty plea and more than two years after the commission of the offence--the respondent began seeing a clinical counsellor.
- [25] Dr. Dugbartey reported that while the respondent expressed embarrassment and shame about her conduct, he "did not hear any sentiment from [her] about deep remorse and empathetic identification with the victims of her offences." He noted that the respondent attributed her conduct to reliance on opioids. She also externalized blame for her offences, explaining that, "the other reason [she committed the offences] was because the 'job was toxic.'" Dr. Dugbartey assessed the respondent to be "at high risk for criminal reoffending in 'repeat scenarios' that have similarities with the current offences."
- [26] The respondent told Dr. Monkhouse a number of factors contributed to the commission of the offence, including: financial and emotional stress; verbal abuse and criticism directed at her by the owners of Errington, which caused her to feel anger and resentment; and a significant deterioration in her attitudes, beliefs and overall outlook which led her "not to care about anything or anyone." She admitted to Dr. Monkhouse that she was fully aware of what she was doing when she committed the offence, made a choice to reoffend, and was willing to go to jail as a means of getting out from under the stressors she was experiencing. The respondent said she has suffered from chronic depression, but told Dr. Monkhouse that she "is not at all interested in taking an anti-depressant or anti-anxiety medication at this time, as she believes that their negative side effects outweigh the benefits." The respondent told Dr. Monkhouse that the OxyNEO she was using at the time of the offence had a negative impact on her mood and mental state and contributed to her anger, poor impulse control and poor decision-making. She expressed remorse for her actions to Dr. Monkhouse.
- [27] Dr. Monkhouse noted that recent research has confirmed the link between taking large quantities of oxycodone and mental health side effects, including personality shifts, low self-esteem, feelings of anger and anxiety, mood swings, depression, and mental confusion.
- [28] Dr. Monkhouse concluded that three broad factors contributed to the respondent's decision to reoffend: (1) her inability to handle interpersonal conflict in her work environment; (2) her belief that she was being mistreated by her employer; and (3) her poor coping and problem-solving skills. Dr. Monkhouse opined that the respondent now has a much better understanding of her risk factors and how to go about managing them in the future. He assessed her current level of risk to the community as being in the moderate to high range.
- [29] The respondent declined to personally address the court before sentence was imposed. She expressed her remorse through counsel who advised that she was not externalizing blame, but taking full responsibility for her conduct.

c) The Sentencing Positions of the Parties

- [30] The Crown sought a custodial sentence of two years less one day to be followed by an 18-month period of probation. The Crown also sought a stand-alone restitution order under s. 738 of the Code. In addition, the Crown sought a prohibition order under s. 380.2 of the Code enjoining the respondent from seeking, obtaining or continuing any employment, or becoming or being a volunteer in any capacity that involves having authority over the real property, money or valuable security of another person.
- [31] On the issue of what may have contributed to this most recent offence, the Crown submitted that there was no evidence about when the respondent was using opioids or the quantity of the drug she was taking. The Crown argued that any suggestion the offence was caused or contributed to by the respondent's use of opioids amounted to speculation.
- [32] In response, Mr. Zargarian, the respondent's counsel on sentencing, handed up to the judge prescriptions for oxycodone given to the respondent in 2017 and 2019. They were not marked as an exhibit.
- [33] Mr. Zargarian acknowledged that the "elephant in the room" was the respondent's criminal record and that this presented a hurdle to the imposition of a CSO. He invited the sentencing judge to infer from Dr. Monkhouse's report that the respondent's use of oxycodone and her mental health challenges were significant contributing factors in the commission of the offence. He acknowledged that this was a key component of his submission that a CSO of two years less one day would be a fit sentence despite the respondent's record for similar criminal conduct. As he put it:

And what's really key in the circumstances of the offender, in the cases I've provided and I will elaborate on and which apply here, is the issue of mental health or mental disorders.

