

ONTARIO COURT OF JUSTICE

CITATION: *R. v. Ogier*, 2016 ONCJ 363

DATE: 2016-02-03

COURT FILE No.: London 14-4269

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

AARON NICHOLAS OGIER

Before Justice A. T. McKay
Heard on December 1 and 2, 2015
Reasons for Sentence released on February 3, 2016

Jeremy Carnegie counsel for the Crown
Ron Ellis counsel for the accused Aaron Ogier

MCKAY, J.:

INTRODUCTION

[1] Mr. Ogier entered a guilty plea to one count of fraud contrary to section 380(1)(a) of the *Criminal Code*. Some of the facts supporting the plea were in issue, and time was set aside for the Court to conduct a *Gardiner* hearing to make necessary findings of fact. However, counsel reached agreement on the disputed issues prior to the Court hearing evidence, and the matter proceeded by way of an Agreed Statement of Fact.

EVIDENCE

[2] During the relevant timeframe, Mr. Ogier was employed by Service Canada as a Service Canada Benefits Officer. As part of his employment duties, Mr. Ogier had access to Service Canada's computer system. As part of his employment duties, he input information to create Service Canada accounts and employment insurance benefits claims for individuals.

[3] From August 8, 2012 to July 12, 2013, Mr. Ogier was working at Service Canada and receiving his regular salary. Notwithstanding that, he fraudulently created an employment insurance claim under his own name, and received benefits totaling nearly \$19,000 in his own name.

[4] During the period from July 25, 2013 to April 16, 2014 Mr. Ogier used his access to the Service Canada computer system in order to create fraudulent claims for EI benefits for 13 additional individuals who were not entitled to receive EI benefits. Through various means, Mr. Ogier obtained social insurance numbers for each of those individuals. In some cases, he used the assistance of other people to obtain social insurance numbers by making payments ranging up to \$1000 in exchange for receiving the numbers. In other instances, the person assigned the social insurance number indicated to police that he or she had simply lost their wallet containing the S.I.N. sometime earlier.

[5] In each situation, Mr. Ogier created a fraudulent claim for EI benefits. In some instances, he input false information to support the claims. In other instances, he forged medical notes relied upon to justify the claims. There were claims based upon a falsified record of employment. With respect to each claim, he arranged to have direct deposit of the benefits paid into a bank account which he had established for that purpose. Eventually, the scheme came to an end in April, 2014, when the security office of one of the banks receiving payments which were being deposited into Mr. Ogier's account became suspicious and, as a result, contacted Service Canada. Mr. Ogier received into various bank accounts all of the funds which were paid out pursuant to the fraudulent claims. The loss to the government of Canada was \$306,221, and the loss to the Canadian Imperial Bank of Commerce was \$7903.33.

POSITIONS OF THE PARTIES

[6] The parties agree that a custodial sentence is the only sentence which appropriately addresses the sentencing considerations of this case. They agree that, generally, an appropriate range of sentence for this type of case varies between a sentence of two years less a day imprisonment to be served conditionally in the community, and four years imprisonment in a penitentiary.

[7] The parties agree that a restitution order under section 738 of the *Criminal Code* is appropriate, as is a fine in lieu of forfeiture pursuant to section 462.37(3) of the *Criminal Code*.

The Crown

[8] The Crown takes the position that, given the facts of this case, an appropriate sentence is three years imprisonment. In addition, Mr. Ogier should face a fine in lieu of forfeiture and a restitution order in the full amount of \$306,221 in favour of the Government of Canada, and \$7903.33 in favor of CIBC.

The Defence

[9] The defence takes the position that an appropriate sentence is imprisonment two years less a day to be served conditionally within the community. Alternatively, if the Court determines that a conditional jail sentence would not adequately address the sentencing principles, the defence position is that the Court should impose a penitentiary sentence of two years plus one day. In addition, the defence position is that although Mr. Ogier received all of the funds paid out pursuant to the

fraudulent claims, he paid a portion of those funds to other parties involved in the scheme. The defence position is that Mr. Ogier should only be required to repay the funds that he personally retained and therefore benefited from, which is estimated by the defense to be something in the range of \$250,000 to \$280,000.