And I will go into the case of Badhesa [phonetic] which elaborates on this, but just to summarize it, the case law has developed and been developed in the recent years to a quite expansive and broad understanding of mental health and mental disorder, and the relevance is that the offender's mental disorders bear on criminal culpability, which is a factor influencing the circumstances of the offender. And so, the cases tell us that where a mental disorder, and a mental disorder is defined as various cognitive issues that impair judgment, problem solving, rational decision making, where these are factors in forming the offence, they will reduce moral culpability commensurate with the weight of their role in the commission of the offence.

...

Then we have the mental health and impaired reasoning contributing to the offence, that's the biggest mitigating factor here, which ties into the existing mental health issues and the continuing therapy to address them. And I would say were it not for the mental health issues, that a jail sentence would be appropriate. It's really the mental health issues that differentiate the CSO cases, by and large, from the jail cases, or that at least to drive the analysis in the lot of the CSO cases . . .

[Emphasis added.]

- [34] Mr. Zargarian told the judge that the respondent was on high doses of oxycodone for many years. He submitted that the respondent was taking oxycodone when the 2006 and 2009 offences were committed and when the fraud was committed on Errington. He argued that the respondent's use of opioids and her struggle with stress management and depression impaired her ability to exercise good judgment.
- [35] Mr. Zargarian further submitted that a CSO would save taxpayer funds and permit the respondent to work in the community and make restitution.
- [36] In reply, the Crown also relied on *R. v. Badhesa*, 2019 BCCA 70 [Badhesa], and reiterated its position that the evidence did not establish the respondent's oxycodone use or any diagnosed mental illness caused or contributed to the commission of the offence. It was clear from the Crown's submission that this central issue was a contested fact on sentencing.

d) Reasons for Sentence

- [37] In reasons for sentence [RFS] indexed as 2021 BCSC 839, the judge accepted that the slightly more favourable report of Dr. Monkhouse reflected a more accurate present-day indication of the respondent's level of insight and remorse. He noted that Dr. Monkhouse did not specifically attribute the respondent's crimes to oxycodone use. Nevertheless, he identified as a mitigating factor, "the potential effects of oxycodone and depression on Ms. Merkel's judgment."
- [38] The judge identified the statutory aggravating circumstances present in this case and noted that the principles of denunciation and deterrence are paramount in sentencing for offences of this kind. He cited *R. v. Kodimiyala*, 2020 BCCA 275 in support of the latter proposition. He also referred extensively to *R. v. Proulx*, 2000 SCC 5 at para. 67, in support of the proposition that a properly crafted CSO can potentially meet the objectives of deterrence and denunciation even for serious offences.
- [39] The judge considered that the "main issue" on sentencing was whether the respondent should be "incarcerated in a public institution, at the cost of the taxpayer, or under house arrest, at the cost of her family."
- [40] The judge determined that a CSO of two years less one day on strict terms followed by a three-year probation order would not endanger the public and would provide an adequate measure of deterrence and denunciation. As the judge put it, "[t]he alternative will be for

Canadian taxpayers to support her for two years while in the provincial or federal institution, a great expense, with no possibility of earning money for restitution." He ordered the respondent to pay \$109,000 in restitution to Errington and \$400 to each of the former Errington employees affected by the fraud. He further ordered that the respondent pay the full amount of the restitution orders within five years, with a minimum payment of \$500 per month.

- [41] The judge was understandably concerned by the respondent's failure to make any payments towards restitution before sentencing. In attempting to address this concern within the confines of the CSO, the judge was of the mistaken view that the CSO could be terminated and the respondent committed to custody if she failed to make court-ordered payments under the stand-alone restitution order. He said this:
- [83] The Court is troubled by the failure of Ms. Merkel to make any restitutionary payments to date. This conditional sentence order is very much based on her stated intention to repay the defrauded amounts. If she does not have the funds at hand, Ms. Merkel, perhaps aided by her family, should borrow money, mortgage properties, and sell vehicles and other assets in order to make these payments. It is wholly appropriate that she should do so. It is also prudent: if she does not make regular repayments, the Court will likely order her to spend the rest of her sentence in prison.
- [84] Section 739.2 directs the court to require the offender to pay the full amount by a specific date unless the court is of the opinion that the amount should be paid in instalments, in which case the court shall set out a periodic payment scheme in the order. To this end, the Court orders that Ms. Merkel repay the full amount of the restitution orders no later than five years from today's date. The restitution payments must start by June 1st, and continue on the first day of each month until repaid, with a minimum repayment of \$500 per month.

...

- [88] In short, it is important for you to understand that while the sentence issued today allows you to avoid incarceration, for now, if you breach any term of your sentencing order, including leaving your residence, or failure to make restitution payments, you will likely be sent to prison for the remainder of your sentence.

[Emphasis added.]

- [42] The judge made an order under s. 380.2 of the Code prohibiting the respondent from working in a position of financial trust, or volunteering in such a capacity, for the rest of her life. In addition, he directed the respondent to advise all future employers of her criminal record, and give them a copy of the reasons for sentence. It does not appear that this latter term was incorporated into either the CSO or probation order. Finally, the judge directed the respondent during the period of the CSO and probation order to "participate fully in terms of counselling and treatment as directed by your supervisor or parole officer after . . . assessment." The respondent did not consent to the imposition of a treatment term.

[43] A number of other ancillary sentencing orders were made, but none are at issue in this appeal and all of them will remain in force.

III. Grounds of Appeal

[44] The Crown submits that the sentencing judge committed the following five errors in principle:

1. By giving mitigating effect to the respondent's claim that her opioid use and mental health issues contributed to her offending conduct in the absence of any evidence establishing a link between the two;
2. By concluding that the respondent's CSO could be terminated if she failed to comply with the restitution order made under s. 738(1) of the Code;
3. By framing as the "main issue" the cost to the taxpayer of incarcerating the respondent as opposed to placing her on a CSO;
4. By failing to give adequate effect to the principles of specific and general deterrence and denunciation in circumstances where previously imposed periods of incarceration and CSOs for similar crimes did not deter her from defrauding employers while in a position of trust; and
5. By imposing a CSO when such disposition is precluded by s. 742.1(c) of the Code.

[45] In the alternative, the Crown submits that the sentence is demonstrably unfit as it fails to properly reflect the respondent's moral culpability and reflects a marked and substantial departure from sentences imposed on similarly-situated offenders.

a) Standard of Review

[46] Appellate intervention is justified when an appellate court identifies an impactful error in principle or if the sentence is demonstrably unfit: *R. v. Lacasse*, 2015 SCC 64 at paras. 41-44; [Lacasse]. Errors in principle include errors in law, a failure to consider a relevant factor, or erroneous consideration of an aggravating or mitigating factor. A demonstrably unfit sentence is one that constitutes a "clearly unreasonable" departure from the fundamental principle of proportionality: *Lacasse* at paras. 53-55. As sentencing judges calibrate the demands of proportionality by reference to sentences imposed in similar circumstances, a sentence that represents "a substantial and marked departure" from sentences imposed in analogous situations may be unfit. But sentencing is an individualized inquiry. The fact that a sentence lies outside an established range does not establish error in principle, nor does it necessarily mean that the sentence is demonstrably unfit. Where intervention is justified, an appellate court will perform its own sentencing analysis with deference to the sentencing judge's factual findings that are untainted by the error: *R. v. Friesen*, 2020 SCC 9 at paras. 27-29 [Friesen]; *R. v. Parranto*, 2021 SCC 46 at paras. 33, 36.2, 38 [Parranto].