CIRCUMSTANCES OF THE OFFENDER

[10] Mr. Ogier is 37 years old, and is a first offender. He has been married to his present partner since 2013. He has two children from a previous relationship, as does his present spouse. He and his present spouse both share joint custody of their respective children with their former partners. Mr. Ogier is of Métis heritage. He grew up in a small town in Northwest Ontario and maintains a relationship with his family members. His family history includes significant alcoholism issues on the part of his maternal grandparents and aunts and uncles. His personal history includes victimization by an assault when he was a child. His current spouse struggles with mental health issues. Mr. Ogier lost his employment with the federal government when this offence came to light. He has found new full-time employment, earning an hourly wage of \$15 per hour, which is a significant decrease in income from his previous employment.

APPLICABLE LEGAL PRINCIPLES

[11] Section 718 of the *Criminal Code* sets out the fundamental purpose of sentencing, and requires a court to impose just sanctions which have one or more of the objectives set out in section 718. Those objectives include denunciation; deterrence; the separation of the offenders from society where necessary; and the rehabilitation of offenders. Section 718.2 sets out other principles to be considered in imposing sentence, including consideration of whether the offender has abused a position of trust. Section 718.2 also requires the court to consider all available sanctions other than imprisonment that are reasonable in the circumstances, with particular attention to the circumstances of aboriginal offenders.

[12] Mr. Ogier was in a position of trust when he committed this offence. He took advantage of his position of trust in order to commit the offence. Relevant case law emphasizes the fact that in situations involving a breach of trust, general deterrence and denunciation are the overriding sentencing principles for the court focus on. As indicated by Hill, J in *R. v. Williams*, [2007] O.J. No. 1604:

“General deterrence tends to have a greater impact in the case of embezzlement type crimes, whether fraud or theft - criminal conduct where persons “usually plan and deliberate about it to some extent” ... Put differently, “law-abiding persons, with good employment records and families ... are the ones most likely to be deterred by the threat of severe penalties” ... In these cases, in addition to general deterrence, “denunciation... and accountability for one’s actions” are the controlling principles of sentencing”.

[13] The Crown and defence both take the position that a conditional sentence is available in this situation notwithstanding the amendments to the *Criminal Code* conditional sentencing regime in 2012. That position is based upon the fact that the fraud involved a continuing series of acts

which began prior to the amendments to the *Code*. They differ as to whether a conditional sentence is appropriate in this situation.

ANALYSIS

[14] The case law highlights a number of aggravating factors which are present in this situation:

- i) Breach of trust: Mr. Ogier was an employee of Service Canada with significant responsibility. He took advantage of that position to commit the crime;
- ii) Scope and complexity of the fraud: the fraud had a degree of complexity and sophistication. It required a significant level of planning, the acquisition of the SIN of other individuals, the forging of medical notes and call notes, the opening of bank accounts to receive the payments and the direction of benefit payments to those accounts. Mr. Ogier actively planned and carried out these various steps to perpetuate the fraud;
- iii) Amount of the loss to the victims: the fraud resulted in losses exceeding \$300,000 to the victims, the vast majority of which involves a loss to the Government of Canada.
- iv) Duration of the deception: the length of time which the fraudulent activities cover is a relevant consideration. In this case, the scheme persisted for approximately 20 months, and was only terminated when the bank's security office contacted Service Canada;
- v) Impact on the victim: As pointed out by Schnall, J in paragraph 48 of *R. v. McConnell, 2011 ONCJ 476*: "*The dishonest attainment of public monies is a serious crime with its own effects, even though the institution on its face seems able to bear the loss*". In cases involving public monies, it is the impact on the individuals who were entitled to those public monies which is often viewed as aggravating;
- vi) Motivation: there is no indication of Mr. Ogier suffering from issues such as addiction. There is no evidence from which one could conclude that Mr. Ogier's actions resulted from anything other than simple greed.