b) Treating Opioid Use and Depression as Mitigating

- [47] Whether the respondent's opioid use played a contributing role in the commission of the offence was a disputed fact relevant to the determination of a just and appropriate sentence. The respondent had the burden of establishing this fact on a balance of probabilities before the judge could rely on it in determining the sentence: Code s. 724(3). Significantly, the respondent's counsel conceded that a CSO would only be appropriate in this case if the respondent's mental health was shown to have caused or contributed to the commission of the offence.
- [48] There are two problems with the judge's consideration of this issue. First, there was no evidence before the sentencing judge linking the respondent's conduct to opioid abuse. Second, even if it could be said that Dr. Monkhouse's report provided the foundation from which an inference could properly be drawn that the respondent was, at the time of the commission of the offence experiencing some of the documented mental health side effects from taking large quantities of oxycodone, the judge never resolved in the respondent's favour the question of whether opioid abuse contributed to her criminal conduct. Instead, the judge treated as mitigating the "potential effects of oxycodone and depression on Ms. Merkel's judgment." [Emphasis added.]
- [49] The respondent did not testify at the sentencing hearing. There was no evidence before the sentencing judge concerning the frequency with which the respondent was using opioids or the dose she was taking at the time of the offence. While hearsay evidence is admissible at a sentencing hearing, it must be credible and trustworthy: *R. v. Gardiner*, [1982] 2 S.C.R. 368 at 414, 1982 CanLII 30 (SCC). The information supplied by counsel on this point was vague. Clearly, the respondent was the source of the limited information put before the judge. She is not a credible and trustworthy source. Further, it was not open to the judge to accept as fact an assertion made by counsel on a material sentencing issue that was disputed and unsupported by any admissible evidence: *R. v. Dreger*, 2014 BCCA 54 at para. 45; *R. v. Pahl*, 2016 BCCA 234 at paras. 53-56.
- [50] It is even more problematic that Dr. Monkhouse did not attribute the respondent's crime to oxycodone use. It is noteworthy that Dr. Monkhouse was engaged by the respondent for the specific purpose of identifying clinical factors contributing to the respondent's reoffence. Dr. Monkhouse identified the respondent's emotional orientation, negative attitudes and beliefs, and poor coping strategies as factors contributing to the commission of the offence. Conspicuously absent from Dr. Monkhouse's report is a finding that opioid use or related mental health issues contributed to the respondent's decision to reoffend. The judge recognized this gap in the evidence, noting that "Dr. Monkhouse did not specifically attribute the respondent's crimes and poor judgment to oxycodone."

- [51] The mitigating effect of a mental health disorder has been addressed by this Court in a number of recent decisions including *Badhesa, R. v. Penttila*, 2020 BCCA 63 and *R. v. Milne*, 2021 BCCA 166. In *Penttila*, a case in which an offender claimed that her fraudulent conduct was driven by a gambling addiction, I made these observations, drawn largely from the reasons of Fenlon and Dickson JJ.A. in *Badhesa*:
- [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.
- [52] In *Badhesa* at para. 43, the Court noted that "[d]etailed and specific medical evidence is essential to a proper understanding" of the relationship between an underlying mental health disorder and criminal behaviour in order to properly gauge an offender's moral culpability. I made the same point in *Penttila* in the following passage:
- [74] . . . those in positions of trust who steal significant amounts of money from their employers must understand that there will be no easy refuge in an unsubstantiated claim made by counsel that the offending conduct is attributable to a gambling disorder. In a case where a dispute exists about whether the offending behaviour was caused by a gambling disorder, detailed and specific evidence, including medical evidence, will generally be required. That evidence should set out the diagnosis, the factual foundation upon which the diagnosis rests, whether the disorder was operative at the time of the commission of the offence and, to the extent it can be determined, whether the disorder caused or contributed to the offending behaviour. Ideally, it should also canvass the offender's prospects for rehabilitation with appropriate treatment. Such an assessment will usually involve canvassing collateral sources of information.

- [53] In the absence of evidence linking the respondent's impaired mental health and her pattern of dishonest conduct, the judge erred in principle by treating the respondent's opioid use or depression as a mitigating circumstance that militated in favour of the imposition of a CSO in this case.
- [54] Even assuming the existence of some evidence on this point, the judge would have been obliged to determine whether the respondent had established on a balance of probabilities that impairment of her mental health contributed to the offence. He did not do so. In these circumstances, it was error in principle for the judge to treat as a mitigating factor the "potential effects" of oxycodone and depression on the respondent's judgment and behaviour. The decision to do so, which was foundational to the imposition of a CSO in this case, rests on little more than speculation.
- [55] To summarize, there was no evidence that a mental health disorder contributed to the respondent's purposeful, sophisticated and repeated acts of fraud. Even if there was, the judge did not find that the respondent met her burden of establishing a link between her mental state and her conduct. In my view, appellant intervention is required on this ground alone.
- c) Treating the CSO as Terminable for Non-Compliance with the Restitution Order
- [56] The judge also erred in principle by reasoning that the circumstances favoured imposition of a CSO because it could be terminated and the respondent committed to custody if she failed to comply with the stand-alone restitution order. That the error was impactful is clear from the judge's statement that the CSO was "very much based" on the respondent's intention to repay the defrauded amounts. In short, the judge considered that a CSO was a fit sentence because of the consequences that would likely befall the respondent if she did not honour her commitment to make full restitution.
- [57] Failure to comply with the restitution order could not result in the termination of the respondent's CSO and her committal to custody. Where an offender fails to comply with the stand-alone restitution order under s. 738(1), the person to whom restitution is owed may file the order, enter it as a civil judgment, and take enforcement proceedings against the offender as if it were a judgment rendered against the offender in civil proceedings: Code s. 741.
- [58] I do not accept the respondent's position that the problem can easily or properly be cured by adding, as an optional condition of the CSO, a requirement that she make restitution while the order is in effect. While not expressly prohibited in this province (no regulations have been made under s. 738(2) of the Code prohibiting the inclusion of a restitution order as an optional condition of a CSO) restitution conditions are rarely imposed as part of a CSO, and for good reason. First, requiring an offender to pay restitution on pain of imprisonment is inconsistent with the legislative scheme. Second, ability to pay is a relevant, but non-determinative, factor in considering whether to make a restitution order: *R. v. Yates*, 2002 BCCA 583 at para. 12; *R. v. Dunkers*, 2018 BCCA 363 at paras. 19, 25 [Dunkers]. It is, therefore,

conceivable that a restitution condition could be added to a CSO that an offender subsequently claims to be unable to satisfy. This would lead to protracted breach proceedings engaging whether the offender's financial situation afforded them a "reasonable excuse" for failing to comply with the CSO: Code s. 742.6(9). Third, given the respondent's financial circumstances and employment prospects, it seems likely that imposing a substantial monthly restitution requirement as part of a CSO would simply invite a breach of the order.

d) Assessing Cost to the Taxpayer of Incarceration

[59] I am also of the view that the judge erred in principle by placing the weight he did on the cost to the taxpayer of incarcerating this respondent. It was certainly not the "main issue" before him, even though he characterized it in this way:

[59] As stated, Crown and defence agree that two years less a day is an appropriate period of time to deprive Ms. Merkel of liberty for her crime. The main issue is whether she should serve that time incarcerated in a public institution, at the cost of the taxpayer, or under house arrest, at the cost of her family.

[Emphasis added.]

The judge returned to this point later in his reasons noting that the cost to Canadian taxpayers of incarcerating the respondent [RFS at para. 69] and the detrimental effect such a sentence would have on her ability to pay restitution.

[60] If a term of incarceration was required in this case, it could not be avoided by privileging the timely payment of a restitution order: *R. v. Hoyt*, (1992) 77 C.C.C. (3d) at 299-300, 1992 CanLII 6006 (BCCA). It is noteworthy, as well, that the respondent has not consistently paid restitution orders made in the past. Further, fiscal considerations relating to the cost of imprisonment should not ordinarily inform the imposition of a fit sentence. As Justice Iacobucci put it in *R. v. Shropshire*, [1995] 4 S.C.R. 227, at 239, it is not the task of sentencing judges "to engage in that kind of budgetary analysis". Although said in the context of setting parole ineligibility above 10 years for the commission of a murder, I regard the admonition as one of general application.