[15] There are also significant mitigating factors present in this case:

- i) Guilty plea: Mr. Ogier’s guilty plea is an indication of remorse. It has also spared the state the time, expense and resources which would have been involved in a trial.
- ii) First-time offender: Mr. Ogier has no prior criminal record;
- iii) Remorse: Mr. Ogier expresses his remorse and a desire to make restitution to the victims.

CONCLUSION

Length of Sentence

[16] Mr. Ogier comes before the Court having pled guilty to a large-scale fraud. He is a first-time offender. Most offenders who commit large-scale frauds involving the breach of trust are people who are respected and trusted by others; that is what provides them with the opportunity to commit the crime. The financial loss to the victims in this case is significant. Mr. Ogier indicates a willingness to make restitution to the victims. Realistically, given his employment prospects and likely level of income, the victims are unlikely to recover their financial loss.

[17] With respect to *Gladue* considerations, judges may take judicial notice of the broad systemic and background factors that may have played a part in bringing the offender before the Court. However, the Court also should look at case specific information. In this situation, there is little before the Court with respect to Mr. Ogier’s connection with his aboriginal heritage. The circumstances of this case require primary consideration of sentencing principles such as denunciation and deterrence.

[18] The defence suggests that an appropriate disposition is a sentence of two years less a day to be served conditionally in the community. Conditional sentences may be crafted appropriately to achieve the objectives of denunciation and deterrence effectively in certain cases, particularly given the principle of restraint. However, Mr. Ogier breached the trust of his employer in order to engage in a large-scale fraud. The offence was planned, deliberate and had a degree of complexity. It went on for a lengthy period of time. The activities only ceased when they were discovered as a result of the call from the bank to Service Canada. Mr. Ogier’s degree of moral blameworthiness is high. In these circumstances, given the seriousness of the offence and the need to emphasize concepts such as denunciation and deterrence, a conditional jail sentence would not adequately address the sentencing principles involved. I find that the appropriate sentence is 30 months in custody in a federal penitentiary.

Restitution and Fine in Lieu of Forfeiture

[19] The Crown relies upon authorities such as *R. v. Khatchatourov*, 2014 ONCA No. 464 to support its position that the restitution order and fine in lieu of forfeiture should be for the full amount of the loss. I find that it is immaterial whether Mr. Ogier dispersed some of the proceeds of his crime to cover his expenses in committing the crime. There will be restitution orders pursuant to section 738 of the *Criminal Code* in favour of the Government of Canada in the amount of \$306,221,

and in favour of CIBC in the amount of \$7903.33. There will also be fines in lieu of forfeiture pursuant to section 462.37(3) of the *Criminal Code* in the same amounts. Any amounts paid pursuant to the restitution orders shall be deducted from the fines in lieu of forfeiture. Any amounts paid by way of restitution or fine in lieu of forfeiture by any other individual who may be subsequently convicted of participating in the fraud perpetrated by Mr. Ogier shall be deducted from the amounts owing by Mr. Ogier pursuant to these restitution orders and fines in lieu of forfeiture.

[20] Section 462.37(4) of the *Criminal Code* requires the Court to impose a term of imprisonment in default of payment of the fines imposed under subsection 3. The amount of the fine determines the maximum and minimum length of the term of imprisonment. With respect to the fine in lieu of forfeiture related to CIBC, there shall be a term of imprisonment of three months in default of payment of a fine if it is not paid within four years of Mr. Ogier's release from custody. With respect to the fine in lieu of forfeiture related to the Government of Canada, there shall be a term of imprisonment of three years in default of payment of the fine if it is not paid within five years of Mr. Ogier's release from custody.

Released: February 3, 2016

Signed: "Justice A. Thomas McKay"