[61] I would not have found appellate intervention to be warranted on this ground alone. This ground, when taken together with the first two, simply underscores the material impact the errors had on the sentence imposed by the judge.

e) Failure to Give Adequate Effect to Deterrence and Denunciation

[62] Appellate courts must afford a sentencing judge considerable latitude in weighing and balancing the objectives of sentencing set out in s. 718 of the Code. As noted in *Friesen*, sentencing judges are on the front line of the administration of criminal justice and will generally be more attuned to issues like the prevalence and impact of an offence, and the needs of the community in which it is committed: see also *Parranto* at para. 13. It has been

said that the weighing or balancing of factors can only amount to an error in principle if emphasizing one factor or not giving weight to another reflects an unreasonable exercise of discretion: Friesen at para. 26; Lacasse at paras. 48-49; R. v. Agin, 2018 BCCA 133 at para. 55.

[63] As I am of the view that the sentence is clearly unreasonable even in the absence of demonstrated error in principle, I will deal with this issue under the next heading.

f) Is the Sentence Demonstrably Unfit?

[64] Although it is unnecessary to address this point, in my view the sentence imposed on the respondent is also demonstrably unfit. It does not give reasonable expression to the respondent's high moral culpability, nor does it reflect in a reasonable way the need for specific deterrence. It is a marked departure from sentences imposed in like circumstances.

[65] The respondent engaged in a deliberate pattern of deception over a substantial period of time, all the while abusing her position of trust. She also engaged in post-offence acts of concealment that were successful to the extent that they delayed discovery of the fraud and permitted her to steal more money from the company's coffers. She caused substantial harm to Errington and its past employees.

[66] Errington is the fourth employer the respondent has defrauded or stolen money from while in a position of trust. Previously imposed CSOs have not deterred her from reoffending. The need for specific deterrence was clear in this case. Dr. Dugbartey and Dr. Monkhouse both concluded that the respondent remains a significant risk to reoffend.

[67] Even accepting the judge's somewhat guarded conclusion that the respondent was remorseful and that she has gained recent insight into the causes of her behaviour, there are many aggravating factors present in the case at bar and few things to be said in favour of mitigation of penalty.

[68] Further, while the respondent's most recent offence appears to mark an escalation in her criminal behaviour, the sentence imposed reflects an unjustified and unreasonable "step down" from sentences imposed in the past for similar conduct.

[69] While the judge recognized that denunciation and deterrence are paramount sentencing objectives in crimes of this kind, the sentence imposed does not give reasonable expression to these objectives.

[70] The authorities the respondent relies on as being broadly analogous to the case at bar do not assist her.

[71] In R. v. Burkart, 2006 BCCA 446 [Burkart], a CSO was substituted on appeal for the 18-month period of incarceration imposed on a bank employee who stole \$81,400 from her employer to cover gambling debts. Notably, Ms. Burkhart was a first offender and a finding was made that she was not a risk to reoffend. In addition, the offence committed by Ms. Burkhart attracted a lower maximum term of imprisonment (ten years).

[72] In *R. v. Dickson*, 2007 BCCA 561, a CSO was substituted on appeal for the 12-month term of incarceration imposed on a bookkeeper who stole \$147,000 from two employers. Notably, Ms. Dickson made full restitution to her victims. Most significantly, the appellant suffered from an undiagnosed and untreated bipolar disorder at the relevant time that was found to cause or contribute to the commission of the offence. Ms. Dickson's prospects for successful treatment were determined to be excellent. She was found not to be a risk to the community. It was in these unusual circumstances that Chief Justice Finch said this at para. 70:

It cannot be necessary in the interests of general deterrence for serious theft, to incarcerate someone who is mentally ill when the offences were committed, whose mental illness was the cause of her committing the offences, who pleads guilty, who makes restitution, and who undertakes an appropriate course of medical treatment.

The circumstances that motivated the imposition of a CSO in *Dickson* are largely absent in the case at bar.

[73] In *R. v. Bunn*, 2000 SCC 9, the Court dismissed a Crown appeal from a CSO imposed on a lawyer who, over a substantial period of time, defrauded elderly clients of \$86,000. The lawyer pleaded guilty to six counts of criminal breach of trust. While the conduct was very serious, Mr. Bunn was a first offender. He was the sole caregiver and provider for his disabled wife and teenaged daughter. The collateral consequences of the conviction involved the loss of a 20-year career as a lawyer as well as the "ruin and humiliation" the offender brought down on himself and his family. Finally, the sentence under review, even though imposed by an appellate court, was found to be entitled to "some deference." In contrast, the respondent is a repeat offender. In the face of demonstrated error in principle, the sentence imposed by the judge below is not entitled to deference.

[74] The extreme personal mitigating circumstances found to be present in cases like *Burkart*, *Dickson* and *Bunn* and to warrant the imposition of a CSO are absent in the case at bar.

[75] In my view, the sentence is also a marked departure from sentences imposed in like circumstances. Sentencing ranges are of course guidelines, not judicial straitjackets: *Lacasse* at para. 57. As noted earlier, the fact that the sentence represents a departure from a generally accepted range does not necessarily mean that the sentence is demonstrably unfit: *Lacasse* at paras. 58-60; *Friesen* at paras. 37, 108.

[76] While I do not propose doing an exhaustive review of sentencing jurisprudence in this area, the following cases are instructive.

[77] In *Penttila*, the sentencing judge would have imposed a three-year sentence on a first offender who defrauded her employer of \$362,740.46 while in a position of trust. The scheme was unsophisticated but continued undetected for a significant period of time. The judge reduced the sentence he otherwise would have imposed to two years' imprisonment to take account of the offender's ill health. In dismissing the offender's appeal, this Court noted that but for her unfortunate personal circumstances, "the sentence could well have been

higher."

- [78] In Dreger, the offender, who was a bookkeeper for a small family-owned company, abused her position of trust to defraud her employer of \$245,514.05 over a period of about seven years. She sought to explain the company's financial difficulties by blaming it on the extravagant spending habits of the owner's wife--a lie that contributed to the owner's marital breakdown. Ms. Dreger pleaded guilty. She had no criminal record. Although she expressed remorse, she continued to make derogatory comments about her employer in a web blog, suggesting that his conduct was why she left the job. A sentence of five years' imprisonment was imposed along with a restitution order. As in the case at bar, the offender had made no payments towards restitution by the time the appeal came on for hearing. This Court reduced the sentence to four years' imprisonment, finding that the judge erred in principle by treating lack of remorse as an aggravating circumstance.
- [79] In Dunkers, this Court upheld a five-year sentence on a 57-year-old mother of three who used her position as a bookkeeper to defraud a non-profit organization of over \$200,000 over a two-year period. The offender was treated as a first offender. Her conduct was found to have advanced a financial crisis that forced the non-profit organization to cease operations. Although the focus of the appeal was on the issue of whether a restitution order made the global sentence harsh and excessive, this Court concluded (at para. 28) that a five-year term of imprisonment was not an excessive penalty given the seriousness of the offender's conduct.
- [80] By contrast, the respondent is not a first offender. Her history of offending, her evident failure to benefit from previously imposed CSOs, her high moral culpability, the harm she inflicted on her victims, and her ongoing risk to the community are such that, but for the position taken by the Crown on sentencing, a significant penitentiary term could well have been imposed.
- [81] Accepting the factual findings of the sentencing judge, the imposition of a further CSO on the respondent for the conduct she engaged in on this occasion is, in my view, a demonstrably unfit sentence.
- g) Fashioning a Fit Sentence
- [82] The Crown seeks the imposition of a custodial sentence of two years less one day. In the event the appeal is allowed and the CSO is set aside, the respondent asks us to impose a federal sentence of two years so she can benefit from institutional programs delivered through the Correctional Services of Canada.
- [83] I would accede to the respondent's request, grant leave to appeal, allow the appeal, set aside the CSO and impose in its place a sentence of two years' imprisonment. Having regard to the circumstances of the offence and the offender, the sentence I would impose is very much conditioned by the position the Crown took in the court below. It is a sentence that lies at the very bottom end of the appropriate range.

- [84] Consistent with this Court's reasoning in *R. v. Andrew*, 2008 BCCA 141 at para. 32, the custodial sentence I would impose on appeal in place of the CSO will run from the day on which the CSO was imposed. It is our expectation that the respondent will be given credit for time served on the CSO on a 1:1 basis.
- [85] The Crown sought an 18-month probation order in the court below. It does not resile from this position on appeal. The judge imposed a three-year probation order. I would not disturb the length of the order. In my view, it is necessary for public protection and to reintegrate the respondent into the community upon her release from custody.
- [86] The judge clearly intended to include as a condition of the probation order a term requiring the respondent to advise future employers of her criminal record (RFS at paras. 66, 77). Through apparent oversight, this condition was not included in the probation order. I would direct that the probation order be varied to require the respondent to comply with this additional condition. I note that a similar condition was imposed in *Burkart* at para. 23, albeit as part of a CSO.
- [87] Except for two minor modifications, I would not vary the conditions of the probation order. As the respondent did not agree to participate in a treatment program, I would amend Condition 8 of the probation order to delete the requirement that she do so: see *R. v. Duguay*, 2019 BCCA 53 at paras. 107-111. Revised Condition 8 shall read:

You will participate fully in counselling as directed by your probation officer after assessment.

- [88] I would also vary Condition 9 of the probation order to delete the requirement that the respondent not consume alcohol. There was no evidence that alcohol abuse is a problem for the respondent or that it played a contributing role in the commission of the offence. The respondent told the author of the Pre-Sentence Report that she has never consumed more than minimal amounts of alcohol in her life and rarely drinks alcohol now. Revised Condition 9 shall read:

You must not consume drugs of any kind, apart from over-the-counter or prescribed medication, and you will provide your probation officer with full details and documentation of all such medications.

- [89] I would not otherwise disturb the probation order or the ancillary sentencing orders made by the judge.

h) The Constitutional Issue

- [90] I would decline the Crown's invitation to address the constitutional issue. I have come to this conclusion for a number of reasons.

- [91] First, courts should, as a general rule, refrain from making constitutional pronouncements where it is unnecessary to do so to properly dispose of a case: *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97 at para. 6, 1995 CanLII 86 (SCC).
- [92] Second, I do not accept the position of the Crown that the constitutional issue is evasive of review. The constitutional issue that arises in this case is before the Supreme Court of Canada in *Sharma*. The appeal is scheduled to be heard on March 23, 2022. Guidance is, therefore, forthcoming from the Supreme Court.
- [93] Third, the federal government has announced its intention to reintroduce Bill C-22, An Act to amend the Criminal Code and the Controlled Drugs and Substances Act, within its first 100 days in office. Public statements have been made on behalf of the Minister of Justice to the effect that the Bill is not expected to be revamped before being reintroduced. If enacted in its current form, s. 742.1(c)--the provision at issue in this case--would be replaced by a more narrowly drawn provision prohibiting the imposition of a CSO for the offences of attempting to commit murder, torture and advocate genocide.
- [94] Fourth, given the manner in which the constitutional issue came before the judge, reflecting an agreement between the parties that the judge should follow *Chen* as a matter of judicial comity, we may not have a complete record upon which to decide the point. Certainly, the respondent has not had an opportunity to adduce evidence relevant to the overbreadth analysis or the application of s. 1 of the Charter.
- [95] Taken together, I am of the view that these considerations strongly militate against this Court embarking in this case on an analysis of the constitutional validity of s. 742.1(c) of the Code.

IV. Disposition

- [96] For the foregoing reasons, I would grant leave to appeal, allow the appeal and vary the sentence by setting aside the CSO and substituting for it a custodial sentence of two years. I would not reduce the period of probation, but I would make the aforementioned modest variations to the conditions of that order. I would not interfere with any of the ancillary sentencing orders made by the judge.

"The Honourable Mr. Justice Fitch"

I AGREE:

"The Honourable Mr. Justice Groberman"

I AGREE:

"The Honourable Mr. Justice Abrioux"

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